

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

RECEIVED

OCT 17 2016

SC Court of Appeals

Karl T. Harbath Respondent,

v.

Stephen Sanders, Bennett-Hall Co., Inc., Sunbelt Rentals, Inc., Defendants,
Of whom Bennett-Hall Co., Inc. is the Appellant.

RECORD ON APPEAL

Brian A. Comer
Kerri A. Rupert
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANT
BENNETT-HALL CO., INC.

John S. Nichols, Esquire
Bluestein Nichols Thompson & Delgado, LLC
Post Office Box 7965
Columbia, SC 29202

Melissa G. Mosier, Esq.
McWhirter Bellinger & Associates, PA
119 E. Main Street
Lexington, SC 29072

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-40-01082

Karl T. Harbath

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

PLAINTIFF(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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

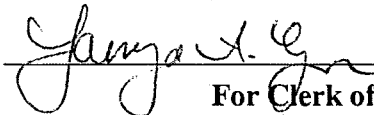
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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



Judge Code 2756

Date 12/10/2015

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,)
Plaintiff,)

Case No.: 2015-CP-40-01082

-vs-

**AMENDED
ORDER STRIKING PORTIONS OF THE
AMENDED ANSWER OF DEFENDANT
OF BENNETT-HALL CO. INC.**

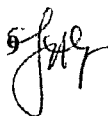
Stephen Sanders,)
Bennett-Hall Co., Inc., and)
Sunbelt Rentals, Inc.)
Defendants.)

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.

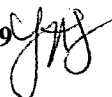
Mr. Harbath argues that because both he and Mr. Sanders worked for the same common employer, the subcontractor Black Box, that Black Box is the statutory employer of both Sanders

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

²Defendant 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.

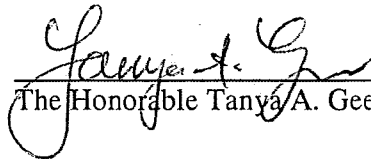


I find that any right of contribution has not yet vested in Bennett-Hall. Therefore, although this Court grants Plaintiff's Motion Striking any and all references to Bennett-Hall's alleged right of contribution, this Court expresses no opinion on Bennett-Hall's alleged right of contribution at this time. 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

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001082

Karl T Harbath

Stephen Sanders

Bennett-Hall Co Inc

PLAINTIFF(S)

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.
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☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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 _____

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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

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

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,

Case No.: 2015-CP-40-01082

Plaintiff,

-VS-

**ORDER STRIKING PORTIONS OF THE
AMENDED ANSWER OF DEFENDANT
OF BENNETT-HALL CO. INC.**

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

Defendants.

2015 OCT 13 PM 12:48
RICHLAND COUNTY
FILED
CLERK OF COURT
C.C.P. 2015

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.

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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

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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.

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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

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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.

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JH

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

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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

²Defendant 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.

SCANNED

JAG

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.

SCANNED

gme

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.*

SCANNED

JMS

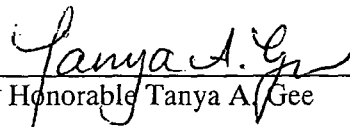
Like *Phillips*, Defendant Bennett-Hall asks this Court to apply section 42-1-580 in a way that our Supreme Court already expressly rejected approximately ten years ago. As a result, per section 15-38-15(E), Defendant Bennett-Hall does not currently have a claim for setoff or contribution against Black 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

October 13, 2015

Columbia, South Carolina

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Kari T. Harbath,

Plaintiff(s)

vs.

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

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 40- 01082

Submitted By: Melissa G. Mosier, Esquire
Address: McWhirter, Bellinger, & Associates, P.A.
119 East Main Street, Lexington, SC 29072

SC Bar #: 78693 (Melissa Mosier);

Telephone #: 803-359-5523

Fax #: 803-996-9080

Other:

E-mail: melissam@mcwhirterlaw.com

tyler@mcwhirterlaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

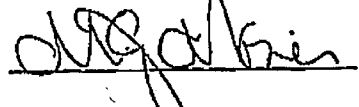
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|---|
| ☐ Contracts | ☐ Torts - Professional Malpractice | ☐ Torts - Personal Injury | ☐ Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20 -NI- | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | ☐ Notice/ File Med Mal (230) | ☒ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |
| ☐ Inmate Petitions | ☐ Administrative Law/Relief | ☐ Judgments/Settlements | ☐ Appeals |
| ☐ PCR (500) | ☐ Reinstate Div. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture-Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Worker's Comp (960) |
| ☐ Special/Complex /Other | ☐ Pharmaceuticals (630) | ☐ Confession of Judgment (770) | ☐ Zoning Board (970) |
| ☐ Environmental (600) | ☐ Unfair Trade Practices (640) | ☐ Petition for Workers Compensation Settlement Approval (780) | ☐ Public Service Comm. (990) |
| ☐ Automobile Arb. (610) | ☐ Out-of-State Depositions (650) | ☐ Other (799) | ☐ Employment Security Comm (991) |
| ☐ Medical (620) | ☐ Motion to Quash Subpoena in an Out-of-County Action (660) | | ☐ Other (999) |
| ☐ Other (699) | ☐ Sexual Predator (510) | | |

Submitting Party Signature: 

Date: February 9, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 274 (10/2014)

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,

Case No: 2015-CP-40- 01082

Plaintiff,

-vs-

SUMMONS
(Jury Trial Demanded)

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

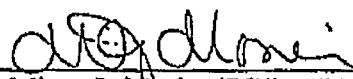
Defendants.

TO: BENNETT-HALL, CO., INC., STEPHEN SANDERS, AND SUNBELT
RENTALS, INC., THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer to the said
Complaint on the Plaintiff or his attorney, Melissa G. Mosier, Esquire, 119 East Main Street,
Lexington, SC 29072, within thirty (30) days after the service hereof, exclusive of the day of
such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in
this action will apply to the Court for the relief demanded in this Complaint.

MCWHIRTER, BELLINGER AND ASSOCIATES, PA

BY:


Melissa G. Mosier (SC Bar # 78693)
119 East Main Street
Lexington, SC 29072
803.359.5522 - Office
803.996.9080 - Facsimile
Melissam@mcwhirterlaw.com

Lexington, South Carolina

February 19, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,

Case No: 2015-CP-40-01082

Plaintiff,

-vs-

COMPLAINT
(Jury Trial Demanded)

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

Defendants.

RICHLAND COUNTY
CLERK
2015 FEB 19 PM 3:41

Upon information and belief, the Plaintiff would respectfully show the following:

1. Plaintiff Karl Harbath is a citizen and resident of the County of Sumter, State of South Carolina.
2. At the time of the acts and omissions complained of, Defendant Stephen Sanders, ("Sanders") was a citizen and resident of Richland County, South Carolina.
3. Defendant Bennett-Hall is a foreign corporation organized and existing pursuant to the laws of the State of North Carolina, but is and was then duly authorized to do business in South Carolina, maintains agents and servants in Richland County, South Carolina, sends a substantial amount of its employees to Richland County, solicits business from and occurring in Richland County, South Carolina, and derives substantial revenue from its transactions, contracts and business dealings in Richland County, South Carolina.
4. At the time of the acts and omissions complained of, Sanders was an employee, agent, and/or servant of Bennett Hall Co., Inc. ("Bennett-Hall") who was acting within the

course and scope of his employment, agency or service of Bennett Hall pursuant to the doctrine of *respondeat superior*.

5. At the time of the acts and omission complained of, Plaintiff was an employee and/or agent of Cornerstone Staffing Solutions, LLC ("Cornerstone").

6. Therefore, at the time of the acts and omission complained of, Plaintiff and Sanders were not co-employees.

7. Defendant Sunbelt Rentals, Inc. ("Sunbelt Rentals") is a foreign corporation organized and existing pursuant to the laws of the State of North Carolina, but is and was then duly authorized to do business in South Carolina, maintains agents and servants in Richland County, South Carolina, sends a substantial amount and a continuous stream of its employees and equipment to Richland County, solicits business from and occurring in Richland County, South Carolina, and derives substantial revenue from its transactions, contracts and business dealings in Richland County, South Carolina.

8. This Court has jurisdiction over the people and subject matter in this case.

9. The Defendants are properly named.

10. Venue is proper in Richland County, South Carolina, pursuant to S.C. Code Ann. §15-7-30.

FACTS

11. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

12. Sunbelt Rentals delivered heavy equipment to the job site where Plaintiff and Sanders worked, and provided safety training on boom lift and scissor lift operation to workers at the Michelin Tire Company, located at 2420 Two Notch Road in Lexington, South Carolina ("Michelin").

13. Sunbelt Rentals' agents and/or employees delivered the heavy equipment, including Aerial Work Platform Model JLG E400AN, Serial Number 0300143503 ("boom lift"), also provided safety training, further acting within the course and scope of their employment, agency or employment with Sunbelt Rentals pursuant to the doctrine of *respondeat superior*.

14. As of February 23, 2012, Black Box Network Services ("BBNS") was the General Contractor responsible for Wireless Access Point and Fiber Optic Cable Installation for Michelin. A host employer, BBNS received temporary workers from staffing agencies, including Cornerstone and Bennett Hall.

15. As of February 23, 2012, Plaintiff was an employee of Cornerstone, an entity that had a contract entitled "Subcontract Agreement" with BBNS.

16. As of February 23, 2012, Sanders was an employee of Bennett-Hall, an entity that had a contract entitled "Agreement for Supplying Temporary Technical Personnel" with BBNS.

17. On or about February 23, 2012, Plaintiff and Sanders were tasked to mount a cable box for an access point that required use of a boom lift. Plaintiff acted as a spotter for Sanders who drove the boom lift inside the Michelin plant.

18. Plaintiff guided Sanders out of the parking spot where the boom lift was parked, and as they reached the first intersection, Sanders stopped and Plaintiff ensured Sanders' path was clear to proceed.

19. Plaintiff spotted for Sanders as they proceeded through the intersection and continued on until it was time to clear the next intersection. At that time, Plaintiff spotted a forklift ahead and signaled Sanders to stop and wait for further instruction.

20. Sanders stopped, and Plaintiff walked ahead to speak with the forklift operator to determine whether he could proceed straight ahead or needed to guide Sanders in a different direction.

21. Instead of waiting for Plaintiff to give him a signal to proceed, Sanders blindly proceeded and ran into his own spotter, the Plaintiff.

22. After seeing Plaintiff's hand waving to him from the floor, Sanders stopped the boom lift, got off of the boom lift, and saw that the front right tire of the boom lift was on Plaintiff's right leg.

23. Sanders got back on the boom lift, backed it up, got off and saw that the boom lift was now on Plaintiff's right foot and backed the boom lift again.

24. Workers rushed to Plaintiff's side, where it was obvious that Plaintiff's right leg and foot were crushed, and that Plaintiff's left foot was also injured.

25. As a direct and proximate result of the negligence, gross negligence, negligence *per se*, reckless, willful and wanton acts and omissions of each of the Defendants, jointly and severally, the Plaintiff has suffered debilitating physical injuries to his right leg, right foot, left foot, and other body parts, which have caused and will in the future cause the Plaintiff to undergo much physical pain, suffering, anguish, emotional distress, disfigurement, scarring, future medical procedures, permanent impairment of health and bodily efficiency, permanent injury and total disability. Furthermore, Plaintiff's injuries have and will in the future cause Plaintiff to spend money for medical services and treatment related to his injuries and Plaintiff's injuries have caused Plaintiff to lose money in the form of wages.

FOR A FIRST CAUSE OF ACTION
Negligence, Gross Negligence, Negligence Per Se and Recklessness of
Bennett-Hall, Co., Inc.

26. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

27. Bennett-Hall was at all relevant times subject to and responsible for ensuring and verifying compliance with applicable OSHA, NIOSH and other industry standards, and its responsibility for compliance endures despite Sanders's assignment to a host employer.

28. As Sanders' employer, Bennett-Hall was careless, negligent, grossly negligent, negligent *per se* and reckless at the time and place above mentioned in the following particulars:

a) in hiring, training, entrusting, supervising, and retaining Sanders in connection with his operation of heavy equipment used to install data transmission cables and for otherwise failing to act as a reasonable and prudent staffing company under the same or similar circumstances.

b) in hiring Sanders, because in doing so Bennett-Hall failed to appropriately investigate and screen Sanders by verifying his credentials, skill, experience, safety history, certifications, and background driving boom lifts and other heavy machinery to ensure his suitability for employment with Bennett-Hall and other host employers.

c) for failing to employ a competent, skilled, experienced and trained worker to operate heavy machinery such as the boom lift at issue, and maneuver the warehouses safely, which culminated in the harms and losses suffered by the Plaintiff.

d) in hiring and retaining Sanders, even though Bennett-Hall knew or reasonably should have known that employing and retaining Sanders created an undue risk of harm to host employers, their employees, and other workers.

e) in retaining Sanders, even though it possessed the requisite ability, authority, responsibility and opportunity to monitor the quality and safety of his work, and knew or reasonably should have known that he posed an unnecessary risk to himself and fellow workers.

f) for failing to properly qualify Sanders to perform the work required of him by BBNS, including the safe operation and navigation of the boom lift in question.

g) for assigning Sanders to perform the work required of him by BBNS, including the safe operation and navigation of the boom lift in question.

h) for failing to provide a qualified, skilled, and capable employee to BBNS when it sent Sanders to Michelin.

i) in failing to do its part in ensuring and verifying compliance with OSHA, NIOSH and other industry standards, which culminated in and proximately caused Plaintiff's injuries and damages.

j) In failing to evaluate the worksite to identify the work duties to which it assigned its employees; and to assess the job hazards, skill level and abilities required to perform the tasks required by BBNS in a safe manner for the benefit of the worker and others on the job site.

k) in failing to maintain contact with its employees to fulfill its duty to inquire into the competency, skill and safety of its workers and any potential hazards presented by the tasks performed by its employees, including an employee's unfamiliarity with or lack of training to operate heavy machinery.

l) in failing to maintain contact with BBNS to monitor Bennett-Hall employees, including Sanders, to ensure their respective abilities to safely conduct their job tasks.

m) In such other particulars as the evidence brought to light in discovery or at trial may show.

29. As a direct and proximate result of Bennett-Hall's failure to deliver on its contractual promise to provide a qualified, experienced, knowledgeable and capable employee to BBNS, Plaintiff has suffered serious and permanent injuries.

30. Further, as a direct and proximate result of Bennett-Hall's violation of its duties and obligations as mentioned above, Bennett-Hall is responsible for the serious physical injuries and other losses suffered by the Plaintiff.

31. The above-referenced duties and obligations are nondelegable by virtue of, at the very least, Bennett-Hall's contractual relationship with its contractor and its representation of Sanders' fitness to perform the desired work, and the reliance upon Bennett-Hall to provide a skilled and able worker in Sanders. Further, due to the nature of the hazardous work Bennett-Hall's employees are expected to perform, one or more of the above-referenced duties and

obligations may be delegated to another, but Bennett-Hall retains ultimate liability for violations of the duty of care.

32. Plaintiff is an intended, or at the very least a foreseeable third party beneficiary of the contract between Bennett-Hall and BBNS, as a fellow worker involved in hazardous employment involving heights and heavy machinery.

33. As a direct and proximate result of Bennett-Halls negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, Plaintiff has suffered injuries and damages as described above.

34. Therefore, Bennett-Hall is jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

FOR A SECOND CAUSE OF ACTION

(Negligent, Grossly Negligent, Negligent *Per Se* and Reckless Acts and Omissions of Stephen Sanders, and Vicarious Liability of Bennett-Hall Company, Inc.)

35. Plaintiff re-alleges and reiterates all of the allegations contained above as if repeated verbatim herein.

36. At all times relevant to this Complaint, Sanders was an agent or employee of Bennett-Hall acting with the scope of his agency or employment.

37. At all times relevant to this Complaint, Bennett-Hall supplied persons to supervise and/or oversee workers assigned to the job site at issue in this case.

38. As such, Bennett-Hall retained control over the method and means by which Sanders performed his job duties.

39. Bennett-Hall also retained the ability and authority to counsel, discipline and terminate its employment relationship with Sanders.

40. Bennett-Hall's contract with BBNS explicitly retains its authority to counsel, discipline and terminate its employment contract with Sanders.

41. At all times relevant to this Complaint, Bennett-Hall is liable for the acts and omissions of its agents and/or employees who were performing their work duties and acting in furtherance of Bennett Hall's business.

42. Sanders, while acting as agent or employee of Bennett-Hall, violated his duty of care and was careless, negligent, grossly negligent, negligent *per se* and reckless at the time and place above mentioned in the following particulars:

- a) In failing to maintain a proper lookout;
- b) In moving the boom lift without being able to see in the direction he was traveling;
- c) In failing to wait to enter the intersection until his spotter indicated it was clear and safe to do so;
- d) In failing to check on the location of his spotter before moving the large and heavy boom lift;
- e) In moving the boom lift without first assuring he could do so safely;
- f) In failing to apply his brakes in time to avoid running over Plaintiff's leg and foot;
- g) In driving the boom lift while fatigued and therefore inattentive;
- h) In driving the boom lift while under the influence of drugs;
- i) In driving the boom lift in utter disregard of the rights and safety of Plaintiff and other workers around him at the time and place aforesaid;
- j) In such other particulars as the evidence brought to light in discovery or at trial may show.

43. As a direct and proximate result of Sanders' negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, all occurring within the course and scope

of his employment and/or agency and in furtherance of Bennett-Hall's business, Plaintiff has suffered injuries and damages as described above.

44. Therefore, Sanders, together with Bennett-Hall, are jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

FOR A THIRD CAUSE OF ACTION

(Negligence, Gross Negligence, Negligence *Per Se* and Recklessness of Sunbelt Rentals, Inc.)

45. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

46. Agents and/or employees of Sunbelt Rentals, acting within the course and scope of their employment and/or agency, delivered the boom lift at issue to the Michelin Plant and also undertook a duty to provide training on the safe operation of the boom lift.

47. In undertaking the responsibility to train workers on boom lift operation, Sunbelt Rentals was required to ensure that it instructed participants on all relevant safety and vehicle operation information.

48. Sunbelt Rentals was also responsible for delivering a copy of the operating manual for the boom lift contemporaneously with the equipment, and for reviewing the relevant operations and safety functions with a representative in accordance with OSHA regulations, NIOSH and other industry standards.

49. Sunbelt Rentals violated its duty of care and was careless, negligent, grossly negligent, negligent *per se*, and reckless at the time and place above mentioned in the following particulars:

a) In failing to instruct participants, and Sanders in particular, in its training session about all relevant aspects of safe boom lift operation.

b) In failing to verify participant's comprehension of all relevant aspects of safe boom lift operation.

c) In failing to provide instruction on the safe use of spotters, and verify comprehension of the safety rules regarding the safe use of spotters.

d) In failing to deliver a copy of the operating manual for the boom lift contemporaneously with the equipment, reviewing the boom lift's operation and safety controls in violation of OSHA, NIOSH and other industry standards.

e) In such other particulars as the evidence brought to light in discovery or at trial may show.

50. As a direct and proximate result of Sunbelt Rentals' negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, all occurring within the course and scope of his employment and/or agency and in furtherance of Bennett-Hall's business, Plaintiff has suffered injuries and damages as described above.

51. Therefore, Sunbelt Rentals is jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

All of the above acts and omissions of these Defendants, jointly and severally, combined with one another to directly and proximately cause the injuries and damages suffered by the Plaintiff, said acts being in violation of the Statutory and Common law of the State of South Carolina.

WHEREFORE, Plaintiff prays for judgment against these Defendants, jointly and severally, for Actual and Punitive damages in a reasonable amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

Signature page following

McWHIRTER, BELLINGER & ASSOCIATES, P.A.

BY:



Melissa G. Mosier (SC Bar #78693)
119 East Main Street
Lexington, SC 29072-3420
(803) 359-5523 Phone
(803) 996-9080 Fax
melissam@mcwhirterlaw.com
Attorneys for the Plaintiff

Lexington, South Carolina
February 19, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Karl T. Harbath,)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-01082

ANSWER OF DEFENDANTS

STEPHEN SANDERS AND

BENNETT-HALL CO., INC.

(Jury Trial Demanded)

RICHLAND COUNTY
FILED
2015 MAY -8 AM 10:14
JEANETTE W. MCBRIDE
C.C.P. & G.S.

TO: MELISSA MOSIER, ESQUIRE, COUNSEL TO PLAINTIFF KARL T. HARBATH

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") by denying each and every allegation 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 Black Box Network Services ("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.

WHEREFORE, having fully answered Plaintiffs' Complaint and having asserted affirmative defenses, 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; and
- c. Defendants be awarded such other and further relief as this Court deems proper.

Respectfully Submitted,

COLLINS & LACY, PC

By: Brian A. Comer
Brian A. Comer, Esquire
bcomer@collinsandlacy.com
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (Voice)
803.771.4484 (Fax)

ATTORNEYS FOR DEFENDANTS BENNETT-
HALL CO., INC. AND STEPHEN SANDERS

Columbia, South Carolina
May 4, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-01082

CERTIFICATE OF SERVICE

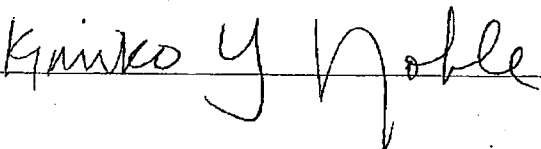
RICHLAND COUNTY
FILED
2015 MAY -8 AM 10:14
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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:

COUNSEL SERVED:

Melissa G. Mosier, Esquire
McWhirter Bellinger & Associates, PA
1807 Hampton Street
Columbia, SC 29201
melissam@mcwhirterlaw.com
Counsel for Plaintiff

T. McRoy Shelley, III
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202-3200
Roy.Shelley@rtt-law.com
Counsel for Defendant Sunbelt Rentals, Inc.



Columbia, South Carolina
May 7, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants,

vs.

Black Box Network Services, Inc.

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-40-01082

AMENDED ANSWER AND
THIRD-PARTY COMPLAINT OF
DEFENDANTS STEPHEN SANDERS AND
BENNETT-HALL CO., INC.

(Jury Trial Demanded)

RICHLAND COUNTY
FILED
2015 JUN -8 AM 9:46
JEANETTE W. MCBRIDE
C.C.P. & G.S.

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: 

Brian A. Comer, Esquire

bcomer@collinsandlacy.com

Kerri A. Rupert, Esquire

krupert@collinsandlacy.com

1330 Lady Street, 6th Floor (29201)

Post Office Box 12487

Columbia, SC 29211

803.256.2660 (Voice)

803.771.4484 (Fax)

ATTORNEYS FOR DEFENDANTS BENNETT-
HALL CO., INC. AND STEPHEN SANDERS

Columbia, South Carolina
June 3, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Karl T. Harbath,)

Plaintiff,)

vs.)

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

Defendants,)

vs.)

Black Box Network Services, Inc.)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-01082

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2015 JUN -8 AM 9:46
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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:

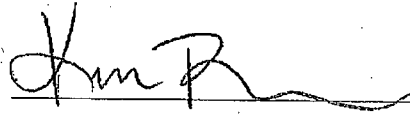
Melissa G. Mosier, Esquire
McWhirter Bellinger & Associates, PA
1807 Hampton Street
Columbia, SC 29201
melissam@mcwhirterlaw.com
Counsel for Plaintiff

T. McRoy Shelley, III
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202-3200
Roy.Shelley@rtt-law.com
Counsel for Defendant Sunbelt Rentals, Inc.

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

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

Black Box Network Services

A handwritten signature in black ink, appearing to read "Kim R.", is written over a horizontal line.

Columbia, South Carolina
June 3, 2015

LAW OFFICES
McWHIRTER, BELLINGER & ASSOCIATES, P.A.

119 EAST MAIN STREET,
LEXINGTON, SOUTH CAROLINA 29072
(803) 359-5523
FAX (803) 359-1248
mail@mcwhirterlaw.com

H. PATTERSON McWHIRTER
THOMAS P. BELLINGER
GARLAND P. McWHIRTER
STACEY TARTE MEYER
JOSEPH R. DASTA
L. LISA McPHERSON
ELIZABETH McMAHON PENTZ

RICHARD W. SIMMONS, II
J. TYLER LEE, JR.
MELISSA G. MOSIER
JOHN P. MEADORS
KEVIN R. HORTON
SARAH W. GUTHRIE

June 29, 2015

Brian Comer, Esquire
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, SC 29201

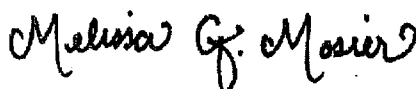
Re: Karl T. Harbath vs. Stephen Sanders, Bennett Hall Co., Inc., and Sunbelt Rentals
2015-CP-40-01082

Dear Mr. Comer:

Enclosed please find Plaintiff's Motion to Strike Amended Answer of Bennett-Hall Co., Inc. that has been filed with the Clerk of Court and which I hereby serve upon you in reference to the above-captioned case.

If you have any questions, please do not hesitate to contact our office.

Sincerely yours,



Melissa G. Mosier

MGM/JGF
Enclosure

cc: Sterling G. Davies, Esquire (w/enclosure)
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia, SC 29211-2519

Catherine F. Wrenn, Esquire (w/enclosure)
Womble Carlyle Sandridge & Rice
550 South Main Street, Suite 400
Greenville, SC 29601

FILE NO. 1-2241

JUN 30 2015

REC'D BAC/mhH/rmg
COLLINS & LACY

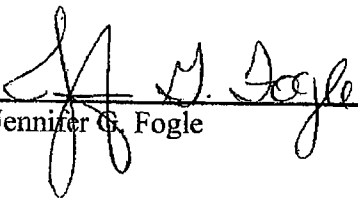
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is the paralegal for Melissa G. Mosier, attorney for the Plaintiff in the above-entitled action, and that the foregoing Motion to Strike Amended Answer of Bennett-Hall Co., Inc. was served upon the persons listed below by depositing a copy thereof in the United States Mail, with sufficient postage annexed thereto, addressed as follows:

Brian Comer, Esquire
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, SC 29201

Sterling G. Davies, Esquire
McAngus Goudelock & Courie, LLC
PO Box 12519
Columbia, SC 29211-2519

Catherine F. Wrenn, Esquire
Womble Carlyle Sandridge & Rice
550 South Main Street, Suite 400
Greenville, SC 29601



Jennifer G. Fogle

June 29, 2015

STATE OF SOUTH CAROLINA

COUNTY OF Richland

Karl T. Harbath

Plaintiff,

vs.

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

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-01082

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

FILED
JUN 26 PM 3:11
RICHLAND COUNTY
CLERK OF COURT
C.C.P. 2 G.S.

Plaintiff's Attorney:
Melissa G. Mosier, Bar No. 78693
Address:
119 East Main Street, Lexington, SC 29072
Phone: 803-359-5523 Fax 803-996-9080
E-mail: melissam@mcwhirterlaw.com Other:

Defendant's Attorney:
Brian Comer, Bar No. _____
Address:
1330 Lady Street, 6th Floor, Columbia, SC 29201
Phone: 803-256-2660 Fax _____
E-mail: bcomer@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 Strike Amended Answer of Bennett-Hall Co., Inc

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

June 26, 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

Collected by: _____ Date Filed: _____

- ☐ **MOTION FEE COLLECTED: \$** _____
☐ **CONTESTED - AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Karl T. Harbath,)
Plaintiff,)
- vs -)
Stephen Sanders,)
Bennett-Hall Co., Inc., and)
Sunbelt Rentals, Inc.)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-01082

**MOTION TO STRIKE AMENDED ANSWER
OF BENNETT-HALL CO. INC.**

RICHLAND COUNTY
FILED
2015 JUN 26 PM 3:11
JEANETTE MC BRIDE
C.C.P.

Pursuant to Rule 12(f) of the *South Carolina Rules of Civil Procedure*, Plaintiff hereby moves this Honorable Court for an Order Striking Bennett-Hall Co., Inc.,’s Amended Answer:

Brief Facts

On February 23, 2012 Mr. Harbath acted as a spotter guiding a boom lift driven by Defendant Sanders through the Michelin Plant. Sanders moved the boom lift without accounting for Mr. Harbath’s whereabouts and ran over his leg. Mr. Harbath lost 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. Mr. Harbath asserted a Workers’ Compensation claim against his direct employer, Cornerstone, for his injuries on the job. As an upstream employer, Black Box is immune from tort liability.

Procedural History

On February 18, 2015, Plaintiffs filed the instant action in Richland County. (Exhibit A) Plaintiffs filed his Proof of Service on the following persons/entities on the following dates: Sunbelt Rentals, Inc. ("Sunbelt") on March 12, 2015; Stephen Sanders ("Sanders") on March 18, 2015; Bennett-Hall Co., Inc. ("Bennett-Hall") on 4/2/15. Defendant Sunbelt answered on April 28, 2015 and Defendants Bennett-Hall and Sanders filed a joint answer on May 8, 2015. (Exhibit B) On June 8, 2015, Defendants Bennett-Hall and Sanders filed an Amended Answer and Third Party Complaint against Black Box Network Services, Inc. asserting contractual indemnification ("Black Box"). (Exhibit C) Defendants Bennett-Hall and Sanders also move for the actual and/or statutory employer to be made a party to the suit for purposes of fault allocation, "even if immune from suit." (Exhibit C, ¶43) Finally Defendants Bennett-Hall and Sanders move for offset against the actual and/or statutory employer. (Exhibit C, ¶44).

Discussion

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

Black Box is an upstream employer immune from suit by virtue of the exclusivity doctrine as set forth in S.C. Code Ann. Section 42-1-540. Plaintiff files this Motion to Strike the Amended Answer for three reasons: (1) It is inappropriate for Defendants to assert any claims against Black Box in this lawsuit when the Plaintiff is barred from doing so. (2) Allowing the defendant the right to blame a party immune from tort liability and incapable of qualifying as a joint tortfeasor would only serve to confuse the jury and slow the speed of the case due to the trial within a trial forced upon the Plaintiff's case. (3) There is no prejudice to Bennett-Hall in waiting to institute an action for contractual indemnification when the obligation to pay is ripe.

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). Also citing 3 *Moore’s Federal Practice* §14.09.).

As to the first concern, *Neeltec Enterprises, Inc., v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) provides guidance. (Exhibit D) 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 two different 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.* Indeed, “[t]he right of the plaintiff to choose her defendant is a **substantial right within the meaning of this subsection.**” (emphasis added)

That the plaintiff is the architect of the complaint was again recently recognized by the South Carolina Supreme Court case, *Morrow v. Fundamental Long-Term Care Holdings, LLC., et al.* Op. No. 27532 (filed Jun 17, 2015). (Exhibit E) In *Morrow*, the plaintiffs filed vicarious liability and direct negligence claims against a long-term care facility for the injuries suffered by a patient. 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 trial court granted this motion. The South Carolina Court of Appeals held that the circuit court’s order was not immediately appealable and the Supreme

Court again disagreed, holding that the trial court's order affected a substantial right held by the plaintiffs.

As articulated by the Court, **"The 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.* citing *Neeltec, supra*, (emphasis added). The same is true in the instant case – Plaintiff has selected the defendants to sue, yet Defendant Bennett-Hall seeks to add a defendant that is immune from tort liability.

As to the second concern, Black Box's alleged fault and alleged liability to Defendant Bennett-Hall will require 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 case. The allegations Defendant Bennett-Hall makes against Black Box make it clear that two cases will be tried at once – a contract case between Bennett-Hall and Black Box and the Plaintiff's case against three potential tortfeasors. This is in violation of Rule 1 of the South Carolina Civil Procedure – which is to "secure the just, speedy and inexpensive determination of every action."

Finally, the allegations against the new defendant are for indemnification, an action which can be instituted in the event of a judgment against Bennett-Hall. Simply stated, there is no prejudice to Defendant Bennett-Hall in waiting until Plaintiff's 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." citing *Choate v. United States*, 233 F.Supp. 463 (W.D. Okla. 1964). Also citing 3 *Moore's Federal Practice* §14.09.).

For these reasons, Plaintiff moves for an Order Striking Defendant Bennett-Hall's Amended Complaint, which purports to add a new defendant.

II. Defendants ask this Court to allow the jury to apportion fault to a defendant that fails to qualify as a joint tortfeasor.

According to S.C. Code Section 15-38-15(D), a defendant can only shift blame to a "potential tortfeasor." An employer immune from tort liability cannot possibly be a "potential tortfeasor."

Plaintiff directs 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.*

Therefore, since neither Black Box nor Cornerstone could be liable to the Plaintiff, then no verdict for damages in favor of the Plaintiff could ever be entered against them. As a result, per S.C. Code Ann. Section 15-38-15(C)(3) Defendant Bennett-Hall does not have a justiciable claim for apportionment of fault against Black Box or Cornerstone (or any other employer or upstream employer broadly referred to in its Amended Answer).

For these reasons, Plaintiffs request that Paragraph 43 is stricken and an Order is issued denying Defendant's request for apportionment.

II. 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.” In Paragraph 42, Defendant Bennet-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, Plaintiff asks the Court 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 42-1-580, and argued that 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 [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.*

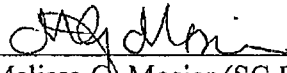
Like Phillips, Defendant Bennett-Hall asks this Court to apply Section 42-1-580 in a way that our Supreme Court has already expressly rejected about ten years ago. Because neither Black Box nor Cornerstone could be liable to the Plaintiff, then no settlement for damages in favor of the Plaintiff could ever be reached against them and a Defendant has no right of contribution against an employer. As a result, per S.C. Code Ann. Section 15-38-15(E) Defendant Bennett-Hall does not have a 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).

For these reasons and others to be adduced at the hearing, Plaintiff moves this Court for an Order Striking Defendant Bennett-Hall Co. Inc.'s Amended Answer. To the extent that the Paragraphs regarding allocation of fault, setoff and contribution appear in the original Answer, Plaintiff requests an Order striking those Paragraphs.

Respectfully submitted,

McWHIRTER, BELLINGER & ASSOCIATES, P.A.

BY:


Melissa G. Mosier (SC Bar #78693)
119 East Main Street
Lexington, SC 29072-3420
(803) 359-5523 Phone
(803) 996-9080 Fax
melissam@mcwhirterlaw.com
Attorneys for the Plaintiff

Lexington, South Carolina
June 26, 2015

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff(s)

vs.

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

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 40- 01082

Submitted By: Melissa G. Mosier, Esquire
Address: McWhirter, Bellinger, & Associates, P.A.
119 East Main Street, Lexington, SC 29072

SC Bar #: 78693 (Melissa Mosier);

Telephone #: 803-359-5523

Fax #: 803-996-9080

Other:

E-mail: melissam@mcwhirterlaw.com
tyler@mcwhirterlaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

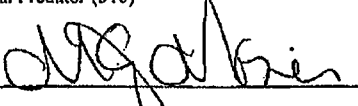
DOCKETING INFORMATION (Check all that apply)

**If Action Is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|---|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20 ____ -NI- ____ - | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | ☐ Notice/ File Med Mal (230) | ☒ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |
| Inmate Petitions | Administrative Law/Relief | Judgments/Settlements | Appeals |
| ☐ PCR (500) | ☐ Reinstate Drv. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture-Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Worker's Comp (960) |
| Special/Complex /Other | | ☐ Confession of Judgment (770) | ☐ Zoning Board (970) |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) | ☐ Petition for Workers Compensation Settlement Approval (780) | ☐ Public Service Comm. (990) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) | ☐ Other (799) | ☐ Employment Security Comm (991) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) | | ☐ Other (999) |
| ☐ Other (699) | ☐ Motion to Quash Subpoena in an Out-of-County Action (660) | | |
| | ☐ Sexual Predator (510) | | |

Submitting Party Signature: 

Date: February 19, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,)
Plaintiff,)

Case No: 2015-CP-40-01082

-vs-

SUMMONS
(Jury Trial Demanded)

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

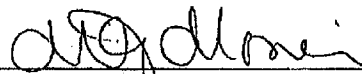
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RICHLAND COUNTY
CLERK OF COURT

TO: BENNETT-HALL, CO., INC., STEPHEN SANDERS, AND SUNBELT RENTALS, INC., THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiff or his attorney, Melissa G. Mosier, Esquire, 119 East Main Street, Lexington, SC 29072, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

MCWHIRTER, BELLINGER AND ASSOCIATES, PA

BY:


Melissa G. Mosier (SC Bar # 78693)
119 East Main Street
Lexington, SC 29072
803.359.5522 – Office
803.996.9080 – Facsimile
Melissam@mcwhirterlaw.com

Lexington, South Carolina

February 19, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Karl T. Harbath,)
Plaintiff,)

Case No: 2015-CP-40- 01082

-vs-

COMPLAINT
(Jury Trial Demanded)

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

RICHLAND COUNTY
FILED
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CLERK OF COURT

Upon information and belief, the Plaintiff would respectfully show the following:

1. Plaintiff Karl Harbath is a citizen and resident of the County of Sumter, State of South Carolina.
2. At the time of the acts and omissions complained of, Defendant Stephen Sanders, ("Sanders") was a citizen and resident of Richland County, South Carolina.
3. Defendant Bennett-Hall is a foreign corporation organized and existing pursuant to the laws of the State of North Carolina, but is and was then duly authorized to do business in South Carolina, maintains agents and servants in Richland County, South Carolina, sends a substantial amount of its employees to Richland County, solicits business from and occurring in Richland County, South Carolina, and derives substantial revenue from its transactions, contracts and business dealings in Richland County, South Carolina.
4. At the time of the acts and omissions complained of, Sanders was an employee, agent, and/or servant of Bennett Hall Co., Inc. ("Bennett-Hall") who was acting within the

course and scope of his employment, agency or service of Bennett-Hall pursuant to the doctrine of *respondeat superior*.

5. At the time of the acts and omission complained of, Plaintiff was an employee and/or agent of Cornerstone Staffing Solutions, LLC ("Cornerstone").

6. Therefore, at the time of the acts and omission complained of, Plaintiff and Sanders were not co-employees.

7. Defendant Sunbelt Rentals, Inc. ("Sunbelt Rentals") is a foreign corporation organized and existing pursuant to the laws of the State of North Carolina, but is and was then duly authorized to do business in South Carolina, maintains agents and servants in Richland County, South Carolina, sends a substantial amount and a continuous stream of its employees and equipment to Richland County, solicits business from and occurring in Richland County, South Carolina, and derives substantial revenue from its transactions, contracts and business dealings in Richland County, South Carolina.

8. This Court has jurisdiction over the people and subject matter in this case.

9. The Defendants are properly named.

10. Venue is proper in Richland County, South Carolina, pursuant to S.C. Code Ann. §15-7-30.

FACTS

11. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

12. Sunbelt Rentals delivered heavy equipment to the job site where Plaintiff and Sanders worked, and provided safety training on boom lift and scissor lift operation to workers at the Michelin Tire Company, located at 2420 Two Notch Road in Lexington, South Carolina ("Michelin").

13. Sunbelt Rentals' agents and/or employees delivered the heavy equipment, including Aerial Work Platform Model JLG E400AN, Serial Number 0300143503 ("boom lift"), also provided safety training, further acting within the course and scope of their employment, agency or employment with Sunbelt Rentals pursuant to the doctrine of *respondeat superior*.

14. As of February 23, 2012, Black Box Network Services ("BBNS") was the General Contractor responsible for Wireless Access Point and Fiber Optic Cable Installation for Michelin. A host employer, BBNS received temporary workers from staffing agencies, including Cornerstone and Bennett Hall.

15. As of February 23, 2012, Plaintiff was an employee of Cornerstone, an entity that had a contract entitled "Subcontract Agreement" with BBNS.

16. As of February 23, 2012, Sanders was an employee of Bennett-Hall, an entity that had a contract entitled "Agreement for Supplying Temporary Technical Personnel" with BBNS.

17. On or about February 23, 2012, Plaintiff and Sanders were tasked to mount a cable box for an access point that required use of a boom lift. Plaintiff acted as a spotter for Sanders who drove the boom lift inside the Michelin plant.

18. Plaintiff guided Sanders out of the parking spot where the boom lift was parked, and as they reached the first intersection, Sanders stopped and Plaintiff ensured Sanders' path was clear to proceed.

19. Plaintiff spotted for Sanders as they proceeded through the intersection and continued on until it was time to clear the next intersection. At that time, Plaintiff spotted a forklift ahead and signaled Sanders to stop and wait for further instruction.

20. Sanders stopped, and Plaintiff walked ahead to speak with the forklift operator to determine whether he could proceed straight ahead or needed to guide Sanders in a different direction.

21. Instead of waiting for Plaintiff to give him a signal to proceed, Sanders blindly proceeded and ran into his own spotter, the Plaintiff.

22. After seeing Plaintiff's hand waving to him from the floor, Sanders stopped the boom lift, got off of the boom lift, and saw that the front right tire of the boom lift was on Plaintiff's right leg.

23. Sanders got back on the boom lift, backed it up, got off and saw that the boom lift was now on Plaintiff's right foot and backed the boom lift again.

24. Workers rushed to Plaintiff's side, where it was obvious that Plaintiff's right leg and foot were crushed, and that Plaintiff's left foot was also injured.

25. As a direct and proximate result of the negligence, gross negligence, negligence *per se*, reckless, willful and wanton acts and omissions of each of the Defendants, jointly and severally, the Plaintiff has suffered debilitating physical injuries to his right leg, right foot, left foot, and other body parts, which have caused and will in the future cause the Plaintiff to undergo much physical pain, suffering, anguish, emotional distress, disfigurement, scarring, future medical procedures, permanent impairment of health and bodily efficiency, permanent injury and total disability. Furthermore, Plaintiff's injuries have and will in the future cause Plaintiff to spend money for medical services and treatment related to his injuries and Plaintiff's injuries have caused Plaintiff to lose money in the form of wages.

FOR A FIRST CAUSE OF ACTION
Negligence, Gross Negligence, *Negligence Per Se* and Recklessness of
Bennett-Hall, Co., Inc.

26. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

27. Bennett-Hall was at all relevant times subject to and responsible for ensuring and verifying compliance with applicable OSHA, NIOSH and other industry standards, and its responsibility for compliance endures despite Sanders's assignment to a host employer.

28. As Sanders' employer, Bennett-Hall was careless, negligent, grossly negligent, negligent *per se* and reckless at the time and place above mentioned in the following particulars:

a) in hiring, training, entrusting, supervising, and retaining Sanders in connection with his operation of heavy equipment used to install data transmission cables and for otherwise failing to act as a reasonable and prudent staffing company under the same or similar circumstances.

b) in hiring Sanders, because in doing so Bennett-Hall failed to appropriately investigate and screen Sanders by verifying his credentials, skill, experience, safety history, certifications, and background driving boom lifts and other heavy machinery to ensure his suitability for employment with Bennett-Hall and other host employers.

c) for failing to employ a competent, skilled, experienced and trained worker to operate heavy machinery such as the boom lift at issue, and maneuver the warehouses safely, which culminated in the harms and losses suffered by the Plaintiff.

d) in hiring and retaining Sanders, even though Bennett-Hall knew or reasonably should have known that employing and retaining Sanders created an undue risk of harm to host employers, their employees, and other workers.

e) in retaining Sanders, even though it possessed the requisite ability, authority, responsibility and opportunity to monitor the quality and safety of his work, and knew or reasonably should have known that he posed an unnecessary risk to himself and fellow workers.

f) for failing to properly qualify Sanders to perform the work required of him by BBNS, including the safe operation and navigation of the boom lift in question.

g) for assigning Sanders to perform the work required of him by BBNS, including the safe operation and navigation of the boom lift in question.

h) for failing to provide a qualified, skilled, and capable employee to BBNS when it sent Sanders to Michelin.

i) in failing to do its part in ensuring and verifying compliance with OSHA, NIOSH and other industry standards, which culminated in and proximately caused Plaintiff's injuries and damages.

j) In failing to evaluate the worksite to identify the work duties to which it assigned its employees; and to assess the job hazards, skill level and abilities required to perform the tasks required by BBNS in a safe manner for the benefit of the worker and others on the job site.

k) in failing to maintain contact with its employees to fulfill its duty to inquire into the competency, skill and safety of its workers and any potential hazards presented by the tasks performed by its employees, including an employee's unfamiliarity with or lack of training to operate heavy machinery.

l) in failing to maintain contact with BBNS to monitor Bennett-Hall employees, including Sanders, to ensure their respective abilities to safely conduct their job tasks.

m) In such other particulars as the evidence brought to light in discovery or at trial may show.

29. As a direct and proximate result of Bennett-Hall's failure to deliver on its contractual promise to provide a qualified, experienced, knowledgeable and capable employee to BBNS, Plaintiff has suffered serious and permanent injuries.

30. Further, as a direct and proximate result of Bennett-Hall's violation of its duties and obligations as mentioned above, Bennett-Hall is responsible for the serious physical injuries and other losses suffered by the Plaintiff.

31. The above-referenced duties and obligations are nondelegable by virtue of, at the very least, Bennett-Hall's contractual relationship with its contractor and its representation of Sanders' fitness to perform the desired work, and the reliance upon Bennett-Hall to provide a skilled and able worker in Sanders. Further, due to the nature of the hazardous work Bennett-Hall's employees are expected to perform, one or more of the above-referenced duties and

obligations may be delegated to another, but Bennett-Hall retains ultimate liability for violations of the duty of care.

32. Plaintiff is an intended, or at the very least a foreseeable third party beneficiary of the contract between Bennett-Hall and BBNS, as a fellow worker involved in hazardous employment involving heights and heavy machinery.

33. As a direct and proximate result of Bennett-Halls negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, Plaintiff has suffered injuries and damages as described above.

34. Therefore, Bennett-Hall is jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

FOR A SECOND CAUSE OF ACTION

(Negligent, Grossly Negligent, Negligent *Per Se* and Reckless Acts and Omissions of Stephen Sanders, and Vicarious Liability of Bennett-Hall Company, Inc.)

35. Plaintiff re-alleges and reiterates all of the allegations contained above as if repeated verbatim herein.

36. At all times relevant to this Complaint, Sanders was an agent or employee of Bennett-Hall acting with the scope of his agency or employment.

37. At all times relevant to this Complaint, Bennett-Hall supplied persons to supervise and/or oversee workers assigned to the job site at issue in this case.

38. As such, Bennett-Hall retained control over the method and means by which Sanders performed his job duties.

39. Bennett-Hall also retained the ability and authority to counsel, discipline and terminate its employment relationship with Sanders.

40. Bennett-Hall's contract with BBNS explicitly retains its authority to counsel, discipline and terminate its employment contract with Sanders.

41. At all times relevant to this Complaint, Bennett-Hall is liable for the acts and omissions of its agents and/or employees who were performing their work duties and acting in furtherance of Bennett Hall's business.

42. Sanders, while acting as agent or employee of Bennett-Hall, violated his duty of care and was careless, negligent, grossly negligent, negligent *per se* and reckless at the time and place above mentioned in the following particulars:

- a) In failing to maintain a proper lookout;
- b) In moving the boom lift without being able to see in the direction he was traveling;
- c) In failing to wait to enter the intersection until his spotter indicated it was clear and safe to do so;
- d) In failing to check on the location of his spotter before moving the large and heavy boom lift;
- e) In moving the boom lift without first assuring he could do so safely;
- f) In failing to apply his brakes in time to avoid running over Plaintiff's leg and foot;
- g) In driving the boom lift while fatigued and therefore inattentive;
- h) In driving the boom lift while under the influence of drugs;
- i) In driving the boom lift in utter disregard of the rights and safety of Plaintiff and other workers around him at the time and place aforesaid;
- j) In such other particulars as the evidence brought to light in discovery or at trial may show.

43. As a direct and proximate result of Sanders' negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, all occurring within the course and scope

of his employment and/or agency and in furtherance of Bennett-Hall's business, Plaintiff has suffered injuries and damages as described above.

44. Therefore, Sanders, together with Bennett-Hall, are jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

FOR A THIRD CAUSE OF ACTION
(Negligence, Gross Negligence, Negligence *Per Se* and Recklessness of Sunbelt Rentals, Inc.)

45. Plaintiff incorporates all previous paragraphs of this Complaint as if each were fully set forth herein in their entirety.

46. Agents and/or employees of Sunbelt Rentals, acting within the course and scope of their employment and/or agency, delivered the boom lift at issue to the Michelin Plant and also undertook a duty to provide training on the safe operation of the boom lift.

47. In undertaking the responsibility to train workers on boom lift operation, Sunbelt Rentals was required to ensure that it instructed participants on all relevant safety and vehicle operation information.

48. Sunbelt Rentals was also responsible for delivering a copy of the operating manual for the boom lift contemporaneously with the equipment, and for reviewing the relevant operations and safety functions with a representative in accordance with OSHA regulations, NIOSH and other industry standards.

49. Sunbelt Rentals violated its duty of care and was careless, negligent, grossly negligent, negligent *per se*, and reckless at the time and place above mentioned in the following particulars:

- a) In failing to instruct participants, and Sanders in particular, in its training session about all relevant aspects of safe boom lift operation.

b) In failing to verify participant's comprehension of all relevant aspects of safe boom lift operation.

c) In failing to provide instruction on the safe use of spotters, and verify comprehension of the safety rules regarding the safe use of spotters.

d) In failing to deliver a copy of the operating manual for the boom lift contemporaneously with the equipment, reviewing the boom lift's operation and safety controls in violation of OSHA, NIOSH and other industry standards.

e) In such other particulars as the evidence brought to light in discovery or at trial may show.

50. As a direct and proximate result of Sunbelt Rentals' negligence, gross negligence, and negligence *per se*, which constitutes reckless conduct, all occurring within the course and scope of his employment and/or agency and in furtherance of Bennett-Hall's business, Plaintiff has suffered injuries and damages as described above.

51. Therefore, Sunbelt Rentals is jointly and severally liable for all damages allowed by law for the injuries, damages, and losses sustained by the Plaintiff in this case.

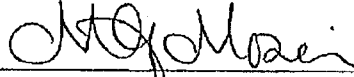
All of the above acts and omissions of these Defendants, jointly and severally, combined with one another to directly and proximately cause the injuries and damages suffered by the Plaintiff, said acts being in violation of the Statutory and Common law of the State of South Carolina.

WHEREFORE, Plaintiff prays for judgment against these Defendants, jointly and severally, for Actual and Punitive damages in a reasonable amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

Signature page following

McWHIRTER, BELLINGER & ASSOCIATES, P.A.

BY:



Melissa G. Mosier (SC Bar #78693)

119 East Main Street

Lexington, SC 29072-3420

(803) 359-5523 Phone

(803) 996-9080 Fax

melissam@mcwhirterlaw.com

Attorneys for the Plaintiff

Lexington, South Carolina
February 19, 2015

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2015-CP-40-1082

ANSWER OF SUNBELT RENTALS, INC.

(Jury Trial Demanded)

Defendant Sunbelt Rentals, Inc. ("Sunbelt"), by and through undersigned counsel, hereby respond to the allegations set forth in the Complaint, as follows:

FOR A FIRST DEFENSE

(General Denial)

1. Each and every allegation of each and every paragraph of the Complaint, not hereinafter specifically admitted, qualified or explained, is denied.

FOR AN ADDITIONAL DEFENSE

(Responding to Plaintiff's Allegations)

2. Sunbelt lacks sufficient information to respond to the allegations contained in Paragraphs 1-6, which are not directly relevant to it, and requests adequate legal proof of same.

3. As to the allegations contained in Paragraph 7, it is admitted that Sunbelt rentals is a corporation registered North Carolina and doing business in South Carolina, including business in Richland County. The remaining allegations are denied as pled.

4. Sunbelt lacks sufficient information to respond to the allegations contained in Paragraph 8 and requests adequate legal proof of same.

5. The allegations contained in Paragraph 9 are admitted as to Sunbelt's legal name.

6. Sunbelt lacks sufficient information to respond to the allegations contained in Paragraph 10 and requests adequate legal proof of same.

7. Paragraph 11 is an incorporation paragraph and Sunbelt reiterates its prior responses thereto.

8. Responding to the allegations contained in Paragraphs 12 and 13, it is admitted that Sunbelt Rentals provided certain equipment to Black Box Network Services, pursuant to a valid rental contract, reportedly for its use at the Michelin Tire Company. By way of further answer, Sunbelt provided all information required by law for the use of such equipment. All remaining allegations are denied as pled.

9. Sunbelt lacks sufficient information to respond to the allegations contained in Paragraphs 14 through 24 and therefore denies same and requests adequate legal proof thereof.

10. Paragraph 25 is denied as to Sunbelt and adequate legal proof thereof is demanded. In addition, Sunbelt specifically objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability, and therefore moves to strike same.

11. Paragraph 26 is an incorporation paragraph and Sunbelt reiterates its prior responses thereto.

12. The allegations contained in Paragraphs 27 through 34 are directed to parties other than Sunbelt. To the extent any of these allegations can be construed against Sunbelt the same are denied and strict legal proof thereof is demanded.

13. Paragraph 35 is an incorporation paragraph and Sunbelt reiterates its prior responses thereto.

14. The allegations contained in Paragraphs 36 through 44 are directed to parties other than Sunbelt. To the extent any of these allegations can be construed against Sunbelt, the same are denied and strict legal proof thereof is demanded.

15. Paragraph 45 is an incorporation paragraph and Sunbelt reiterates its prior responses thereto.

16. Responding to the allegations contained in Paragraphs 46 - 48, it is admitted that Sunbelt Rentals provided certain equipment to Black Box Network Services, pursuant to a valid rental contract, for its use at the Michelin Tire Company. By way of further answer, Sunbelt provided all information required by law for the use of such equipment. All remaining allegations are denied as pled

17. The allegations contained in Paragraphs 49 through 51 and the concluding paragraphs are denied and strict legal proof thereof is demanded.

FOR AN ADDITIONAL DEFENSE
(Failure to State a Claim)

18. Plaintiff's Complaint fails to state a claim against Sunbelt for which relief can be granted and Plaintiff's Complaint should be dismissed pursuant to Rules 9 and 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR AN ADDITIONAL DEFENSE
(Standing/Privity)

19. Plaintiff lacks sufficient legal right to assert a claim against Sunbelt.

FOR AN ADDITIONAL DEFENSE
(Statute of Limitations)

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

FOR AN ADDITIONAL DEFENSE

(Waiver/Estoppel/Laches)

21. The claims set forth in the Complaint are barred by the doctrines of waiver, estoppel and/or laches.

FOR AN ADDITIONAL DEFENSE
(Liability/Remedy Limitations)

22. Plaintiff's claims and remedies are limited, restricted, or excluded by the substance of any communication between the parties, including documents and/or oral conversations. Further, Defendant's liability, if any, may be limited, restricted, or excluded by the rights, responsibilities, and liability of Plaintiff and/or third parties, either by contract, statute, or equity.

FOR AN ADDITIONAL DEFENSE
(Failure to Mitigate)

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

FOR AN ADDITIONAL DEFENSE
(Third Party Fault)

24. Defendant asserts that the claims against it are barred or limited by the contributing, concurring, intervening, or superseding fault, negligence, or breach by persons or entities other than Defendant, 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. Defendant asserts such fault, negligence, or breach as a basis for the elimination or reduction of any liability by Defendant, the existence of which is denied.

FOR AN ADDITIONAL DEFENSE

(Agency/Authority)

25. To the extent that Plaintiff's claims rely upon acts or omissions of others to assert claims against this Defendant, this Defendant specifically denies any liability for any acts or omissions of others acting without this Defendant's express or other legal authority. This Defendant objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability.

FOR AN ADDITIONAL DEFENSE

(Set-off/Credit)

26. Defendant asserts entitlement to a set-off and/or credit for all proceeds received by or on behalf of Plaintiff as a result of Plaintiffs' claims in this matter, regardless of the source or basis of such proceeds, to include any contractual or gratuitous reduction in charges or provision of services or materials

FOR AN ADDITIONAL DEFENSE

(Incorporation)

27. Defendant hereby incorporates and asserts 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, counterclaims, set-offs, and credits pled to Plaintiffs' claims, to the extent not inconsistent with its Answer herein and its denial of liability of any kind.

FOR AN ADDITIONAL DEFENSE
(Contributing/Comparative Fault, § 15-38-15)

28. The Defendant alleges that any damages sustained by the Plaintiff were caused and occasioned by the Plaintiff's own negligence, recklessness, willfulness and wantonness or other fault, and/or by the negligence, recklessness, willfulness and wantonness or other fault of others not under Defendant's control, and:

- A. That the fault attributable to Plaintiff is a complete bar to the Plaintiff's claim;
- B. That the fault attributable to Plaintiff was greater than any alleged fault of the Defendant or others and is a complete bar to the Plaintiff's claim;
- C. That the fault attributable to Plaintiff combined with, contributed to, or concurred in any alleged fault of the Defendant or others and acted as a proximate cause of the damages allegedly sustained and is therefore a complete bar to Plaintiff's claim;
- D. Should the Plaintiff be entitled to a recovery, such recovery should be reduced in proportion to the fault attributable to Plaintiff and/or others; and
- E. Should Plaintiff be entitled to a recovery, Defendant specifically requests and moves that such liability should be assessed in accordance with S.C. Code § 15-38-15, if applicable. In addition and in the alternative, Defendant asserts its right under due process of law to have liability, if any, assessed in proportion to the fault of each factually and/or legally responsible entity for such liability and that the amount of recoverable damages, if any, be assessed in accordance with such apportionment.

FOR AN ADDITIONAL DEFENSE
(Assumption of the Risk; SC Code § 15-73-20)

29. The Defendant alleges that any damages sustained by the Plaintiff were the result of a dangerous condition or the risk thereof, known to Plaintiff, the nature and extent of which Plaintiff fully appreciated, and the Plaintiff voluntarily and knowingly exposed itself to such condition and risk, and is barred from recovery in this matter.

FOR AN ADDITIONAL DEFENSE
(S.C. Code § 42-1-540)

30. Upon information and belief, Plaintiff has sought and received benefits under the South Carolina Workers' Compensation Act. Under S.C. Code § 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 Defendant hereby pleads the South Carolina Workers' Compensation Act, S.C. Code Ann. § 42-1-10 et seq., as an exclusive remedy and a bar to this action.

FOR AN ADDITIONAL DEFENSE
(S.C. § 42-1-540 & § 15-38-15)

31. In the alternative, if it is finally determined that the South Carolina Workers' Compensation Act does not bar this action, This Defendant pleads the application of S.C. Code §42-1-580 to this action and further alleges 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 properly train and/or supervise Plaintiff and/or other employees;
- D. Failure to provide proper warnings and/or safeguards;
- E. Failure to recognize Plaintiff's injuries, if any, in a timely manner;
- F. Failure to properly respond to Plaintiff's requests for medical care;
- G. Causing and/or contributing to the acts and/or omissions alleged in the Complaint;
- H. Other such acts or omissions to be proven at trial.

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

32. Further, pursuant to S.C. Code § 15-38-15 (2005, as amended), This Defendant hereby moves 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. This Defendant specifically requests that such actual and/or statutory employer(s), even if immune from suit pursuant to § 42-1-540 or other law, be listed on the verdict form for purposes of allocation of fault.

33. In the alternative, This Defendant seeks a proportional credit or offset pursuant to § 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 AN ADDITIONAL DEFENSE
(Punitive Damages – Procedural)

34. Sunbelt alleges, upon information and belief, that punitive damages as currently awarded in the State of South Carolina violate the Constitutions of the United States and of South Carolina.

FOR AN ADDITIONAL DEFENSE
(Punitive Damages – Substantive)

35. Sunbelt alleges that a verdict for the Plaintiff for punitive damages would deprive Sunbelt of property without due process of law and without equal protection of the laws:

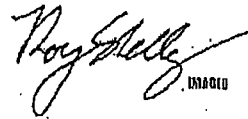
- a. If the award is based upon conduct that is not intentional or malicious, or conduct that was lawful at the time and place where the conduct occurred or had no impact upon the State of South Carolina or its residents;
- b. If the amount awarded bears no reasonable relationship to the proven harm claimed by Plaintiff;
- c. If the award is based upon other, dissimilar acts or omissions;
- d. If the award is based upon other parties' hypothetical claims;
- e. If the award is based upon economic rather than physical harm;
- f. If the award is excessive in comparison to penalties imposed or authorized in comparable cases.

RESERVATION AND NON-WAIVER

36. Sunbelt reserves and does not waive an additional or further defense as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully answered the claims of the Plaintiff and stated defenses to such, Sunbelt prays that the Court dismiss all claims against this Defendant and tax the costs thereof to the Plaintiff and for such other and further relief as this Court may deem just and proper.

ROGERS TOWNSEND & THOMAS, PC



T. McRoy Shelley, III SC Bar # 007067
Post Office Box 100200
Columbia, South Carolina 29202-3200
Tel: (803) 771-7900
Direct: 803-744-1818; Fax: (803) 343-7017
Email: roy.shelley@rtt-law.com

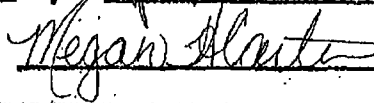
Counsel for Sunbelt Rentals, Inc.

Columbia, South Carolina
Date: April 20, 2015

CERTIFICATE OF SERVICE

I certify that on this date, a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 20th day of April, 20 15.



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Karl T. Harbath,)
)
Plaintiff,)
)
vs.)
)
Stephen Sanders, Bennett-Hall Co., Inc.,)
and Sunbelt Rentals, Inc.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-01082

ANSWER OF DEFENDANTS

STEPHEN SANDERS AND

BENNETT-HALL CO., INC.

(Jury Trial Demanded)

TO: MELISSA MOSIER, ESQUIRE, COUNSEL TO PLAINTIFF KARL T. HARBATH

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") by denying each and every allegation 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 Black Box Network Services ("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. Leathernan 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.

WHEREFORE, having fully answered Plaintiffs' Complaint and having asserted affirmative defenses, 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; and
- c. Defendants be awarded such other and further relief as this Court deems proper.

Respectfully Submitted,

COLLINS & LACY, PC

By: Brian A. Comer
Brian A. Comer, Esquire
bcomer@collinsandlacy.com
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (Voice)
803.771.4484 (Fax)

ATTORNEYS FOR DEFENDANTS BENNETT-
HALL CO., INC. AND STEPHEN SANDERS

Columbia, South Carolina
May 4, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2015-CP-40-01082

CERTIFICATE OF SERVICE

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:

COUNSEL SERVED:

Melissa G. Mosier, Esquire
McWhirter Bellinger & Associates, PA
1807 Hampton Street
Columbia, SC 29201
melissam@mcwhirterlaw.com
Counsel for Plaintiff

T. McRoy Shelley, III
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202-3200
Roy.Shelley@rtt-law.com
Counsel for Defendant Sunbelt Rentals, Inc.

Columbia, South Carolina
May 7, 2015

Krinko Y. Noble

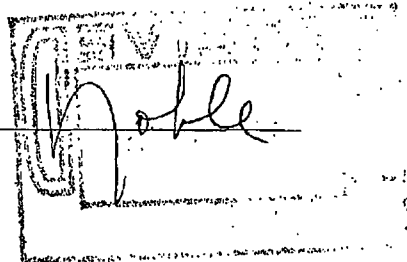


EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants,

vs.

Black Box Network Services, Inc.

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-40-01082

AMENDED ANSWER AND
THIRD-PARTY COMPLAINT OF
DEFENDANTS STEPHEN SANDERS AND
BENNETT-HALL CO., INC.

(Jury Trial Demanded)

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.

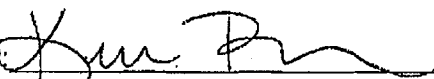
62. Therefore, BBNS is liable to Bennett-Hall Co., Inc. for the costs of defense and indemnity for any verdict against Bennett-Hall Co., Inc. or settlement.

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: 

Brian A. Comer, Esquire
bcomer@collinsandlacy.com
Kerri A. Rupert, Esquire
krupert@collinsandlacy.com
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (Voice)
803.771.4484 (Fax)

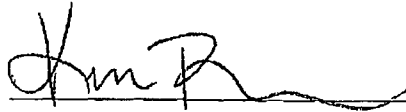
ATTORNEYS FOR DEFENDANTS BENNETT-
HALL CO., INC. AND STEPHEN SANDERS

Columbia, South Carolina
June 3, 2015

CT Corporation System
75 Beattie Place
(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

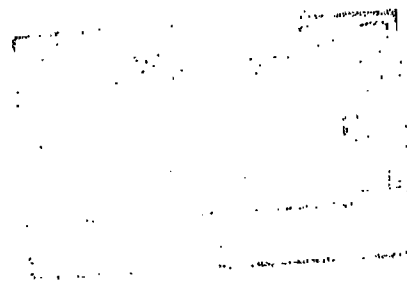


EXHIBIT D

WestlawNext

Neeltec Enterprises, Inc. v. Long
 Supreme Court of South Carolina May 16, 2012 397 S.C. 563 725 S.E.2d 926 (Approx. 5 pages)

Original Image of 725 S.E.2d 926 (PDF)

397 S.C. 563
 Supreme Court of South Carolina.

NEELTEC ENTERPRISES, INC., d/b/a Fireworks Supermarket,
 Petitioner,

v.

Willard LONG, d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore,
 Respondent.

No. 27125. Heard April 3, 2012. Decided May 16, 2012.

Synopsis

Background: Operator of fireworks store brought action against competitor under South Carolina Unfair Trade Practices Act. The trial court, Colleton County, A. Victor Rawl, Special Referee, granted competitor's motion for summary judgment in part and ordered operator to substitute two corporate owners of competitor's business as defendants. Operator appealed. The Court of Appeals, 391 S.C. 177, 705 S.E.2d 57, dismissed appeal as one from non-appealable interlocutory order. Certiorari review was granted.

Holding: The Supreme Court held that order requiring operator to substitute alleged corporate owners of competitor for defendant named in complaint was appealable interlocutory order.

Judgment of Court of Appeals reversed and remanded.

West Headnotes (3)

[Change View](#)

- 1 **Appeal and Error** Relating to parties or process
 Order requiring fireworks store operator to substitute alleged corporate owners of competitor for defendant named in complaint was appealable interlocutory order, where it affected plaintiff owner's substantial right to name his defendant. Code 1976, § 14-3-330(2)(a).
 1 Case that cites this headnote
- 2 **Appeal and Error** Determining action and preventing judgment
 The right of the plaintiff to choose her defendant is a substantial right, within the meaning of the statute permitting an appeal for correction of errors of law in law cases when such order determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. Code 1976, § 14-3-330(2)(a).
 1 Case that cites this headnote
- 3 **Appeal and Error** Relating to parties or process
 A party who does not immediately appeal an order of substitution of a party may not appeal this interlocutory order after final judgment. Code 1976, § 14-3-330(2)(a).

Attorneys and Law Firms

**927 Robert J. Thomas and Robert P. Wood, both of Rogers Townsend & Thomas, of Columbia, for Petitioner.

Bert G. Utsey, III, of Peters Murdaugh Parker-Eltzroth & Detrick, of Walterboro, for Respondents.

SELECTED TOPICS**Appeal and Error****Decisions Reviewable**

Benefit of Interlocutory Review of
 Discovery Order

Notice of Appeal of Judgment Overruling
 Motion

Secondary Sources

¶ 74,484 HARRY E. STETSER, DALE E. NELSON AND MICHAEL DE MONTEBRUN, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. TAP PHARMACEUTICAL PRODUCTS, INC., ABBOTT LABORATORIES, TAKEDA CHEMICAL INDUSTRIES, LTD., JOHNSON & JOHNSON, ETHICON ENDO-SURGERY, INC., INDIGO LASER CORP., DAVID JETT, CHRISTOPHER COLEMAN, SCOTT HIDALGO, AND EDDY JAMES HACK, DEFENDANTS.

2004 WL 6792805

...Harry E. Stetser, Dale E. Nelson and Michael de Montbrun, individually and on behalf of themselves and all others similarly situated, Plaintiffs v. TAP Pharmaceutical Products, Inc., Abbott Laboratories...

Modern status of state court rules governing entry of judgment on multiple claims

80 A.L.R.4th 707 (Originally published in 1950)

...This annotation collects and analyzes the modern state cases in which the courts have discussed state rules of civil procedure identical or similar to Federal Rule of Civil Procedure 54(b) (FRCP 54(b))...

SPECIAL PROCEEDINGS IN OHIO: WHAT IS THE OHIO SUPREME COURT DOING WITH THE FINAL JUDGMENT RULE?

41 Clev. St. L. Rev. 537

...I. Introduction II. What is a Substantial Right? III. Special Proceedings in Ohio Prior to Amato IV. Special Proceedings After Amato V. The Ideological Split on the Ohio Supreme Court VI. Analysis of O...

[See More Secondary Sources](#)

Briefs**Brief for the Respondent**

1978 WL 223441
 Gardner v. Westinghouse Broadcasting Company
 Supreme Court of the United States.
 March 04, 1978

...The unreported Memorandum Opinion and Order of the District Court For the Western District of Pennsylvania is printed in Appendix B to the Petition For Certiorari. (P. 34a-40a). The opinion of the Unit...

Brief for the Respondent

1978 WL 206052
 Jo Ann Evans GARDNER, Petitioner, v. WESTINGHOUSE BROADCASTING COMPANY, Respondent.
 Supreme Court of the United States.
 March 04, 1978

...The unreported Memorandum Opinion and Order of the District Court For the Western District of Pennsylvania is printed in Appendix B to the Petition For Certiorari. (P. 34a-40a). The opinion of the Unit...

BRIEF FOR PETITIONERS

Opinion

PER CURIAM.

*564 Petitioner appealed an order requiring it to substitute two corporations as defendants in its SCUTPA¹ suit in lieu of the individual (Long) against whom it had brought suit. The Court of Appeals dismissed petitioner's appeal finding it was not immediately appealable under S.C. Code Ann. § 14-3-330 (1977 and Supp.2011). *Neeltec Enterp., Inc. v. Long*, 301 S.C. 177, 705 S.E.2d 57 (Ct.App.2011). We granted certiorari to review that decision, and now reverse, finding the order is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a). The matter is remanded to the Court of Appeals for consideration of the merits.

***565 FACTS**

Petitioner has long operated a fireworks store near I-95. It advertises its store "Fireworks Supermarket" on billboards along I-95. Defendant Long is alleged in petitioner's complaint to own and operate a competing fireworks store currently named "Fireworks Superstore" located closer to the I-95 exit than is petitioner's "Fireworks Supermarket." As a result, cars exiting the interstate will encounter Long's store before reaching petitioner's business. Petitioner alleged that Long first changed his store's name to closely resemble petitioner's. Petitioner then redecorated the outside of his building facing I-95 traffic with an advertising display. Defendant Long allegedly retaliated by moving a 45-foot long, 9-foot tall storage container onto his property, effectively blocking travelers' views of petitioner's wall advertisement. Petitioner alleged that, by his actions, defendant Long had violated the SCUTPA. Defendant Long answered, and subsequently filed a "Motion for Summary Judgment or, in the Alternative, for Substitution of Parties." Long asserted he never owned the Fireworks Superstore, but that it had been owned by **928 Hobo Joes, Inc., when the suit was commenced and was now owned by Foxy's Fireworks Superstore, Inc., both South Carolina corporations. He sought either summary judgment because petitioner had sued the wrong party or an order, pursuant to Rule 21, SCRPC, that Long be dropped as a party and that Hobo Joe's and Foxy's Fireworks be added as defendants.

The special referee granted defendant Long's motion in part, finding he was not "the proper defendant for the claims presented" and ordering that Hobo Joe's and Foxy's Fireworks Superstore "be substituted as Defendants instead of Willard Long." In addition, the referee conditionally permitted petitioner to file an amended complaint if it "wishes to articulate a conspiracy claim against [Long] individually...." Petitioner appealed and the Court of Appeals dismissed the appeal.

ISSUE

Did the Court of Appeals err in dismissing this appeal?

***566 ANALYSIS**

1 2 This is an appeal from an order requiring the plaintiff, at the request of the named defendant, to remove him from the suit and substitute two different defendants.² Since no specialized statute applies here, appealability is determined by § 14-3-330 which provides in pertinent part:

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;

An interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under § 14-3-330(2)(a). The right of the plaintiff to choose her defendant is a substantial right within the meaning of this subsection. *Cf. Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 688 S.E.2d 559 (2010) (on appeal from order requiring plaintiff to join parties as defendants, Court recognized common law right of tort plaintiff to choose her defendant); *see also Hagood v. Sommerville*, 382 S.C. 191, 807 S.E.2d 707 (2006) (order disqualifying party's chosen attorney is immediately appealable under § 14-3-330(2)). Moreover, this order effectively discontinues petitioner's suit against Long, thus bringing the order under 2(a).

1998 WL 699571
Johnson v. Fankell
United States Supreme Court Petitioner's
Brief,
December 05, 1998

...FN* Counsel of Record Jurisdiction is conferred on this Court by 28 U.S.C. § 1257, which provides "final judgments or decrees rendered by the highest court of a State in which a decision could be had..."

See More Briefs

Trial Court Documents

In re Synterra 3020 Market, LP

2011 WL 2750931
In re Synterra 3020 Market, LP
United States Bankruptcy Court, E.D.
Pennsylvania,
March 30, 2011

...Chapter 11 This matter is before the Court on the motion of Synterra 3020 Market, LP (the "Debtor") for authority to use cash collateral on an interim basis pursuant to Federal Rule of Bankruptcy Proce...

In re Roper Bros. Lumber Co., Inc.

2008 WL 8189301
In re Roper Bros. Lumber Co., Inc.
United States Bankruptcy Court, E.D.
Virginia,
December 18, 2008

...Chapter 11 This matter came before the Court on the motion (the "Motion") of Roper Brothers Lumber Company, Incorporated (the "Debtor") requesting that the Court enter an order authorizing the Debtor to...

In re Synterra 3020 Market, LP

2011 WL 2750930
In re Synterra 3020 Market, LP
United States Bankruptcy Court, E.D.
Pennsylvania,
January 31, 2011

...Chapter 11 This matter is before the Court on the motion of Synterra 3020 Market, LP (the "Debtor") for authority to use cash collateral on an interim basis pursuant to Federal Rule of Bankruptcy Proce...

See More Trial Court Documents

³ In a 1933 case, the Court considered an appeal by the defendant from an order substituting an individual plaintiff for a corporate plaintiff. The defendant did not immediately appeal the substitution order, but instead sought to appeal it after judgment. The Court held

"567 [F]rom the court's order no appeal was taken by [the defendant]. On the contrary, as stated, she elected to file an answer and go to trial on the issues made by the pleadings. Clearly, in these circumstances, the question here made is *res adjudicata*. [Defendant], by her failure to appeal from the court's order of substitution, is now estopped to deny that [the individual] was the proper party to prosecute the action.

Watts v. Copeland, 170 S.C. 449, 458-7, 170 S.E. 780, 783 (1933).

Watts holds that a party who does not immediately appeal an order of substitution may not appeal this interlocutory order after final judgment. This Court has held that an interlocutory order that falls within the purview of § 14-3-330(2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment. *E.g.*, *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). We hold the order of substitution is appealable under § 14-3-330(2)(a), and that the failure to take such an immediate appeal would bar consideration of the order in an appeal from final judgment. *Watts*, *supra*.

The Court of Appeals and respondent rely on the portion of the special referee's order conditionally allowing petitioner to file an amended complaint naming Long individually as a co-conspirator with his companies. Leaving aside the validity of such a claim,³ the judge's suggestion that he might permit the plaintiff to sue the original defendant on a legal theory of the referee's choosing is irrelevant to the appealability of the order of substitution.

CONCLUSION

The order requiring petitioner to discontinue its SCUTPA suit against respondent Long affects petitioner's substantial right to name its defendant. This interlocutory order is immediately appealable under § 14-3-330(2)(a). *Watts*, *supra*. The decision of the Court of Appeals dismissing the *668 appeal is reversed, and the matter remanded for consideration of the merits of petitioner's appeal.

REVERSED AND REMANDED.

PLEICONES, Acting Chief Justice, BEATTY, KITTREDGE, JJ., and Acting Justices JAMES E. MOORE and J. ERNEST KINARD, Jr., concur.

Parallel Citations

725 S.E.2d 926

Footnotes

- 1 South Carolina Unfair Trade Practices Act, S.C.Code Ann. §§ 39-5-10 et seq. (1985 and Supp.2011).
- 2 This is neither a "misnomer" situation, nor one involving a non-existent party. Compare *McCullar v. Estate of Campbell*, 381 S.C. 205, 672 S.E.2d 784 (2009); *Griffin v. Capital Cash*, 310 S.C. 288, 423 S.E.2d 143 (Ct.App.1992).
- 3 See *McMillan v. Oconee Mem. Hosp.*, 387 S.C. 559, 626 S.E.2d 884 (2006).

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EXHIBIT E

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Lawrence E. Morrow and Evelyn M. Morrow,
Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC;
Fundamental Clinical Consulting, LLC; Fundamental
Administrative Services, LLC; THI of Baltimore, Inc.;
THI of South Carolina, LLC; THI of Baltimore
Management, LLC; THI of South Carolina at Magnolia
Place at Spartanburg, LLC, d/b/a Magnolia Place at
Spartanburg, Respondents.

Appellate Case No. 2012-212871

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 27532
Heard January 13, 2015 – Filed June 17, 2015

REVERSED AND REMANDED

John S. Nichols and Blake A. Hewitt, both of Bluestein,
Nichols, Thompson & Delgado, LLC, of Columbia, and
Gary W. Poliakoff and Raymond P. Mullman, Jr, both of
Poliakoff & Associates, PA, of Spartanburg, for
Petitioners.

William L. Howard, Sr., D. Jay Davis, Jr., and Russell G. Hines, all of Young Clement Rivers, LLP, of Charleston, and Lori D. Proctor, of Cooper & Scully, PC, of Houston, TX, for Respondents.

JUSTICE HEARN: The court of appeals dismissed as interlocutory an appeal which severed a number of defendants from this lawsuit, ostensibly under the label of "bifurcation." We hold the order went far beyond our common understanding of bifurcation, thereby affecting a substantial right of the petitioners. We therefore reverse.

FACTUAL/PROCEDURAL HISTORY

Lawrence and Evelyn Morrow filed a lawsuit against THI of South Carolina at Magnolia Place at Spartanburg, LLC (Magnolia Place) alleging personal injuries were suffered by Lawrence as a nursing home resident. The Morrows alleged that due to Magnolia Place's negligence, Lawrence sustained an injury while being assisted in the shower and was required to undergo surgery to remove a penile implant. They also alleged the nursing home failed to properly monitor Lawrence's diabetes or properly care for his pressure wounds.

The Morrows also brought suit against Fundamental Long-Term Care Holdings, LLC, Fundamental Clinical Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina, Inc., and THI Holdings, LLC (collectively, Fundamental Entities). The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place. As an extension, the Fundamental Entities argued bifurcation of the trial would simplify the issues, save significant judicial resources, and cut costs related to discovery.

The trial court granted the motion, finding that without first proving negligence against the nursing home the Morrows' claims for corporate negligence could not proceed. Accordingly, the trial court ordered that discovery and a trial on the nursing home negligence claims could go forward, and only if the Morrows were successful, a new jury could hear the corporate negligence claims in a later proceeding.

The Morrows moved for reconsideration pursuant to Rule 59(e), SCRCP, and the trial court issued a Form 4 order denying the motion. The Morrows appealed, and a single judge of the court of appeals issued an order dismissing the case finding the order granting bifurcation was not immediately appealable. The Morrows petitioned for rehearing, which was denied by a three-judge panel. The Morrows petitioned this Court for a writ of certiorari and we granted the petition.

ISSUE PRESENTED

Did the court of appeals err in holding the trial court's order of bifurcation was not immediately appealable?

LAW/ANALYSIS

The Morrows argue the court of appeals erred by holding the trial court's order of bifurcation was not immediately appealable because the order affects a substantial right. We agree.

The determination of whether a trial court's order is immediately appealable is governed by statute. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); see S.C. Code Ann. § 14-3-330 (1976 & Supp. 2014). Pursuant to Section 14-3-330, appellate courts have jurisdiction to immediately review:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. The provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.

The Morrows argue the trial court's order is immediately appealable under section 14-3-330 because it is based on a material misunderstanding of their claims against the Fundamental Entities. Specifically, they argue the trial court's order conflates the theories of vicarious liability and direct liability by determining the Morrows can move forward on their claims against the corporate defendants only if they first recover against Magnolia Place. We agree.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. See Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. *Id.* at 439. Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care. *Id.* at 462. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other. See *Scampone v. Highland Park Care Ctr.*, 57 A.3d 582, 596–600 (Pa. 2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); see also *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So. 2d 221, 225–26 (Ala. 1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); cf.

Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 237 (Ill. 2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

We therefore find that the trial court's order misapprehended the nature of the Morrows' claims against the Fundamental Entities. The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.¹

Accordingly, we find the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. *See Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14-3-330(2)(a)]"). To prevent the Morrows from appealing the order immediately would encourage piecemeal litigation and limit their appellate remedies after the first trial on nursing home negligence and its subsequent appeal.²

We decline the Fundamental Defendants' invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct.

¹ Defense counsel candidly admitted during oral argument that if the Morrows' claims against the Fundamental Entities was unsuccessful he would argue that based on the "bifurcation" order, summary judgment on the claims of corporate liability would be proper.

² The dissent asserts the trial court's order will have no effect if the Morrows win on their nursing home negligence claim. We respectfully disagree. The trial court's order implicates a substantial right of the plaintiffs. Just because *part* of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330(2)(a).

App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.").

The trial court's order is quite distinct from other orders of bifurcation which have come before this Court. *See e.g., Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) (holding order bifurcating issue of exclusion under insurance contract from issue of occurrence was not appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (holding order bifurcating issues in contract case between liability and damages was not immediately appealable); *see also Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) (encouraging bifurcation of issues of actual and punitive damages in complex medical malpractice cases). We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.

CONCLUSION

Accordingly, we hold the trial court's order is immediately appealable pursuant to § 14-3-330(2)(a). The order of the court of appeals dismissing the case is reversed and we remand for a determination on the merits of the appeal.

TOAL, C.J., and BEATTY, J., concur. KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE KITTREDGE: Because I believe the court of appeals properly dismissed the appeal as interlocutory, I respectfully dissent.

I reject any suggestion that perceived error in the trial court's bifurcation order impacts the appealability question. The majority is convinced that the trial court erred in bifurcating the plaintiffs' (the Morrows) claims against the Magnolia Place nursing home and corporate defendants (Fundamental Entities). The majority agrees with the Morrows that the trial court order "is based on a material misunderstanding of their claims" and that "the trial court order conflates the theories of vicarious liability and direct liability." After discussing the law concerning direct and vicarious liability, the majority "finds that the trial court's order misapprehended the nature of the Morrows' claims against the Fundamental Entities." This perceived error in the bifurcation order, in my judgment, is a central feature of today's decision. Yet, error in an order granting or denying bifurcation does not transform the order into an appealable one.

Even if I were to accept the Court's premise of error in the bifurcation order, I would still resist the temptation to find the interlocutory order immediately appealable. This is because the Morrows are in no manner precluded from appealing a subsequent, and truly final, order preventing their claims against the Fundamental Entities from going forward.³ The Court nevertheless concludes that the trial court order implicates a "substantial right" pursuant to section 14-3-330(2)(a), which allows an appeal from an interlocutory order when the order "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." The bifurcation order before us neither discontinues their action against the Fundamental Entities nor prevents a judgment from which an appeal may be taken should (and we are speculating) the Morrows be precluded from pursuing their claims against the Fundamental Entities.

I am concerned that today's loose construction of section 14-3-330 undermines the final judgment rule. I would affirm the court of appeals.

PLEICONES, J., concurs.

³ This highlights another concern. Assuming the Morrows' claim against Magnolia Place is successful, the additional claims against the Fundamental Entities would proceed in the normal course pursuant to the bifurcation order. In that event, the Morrows would have no reason to appeal.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants,

vs.

Black Box Network Services,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-40-01082

**DEFENDANT BENNETT-HALL
CO., INC.'S RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE
AMENDED ANSWER**

RICHLAND COUNTY
FILED
2015 SEP 25 AM 10:51
JEANETTE M. MCGRATH
C.C.P. & G.S.

INTRODUCTION

Bennett-Hall respectfully requests this Court deny Plaintiff's Motion to Strike. First, Bennett-Hall has a right to assert its third-party complaint for contractual indemnification now, and the third-party claim promotes judicial economy by dispensing with all issues in one proceeding. Second, the Workers' Compensation Act does not shield an employer like BBNS from liability arising under an express indemnification agreement. Third, Plaintiff's arguments that this Court should strike Paragraphs 43 and 44 of the Amended Answer are without merit because Bennett-Hall has a right to assert inconsistent defenses.

FACTS/PROCEDURAL BACKGROUND

Plaintiff Karl T. Harbath ("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 Third-Party Defendant Black Box Network Services ("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. 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. Bennett-Hall now files this Memorandum in Opposition to Plaintiff's Motion to Strike and requests that the Court deny the motion.

LAW/ANALYSIS

I. Bennett-Hall has a Right to Assert a Third-Party Claim for Contractual Indemnification.

Rule 14, of the South Carolina Rules of Civil Procedure ("SCRCP"), provides that at any time a defendant, as a third-party plaintiff, may serve a summons and complaint upon a person

not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against it. Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). In addition, the outcome of the principal claim must impact the third-party defendant's liability. Id.

Indemnity is a 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 a third party. Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 636 (Ct. App. 2001). A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party. Id. Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

Bennett-Hall properly filed its third-party complaint under Rule 14, SCRPC. Bennett-Hall's substantive claim against BBNS for derivative liability sounds in express contractual indemnification. See Miller, 314 S.C. at 442, 445 S.E.2d at 447 (holding the third-party plaintiff must have a substantive claim of derivative liability against a third-party defendant). 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). The Agreement provided Bennett-Hall expressly disclaimed all liability resulting from BBNS (1) failing to adequately supervise or control Sanders; (2) allowing Sanders to use a vehicle, like the boom lift, without Bennett-Hall's prior approval in writing; and (3) assigning Sanders to duties different from their original duties. (Amended Answer ¶ 54). As a Level 2 technician, Sanders was not permitted to operate a boom lift, and BBNS did not seek Bennett-

Hall's prior written approval before allowing Sanders to operate the boom lift. (Amended Answer ¶¶ 56-61).

Plaintiff's claims are within the scope of this provision of the Agreement in which Bennett-Hall expressly disclaimed its liability. (Amended Answer ¶¶ 56-61). Pursuant to the indemnification and disclaimer of liability provisions in the Agreement, BBNS agreed to indemnify Bennett-Hall for the damages incurred by Plaintiff from Sanders operating the boom lift. (Amended Answer ¶¶ 53-54). Therefore, Bennett-Hall has properly asserted a third-party complaint against BBNS pursuant to Rule 14, SCRC.

Plaintiff argues he would be prejudiced by Bennett-Hall's third-party complaint because it will complicate the proceedings. When considering a request to strike a third-party claim, the Court should consider the effect the additional parties and claims will have on the adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way. Beach v. Hudson, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989) (internal quotation marks omitted). In Beach, the Court of Appeals found a third-party complaint asserting four additional parties with seven additional causes of action, involving allegations of fraud, negligence, recklessness, outrage, unfair trade practices, treble damages, and punitive damages would unduly complicate the adjudication of a simple contract action brought by the plaintiffs. Id. at 426-27, 380 S.E.2d at 871. The Court of Appeals concluded striking the third-party complaint was necessary because the causes of action asserted by the defendant/third-party plaintiff would all but submerge the plaintiffs' claims. Id. at 427, 380 S.E.2d at 871.

This case is a far cry from Beach. Id. Bennett-Hall is seeking to add only one party to the action—BBNS. Moreover, Plaintiff has already asserted BBNS within the context of this

litigation and heavily relies on the Agreement in his Complaint. In his Complaint, Plaintiff refers to BBNS as the general contractor responsible for installing fiber optic cable at Michelin and supervising the temporary workers from Cornerstone and Bennett-Hall. (Complaint, ¶ 14). The Complaint also explicitly refers to the Agreement entered into by Bennett-Hall and BBNS. (Complaint, ¶ 16). Plaintiff's causes of action against Bennett-Hall rest on the Agreement Bennett-Hall executed with BBNS. (Complaint, ¶¶ 29, 32, 40). Plaintiff claims (1) he suffered serious injuries as a direct and proximate result of Bennett-Hall allegedly failing to deliver its contractual promise to provide qualified employees to BBNS; (2) he was a foreseeable third-party beneficiary of the Agreement executed between Bennett-Hall and BBNS; and (3) the Agreement provides Bennett-Hall retains the authority to discipline and terminate its employment contract with Sanders. (Complaint, ¶¶ 29, 32, 40).

In order for Plaintiff to prove the allegations in his Complaint, he must necessarily rely on BBNS's role as a general contractor at the Michelin plant and the Agreement between BBNS and Bennett-Hall. Additionally, Bennett-Hall only raises one cause of action in its third-party complaint—contractual indemnification. The Agreement that contains the indemnification provision is already at issue in this case through Plaintiff's own pleading. Bennett-Hall respectfully requests that this Court deny Plaintiff's Motion to Strike because Plaintiff has already injected BBNS and the Agreement within the case. Moreover, striking Bennett-Hall's third-party complaint would greatly prejudice Bennett-Hall by forcing it to commence a separate action after this one is resolved; especially considering the extent Plaintiff involves BBNS in his own action. Therefore, including BBNS in the current action would promote judicial economy by dispensing with all issue in one proceeding.

Plaintiff also argues he has a substantial right to determine the parties to this action. However, the cases cited by Plaintiff in support of this argument are inappropriate because they concern whether a trial court order is immediately appealable by determining if the order affected a “substantial right” of the Plaintiff.¹ Accordingly, Plaintiff has failed to present any argument that Bennett-Hall should not be permitted to file its third-party complaint under Rule 14, SCRPC.

II. Bennett-Hall Properly Named BBNS as a Third-Party Defendant Because Section 42-1-580 of the South Carolina Code Does Not Shield an Employer from Third-Party Claims If the Parties Executed an Express Indemnification Agreement.

Even if Plaintiff asserted a workers’ compensation claim against BBNS, Bennett-Hall may still file a third-party action for express contractual indemnification against BBNS. Section 42-1-580 of the South Carolina Code, 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 or indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

Recently, the United States District Court for the District of South Carolina addressed whether this workers’ compensation statute permits a third-party to enforce an express indemnity contract against an employer. See Brayboy v. MST-Maschinenbau Gmb, Civil Action No. 4:14-cv-02965-RBH (filed May 4, 2015). There, the third-party defendant filed a motion to dismiss

¹ See S.C. Code Ann. § 14-3-330(3) (providing the appellate courts have jurisdiction over a “final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment”); see also Neeltec Enterprises, Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926 (2012); Morrow v. Fundamental Long-Term Care Holdings, LLC, et al., Op. No. 27532 (S.C. Sup. Ct. filed June 17, 2015) (Shearouse Adv. Sh. No. 23 at 24).

the third-party complaint for failure to state a claim. Brayboy, the claimant, suffered an injury on the job from using a machine manufactured by the defendants while employed by the third-party defendant. Brayboy sought and was awarded workers' compensation benefits from the third-party defendants. Brayboy then filed a products liability action against the defendants. The defendants filed an answer and a third-party complaint, alleging a cause of action for equitable indemnity against the third-party defendant.

The Court concluded section 42-1-580 generally satisfied any claim a third party may have against the employer arising out of the same accident, except in the limited circumstance where there is an express indemnification agreement. *Id.* (emphasis added). Therefore, a defendant acting as a third-party plaintiff may name an employer, who paid a workers' compensation claim, as a third-party defendant because the workers' compensation statute does not insulate an employer from liability under an express indemnification agreement. *Id.* (citing BET Plant Servs., Inc. v. W.D. Robinson Elec. Co., Inc., 941 F. Supp. 54 (D.S.C. 1996) (holding section 42-1-580 does not shield an employer from third-party claims where there is an express indemnification agreement); Daniels v. Conrad Constr. Co. v. Joe Harden Builder, Inc., No 93-UP-119 (S.C. Ct. App. filed April 22, 1993) (same)).

Here, Bennett-Hall may assert a third-party complaint against BBNS, even if BBNS paid a workers' compensation claim, because there was a pre-existing express contractual agreement for indemnification between Bennett-Hall and BBNS. (Exhibit A, ¶¶ 7-8). See Brayboy v. MST-Maschinenbau Gmb, Civil Action No. 4:14-cv-02965-RBH (filed May 4, 2015); BET Plant Servs., Inc. v. W.D. Robinson Elec. Co., Inc., 941 F. Supp. 54 (D.S.C. 1996); Daniels v. Conrad Constr. Co. v. Joe Harden Builder, Inc., No 93-UP-119 (S.C. Ct. App. filed April 22, 1993).

Accordingly, Bennett-Hall properly asserted a third-party claim against BBNS because the parties had an express indemnification agreement.

III. Bennett-Hall is Allowed to Plead Inconsistent Defenses, Which Should Not Impact the Third-Party Complaint for Contractual Indemnification Against BBNS.

Plaintiff argues the Court should strike Paragraphs 43 and 44² of Bennett-Hall's Amended Answer because Bennett-Hall does not have a justiciable claim for apportionment of fault against BBNS or Cornerstone, and Bennett-Hall is not entitled to setoff or contribution against them. As a threshold matter, Bennett-Hall has not named Cornerstone as a third-party defendant. Furthermore, and as set forth above, Bennett-Hall's third-party claim is based on contractual indemnification independent of any workers' compensation exclusivity arguments.

Further, Bennett-Hall is permitted to plead inconsistent defenses to give it the benefit of all its claims. See MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) ("Defendants are permitted to plead inconsistent defense."); Collins v. Johnson, 242 S.C. 112, 119, 130 S.E.2d 185, 188 (1963) ("[T]he defendant may set up as many defenses of counterclaims as he has, however inconsistent they are with each other."). If Bennett-Hall did not raise all possible affirmative defenses, it could risk the Court finding those defenses waived. See Howard v. S.C. Dep't of Highways, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) ("Affirmative defenses are waived if not pled."); Rule 8(c), SCRPC (providing a party shall set

² Paragraph 43 asserts, "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.

Paragraph 44 asserts, "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."

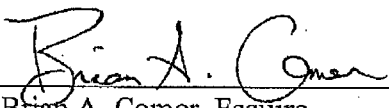
forth any other matter constituting an affirmative defense). Accordingly, Bennett-Hall respectfully requests this Court to deny BBNS's Motion to Strike.

CONCLUSION

For the reasons argued above, Bennett-Hall Co., Inc. respectfully requests this court deny Plaintiff's Motion to Strike Amended Answer of Bennett-Hall Co., Inc.

Respectfully Submitted,

COLLINS & LACY, P.C.

By: _____

Brian A. Comer, Esquire
bcomer@collinsandlacy.com
Kerri A. Rupert, Esquire
krupert@collinsandlacy.com
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (Voice)
803.771.4484 (Fax)

**ATTORNEYS FOR DEFENDANT
BENNETT-HALL CO., INC.**

Columbia, South Carolina.
September 25, 2015

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 25th day of September, 2015, the following named individual(s) were served with a copy of the within pleading via electronic mail and/or by mailing a copy of same to said person(s) via the United States Postal Service with sufficient postage affixed thereto and return address clearly marked.



Susan R. McLeod

COUNSEL SERVED:

Melissa G. Mosier, Esquire
McWhirter Bellinger & Associates, PA
119 E. Main Street
Lexington, SC 29072
Counsel for Plaintiff

T. McRoy Shelley, III, Esq.
Rogers, Townsend & Thomas, PC
Synergy Business Park
220 Executive Center Drive
Columbia, SC 29210
Counsel for Defendant Sunbelt Rentals, Inc.

Catherine F. Wrenn (S.C. Bar No. 76042)
Womble Carlyle Sandridge & Rice, LLP
550 S. Main Street, Suite 400
P.O. Box 10208
Counsel for Defendant Stephen Sanders

Catharine Garbee Griffin, Esq.
Baker, Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
Counsel for Third-Party Defendant, Black Box Network Services, Inc.

RICHARD D. DUNCAN
FILED
2015 SEP 25 AM 10:51
JEANNETTE W. HOBBS
C.C.P. & G.S.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath

☐ Plaintiff,

vs.

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

☒ Defendant.

check box above indicating submitting party

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015-CP-40-01082

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Name, S.C. Bar No. and address of plaintiff's attorney: Melissa G. Mosier, Esquire SC Bar No: 78693 119 E. Main Street Lexington, SC 29072 telephone: (803) 252-5523 fax: (803) 252-0127 e-mail: melissam@mcwhirterlaw.com other:		Name, S.C. Bar No. and address of defendant's attorney: Kerri A. Rupert, Esquire SC Bar No: 100557 Post Office Box 12487 Columbia, SC 29211 telephone: 803.256.2660 fax: 803.771.4484 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.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant <i>Kerri Rupert</i>		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 ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ 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			
Collected by: _____ (print name)		DATE FILED	
☐ MOTION FEE COLLECTED: \$ ☐ CONTESTED - AMOUNT DUE: \$			

SCCA/233 (11-03)

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
Stephen Sanders, Bennett-Hall Co., Inc.,	)	AMENDED ANSWER OF DEFENDANT
and Sunbelt Rentals, Inc.,	)	BENNETT-HALL CO., 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).

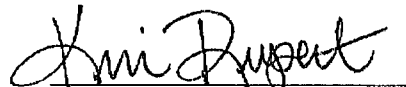
an express indemnification agreement between the parties. Therefore, Bennett-Hall has a contractual claim for indemnity pursuant to sections 42-1-580 and 15-38-15(E) of the South Carolina Code. Finally, the Court should reconsider striking paragraphs 43 of the Amended Answer. Allocating fault on a jury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



Brian A. Comer, Esquire
bcomer@collinsandlacy.com
Kerri A. Rupert, Esquire
krupert@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660

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:

COUNSEL SERVED:

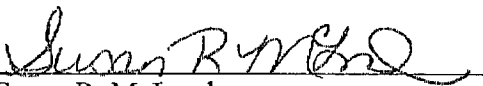
Melissa G. Mosier, Esq.
McWhirter Bellinger & Associates, PA
119 E. Main Street
Lexington, SC 29072
Counsel for Plaintiff

T. McRoy Shelley, III, Esq.
Rogers, Townsend & Thomas, PC
Synergy Business Park
220 Executive Center Drive
Columbia, SC 29210
Counsel for Defendant Sunbelt Rentals, Inc.

Catherine F. Wrenn, Esq.
Womble Carlyle Sandridge & Rice, LLP
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29601
Counsel for Defendant Stephen Sanders

Catherine Garbee Griffin, Esq.
Baker, Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
Counsel for Third-Party Defendant, Black Box Network Services, Inc.

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


Susan R. McLeod

Columbia, South Carolina
November 5, 2015

2015 NOV -5 PM 3:53
JENNIFER M. ROBERTS
C.C.P. 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

vs.

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

Defendants.

) IN THE COURT OF COMMON PLEAS
)
)
) FIFTH JUDICIAL CIRCUIT
)
) Civil Action No.: 2015-CP-40-01082
)
)

) **MEMORANDUM OF LAW IN SUPPORT**
) **OF ITS MOTION TO RECONSIDER THE**
) **ORDER STRIKING PORTIONS OF THE**
) **AMENDED ANSWER OF DEFENDANT**
) **BENNETT-HALL CO., INC.**
)
)

) **(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), SCRPC, 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

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/Riggie 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: 

Brian A. Comer, Esquire
bcomer@collinsandlacy.com

Kerri A. Rupert, Esquire
mhall@collinsandlacy.com

Post Office Box 12487

Columbia, SC 29211

803.256.2660

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:

COUNSEL SERVED:

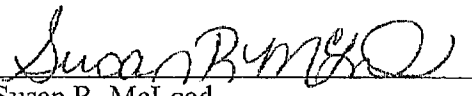
Melissa G. Mosier, Esq.
McWhirter Bellinger & Associates, PA
119 E. Main Street
Lexington, SC 29072
Counsel for Plaintiff

T. McRoy Shelley, III, Esq.
Rogers, Townsend & Thomas, PC
Synergy Business Park
220 Executive Center Drive
Columbia, SC 29210
Counsel for Defendant Sunbelt Rentals, Inc.

Catherine F. Wrenn, Esq.
Womble Carlyle Sandridge & Rice, LLP
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29601
Counsel for Defendant Stephen Sanders

Catharine Garbee Griffin, Esq.
Baker, Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
Counsel for Third-Party Defendant, Black Box Network Services, Inc.

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

COLLINS & LACY, P.C.
2015 NOV -5 PM 3:54
JEANETTE M. LORRICK
P.C.P. 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 § 42-1-580¹ 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

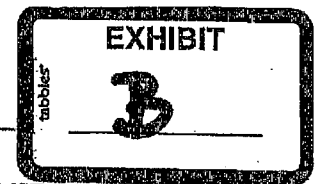
941 F.Supp. 54

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

John Daniel Kassel, Theile Branham McVey, John D. Kassel
Law Firm, Robert Francis McMahan, Jr, Harris and Graves,
Columbia, SC, for Plaintiff/Third Party Defendant.

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. Consumer Affairs.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, 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 ultimately 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 or 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

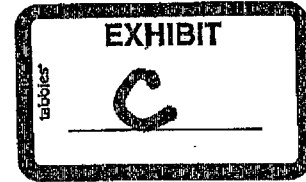
Footnotes

- 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. Ojaniit*, 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

¹The 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

²The 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.

³Woodle 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.

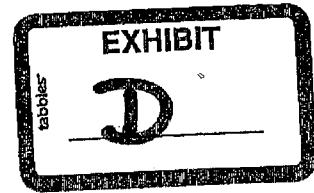
IV. CONCLUSION

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,

Plaintiff,

vs.

Carus Corporation,

Defendant.

C/A No.: 3:12-02675-JFA

ORDER
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 form⁴ 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

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.

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



BAKER RAVENEL BENDER

ATTORNEYS AT LAW

Catharine Garbee Griffin
Direct Dial 803.343.3863
cgriffin@brblegal.com

July 30, 2015

Melissa G. Mosier, Esquire
McWhirter, Bellinger & Associates, PA
119 East Main St.
Lexington, SC 29072

Brian A. Comer, Esquire
Kerri A. Rupert, Esquire
P.O. Box 12487
Columbia, SC 29211

Catherine F. Wrenn, Esquire
Womble Carlyle Sandridge & Rice
550 South Main St., Suite 400
Greenville, SC 29601

Roy Shelley, Esquire
Rogers Townsend and Thomas
PO Box 100200
Columbia, SC 29202-3200

FILE NO. 1-2261

AUG 03 2015

REC'D BAC/mh/vmg
COLLINS & LACY

Re: Karl T. Harbath v. Stephen Sanders, Bennett-Hall Co., Inc. and Sunbelt Rentals, Inc.
Vs. Black Box Network Services, Inc.
Our File No.: 7746.2105
Claim No.: ETF1786

Greetings:

Enclosed herein please find Black Box Network Services, Inc.'s Motion to Dismiss the Third Party Complaint and Answer to the Third Party Complaint which I hereby serve upon you by mail in the above-referenced case.

If you have any questions concerning this letter, please feel free to call me.

Yours truly,


Catharine Garbee Griffin

CGG/tkt

BAKER, RAVENEL & BENDER, L.L.P.
www.brblegal.com

mail. PO BOX 8057 | COLUMBIA, SC 29202
shipping. 3710 LANDMARK DRIVE. suite 400 | COLUMBIA, SC 29204
phone. 803.799.9091 | fax. 803.779.3423

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath v. Stephen Sanders, Bennett-Hall
Co., Inc., & Sunbelt Rentals, Inc.

☐ Plaintiff

v.

Black Box Network Services, Inc.,

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-40-01082

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Melissa G. Moser, Bar No. Address: McWhirter, Bellinger & Associates, 119 East Main St., Lexington, SC 29072 phone: fax: e-mail: other:	Defendant's Attorney: Catharine Garbee Griffin, Bar No. 9821 Address: P.O. Box 8057, Columbia, SC 29202 phone: 803 799 9091 fax: 803 779-3423 e-mail: cgriffin@brblegal.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 Dismiss Third Party Complaint Estimated Time Needed: <u>20</u> Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <u>S/</u> Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted: <u>July 30, 2015</u>	
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 Collected by: _____ Date Filed: _____	

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Karl T. Harbath,

Plaintiff,

v.

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

Defendants.

v.

Black Box Network Services, Inc.

Third-Party
Defendant.

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) Case No. 2015-CP-40-01082

) **THIRD-PARTY DEFENDANT BLACK BOX**
) **NETWORK SERVICES, INC.'S MOTION**
) **TO DISMISS THE THIRD-PARTY**
) **COMPLAINT OF BENNETT-HALL CO.,**
) **INC. AND SANDERS**

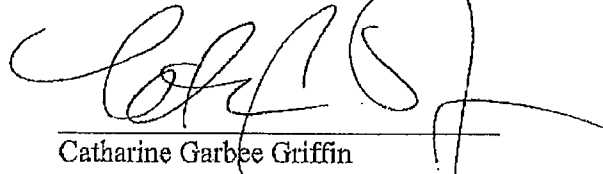
RICHLAND COUNTY
FILED
2015 JUL 30 PM 3:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: BRIAN A. COMER AND KERRI A. RUPERT, ESQUIRE, ATTORNEYS FOR
THE THIRD-PARTY PLAINTIFFS SANDERS AND BENNETT-HALL CO., INC.:

YOU WILL PLEASE TAKE NOTICE that the third-party defendant, Black Box Network Services, Inc. (hereinafter "Black Box"), by and through its undersigned attorney, will move as soon as practicable before this honorable court for an order dismissing the third-party plaintiffs' complaint pursuant to Rule 12(b)(6), *SCRCP*, on the basis that third-party plaintiff Bennett-Hall Co., Inc., has failed to set forth sufficient facts to constitute a cause of action for contractual indemnity. Pursuant to the applicable law, the indemnity provision cited by third-party plaintiff as a basis for its claim violates public policy and is void and unenforceable. Furthermore, third-party plaintiff Sanders' claim should be dismissed as he is not a party to the

contract between Bennett-Hall Co., Inc., and Black Box Network Services, Inc., and, therefore, would have no claim for contractual indemnity.

This motion will be supported by a memorandum of law which will be filed in the future.



Catharine Garbee Griffin
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Third-party Defendant Black Box
Network Services, Inc.

July 30, 2015

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

RICHLAND COUNTY
 FILED
 2015 JUL 30 PM 3:31
 JEANNETTE M. MCBRIDE
 C.C.P. & G.S.

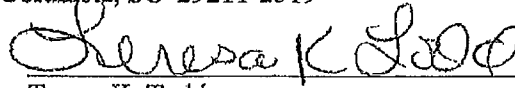
I, Teresa K. Todd, Legal Assistant to Catharine Garbee Griffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Third-Party Defendant Motion to Dismiss the Third-Party Complaint of Bennett-Hall Co., Inc., by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Brian A. Comer, Esquire
 Kerri A. Rupert, Esquire
 P.O. Box 12487
 Columbia, SC 29211

Melissa G. Mosier, Esquire
 McWhirter, Bellinger & Associates, PA
 119 East Main St.
 Lexington, SC 29072

Catherine F. Wrenn, Esquire
Womble Carlyle Sandridge & Rice
550 South Main St., Suite 400
Greenville, SC 29601

Sterling G. Davies, squire
McAngus, Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211-2519


Teresa K. Todd

July 30, 2015

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

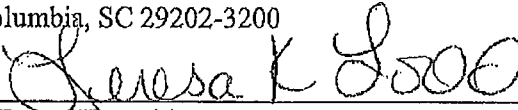
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 Lexington, SC 29072

Catherine F. Wrenn, Esquire
Womble Carlyle Sandridge & Rice
550 South Main St., Suite 400
Greenville, SC 29601

Roy Shelley
Rogers Townsend and Thomas
PO Box 100200
Columbia, SC 29202-3200



Teresa K. Todd

July 30, 2015



BAKER RAVENEL BENDER

ATTORNEYS AT LAW

Catharine Garbee Griffin
Direct Dial 803.343.3863
cgriffin@brblegal.com

September 23, 2015

Via email and hand delivery

The Honorable Tanya A. Gee
Post Office Box 192
Columbia, SC 29202

Re: Karl T. Harbath v. Stephen Sanders, Bennett-Hall Co., Inc. and
Sunbelt Rentals, Inc. vs. Black Box Network Services, Inc.
Our File No.: 7746.2105
Claim No.: ETF1786

Dear Judge Gee:

Enclosed herein please find a hard copy and disk of Third-Party Defendant Black Box Network Services, Inc.'s Memorandum in Support of its Motion to Dismiss the Third-Party Complaint of Bennett-Hall Co., Inc. and Stephen Sanders. I am also having our courier file the memorandum with the Clerk's office. By copy of this letter to the other parties in this case, I am serving them with a copy of same.

If you have any questions concerning this letter, please feel free to call me.

Yours truly,

Catharine Garbee Griffin
CGG/tkt
Enclosure

Cc: Melissa G. Mosier, Esquire (via email w/enclosures)
Brian A. Comer, Esquire (via email w/enclosures)
Catherine F. Wrenn, Esquire (via email w/enclosures)
Roy Shelley, Esquire (via email w/enclosures)
The Honorable Jeanette W. McBride

FILE NO. #7-2261

SEP 24 2015

REC'D Bac/eng
COLLINS & LADY

employee for Cornerstone at a job at Michelin Tire Company. (Complaint). Sanders was employed by Bennett-Hall. (Complaint ¶ 4). Plaintiff and Sanders were both temporary employees assigned to Black Box, a general contractor that had contracted to perform work on the Michelin plant. (Complaint ¶ 14). At the time of the accident, Plaintiff was acting as a spotter while Sanders drove a boom lift. (Complaint ¶ 17). Plaintiff was injured when Sanders ran into him. (Complaint ¶ 21).

The first cause of action in Plaintiff's Complaint is directed against Bennett-Hall for its alleged negligence, gross negligence, *negligence per se* and recklessness. (Complaint ¶ 26-34). Plaintiff alleges that Bennett-Hall failed to comply with government and industry standards. (Complaint ¶ 27). Plaintiff also alleges that Bennett-Hall was careless, negligent, grossly negligent or *negligent per se* in its hiring and training of Sanders and lists thirteen allegations against Bennett-Hall to support this allegation. (Complaint ¶ 28). Plaintiff specifically alleges that the duties of Bennett-Hall were "nondelegable". (Complaint ¶ 31). Plaintiff's second cause of action addresses the acts and omissions of Sanders and the vicarious liability of Bennett-Hall for his actions given its retention of the right to counsel, discipline, and terminate Sanders. (Complaint ¶ 35-44). Plaintiff alleges ten particular acts of Sanders that are negligent, grossly negligent, *negligent per se* and reckless. (Complaint ¶ 42).

Bennett-Hall and Sanders filed an Amended Answer and Third-Party Complaint which includes a claim against Black Box for contractual indemnity. (Amended Answer ¶ 47-62). This cause of action is based on the "Agreement for Supplying Temporary Technical Personnel" between Bennett-Hall and Black Box. (*Id.*). Bennett-Hall and Sanders request that, in the event a judgment is entered in favor of Plaintiff, Black Box indemnify Bennett-Hall for all costs and any verdict or settlement. (*Id.*).

LAW AND ANALYSIS

When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the motion must be granted if, viewing the evidence in the plaintiff's favor, the "facts alleged in the complaint and inferences reasonably deducible therefore do not entitle the plaintiff to relief on any theory of the case." Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999) aff'd, 345 S.C. 626, 550 S.E.2d 304 (2001). When the dispute is not to the underlying facts but involves the interpretation of the law, it is proper to decide issues on a 12(b)(6) motion. Id. In the instant matter, Bennett-Hall and Sanders have failed to allege facts to support a cause of action for contractual indemnity in their third-party complaint because the contractual provisions they rely on to support their cause of action are void and unenforceable as a matter of law. Alternatively, Sanders is not a party to the contract on which this claim is based and is therefore not entitled to contractual indemnity.

I. THE INDEMNIFICATION PROVISION UNDERLYING THIRD-PARTY PLAINTIFFS' CLAIM FOR CONTRACTUAL INDEMNITY IS VOID AS A MATTER OF LAW

"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 a third party." Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." Id. "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). "Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made." Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (Ct. App. 1993).

The contract between Bennett-Hall and Black Box entitled "Agreement for Supplying Temporary Technical Personnel" ("Contract") and incorporated by reference in Third-Party Plaintiff's Amended Answer and Third-Party Complaint was made in North Carolina, as evidenced by the first paragraph of the agreement. A full copy of the contract is attached as Exhibit A. Therefore, North Carolina law applies to the validity and interpretation of this contract. Applying North Carolina law, the contractual provisions on which Third-Party Plaintiffs' rely to assert their claim for contractual indemnity violate public policy and are void and unenforceable.

The Contract provides:

8. Indemnification

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 reasonable 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. Claims for bodily injury to the extent caused by an indemnifying party's workers' compensation insurance
- c. A breach of the indemnifying party's obligations under this Agreement

(Exhibit A, p. 3).

The indemnification clause references the section of the Contract entitled "Disclaimer of Liability", in which Bennett-Hall attempts to disclaim liability for any claims or losses resulting from a number of events, including "claims for special, indirect, consequential, punitive, or lost profit damage" and for "[p]roperty damage or personal injury, including death, arising out of or resulting from acts or omissions of the Assigned Workers." (Exhibit A, pp. 2-4). Third-Party Plaintiffs' allege that the Plaintiff's claims against them in the underlying complaint are within

the scope of the provisions in the "Disclaimer of Liability" section and they are therefore entitled to contractual indemnity from Black Box.

Contractual indemnity provisions in North Carolina are governed by General Statute § 22B-1, which states:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance ... **purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.** Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees...

N.C. Gen. Stat. Ann. § 22B-1 (Attached as Exhibit B) (emphasis added). This anti-indemnity statute significantly differs from South Carolina's statute in that it prohibits indemnity for damages arising from **any** of the promisee's own negligence, "in whole or in part". South Carolina's statute only prohibits indemnity provisions that indemnify for a promisee's "sole negligence". See S.C. Code Ann. § 32-2-10. Under North Carolina law, a promise or agreement indemnifying a party for that party's own negligent acts violates public policy and is void and unenforceable. This statute applies to the contract between Bennett-Hall and Black Box, a general contractor, since the agreement was made in connection with the alteration of the Michelin plant. See Complaint ¶ 14, Amended Answer and Third-Party Complaint, ¶ 11, and Miller Brewing Co. v. Morgan Mechanical Contractors, Inc., 90 N.C. App. 310, 368 S.E.2d 438

(1988). Furthermore, the statute applies to Sanders since Bennett-Hall has admitted that he is their employee. (Amended Answer ¶ 4).

In the underlying Complaint, Plaintiff's causes of action against Bennett-Hall and Sanders are based on their active negligence and allege numerous instances of their independent tortious acts and omissions. (See "Facts" *supra*). Bennett-Hall and Sanders allege that these claims are within the limitation of liability provisions of the contract with Black Box and Black Box is therefore required to indemnify them pursuant to the contract. Assuming for the purposes of this motion that these allegations are true, Bennett-Hall and Sanders cannot state a claim for contractual indemnification. As a threshold matter, in order for there to be any liability of Bennett-Hall and Sanders to Plaintiff, Plaintiff would have to prove that Bennett-Hall and Sanders were negligent. North Carolina clearly holds that any agreement to indemnify a party for its own negligent actions is void and unenforceable. Jackson v. Associated Scaffolders and Equip. Co., Inc., 152 N.C. App. 687, 568 S.E.2d 666 (Ct. App. 2002). Bennett-Hall and Sanders are asking this Court to apply the contract provisions with Black Box to require Black Box to indemnify them for their own negligence. Such an interpretation of the contract clearly violates North Carolina §22B-1, which mandates that such agreements violate public policy, are void, and are unenforceable. Therefore, the claim for contractual indemnity by Bennett-Hall and Sanders should be dismissed as a matter of law since the provisions cited by Third-Party Plaintiffs' as the basis for their contractual indemnity claim are prohibited by statute.

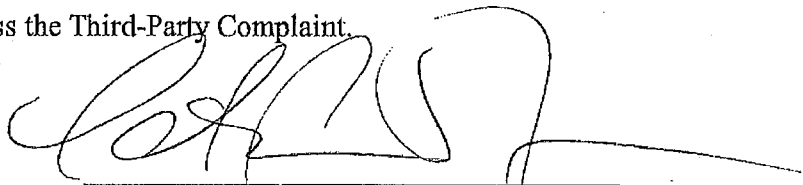
II. STEPHEN SANDERS IS NOT A PARTY TO THE CONTRACT AND LACKS STANDING TO SUE FOR CONTRACTUAL INDEMNITY

Even if the Court does not dismiss the Third-Party Complaint on the basis that the indemnification clause underlying the cause of action is void as a matter of law, the claim by

Third-Party Plaintiff Stephen Sanders should be dismissed on the additional ground that Sanders lacks standing to maintain an action on the contract. "The general rule is that one who is not a party to a contract may not maintain an action for its breach." Matternes v. City of Winson-Salem, 286 N.C. 1, 209 S.E.2d 481 (1974). Third-Party Plaintiffs' Amended Answer and Third-Party Complaint alleges that Bennett-Hall Co., Inc. entered into an "Agreement for Supplying Temporary Technical Personnel" with Black Box. (Amended Answer ¶ 48). There is absolutely no allegation that Sanders was a party or third-party beneficiary to the contract which is the basis for the contractual indemnity claim. Therefore, Sanders lacks the standing necessary to bring a claim for contractual indemnity under the contract and his claim for contractual indemnity should be dismissed. See American Oil Co., Inc. v. AAN Real Estate, LLC, 754 S.E.2d 844 (2014) (applying North Carolina law and dismissing complaint for lack of standing where there was no allegation of privity of contract).

Conclusion

For the reasons stated herein, Bennett-Hall and Sanders have failed to set forth facts sufficient to constitute a cause of action against Black Box for contractual indemnity, and as a matter of law, the Court should dismiss the Third-Party Complaint.



Catharine Garbee Griffin
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Third-party Defendant Black Box
Network Services, Inc.

September 23, 2015

EXHIBIT A

AGREEMENT FOR SUPPLYING TEMPORARY TECHNICAL PERSONNEL

This is an Agreement ("Agreement") made as of August 23, 2010, between Beckett-Hall Company, Inc., which has offices at 6525 Morrison Blvd. Suite 101 Charlotte NC 28211, (called "we," "us," and "our" in this Agreement) and Black Box Network Services, which has offices at 10817 Southern Loop Blvd. Pineville NC 28134, (called "you" and "your" in this Agreement).

1. Statement of Work

You have requested that we supply certain of our employees to you on a temporary basis to supplement your own work force. We will supply such workers to you ("Assigned Workers") as you may from time to time request, to work under your direction, control, and supervision.

2. Persons to Be Sent to You

Once this Agreement is signed, we will, at your request, send Assigned Workers to work at your premises. We will send only persons who have been approved by you for the assignment—as a result of your having personally interviewed them, as a result of your having reviewed their résumés, or on some other basis upon which you and we will agree. For each such Assigned Worker, we will send to you a confirming letter, or attach an addendum to this contract, that will contain the hourly billing rates that we have agreed to accept and that you have agreed to pay for each Assigned Worker. Exhibit A is a sample of such a confirming letter. In the absence of such a letter, you nonetheless agree to pay us for the value of the services provided.

We are responsible for assigning to you workers with the skills and abilities you specify. We are not your legal partner, co-venturer, principal, agent, insurer, or representative. Neither we nor any Assigned Workers have any claim to your revenues related to their work. You are solely responsible for meeting your goals for profits, costs, production, and scheduling. Assigned Workers have no authority to bind us legally.

3. Assigned Workers

We will pay the wages of the Assigned Workers, and we will be responsible for withholding all income and Social Security taxes from their wages and for paying workers' compensation insurance premiums, state and federal unemployment insurance taxes, and the employer's share of Social Security taxes on their behalf.

4. Direction and Supervision

We are supplying the Assigned Workers to you to supplement your own work force. You will direct and supervise the Assigned Workers on the job. We are not supplying persons to supervise or oversee the Assigned Workers during their assignment to you unless otherwise agreed to in writing.

5. Guarantee

Even though you have selected or approved the Assigned Workers who will be assigned to you, it is possible that their abilities will not be up to your expectations. You have the right at all times to end the assignment of any Assigned Worker we send to you. Furthermore, if you become dissatisfied with the performance of any of the Assigned Workers during the first two

days (2 days) of their assignment to you, you may cancel their assignment by calling us within the time frame and telling us that you are dissatisfied. We will not bill you for the time spent by an Assigned Worker whose assignment has been ended in this way. However, if you keep an Assigned Worker on assignment for more than two (2) workdays, it is agreed that the Assigned Worker's performance is deemed to be satisfactory and you will pay the entire bill for such Assigned Worker when it is rendered. However, if we remove any Assigned Worker from an assignment at your direction, we may, nonetheless, refuse to assign replacement workers or assign other workers if, in our judgment, such action is legally required or advisable.

6. Our Responsibilities

In general, in regard to the Assigned Workers assigned to you by us under this Agreement, our responsibilities include the following:

- Maintaining personnel and payroll records
- Calculating and paying wages
- Withholding and remitting payroll taxes and other government-mandated charges
- Hiring, assigning, reassigning, counseling, disciplining, and discharging
- Handling employee work-related claims and complaints

Prior to beginning their assignments, Assigned Workers will be asked to acknowledge that they have no right to participate in your employee benefit plans, fringe benefit plans, or your personnel policy.

We are not undertaking to provide you with a specific design, engineering, or system concept or solution to a particular problem. Accordingly, we do not warrant or guarantee that the Assigned Workers will produce a technical solution to your particular problem or need. Rather, the Assigned Workers are provided to augment your existing technical capabilities to perform such technical services as you may direct.

7. Disclaimer of Liability

We expressly disclaim liability for any claim, loss, or liability of any kind resulting from

- a. Your failure to adequately supervise or control Assigned Workers or safeguard your premises, processes, or systems; or without our express prior written approval, entrusting Assigned Workers with unattended premises, cash, checks, keys, credit cards, merchandise, confidential or trade secret information, negotiable instruments, or other valuables.
- b. Your requesting or permitting Assigned Workers to use any vehicle, regardless of ownership, in connection with the performance of services for you unless we have given our prior approval in writing.
- c. Claims by Assigned Workers for benefits, compensation, damages, contributions, or penalties under any employee benefit plans sponsored and maintained by you, whether or not your plans exclude Assigned Workers from coverage.
- d. Promises of increased compensation or benefits made by you to Assigned Workers.
- e. Claims by any person relating to your product or service.

- f. Your assigning Assigned Workers to duties different from their original duties or your making substantial changes to Assigned Worker's job duties or risks without our prior written approval.
- g. Claims by any person based on allegations that your business activities damaged the environment.
- h. The conduct of your officers, employees, and agents.
- i. Failure by you to provide Assigned Workers with a safe work site or to provide information, training, and safety equipment with respect to any hazardous substances or conditions to which they may be exposed at the work site, whether or not required by law.
- j. Claims for special, indirect, consequential, punitive, or lost profit damages.
- k. A violation or breach by you of any law, statute, or regulation.
- l. Property damage or personal injury, including death, arising out of or resulting from acts or omissions of the Assigned Workers.

8. Indemnification

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 reasonable 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. Claims for bodily injury to the extent covered by the indemnifying party's workers' compensation insurance
- c. A breach of the indemnifying party's obligations under this Agreement

9. Billing, Payment, and Time Cards

We will send you a bill, generally each week, for all hours worked by the Assigned Workers since our previous billing, plus charges for any other properly billable items. These invoices are payable upon receipt.

Because invoices are principally based upon the number of hours worked by the Assigned Workers, we require each Assigned Worker to submit a weekly record of hours worked during that week. This record is maintained on a time card that is certified by the Assigned Worker as being accurate. Your representative will also have the opportunity to sign the Assigned Worker's time card to verify that the Assigned Worker has worked, for you, the hours listed on the time card. However, if your representative does not sign the timecard within three (3) business days, it will be presumed to be accurate and you agree to pay for the time indicated and to abide by the other terms contained on the time card.

10. Termination of this Agreement

Once this Agreement has been executed, you and we have agreed that either you or we can terminate it by giving fifteen (15) days' written notice of such termination to the other. Also, you and we have agreed that either you or we will have the option to terminate this Agreement immediately if the other materially breaches any of its provisions. You will remain liable to pay any unpaid charges, and the provisions of Paragraphs 6, 7, 8, 10, 11, 12, 13, 18, and 19 of this agreement will remain in effect notwithstanding termination.

11. Insurance and Liability

During the term of this Agreement, we will maintain the following insurance coverages:

Type	Coverage Limits
a. Standard workers' compensation	Statutory
b. Employer's liability	\$ _____
c. Comprehensive general liability	\$ _____
i. Bodily injury	\$ _____
ii. Property damage	\$ _____
d. Comprehensive automobile liability	\$ _____
e. Excess umbrella liability	\$ _____

*See attached
Certificates of Insurance*

You and we agree that our total liability to you for any claims, losses, expenses, or damages whatsoever arising out of or in any way related to this Agreement from any cause or causes, including our negligence, shall not exceed the total amount paid to us or paid on our behalf by our insurers under these coverages in settlement or satisfaction of your claim. If no such insurance coverage is provided with respect to your claim, then our total liability for such uninsured claim shall not exceed twenty-five percent (25%) of the total of the payments made by you to us under this Agreement.

12. Confidential Information

We recognize that the Assigned Workers who are assigned to your premises may have access to certain information that you consider to be proprietary and confidential, and designate as such. We will require each of the Assigned Workers to agree to treat this information as confidential and to agree not to disclose it to any third person.

Proprietary and/or confidential information does not include any of the following:

- Information that, at the time of disclosure, is generally available to the public
- Information that, after disclosure, becomes generally available to the public by publication or otherwise
- Information that was in the Assigned Workers' possession prior to disclosure and that was not acquired directly or indirectly from you
- Information that we or the Assigned Workers received after the time of disclosure from a third party imposing no obligation of confidentiality and who did not acquire any such information directly or indirectly from you
- Information as may be authorized by you to be disclosed

13. Solicitation of Assigned Workers

During the term of this Agreement and for ninety (90) days after its termination or termination of an individual Assigned Worker's assignment, whichever is later, you agree not to solicit or hire any of our Assigned Workers. An exception to this prohibition may be agreed to only in writing.

14. Equal Employment Opportunity

It is our policy to provide employment, training, compensation, promotion and other conditions of employment without regard to race, color, religion, national origin, sex, marital or veteran status, age, disability, or other protected category. We will follow this policy in providing persons to you under this Agreement. You agree to comply with your legal obligations in this regard.

15. Right-to-Know Laws

Except as provided in the next paragraph, you represent that those persons who we will send to work at your premises will not be exposed to any hazardous chemicals (as defined by the Occupational Safety and Health Administration Hazard Communication Standards or any applicable state or local right-to-know law) under normal operating conditions or any foreseeable emergencies.

If this is not presently the case, or if this changes in the future, you agree to give us immediate written notification so that you and we may take any appropriate precautions required by the OSHA Hazard Communication Standards or any applicable state or local right-to-know law.

16. Waiver

The failure of either you or us to enforce at any time, or from time to time, any provision of this Agreement shall not be construed as a waiver thereof.

17. Amendment

This Agreement may be amended only by a written agreement between you and us that expressly amends, terminates, or supersedes this Agreement.

18. Validity of Terms

If any term or provision of this Agreement shall be held void, illegal, unenforceable, or in conflict with any law of a federal, state, or local government having jurisdiction over this Agreement, the validity of the remaining portions or provisions of this Agreement shall not be affected thereby.

19. Entire Agreement

This Agreement constitutes the entire agreement between you and us, and no other understanding that modifies the terms hereof shall be binding unless made in writing and signed by authorized representatives of both you and us.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement as of the day and year first above written.

Client

Black Box Network Services, Inc.

Company

Bennett-Hall Company Inc.

Client name

John A. Varney

Company name

C Cliff Edali

By

John Varney
Senior Vice President

By

C Cliff Edali
President

Title

August 23, 2010

Title

August 23, 2010

Date

Date

EXHIBIT A
CONFIRMING LETTER SAMPLE

Pursuant to the Agreement between Bennett-Hall Company, Inc.
and Black Box Network Services dated as of
August 23, 2010, this letter confirms your order for the assignment of the
following persons to work at your premises located at 10877 Southern Loop West
Pineville NC 28134 on the following dates and at these rates:

Name	Position	Start Date	Straight Time Hourly Billing Rate	Overtime Hourly Billing Rate
Level I Techs	& attached job description		\$ 15.41	\$ 23.12
Level II / III Techs	& attached job description		\$ 19.93	\$ 29.15

Note: Overtime is defined as all hours worked in excess of 40 in any one week by an individual.
Overtime may be defined differently under contractual provisions or applicable state law.

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EXHIBIT B

West's North Carolina General Statutes Annotated
Chapter 22B. Contracts Against Public Policy
Article 1. Invalid Agreements

N.C.G.S.A. § 22B-1

§ 22B-1. Construction indemnity agreements invalid

Currentness

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

Credits

Added by Laws 1979, c. 597, § 1. Amended by Laws 1991, c. 636, § 3; Laws 1993, c. 553, § 12, eff. July 24, 1993.

Notes of Decisions (27)

N.C.G.S.A. § 22B-1, NC ST § 22B-1

The statutes and Constitution are current through Chapter 116 of the 2015 Regular Session of the General Assembly.

End of Document

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

I, Teresa K. Todd, Legal Assistant to Catharine Garbee Griffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Third-Party Defendant Black Box Network Services, Inc.'s Memorandum in Support of its Motion to Dismiss the Third-Party Complaint of Bennett-Hall Co., Inc. and Stephen Sanders , by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Brian A. Comer, Esquire
 Kerri A. Rupert, Esquire
 P.O. Box 12487
 Columbia, SC 29211

Melissa G. Mosier, Esquire
 McWhirter, Bellinger & Associates, PA
 119 East Main St.
 Lexington, SC 29072

Catherine F. Wrenn, Esquire
Womble Carlyle Sandridge & Rice
550 South Main St., Suite 400
Greenville, SC 29601

Roy Shelley, Esquire
Rogers Townsend and Thomas
PO Box 100200
Columbia, SC 29202-3200


Teresa K. Todd

September 23, 2015

1 State of South Carolina Court of Common Pleas
 2 County of Richland Fifth Judicial Circuit

3
 4 Karl T. Harbath,) Transcript of Record
)
 5 Plaintiff,) 2015-CP-40-01082
)
 6 vs.)
)
 7 Stephen Sanders, et al.,)
)
 8 Defendants.)

9 September 29, 2015
 10 Columbia, South Carolina

11 B E F O R E:

12 The Honorable Tanya A. Gee, Judge

13
 14 A P P E A R A N C E S:

15 Melissa G. Mosier, Esquire
 16 Attorney for the Plaintiff

17 Christopher M. Towery, Esquire
 18 Attorney for Stephen Sanders

19 Brian A. Comer, Esquire
 20 Kerri B. Rupert, Esquire
 21 Attorney for Bennett-Hall Co., Inc.

22 Susan D. DuBose, Esquire
 23 Catharine H. Garbee Griffin, Esquire
 24 Attorney for Black Box Network Services, Inc.

25 STACY S. JOHNSON
 CIRCUIT COURT REPORTER

I N D E X

WITNESS	PAGE
Certificate of Reporter	40

E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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(No exhibits marked.)

P R O C E E D I N G S

THE COURT: All right. The next on the list is a -- let's see. Harbath versus Sanders, a motion to strike, as well as a motion to dismiss third-party complaint.

All right. If y'all could just state your names for the record and who you represent, that will help both me and my court reporter out.

MS. MOSIER: Good morning, Your Honor. I'm Melissa Mosier. I'm here for the plaintiff, Karl Harbath.

MR. COMER: Good morning, Your Honor. I'm Brian Comer with Collins and Lacy. I'm accompanied by Kerri Rupert and we represent the defendant Bennett-Hall in this matter.

MR. TOWERY: Your Honor, Christopher Towery on behalf of defendant Stephen Sanders. He's also a third-party plaintiff.

THE COURT: Okay. And your last name was?

MR. TOWERY: Towery, T-O-W-E-R-Y.

THE COURT: Okay.

MS. DuBOSE: Hi. My name is Susan DuBose and I am up here with Catharine Griffin representing Black Box Network Services, Inc.

THE COURT: All right. We can start with the motion to strike or the motion to dismiss third-party complaint. I think they're both very similar, so.

MS. MOSIER: Okay. Your Honor, may it please the

1 Court, I'm here on behalf of Karl Harbath. Mr. Harbath --
2 if I may by way of background, this is gonna rely heavily
3 on the motion that I filed, which is more than just, you
4 know, a line saying we move to strike. It's more detailed
5 than that, I have Exhibits A through E, but I'm gonna move
6 through some background quickly.

7 **THE COURT:** Okay.

8 **MS. MOSIER:** Mr. Harbath was injured at work.
9 Mr. Harbath was a temporary employee who was employed by
10 a staffing agency, Cornerstone Staffing. He was injured
11 at work over at the Michelin plant back on February 23,
12 2012, and on this day he was in charge of being a spotter
13 for a man, Stephen Sanders. Stephen Sanders is employed
14 by a different staffing agency named Bennett-Hall. So in
15 the process of spotting for Mr. Sanders, who's driving a
16 big old boom lift -- this is like a thousands-of-pound
17 vehicle, somehow the driver, Mr. Sanders, loses sight of
18 my client, Mr. Harbath, and unfortunately he runs over
19 Mr. Harbath's right leg and he doesn't realize it until he
20 sees Mr. Harbath's arm just a-waving around. So he stops
21 the big old boom lift, he backs up, and realized I didn't
22 back up enough, I'm still on his leg, so he gets on the
23 boom lift and backs up again and he finally gets off my
24 client's leg. They have a huge to-do in the plant. They
25 immediately start giving medical assistance to my client.

1 **THE COURT:** And he loses his leg?

2 **MS. MOSIER:** He does eventually become a
3 below-the-knee amputee. And this is after like twenty
4 surgeries, Your Honor, a very painful process. He also
5 developed a whole bunch of complications during his
6 recovery and all of his doctors are relating those
7 complications to the original injury.

8 **THE COURT:** And he filed a workers' comp claim against
9 Cornerstone?

10 **MS. MOSIER:** Yes, Your Honor. He did file a workers'
11 comp claim against Cornerstone, that's his direct employer,
12 and it's important because under 42-1-410 he could have
13 chosen to bring his workers' comp claim against Black Box
14 because you see Black Box, Your Honor, is the common
15 employer for both Sanders, who was driving the boom lift,
16 and Mr. Harbath, who was spotting him. So they work at
17 two different staffing agencies, but for a common
18 subcontractor, Black Box. Black Box's job was to install
19 cads and cable over at Michelin and they didn't have enough
20 of their own employees I would imagine, so they had to get
21 staffing agencies involved; hey, give us some workers, we
22 have this job to do.

23 **THE COURT:** Right. And so now you're suing in tort
24 Sunbelt, Bennett-Hall and Sanders --

25 **MS. MOSIER:** And Sanders.

1 **THE COURT:** -- and they're trying to bring in Black
2 Box?

3 **MS. MOSIER:** Yes, Your Honor.

4 **THE COURT:** And that's an issue because as the
5 upstream employer you can't sue them --

6 **MS. MOSIER:** Right.

7 **THE COURT:** -- because of the workers' comp issue?

8 **MS. MOSIER:** Right. Black Box is the statutory
9 employer of my client and Mr. Sanders and so we could not
10 sue Black Box. And quite honestly, Your Honor, especially
11 the way that we -- that I drafted the complaint, it seems
12 to me that there's plenty of direct negligence or -- or at
13 least clues of that, a good faith basis to think that
14 Bennett-Hall is directly negligent here. It's not just
15 that they employed Sanders, but we have made many specific
16 allegations of direct negligence against Bennett-Hall that
17 needs to be fleshed out in discovery.

18 So far we've only had the written discovery process
19 exchange, which there's still a little bit more back and
20 forth that needs to go on that, but, you know -- as you
21 know, Your Honor, 42-1-540 is known as the exclusive
22 remedy provision, and what that is, of course, means that
23 the employer's sole recourse against -- the employee's
24 sole recourse against his employer is in workers' comp.
25 Workers' comp is a totally different administrative

1 proceeding. It's no-fault. You know, they have to pay for
2 a whole bunch of things, you know, medical care if they go,
3 temporary total disability, but there are some things
4 that are not covered by workers' comp, which is why we're
5 pursuing this third-party action on behalf of Mr. Harbath.

6 And so you hit it right on the head, Your Honor.
7 We've sued three defendants. Sunbelt, who it seems
8 provided some training with regard to the operation of the
9 boom lift, that very heavy piece of equipment. We've sued
10 Bennett-Hall, direct negligence, specifically alleging,
11 Your Honor, because Bennett-Hall is a direct employer and
12 shares joint responsibility for employees that they let go
13 to work for Black Box at Michelin. According to OSHA, they
14 are joint employers. They share responsibility. They
15 should have better screened Mr. Sanders before they allowed
16 him to go work at Black Box -- or for Black Box, made sure
17 that he was well-credentialed to drive this big old piece
18 of equipment, that he had certifications in place, that he
19 felt comfortable there. They had the right to and they
20 very well could have sent representatives. Bennett-Hall
21 could have sent representatives to go to the worksite and
22 perform an audit to make sure that hey, if my workers are
23 doing something really skilled here, they need to be paid
24 more and that means I need to be paid more. This is all --

25 **THE COURT:** And it's Bennett-Hall who has brought in

1 the third-party, Black Box?

2 **MS. MOSIER:** Yes, it's Bennett-Hall that is wanting to
3 bring in the upstream employer who is immune and I could
4 not sue.

5 **THE COURT:** Okay.

6 **MS. MOSIER:** Your Honor, it's not that we -- we
7 didn't sue them, you know, just because we can't. It's
8 that, you know, the liability here it seems to be -- again,
9 there's direct negligence it seems here that resides with
10 Bennett-Hall. It's not just common law negligence, but
11 also flows from OSHA and there are very clear duties and
12 responsibilities through OSHA to protect temporary workers.
13 It's the right of the plaintiff, and I cited these cases
14 as exhibits in my motion, Neeltec and Morrow. Those cases
15 talk about the plaintiff being the architects of the
16 complaint, getting to choose the defendants. I believe in
17 Neeltec that's the case where the defendant said oh, you
18 sued the wrong people and you need to substitute these
19 folks and the court said wait a minute, you can't do that.
20 If the plaintiff sues these people, it can't be at the
21 suggestion of the defendant that you substitute different
22 defendants. You can't do that. And in those cases it was
23 held that there was a -- an interlocutory appeal was
24 appropriate because --

25 **THE COURT:** Because there's a substantial right.

1 **MS. MOSIER:** -- there's a substantial right involved,
2 and I think that's what we have here. It's a substantial
3 right of Mr. Harbath, the plaintiff, who has lost a
4 critical part of himself and as a result a life-changing
5 injury that he still deals with today to choose his
6 defendant and to not have a defendant try to deflect
7 responsibility and blame another entity who can never be
8 a joint tortfeasor. They cannot possibly be a joint
9 tortfeasor.

10 They're asking three things, it seems to me, in their
11 third-party complaint, Your Honor. They want Black Box to
12 be made a party for purposes of fault allocation in their
13 amended answer, they want contribution from the statutory
14 employer, Black Box. They say that in the event that
15 there's a judgment, they want to go ahead and bring in
16 Black Box for purposes of indemnification, and I'll address
17 each one of those points, you know, in turn.

18 I think we've already covered the direct negligence
19 claims I've made against Bennett-Hall which, to me, makes
20 it inappropriate for them to say Black Box needs to
21 indemnify us because y'all are the ones who are wholly
22 responsible. If you look at Paragraph 28 of my complaint,
23 just some of my aspects of negligence, Bennett-Hall failed
24 to comply with industry and government standards. This is
25 what I was referring to earlier because Black Box is a host

1 employer, but Bennett-Hall is still a joint employer who
2 shares responsibility for this worker. And the -- the
3 regs puts an onus on Bennett-Hall. They can't just assign
4 these employees and forget they're there or not check on
5 them, not make sure that they're safe and that the work
6 environment is safe.

7 Bennett-Hall failed to verify Sanders' credentials,
8 skills, experience, safety history, certification and his
9 background driving a boom lift. We've alleged that
10 Bennett-Hall hiring and retaining Mr. Sanders when they
11 knew or should have known that he posed an undue risk or
12 hazard was also unreasonable and negligent. We've alleged
13 that Bennett-Hall failed to properly qualify Sanders
14 before assigning him to the job, they negligently assigned
15 him to the job, they failed to evaluate the worksite, to
16 identify the work duties that he would be responsible for.
17 How is it that Bennett-Hall didn't know he was gonna be
18 driving a boom lift, a big, old thousands of pounds piece
19 of machinery? And why didn't they do more to make sure he
20 was qualified to safely do that job? We've alleged that
21 as a direct and proximate cause of Bennett-Hall's violation
22 of these duties and responsibilities that Bennett-Hall is
23 responsible. These duties, we believe, are nondelegable.
24 You can't just walk away and say we have dropped off this
25 employee, it's up to you to supervise him. I just don't

1 think that's the way it goes. Bennett-Hall, we believe, is
2 directly responsible.

3 Moving on, Your Honor, I believe that Bennett-Hall's
4 request to add Black Box now for purposes of contribution
5 is premature because 15-38-20, Subsection B, provides that
6 the right of contribution exists in favor of a tortfeasor
7 who has paid more than his pro rata share of the common
8 liability. So Subsection A makes it clear that there's a
9 right of contribution, but contribution and the obligation
10 doesn't, of course, kick in until someone has actually paid
11 more than what they should have. Your Honor, I think the
12 biggest reason -- do you have a question?

13 **THE COURT:** I do. Have you looked at this Gordon
14 versus Phillips Utilities case?

15 **MS. MOSIER:** Yes, Your Honor, and that would be right
16 on point with my last and I think the biggest point of
17 emphasis as to why Mr. Harbath I think should win this
18 motion to strike.

19 Gordon versus Phillips, again, goes to my point that
20 Bennett-Hall -- excuse me, Black Box cannot be a tortfeasor
21 because they are a statutory employer. Their liability
22 has been set and is being addressed by workers' comp by a
23 no-fault system. Just because we have mentioned the
24 contract between Bennett-Hall and Black Box Network
25 Services in our complaint should in no way mean that we

1 have opened the door to allowing Black Box to be injected
2 as a defendant into this case because the argument has come
3 up, and I understand, I guess, where that comes from, but
4 if you look at, for instance, Fuller versus Southern
5 Electric, that's a 1942 case, and I'm looking at Page 712
6 there, the same thing came up there. The plaintiff in an
7 effort to explain who the players are in a case and who got
8 to be employed by whom mentioned the contract, but just
9 because we've mentioned that doesn't mean that we have
10 injected another or consented to another defendant being
11 added, especially one we can't sue and cannot to be a
12 tortfeasor.

13 **THE COURT:** Okay.

14 **MS. MOSIER:** As the defendants have accurately pointed
15 out in their memorandum, the Court should consider the
16 effect of adding this new party would have on this action
17 -- on this main action, which is a tort action. Your
18 Honor, I believe that -- that adding this immune defendant
19 prejudices the plaintiff because it injects a contract into
20 a tort case. It would be like two cases going on at the
21 same time. We'd be litigating this contract and talking
22 about it and then we'd be talking about what happened to
23 Mr. Harbath and why. I think that's very confusing or it
24 could be very confusing.

25 And more importantly, Your Honor, it allows these

1 defendants to blame someone who I can't and who the jury
2 is not allowed to assign fault to according that Gordon
3 versus Phillips case. There is no prejudice in -- in
4 having Bennett-Hall wait. Maybe I don't get a judgment
5 against Bennett-Hall, maybe I get a judgment all against
6 Sunbelt because they should have better trained
7 Mr. Sanders. That's a possibility. I've sued them as
8 well and argued they're jointly and severally responsible.
9 So let's say the jury finds them more at fault than
10 Bennett-Hall. This is all advisory then. You've brought
11 in -- you know, they have brought in an immune defendant
12 and it's really all for naught, it's -- it's for no reason.

13 Finally, Your Honor, I want to wrap this up and give
14 Mr. Comer an opportunity to respond. The defense has
15 brought up the case -- the B-E-T case in support of
16 allowing them to bring in a defendant for purposes of
17 indemnification now, but I want you to read that case more
18 closely. I did bring it with me, an unmarked version of
19 it.

20 **THE COURT:** Okay. Can you pass that up, please?

21 **MS. MOSIER:** Yes, Your Honor. May I approach?

22 **THE COURT:** Yes, of course.

23 **MS. MOSIER:** Your Honor, the procedural history in
24 that case I think is important.

25 **THE COURT:** Okay. Go ahead and explain that to me.

1 **MS. MOSIER:** Okay. And so the reason why it is
2 is that in that case -- it's also a workers' comp
3 third-party case to use the lingo. We have an employee
4 who is injured by a product, an allegedly defective
5 product. He makes a workers' comp claim and then he makes
6 a third-party claim against the manufacturer of this
7 allegedly defective product and that product manufacturer
8 goes ahead and they litigate that case and they settle that
9 case. At the end of the third-party case, that product
10 manufacturer wants to sue the employer for indemnification
11 saying you altered this piece of equipment, it was not used
12 properly and you allowed abnormal use, that kind of thing,
13 so in that case the defendants were not allowed and they
14 never asked to inject the employer in a tort action.
15 That's exactly what -- what they're trying to do here and
16 we say is inappropriate.

17 And I can't find any other cases that are published
18 because the other two cases in there are unpublished
19 decisions, which, Your Honor, I would say is a no-no
20 according to Higgins versus MUSC for allowing an
21 unpublished order.

22 **THE COURT:** Well, and this is an order from a district
23 court judge from 1996, and this Gordon versus Phillips
24 Utilities is a Supreme Court of South Carolina case from
25 2005, which seems -- it seems to me like perhaps the Gordon

1 case is more on point than this district court case, but
2 I'll let the other side tell me why that's not so.

3 **MS. MOSIER:** Yes, Your Honor. Last, but not least, I
4 do want to mention that case that I referred to in the --
5 at the very bottom of my motion to strike. There is
6 actually these similar issues. It's not exactly on point,
7 but there's certified questions that are with the Supreme
8 Court right now relating to a case called Machin versus
9 Carus Corporation, et. al. That's a case with Judge
10 Anderson and my first boss, John Koon, was involved in that
11 case and what happened there was he represented a man who
12 worked for the Town of Lexington and the man who worked for
13 the Town of Lexington, Mr. Machin -- I hope I'm saying his
14 name right, in the process of his job was exposed to some
15 nasty chemicals and he got really sick as a result, made a
16 workers' comp claim, got a "meh" kind of settlement from
17 that, and then pursued a third-party claim against third
18 parties Carus Corporation, Anderson and Fetter and Sons.
19 And I think they settled with one defendant and then they
20 take the rest to trial and in the pre-trial hearing with
21 Judge Anderson, the plaintiff asked well, how are we gonna
22 address workers' comp and what happened there, in the
23 recovery that was had, and Judge Anderson decided to allow
24 the defendants to make an empty chair defense and put all
25 blame on the Town, but they did not allow the plaintiffs

1 to talk at all about workers' comp or the recovery or
2 subrogation or the fact that he would have to pay back some
3 of that money, just none of that. So, of course, what do
4 you think happened? Shortly -- and, mind you, the Town was
5 not a defendant in that case. They never moved to have the
6 Town made a defendant, but they were allowed to point the
7 finger at the Town. And so, of course, the very first very
8 question that came from the jury was why wasn't the Town
9 made a party? And that's when I think everyone realized
10 that there was a problem because the Town could not be made
11 a party, could not be a joint tortfeasor, had already paid
12 their money, and yet the defense got to point to the Town
13 and -- for fault allocation purposes and the plaintiff
14 couldn't address it at all.

15 This is -- this is a novel issue. There's not a lot
16 of law on this, but I think the court's gonna make some now
17 with some certified questions. All I have right now is the
18 name of the case and it was a Judge Anderson case. I have
19 a brief of the plaintiff. It's not signed, John Nichols
20 gave it to me, but for what it's worth, this is a big issue
21 that's going on. And while the facts are not totally on
22 point with our case, they site the same case as I do,
23 Gordon versus Phillips, to say that an upstream -- or any
24 employer, including a statutory employer like Black Box,
25 could not be a tortfeasor and should not be forced to pay

1 or any fault allocated to them, and it talks about, you
2 know, the right of a plaintiff to sue who they want to
3 sue, which should not be abrogated by a defendant.

4 **THE COURT:** All right. Thank you very much.

5 **MS. MOSIER:** Thank you.

6 **THE COURT:** All right. Who wants first crack on this
7 side?

8 **MR. COMER:** Good morning, Your Honor. Brian Comer for
9 Bennett-Hall. I don't think I've had the opportunity to
10 appear before you, so I appreciate the chance to be in your
11 courtroom this morning.

12 **THE COURT:** Good to see you. Yes.

13 **MR. COMER:** A couple of things that I would just like
14 to provide as context. First of all, I don't disagree
15 with Ms. Mosier's general explanation of the facts that's
16 involved in the case at the Lexington plant where
17 Mr. Sanders was serving as a spotter -- I'm sorry,
18 Mr. Harbath was serving as a spotter for Mr. Sanders and
19 got run over by a boom lift. We also don't dispute the
20 fact that there was a contract between Bennett-Hall, my
21 client, and Black Box to provide Mr. Sanders to the site.

22 At the end of the day, Your Honor, what we're doing
23 in this case is we brought a third-party claim for
24 contractual indemnification against Black Box and that is
25 because the agreement that we had with Black Box disclaimed

1 liability and actually put the obligation upon Black Box to
2 do certain things. For example, we disclaimed liability
3 for fail -- for supervision of the workers, we disclaimed
4 any liability relating to the workers driving something
5 without our prior approval, we disclaimed liability in
6 situations where Black Box had these workers doing some
7 duty that we had not authorized. That was part of the
8 contract that we had with Black Box that preexisted this
9 incident. This was the contract that began all of this
10 work.

11 Now, Your Honor, Ms. Mosier would have this Court
12 believe that third-party practice is some kind of a
13 novel concept and in my experience in litigating in
14 courts in South Carolina this is done fairly frequently
15 where a third-party action is brought for contractual
16 indemnification to bring an additional party in, and
17 that's what we've done here. We've got a right to do
18 that under Rule 14 of the rules, but more than that, Your
19 Honor --

20 **THE COURT:** But why do you have to do it right now?

21 **MR. COMER:** Well, she states that we -- we wouldn't
22 be prejudiced by waiting and what I would submit to the
23 Court is I don't agree with that. We're gonna do a lot
24 of the discovery right now relating to this issue of
25 indemnity and what happened at this site and if we bring

1 the indemnification action later, I would venture to
2 guess that Black Box would then want to do some of the
3 very same discovery that involves this same incident and
4 so I think that the prejudice to us is waiting and having
5 to relitigate a lot of the discovery that goes into this
6 issue right now. That's our -- and we have a present right
7 to indemnification, Your Honor. I mean, in South Carolina
8 we can bring this now as a matter of third-party practice,
9 so that's what we've opted to do.

10 And one of the things that the plaintiff says is
11 well, you know, just by referencing the agreement we don't
12 open the door. Well, Your Honor, they don't just reference
13 the agreement. In Paragraph 29 of the complaint, the
14 plaintiff says that he suffered serious injuries as a
15 direct and proximate result of qualified employees --
16 I'm sorry. He suffered serious injuries as a direct and
17 proximate result of Bennett-Hall allegedly failing to
18 deliver its contractual promise to provide qualified
19 employees. In Paragraph 32, the plaintiff says he was a
20 foreseeable third-party beneficiary of the agreement
21 executed between Bennett-Hall and Black Box. And in
22 Paragraph 40, the plaintiff alleges the agreement provides
23 Bennett-Hall retained the authority to discipline and
24 terminate its employment contract with Sanders. So these
25 issues are going to come up during the course of this

1 litigation and our position is that if we have a
2 contractual right to indemnification, it's more efficient
3 to litigate those issues now, especially since the
4 plaintiff raised them in his complaint.

5 The second issue, and really, I think, the one that
6 is critical for this Court today, is whether or not the
7 workers' comp exclusivity provision somehow bars this.
8 And what I, again, want to emphasize, Your Honor, is that
9 this is a contractual claim against Black Box, and there
10 are two decisions that I believe we put in our brief, and
11 I have for Your Honor. One that's been handed up, which
12 is the BET Plant Services, the other one is an unpublished
13 order by the district court in May of this year. May I
14 approach, Your Honor?

15 **THE COURT:** You may.

16 **MR. COMER:** And what both of these cases stand for,
17 Your Honor, is that in a situation where a plaintiff has
18 had a comp action and reaches some sort of settlement
19 with the employer, what later happens in the case is that
20 there is some sort of indemnity right asserted against a
21 third-party and what the court says, Your Honor, is that
22 where there is a preexisting contractual relationship that
23 that's independent of the exclusivity provision. And I
24 believe it was the Brayboy versus MST-Maschinenbau case
25 where they say that Section 42-1-580 generally satisfied

1 any claim a third-party may have against the employer
2 arising out of the same accident except in the limited
3 circumstance where there is an express indemnification
4 agreement. That's what we've got here, Your Honor. In
5 fact, this agreement -- I don't believe I have it in front
6 of me, but it predated -- bear with me, Your Honor. It
7 predated this accident by a year and a half and governed
8 the terms between my client and Black Box, many of which
9 are at issue in this case, and so our position is that we
10 have a present right to indemnification; that it makes more
11 sense to be able to assert it right now while the discovery
12 is going on to find out what some of these issues entail
13 with regard to what the claims were --

14 **THE COURT:** But you're -- right now you're saying it
15 makes more sense to assert it right now. Before you
16 said that you have an absolute legal right to do it now.

17 **MR. COMER:** Yes, Your Honor.

18 **THE COURT:** Talk to me about why you have that
19 absolute legal right. Where does that come from?

20 **MR. COMER:** Well, Your Honor, our position is that
21 our right to indemnification comes from our agreement with
22 Black Box, which says --

23 **THE COURT:** So it's a contractual right?

24 **MR. COMER:** Yes, Your Honor.

25 **THE COURT:** So you think that that contractual right

1 trumps the plaintiff's right to choose her defendants?

2 **MR. COMER:** Well, I -- and I'm glad to operate that
3 point. What my understanding of what -- I don't disagree
4 that the plaintiff has a substantive right to be the
5 architect of her defendants. We're not looking to be
6 substituted in this case, substitute Black Box in for us,
7 which I think is what one of the cases she cited to
8 involved.

9 **THE COURT:** But you would be inserting a whole new
10 issue that would have just a whole different flavor to the
11 jury.

12 **MR. COMER:** We'll, we'd be asserting an issue that
13 the plaintiff raised three or four times throughout her
14 complaint, which is what -- who had the obligations under
15 the agreement for provision of these workers for things
16 like supervision, for things like controlling the work,
17 things like that. To me, Your Honor, her issue is a -- is
18 a tort case, our's is a contractual issue as to whether or
19 not Black Box breached its contract with us. That's a
20 contractual issue. We're not bringing them in as a
21 tortfeasor. It's a breach of contract issue.

22 **THE COURT:** And do you think that you wouldn't have
23 the opportunity to argue that there's a missing party to
24 the jury if there's an empty seat?

25 **MR. COMER:** You know, that's -- that's the problem or

1 at least the problem I perceive with the -- the status of
2 our 2005 tort reform. On the one hand that statute says
3 that the allocation of fault on the verdict form has to
4 equal a hundred percent between the parties. On the other
5 hand, it says this doesn't forego the right of somebody to
6 point to an empty chair. It doesn't say empty chair, but
7 it says it doesn't forego the right to argue the fault
8 of a nonparty. So in my experience, because of that
9 contradiction, on the one hand you have to be a party in
10 order to have fault allocated to you; on the other hand,
11 you can have an empty chair. In my experience, that's the
12 rationale for a lot of the third-party practice right now
13 is because there's no real direction from the legislature
14 on that issue. So we would argue, Your Honor, that -- I
15 mean, that's a big risk for us to have to get up in front
16 of a jury and argue something relating to the allocation
17 of fault to a nonparty but not at the same time have that
18 party be able to be on the -- on the verdict form because
19 they're not a party -- not have that third-party on the
20 verdict form because they're not a party to the action.

21 And I know Your Honor is -- is probably reading that
22 provision. The only -- the only last thing that I would
23 raise, Your Honor, is I think there's been a suggestion in
24 the motion that we've pleaded some inconsistent defenses
25 and our response to that is merely that that's allowed. I

1 mean, it's Law School 101 that we if don't plead defenses
2 we may waive them and so we have admittedly pleaded as many
3 defenses as we can under Rule 11 present to the Court and
4 now what we're gonna do is get into some discovery on these
5 issues, including our third-party claim against Black Box
6 to determine the viability of some of -- of those defenses.
7 We haven't served any discovery on Black Box yet because I
8 am mindful of their motion to dismiss and so I knew any
9 discovery would be met with a motion for protective order.
10 So we've completed a lot of the written discovery between
11 the plaintiff and the defendant, but there's still a lot of
12 other things to do to substantiate some of these defenses,
13 so we have pled them in order to preserve them.

14 **THE COURT:** All right. And so let's just go ahead and
15 dovetail into the motion to strike from Black Box. They're
16 arguing that this contract that you're relying on is void
17 as a matter of law because North Carolina applies to this
18 contract.

19 **MR. COMER:** That's their position, Your Honor, and
20 they would be right if we were talking about the formation,
21 the interpretation or the validity of the contract. I
22 don't think either party is disputing that there was a
23 contract between the parties. Our position is that this
24 really relates to performance of the contract. This
25 contract was performed in South Carolina and under South

1 Carolina law, I believe it's the Witt versus American
2 Trucking Association -- I'm sorry -- about when performance
3 is at issue, yes, Your Honor, the place of performance
4 governs. And so we would submit to the Court, first, that
5 South Carolina law governs. We're talking about an
6 indemnification right relating to performance of a contract
7 in South Carolina and we're also talking about a tort that
8 happened in South Carolina, but beyond that, Your Honor,
9 even if North Carolina law does apply, I don't think that
10 the remedy in North Carolina is just to dismiss the
11 complaint. The remedy in North Carolina is to strike the
12 offending provision and then see what it looks like and if
13 you even apply that as a fallback in this case. I believe
14 it's Section 8A of our contract that they would cite to as
15 being the offending provision where it talks about being
16 indemnified for our own negligence. Well, if you strike
17 that altogether, it still allows for indemnification for a
18 breach of the indemnifying party's obligations under this
19 agreement. So it wasn't clear from their pleading, Your
20 Honor, which provision of the indemnification provision
21 they thought violated public policy, but if it is 8A and
22 if North Carolina does apply, which we dispute, I think
23 the indemnification provision still holds up because
24 there's other subsections that provide -- that allow for
25 indemnification pursuant to a breach of the contract.

1 **THE COURT:** But you're also arguing that somehow
2 Mr. Sanders is bound by this right to indemnity
3 immediately --

4 **MR. COMER:** No, Your Honor.

5 **THE COURT:** -- that he wasn't a party to.

6 **MR. COMER:** I apologize, no. And since we've segued
7 into this second motion --

8 **THE COURT:** Sure, yeah.

9 **MR. COMER:** -- may I approach?

10 **THE COURT:** Absolutely.

11 **MR. COMER:** And I apologized to Ms. Griffin this
12 morning for not getting this to her earlier, and I
13 certainly will not dispute if they want a chance to
14 brief it, but we received their brief on Thursday and we
15 finished ours this morning and filed it.

16 **MR. TOWERY:** Your Honor, it might be helpful for
17 me to give a twenty second clarification on behalf of
18 Mr. Sanders.

19 **THE COURT:** Okay. Please. Any clarification.

20 **MR. TOWERY:** Mr. Sanders does not take the position
21 that we're a third-party plaintiff pursuant to the contract
22 and if there's any ambiguity to that --

23 **MR. COMER:** And we stipulate to that, Your Honor,
24 which is why I handed up our brief. In our brief, we
25 set forth that it may have been some poor drafting or a

1 scrivener's error by us, but we are not asserting an
2 indemnification claim on Mr. Sanders' behalf. He now has
3 separate counsel. This indemnification claim is solely on
4 behalf of Bennett-Hall. Mr. Sanders is not a party to that
5 contract.

6 **THE COURT:** Okay. Thank you.

7 **MR. TOWERY:** And -- and very quickly, Your Honor,
8 the -- I'm only here because -- to the extent that the
9 plaintiff has moved to strike portions of the answer as
10 opposed to the third-party complaint. Paragraphs 43 and 44
11 of the amended answer.

12 **THE COURT:** And which are those paragraphs?

13 **MR. TOWERY:** They refer to the, quote unquote,
14 inconsistent defenses for including statutory employers
15 on the verdict form and for those arguments I join
16 Bennett-Hall's exposition.

17 **THE COURT:** Okay. So -- I got you. In all of the
18 other glory, I think that argument was lost on me, so I'll
19 have to look carefully at that argument.

20 **MR. TOWERY:** Thank you, Your Honor.

21 **THE COURT:** Thank you.

22 **MR. COMER:** And, Your Honor, I've kind given a --
23 an abbreviated version of what I came here to say about
24 Ms. Griffin's motion, but I think at the end of the day
25 we would argue -- our points would be that we believe

1 South Carolina law governs because it's a performance
2 issue. We believe that because South Carolina governs
3 that any provision within the indemnification provision is
4 not void as a matter of public policy, but even if North
5 Carolina law applies, Your Honor, taking out Section 8A
6 still entitles us to contractual indemnification rights
7 for breach of the contract and those were the things that
8 we would cite to that gives Bennett-Hall the right of
9 contractual indemnity.

10 **THE COURT:** Okay.

11 **MR. COMER:** Thank you, Your Honor.

12 **THE COURT:** All right. I'll hear from you.

13 **MS. DuBOSE:** Your Honor, I'm gonna address --

14 **THE COURT:** And you are Susan DuBose, right?

15 **MS. DuBOSE:** Right. Yes, Your Honor.

16 **THE COURT:** Okay. I just wanted to make sure.

17 **MS. DuBOSE:** And I'm gonna be addressing the issues
18 on behalf of my co-counsel, Ms. Griffin. We believe that
19 North Carolina law does apply. It's the validity and
20 interpretation of this provision that is at issue and
21 under North Carolina law, which clearly applies, Statute
22 22B-1 prohibits any promise or agreement purporting to
23 indemnify or hold harmless a promisee or its employee for
24 liability for damages arising out of bodily injury or
25 damage caused, in whole or in part, by the negligence of

1 the promisee or his employee. What this contractual
2 indemnity claim that Bennett-Hall has brought is attempting
3 to do is hold Black Box liable for the independent acts and
4 omissions of Bennett-Hall and its employee, Mr. Sanders.
5 And plaintiff's counsel did a very good job of detailing
6 the numerous causes of action and instances where
7 Bennett-Hall and its employee, Sanders, were negligent.

8 Now to the extent that counsel for Bennett-Hall
9 argues that there's a way to -- to strike the offending
10 provisions, in the Miller versus Morgan case, which I cited
11 in our motion, and it was also discussed in another case
12 called International Paper versus CORPOREX, and, I'm sorry,
13 I don't have another copy of that case --

14 **THE COURT:** That's okay.

15 **MS. DuBOSE:** -- but I can provide the cite. It's
16 385 S.E.2d 553. That International Paper case discussed
17 the Miller versus Morgan case and -- and described what the
18 North Carolina court did in Miller versus Morgan. They
19 found that illegality permeated the entire provision making
20 severance impossible, and that's what we have here, is what
21 Bennett-Hall is asking this Court to do is to make Black
22 Box contractually liable for Bennett-Hall's independent act
23 of negligence and that permeates the agreement. Their
24 indemnification agreement contains a reference to these
25 limitations of liability where they say we're not liable

1 and it lists this whole litany of things that they're
2 saying that they're not gonna be liable for. And North
3 Carolina has enacted a statute to address this very
4 situation and it holds that in contracts such as this
5 indemnity provisions are only enforceable if the party
6 seeking indemnity is not seeking indemnity for a claim
7 arising from its own negligence, no matter the degree.

8 It is different than in South Carolina. In South
9 Carolina, indemnity provisions that indemnify another party
10 for their sole negligence are void as a matter of law. In
11 North Carolina, if you're negligent in any degree you
12 cannot seek indemnity from another party. I think it's
13 clear that North Carolina law applies to this. The
14 contract which was referenced in third-party plaintiff's
15 answer and is attached -- a copy is attached to our motion,
16 shows that these are two North Carolina entities that are
17 executing the contract and Exhibit A to that contract
18 shows that the workers are to report to Black Box's North
19 Carolina address. This is a contract about the validity --
20 I mean, this is a case about the validity of a contract
21 provision, North Carolina law applies, and North Carolina
22 clearly holds that the interpretation that Bennett-Hall is
23 attempting to use in this case is void and unenforceable,
24 so as a matter of law they cannot maintain an action for
25 contractual indemnity and it should be dismissed.

1 **THE COURT:** All right. Mr. Comer.

2 **MR. COMER:** Your Honor, Mr. Sanders wasn't supposed
3 to be driving a boom lift at all. Why? Because under our
4 contract Black Box had to get our prior approval to have
5 him drive any sort of boom lift, and they didn't, so that's
6 a breach of the contract. He wasn't supposed to be using a
7 boom lift because that was different from the duties that
8 they set forth in their order form for a Level 2 worker,
9 which is what he was. Why? Because the contract said that
10 he can't do other things without our prior approval. Those
11 are independent acts of negligence by Black Box for which
12 Bennett-Hall may not be negligent at all because it's a
13 prior approval issue that comes under the agreement, so
14 that's why we believe Black Box is a proper party to this
15 action.

16 We believe that we have a -- we believe that basically
17 what Black Box and the plaintiff are asking -- are telling
18 this Court is that parties can't contract to allocate and
19 mitigate risk and I don't think that's what the case law
20 suggests, Your Honor. I think the parties are free to
21 contract and we've provided a couple of orders where the
22 district court of South Carolina has said that where there
23 is this pre-existing contract then there's a right to
24 indemnification and it's not subject to dismissal.

25 **THE COURT:** But are they -- are parties allowed to

1 contract in such a way that it would affect the right of
2 Mr. Harbath? That's where I get tripped up.

3 **MR. COMER:** Well, Your Honor, Mr. Harbath has chosen
4 to -- to bring a lawsuit against us. We're not trying to
5 be the architect of Mr. Harbath's complaint. What we are
6 trying to do is that to the extent that there's liability
7 by us, point to the contract of what the parties bargained
8 for between Bennett-Hall and Black Box to mitigate their
9 risk between each other. So, Your Honor, we're not
10 suggesting that the plaintiff can't bring an action against
11 Bennett-Hall, but we do believe that Bennett-Hall has the
12 right to have an allocation of fault for any wrong that may
13 be imputed as a result of the action against Bennett-Hall.

14 **THE COURT:** And that might be so, but why -- why
15 doesn't it make the most sense to do that after this has
16 been resolved over here? To have all -- I mean, we can
17 see from this hearing right now there's this level, this
18 level, this level. If we have a jury having to not only
19 determine out of three defendants who've been sued who's
20 liable for how much and then take one of those defendants
21 and determine of that defendant's liability how much is
22 indemnified by Black Box, isn't that asking too much? It
23 seems unfair.

24 **MR. COMER:** No, I don't think so, Your Honor, because
25 I think the -- and I apologize, I didn't mean to interrupt,

1 Your Honor.

2 **THE COURT:** No, go ahead. Go ahead.

3 **MR. COMER:** But at the end of the day the plaintiff is
4 going to say Bennett-Hall, you should have been supervising
5 Mr. Sanders better and Bennett-Hall is going to say here
6 is the contract we had for the work on this site that was
7 supervised by Black Box and our contract says supervision
8 was their issue. And I don't think that it's the complex
9 issue that the plaintiff would have the Court believe,
10 especially since the plaintiff brought the agreement in as
11 part of -- a substantial part of the complaint. And I also
12 think that it makes more sense to address some of those
13 issues in discovery here as opposed to having to revisit a
14 lot of those issues in a separate action later from the
15 standpoint of judicial economy.

16 **THE COURT:** All right. All right, Ms. Mosier.

17 **MS. MOSIER:** Thank you for hearing me again. I do
18 want to hand up some OSHA regulations and then there's also
19 a policy background on temporary workers making it clear
20 that Bennett-Hall has -- shares that joint responsibility.
21 I'm not quite sure -- I mean, the contract's really not my
22 deal, but I'm not quite sure how the contract can trump
23 regulations that are set by Federal law. I don't get it.
24 And I brought an extra copy for opposing counsel. If I may
25 approach, I'd --

1 **THE COURT:** You may.

2 **MS. MOSIER:** -- like to bring this up to you as well.

3 **THE COURT:** Yes. Help me to understand what -- what's
4 the motion to strike Paragraph 43 and 44? I thought that
5 the motion to strike was solely with regard to Black Box,
6 the third-party defendant.

7 **MS. MOSIER:** Well, 43 and 44, I believe, Your Honor,
8 talk about the fault allocation and contribution. I don't
9 think it's appropriate for the reasons that I went over
10 earlier for them to be able to talk about contribution
11 because there's been no award yet and then the fault
12 allocation because of Gordon versus Phillips.

13 **THE COURT:** Okay.

14 **MS. MOSIER:** I think that's right.

15 **THE COURT:** So you're just -- on Page 5 of your motion
16 where you ask that -- I mean, your -- your ultimate ask is
17 that their amended answer be struck --

18 **MS. MOSIER:** Yes.

19 **THE COURT:** -- because they should not be able to add
20 a third-party defendant? That's bottom line?

21 **MS. MOSIER:** Right. At the heart of it, I don't want
22 them to be able to add a party that I can't sue. I really
23 think it -- it means -- like I said, in mentioning the
24 contract I'm setting the stage and explaining who's who
25 and out of a fifty-one page -- paragraph complaint, you

1 know, I don't think it's quite fair to point to three or
2 four paragraphs of it and say that I've, you know, made
3 this an issue because I certainly don't want a breach of
4 contract dispute.

5 **THE COURT:** And do you have the Neeltec case handy?

6 **MS. MOSIER:** Yes, I do. I'm just gonna hand up to
7 you a clean copy of the motion. I think --

8 **THE COURT:** Oh, is it attached?

9 **MS. MOSIER:** It is. It's Exhibit -- it's either D
10 or E.

11 **THE COURT:** Okay. I'll find it.

12 **MS. MOSIER:** E might be Morrow because that one was
13 brand new. It should be Exhibit D to my motion, Your
14 Honor.

15 **THE COURT:** Okay.

16 **MS. MOSIER:** You know, and -- to add these folks in
17 under Rule 14, that rule itself says they may bring in a
18 party, there's discretion here. And, Your Honor, I'm not
19 filing a motion to strike for the sake of being difficult
20 or because I like to sit here and argue because I really
21 don't, it makes me really nervous, but I'm arguing it
22 because I just don't think it's fair and I think that the
23 Supreme Court has been presented with certified questions
24 and they may not think it's fair either. Judge Anderson
25 certainly thought that it was worth asking the certified

1 questions. I've cited Gordon versus Phillips where the
2 Supreme Court, you know, said pretty clearly that they
3 can't be a joint tortfeasor, so I don't see how it's quite
4 fair at all. I know the fair only comes around in October,
5 but I hope it also exists in a courtroom. If I can't sue
6 them, they can't either.

7 They brought up 42-1-580 and I think that statute is
8 a workers' comp statute that needs to be read really
9 closely and it says a third person, Bennett-Hall here, has
10 the right upon payment of recovery against him to enforce
11 constitutional indemnity. So, you know, that BET case, the
12 two unpublished decisions, which for the record, I object
13 to them being interjected here under Higgins versus MUSC.
14 They're unpublished orders. They also come before the
15 certified questions are being answered by the court. And
16 I -- I tried Googling those opinions to find them and I
17 couldn't and, come to find out, they're unpublished and
18 that's why I couldn't find them. Your Honor, I don't want
19 there being discovery by the contract in my case. I don't
20 get paid by the hour. I don't think Mr. Harbath should
21 have to suffer through that either because this is a tort
22 action and we sued Bennett-Hall on purpose. I think the
23 case goes on and there's plenty to be discovered against
24 Bennett-Hall individually.

25 **THE COURT:** Okay. Thank you.

1 **MR. COMER:** Your Honor, can I make one point about
2 what I've just received from Ms. Mosier? I'm looking at
3 her guideline that says protecting temporary workers and
4 it says employer responsibilities to protect temporary
5 workers. To ensure there is a clear understanding of each
6 employer's role in protecting employees, OSHA recommends
7 that the temporary staffing agency and a host employer set
8 out their respective responsibilities for compliance with
9 applicable OSHA standards in their contract. Including
10 such terms in a contract will ensure that each employer
11 complies with all relevant regulatory requirements thereby
12 avoiding confusion as to the employer's obligations.

13 So, Your Honor, I'm looking at what she's handed up to
14 the Court and, again, it says that these are issues that
15 are suitable to be covered in a contract between a host
16 employer and a temporary staffing agency. That is exactly
17 what we have done, Your Honor, in our contract with Black
18 Box and all we are seeking to do is enforce a contractual
19 right, not a tort right. We haven't brought them in under
20 a negligence tort theory. This is a contractual right that
21 pre-existed this incident and that's why we believe that
22 it's appropriate for now.

23 **MS. MOSIER:** But when you -- if the Court were to
24 allow Bennett-Hall to bring in Black Box, these people
25 will be defendants and they will be allowed to have fault

1 allocated to them, which is not appropriate,, and I think
2 what I handed up to you and Mr. Comer read out loud to you
3 is, yes, there's a contract to make sure that Federal law
4 is enforced. So just because Bennett-Hall doesn't follow
5 up doesn't mean you get to point to their contract and say
6 well, the contract says this.

7 **THE COURT:** All right. If you-all will bear with me,
8 I just want to read a couple of cases before I make a
9 ruling.

10 All right. After careful consideration of the motions
11 and the very, very articulate arguments from all counsel
12 who've argued today, I find that the motion to strike the
13 amended answer of Bennett-Hall is granted. I find that
14 Black Box cannot be a defendant and plaintiff has the sole
15 right to determine who he will sue. There's a case,
16 Chester versus the South Carolina Department of Public
17 Safety, where the South Carolina Supreme Court indicated
18 its unwillingness even after the South Carolina
19 Contribution Among Tortfeasors Act was passed to allow
20 fault allocation to a non-party tortfeasor. I make no
21 finding as to whether Bennett-Hall has an indemnification
22 action against Black Box as that issue is not yet ripe and
23 can be resolved another day. But with regard to granting
24 the motion to strike, that includes the striking of the
25 setoff and contribution as against Black Box and

1 Cornerstone.

2 Ms. Mosier, I would ask that you, please, draft up the
3 order.

4 **MS. MOSIER:** I will. Thank you, Your Honor.

5 **MR. COMER:** And, Your Honor, just for the record and
6 to be sure I'm clear, this is without any prejudice to any
7 future indemnification claim --

8 **THE COURT:** That's right.

9 **MR. COMER:** -- by Bennett-Hall against Black Box?

10 **THE COURT:** That's correct.

11 **MR. COMER:** Thank you, Your Honor.

12 **MS. MOSIER:** I'll be sure to include that.

13 **THE COURT:** All right. Ms. Mosier, when do you think
14 you can get that order in? I don't want to rush you, but
15 I'd just like a kind of sense so we mark it on our calendar
16 and know when something's missing.

17 **MS. MOSIER:** May I have ten days?

18 **THE COURT:** Oh, absolutely.

19 **MS. MOSIER:** Thank you.

20 **THE COURT:** All right. Thank you-all very much.

21 **MR. COMER:** Thank you, Your Honor.

22 **MR. TOWERY:** Thank you, Your Honor.

23 (Whereupon, the proceedings were concluded at
24 12:27 PM.)
25

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 29th day of September, 2015.

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I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

December 15, 2015

s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

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

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SC Court of Appeals

Karl T. Harbath Respondent,

v.

Stephen Sanders, Bennett-Hall Co., Inc., Sunbelt Rentals, Inc., Defendants,
Of whom Bennett-Hall Co., Inc. is the Appellant.

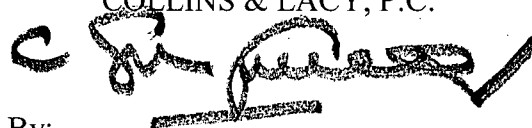
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

Respectfully submitted,

COLLINS & LACY, P.C.

By:

 **FOR**

BRIAN A. COMER

bcomer@collinsandlacy.com

KERRI A. RUPERT

krupert@collinsandlacy.com

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

Columbia, South Carolina
September 26, 2016

ATTORNEYS FOR APPELLANTS BENNETT-
HALL CO., INC.