THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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

Karl T. Harbath ..... Respondent,

v.

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

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ATTORNEYS FOR APPELLANT
BENNETT-HALL CO., INC.

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STATEMENT OF THE CASE

In February 2015, Respondent Karl Harbath ("Respondent") filed a Complaint asserting claims of negligence against Appellant Bennett-Hall Co., Inc. ("Appellant"), Stephen Sanders, and Sunbelt Rentals, Inc. ("Sunbelt Rentals"). Appellant answered the Complaint in May 2015, asserting several affirmative defenses, including (1) the right to contribution or indemnity for from any actual and/or statutory employer under section 42-1-580 of the South Carolina Code; (2) the actual and/or statutory employer be made a party under section 15-38-15 of the South Carolina Code for purposes of fault allocation on the verdict form; and (3) the right to a proportional credit or offset pursuant to section 15-38-15(E) for the amounts paid by the actual and/or statutory employer of Plaintiff. (R. pp. 42-43, ¶¶ 42-44). The next month, Appellant filed an Amended Answer, which incorporated the above-listed defenses, and a Third-Party Complaint, asserting a third-party claim for contractual indemnification against Black Box Network Services ("BBNS"). (R. pp. 53-58, ¶¶ 42-44, 47-62).

Respondent filed a Motion to Strike the Amended Answer of Bennett-Hall on June 26, 2015. (R. pp. 62-137). BBNS also filed a Motion to Dismiss the Third-Party Complaint. The Circuit Court held a hearing on the two motions on September 29, 2015. At the conclusion of the hearing on these motions, the Court granted Respondent's Motion to Strike, and found the ruling on the Motion to Strike rendered BBNS's Motion to Dismiss moot. (R. pp. 11-20). The Circuit Court did not rule on the merits of BBNS's Motion to Dismiss. (R. pp. 11-20).

The Court issued its Order on October 13, 2015, which Appellant received on October 26, 2015. (R. pp. 11&148). On November 5, 2015, Appellant timely filed a Motion to Reconsider, which the Circuit Court denied other than removing certain findings of fault that

were not raised to the Circuit Court in the briefing or at the hearing. (R. pp. 1-10)). This appeal followed.

STATEMENT OF THE FACTS

In February 2012, Plaintiff and Defendant Stephen Sanders began installing fiber optic cable at the Michelin plant in Lexington County, South Carolina. (R. p. 26, ¶ 17). Sanders was a temporary worker employed by Appellant, and Respondent was a temporary worker employed by Cornerstone Staffing Solutions ("Cornerstone"). (R. p. 26, ¶¶ 15-16). Both Cornerstone and Appellant supplied temporary workers, like Sanders and Respondent, to BBNS, who served as the general contractor for the wireless access point and fiber optic installation at Michelin. (R. p. 26, ¶ 14).

As alleged in the Amended Answer and Third-Party Complaint, Bennett-Hall and BBNS entered into a contract, entitled "Agreement for Supplying Temporary Technical Personnel" (hereinafter "Agreement"), setting forth the terms of Bennett-Hall's relationship with BBNS for staffing prior to Bennett-Hall supplying temporary workers to BBNS. (R. p. 55-58, ¶¶ 47-62). The Agreement provided the temporary workers supplied by Bennett-Hall would work under BBNS's direction, control, and supervision. (R. p. 55, ¶ 49).

The Agreement also required indemnification from BBNS for certain claims and breaches of the Agreement. (R. p. 56, ¶ 53). The "Indemnification" provision of the Agreement 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.

(R. p. 56, ¶ 53).

In the "Disclaimer of Liability" provision, Appellant expressly disclaimed liability resulting from BBNS:

a. Failing to adequately supervise or control the temporary workers;

b. Assigning workers to duties different than their original duties without prior written approval by Bennett-Hall;

c. Permitting temporary workers to use any vehicle during the performance of work for BBNS unless Bennett-Hall had given its prior approval in writing;

d. Due to any claims for special, indirect, consequential, punitive, or lost profit damages; and

e. Property damage or personal injury arising out of or resulting from acts or omissions of the temporary workers.

(R. pp. 56-57, ¶ 54). Appellant asserted the indemnification and the disclaimer of liability clauses, when read together, provided BBNS agreed to indemnify Appellant for Respondent's damages. (R. pp. 56-57, ¶¶ 53-54).

During the course of their work on February 23, 2012, Respondent and Sanders were using a boom lift, which was rented from Sunbelt Rentals, to install a cable box. (R. p. 26, ¶ 17). As a "Level 2" technician, Sanders' job description did not provide for the use any vehicles like the boom lift. (R. p. 57, ¶ 56). Moreover, BBNS did not seek Appellant's written permission prior to allowing Sanders to operate the boom lift. (R. p. 57, ¶ 57). Respondent was injured while acting as a spotter and directing Sanders as Sanders was driving the boom lift through the Michelin plant. (R. p. 26, ¶ 17).

STANDARD OF REVIEW

A motion to strike under Rule 12(f), of the South Carolina Rules of Civil Procedure, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. McCormick v. England, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). In reviewing a ruling on a motion to dismiss a claim, this Court must base its decision solely on the allegations set forth on the face of the complaint. Id. at 632–33, 494 S.E.2d at 433. "The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id. at 633, 494 S.E.2d at 433 (citing Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995)). "The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action." Id. at 633, 494 S.E.2d at 433–34.

ARGUMENTS

I. The Circuit Court's Order Striking Appellant's Third-Party Complaint and Portions of the Amended Answer is Immediately Appealable.

Absent some other specialized statute, an order on appeal must fall into one of several categories under section 14-3-330 of the South Carolina Code. Here, the orders on appeal fall under section 14-3-330(2), which allows for the immediate appeal of "[a]n order affecting a substantial right made in an action when such order . . . strikes out an answer or any part thereof or any pleading." The Supreme Court has held an order affects a substantial right when the order "would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993).

As expressly provided under section 14-3-330(2)(c), Appellant may immediately appeal an order that affects a substantial right when it strikes "any pleading" like Appellant's Third-Party Complaint and portions of the Amended Answer. The courts narrowly construe section 14-3-330(2)(c) to "focus on the effect of the order, not the label given to the motion or to the order granting it." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 303, 705 S.E.2d 475, 478 (2011) (holding the order must *in effect* strike a portion of the pleading). Under this narrow construction, "[a]n order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." Id. at 304, 705 S.E.2d at 479.

Thorton relied upon an older case, Bowden v. Powell, which noted that an order striking material allegations of a good cause of action was immediately appealable because "the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading,

and on appeal from the final judgment, this court could not say there was an error of law in confining the evidence and charge to the pleadings." Id. at 303, 705 S.E.2d at 479 (citing Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940)). The Thorton Court then looked at two different factors to determine whether an order granting a Rule 12(f) motion was immediately appealable—whether that order removed an issue from the case and prevented the party from litigating the issue. Id. at 304, 705 S.E.2d at 479.

In Tatnall v. Gardner, this Court dismissed without prejudice an appeal in which the appellant appealed an order denying a motion to amend the pleadings to assert a third-party complaint. 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002). Tatnall is distinguishable from this case because the Tatnall circuit court denied a motion to amend,[1] and thus, a different subsection of section 14-3-330(2) applied. Id. at 138, 564 S.E.2d at 379; see also Baldwin Construction Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) (providing the denial of a motion to amend an answer is not immediately appealable). To be immediately appealable, a motion to amend must be an "order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Id. at 137, 564 S.E.2d at 378 (citing § 14-3-330(2)(a)). The appellant also argued the order denying the motion to amend was immediately appealable under section 14-3-330(1) as an order "involving the merits." Id. at 138, 564 S.E.2d at 379. The Tatnall Court concluded an order denying a motion to amend did not prevent "a judgment from being rendered in the action" or involve the merits under section 14-3-330(1) because the appellant could appeal at the conclusion of the action or file a separate, first-party suit for indemnity. Id.

[1] Appellant filed its Amended Answer and Third-Party Complaint as a matter of course under Rule 15(a), SCRCP. Thus, Appellant did not have to move the Court to seek leave to amend like the appellant in Tatnall.

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

Here, the Circuit Court's order struck Appellant's third-party complaint for contractual indemnification against Black Box and several of Appellant's affirmative defenses. See § 14-3-330(c)(2); Mid-State Distributors, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4 (providing an order affects a substantial right when the order "would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense"). This case is immediately appealable under section 14-3-330(2)(c) and Thorton, which looked at two factors to determine whether an order granting a Rule 12(f) motion was immediately appealable—whether that order removed an issue from the case and prevented the party from litigating the issue. Id. at 304, 705 S.E.2d at 479.

The Circuit Court's order removed the issue of the contractual indemnity clause from this case. Appellant has an existing right to enforce the Agreement now in this action to claim BBNS is liable through the parties' Agreement for any fault attributable to Appellant. See id. (finding the order was not immediately appealable because it did not remove an issue from the case). If BBNS is not named as a third-party defendant or Appellant cannot add Black Box to the verdict

form as a non-party under section 15-38-15 of the South Carolina Code, Appellant's share of the liability may be artificially increased,[2] especially when Respondent claimed to be a third-party beneficiary under the Agreement. See id. (finding an order must prevent the party from litigating the issue). Further, if this case proceeds to trial without BBNS and Appellant was forced to file a separate action for contractual indemnity, BBNS may use any ruling in this case related to Appellant's liability as a defense.

Finally, contrary to Respondent's argument in his appealability memorandum to this Court, the effect of the Circuit Court's order was not to deny Appellant the right to amend its answer. See Baldwin, 357 S.C. at 230, 593 S.E.2d at 147 (providing the denial of a motion to amend is not immediately appealable). Appellant amended the Answer as a matter of right and did not have to seek leave of the Court to amend the answer. In addition, the Circuit Court struck Paragraphs 42, 43, and 44 of the Amended Answer, which were defenses originally asserted in the Answer. (R. pp. 42-43, ¶¶ 42-44; R. pp. 53-54, ¶¶ 42-44). Thus, the effect of the Circuit Court's order struck these three defenses and a third-party complaint, which made the order immediately appealable.

II. The Circuit Court Erred in Striking Appellant's Third-Party Complaint for Contractual Indemnification.

A. The Workers' Compensation Act Does Not Render BBNS Immune from Appellant's Claim of Contractual Indemnification.

Following the accident, Respondent received workers' compensation benefits from his employer, Cornerstone. Under the exclusivity provision of the Workers' Compensation Act, Cornerstone is immune from tort liability. Similarly, as an upstream employer, BBNS is also immune from tort liability under sections 42-1-410 and -540 of the South Carolina Code. See

[2] See sections II and IV of this brief for further argument on these issues.

Poch v. Bayshore Concrete Prods./S.C., Inc., 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009). The Order struck Appellant'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." (R. p. 16).

Appellant never disputed BBNS was immune from tort liability. Instead, Appellant has maintained throughout this case that a claim for contractual indemnification is an exception to the general rule that an employer is immune from liability under the Workers' Compensation Act.[3] 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 state appellate courts, has directly addressed this issue several times and found the South Carolina Workers' Compensation Act do not bar a claim of contractual indemnification.

In support of striking Bennett-Hall's Third-Party Complaint against BBNS, the Circuit Court cited 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

[3] The Circuit Court's orders do not address Appellant's argument that a claim for contractual indemnity is an exception to the general rule that an employer is immune from liability. These arguments are still preserved because Appellant raised them in the Response to the Motion to Strike, at the hearing before the Circuit Court, and in the Motion to Reconsider. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). After the Circuit Court issued the Amended Orders without addressing this exception again, Appellant was left with no choice to appeal because Appellant could not file a second Rule 59(e) motion on the same grounds to toll the time to file the Notice of Appeal. See Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).

three state agencies under the Tort Claims Act, and the defendants sought to join other alleged tortfeasors as defendants under Rule 19(a), SCRCP, to allocate fault proportionally among the defendants. 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. The Court concluded the provision in the Tort Claims Act giving defendants the right to a proportionate verdict did not abrogate the plaintiff's right to choose his defendant. See id. (citing to S.C. Code Ann. § 15-78-100(c)).

Relying upon Chester, the Circuit Court concluded BBNS could not be defendant and Plaintiff had the sole right to determine who he sued. (R. p. 261, ll. 13-20; R. pp. 6-10). Again, Appellant has maintained that Appellant (as a third party) and BBNS (as a statutory employer) cannot be joint tortfeasors. See 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 workers' compensation benefits from his employer, he filed a negligence suit against a third party, Phillips Utilities. 362 S.C. at 407, 608 S.E.2d at 427. Phillips Utilities filed for set-off for the amount of Gordon's workers' 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 Gordon Court held that because an employer could not be liable to its employee in tort under the Workers' Compensation Act, Phillips Utilities, the third party, did not have any right to contribution from the employer. Id. at 406, 608 S.E.2d at 426-27.

In Indemnity Insurance Co. of North America v. Odom, the Court reached a similar result when it found an employer and a third party were not "joint tortfeasors" because the liability of the employer arose out of the Workers' Compensation Act and not from any theory of tort. 237 S.C. at 176, 116 S.E.2d at 27. The Court explained, "[t]he 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." Id. Thus, 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.

Several cases from the District Court have addressed this issue and noted the distinction in asserting a third-party claim for contractual indemnification against an employer. 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); (R. pp. 172-175). 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. 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 BET Plan Services 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.

The District Court again addressed this issue last year. Applying BET Plant Services, the District Court 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); (R. pp. 176-179). MST filed a third-party complaint against the plaintiff's employer, East Coast, alleging a claim of equitable indemnity. Id. at *1. The Brayboy Court dismissed the third-party complaint, noting the third-party defendant was immune from liability absent an express agreement to indemnify. Id. at *3. Because MST did not assert an allegation of an express indemnification agreement and in the

absence of an express contractual agreement to indemnify, the Court found East Coast was immune from common law claims for indemnity. Id.

The day after the Circuit Court struck Appellant's Third-Party Complaint in this case, the District Court again applied BET Plant Services and recognized a claim for contractual indemnification is the exception to the general rule that an employer is immune from liability under the Workers' Compensation Act. 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); (R. pp. 180-186). In fact, these three cases from the District Court, all applying the law of South Carolina appellate courts, also follow a majority rule among other state courts that have considered the issue under similar workers' compensation acts.[4]

To be clear, Appellant never disputed Respondent has a right to choose who he names as a defendant. Appellant also does not dispute that it can never be a joint tortfeasor with BBNS, who is an immune, upstream employer, or that the Workers' Compensation Act generally shields an employer from liability by a third party. However, the Circuit Court erred because it failed to recognize a third-party claim for contractual indemnification is an exception to this general rule.

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[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.").

Gordon and Odom 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. Unlike Gordon and Odom, Appellant never sought to add BBNS as a joint tortfeasor. Rather, Appellant filed a third-party claim for contractual indemnification, requesting BBNS to indemnify it if the jury agrees Appellant is entitled to indemnification for BBNS's acts/omission under the Agreement. These are distinct issues, which require a separate analysis as recognized by the District Court in BET Plant Services, Brayboy, and Labor Finders.

Further, this case is distinguishable from Chester because Appellant's third-party complaint does not affect Respondent's right to choose his defendants. The Circuit Court essentially found Chester eviscerated the third-party practice in South Carolina. However, the Court's ruling failed to recognize the procedural difference in the Chester defendant attempting to join other tortfeasors as defendants under Rule 19, SCRCP, and Appellant seeking to file a third-party claim under Rule 14, SCRCP. Third-party claims sound in derivative liability whereby the defendant shifts some or all of its liability to the impleaded party. Rule 14, SCRCP; James F. Flanagan, South Carolina Civil Procedure (2d ed. 1996). Respondent is actually affecting Appellant's right to choose who it names as a third-party defendant when Appellant has a valid third-party claim sounding in derivative liability.

Respondent may not have been able to sue BBNS, but BBNS contracted away its immunity from liability to Appellant when it expressly agreed to indemnify Appellant. Although the Workers' Compensation Act prohibits an employee from waiving the exclusivity provisions of the Act under section 42-1-620, there is nothing in the Act to prevent a waiver of the exclusivity provision by an employer. This case is also similar to BET Plant Services because 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). Thus, the Circuit Court erred in finding the Workers' Compensation Act shields BBNS from liability under an express indemnification agreement.

B. The Contractual Indemnification Claim is Ripe Now.

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

In First General Services of Charleston, Inc. v. Miller, a home renovation company sued a homeowner for failure to pay the outstanding balance owed, and the homeowner filed counterclaims against the home renovation company based on his dissatisfaction with their work. 314 S.C. 439, 441, 445 S.E.2d 446, 447 (1994). In turn, the home renovation company filed a third-party complaint against its subcontractor, alleging claims of indemnity and contribution. Id. The third-party defendant moved to dismiss the third-party complaint, which the circuit court granted. Id. Although the Supreme Court upheld the dismissal of the contribution third-party

claim, the Court found the circuit court had erred in dismissing the equitable indemnification claim. Id. at 444, 445 S.E.2d at 448.

As to the contribution claim, the Court held that claim was not ripe because a third-party complaint must be premised upon an existing right. Id. at 443-44, 445 S.E.2d at 448. The right to contribution from the subcontractor did not exist until the home renovation company made a payment to the homeowner. Id. (citing S.C. Code Ann. § 15-38-20(B) ("T*he 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 claim for contribution was not ripe. Id. at 444, 445 S.E.2d at 448.

However, the third-party claim for equitable indemnification was ripe because that claim already existed. Id. Although the homeowners alleged the home renovation company was negligent, those mere allegations of negligence did not defeat the home renovation company's right to claim derivative liability at such an early stage in the proceedings. Id. Rather, the right to assert a third-party claim for equitable indemnification was created by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Id. at 442, 445 S.E.2d at 448. Unlike the contribution claim, the Court found the equitable indemnification claim was an existing right by operation of law because (1) the subcontractor was responsible for the restoration to the part of the house the homeowners claimed the home renovation company negligently restored and (2) the relationship between a contractor and subcontractor was sufficient to support a claim of equitable indemnity. Id. at 443-44, 445 S.E.2d at 448; see also Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 313, 476 S.E.2d 708, 711 (Ct. App. 1996) (finding a circuit court erred in dismissing a counter-claim

for equitable indemnification as the dismissal was premature when the allegations of the Complaint were not determinative of the right to indemnity).

Here, the Circuit Court found Appellant's third-party complaint was not ripe for adjudication because First General held the statute of limitations for an equitable indemnification claim did not begin to run until after a judgment was entered against the party. (R. p. 7); See id. at 444, 445 S.E.2d at 449 ("As to the indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant."). In First General, the circuit court found the statute of limitations was an alternative grounds for dismissal of the equitable indemnification claim—an entirely different issue than whether the claim was ripe. See id. at 444, 445 S.E.2d at 448 (holding the circuit court also erred in finding the third-party action for indemnity was time barred). In this case, the Circuit Court ignored the fact that First General specifically held the claim for equitable indemnification was ripe. See id. at 443, 445 S.E.2d at 448. The ruling in First General shows the statute of limitations does not affect ripeness. Thus, the Circuit Court erred in relying upon First General to find Appellant's contractual indemnification claim was not ripe by virtue of when the statute of limitations begins to run.

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

A claim for equitable indemnification will be barred if the parties are joint tortfeasors, but that is not an issue with a claim for contractual indemnification. See Lightner v. Duke Power

Co., 719 F. Supp. 1310, 1312 (D.S.C. 1989) ("[A]t least in the absence of a contractual or legal relation between the parties, one who is himself negligent cannot maintain an action for indemnity."); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding the joint tortfeasor rule inapplicable where there is a contractual relationship between the two parties). Further, unlike a claim for equitable indemnification, a party asserting contractual indemnification does not have to prove imputed fault or a special relationship between the parties for the claim to exist. See First General, 314 S.C. at 443-44, 445 S.E.2d at 448. Instead, the right exists through the pre-existing contract.

Appellant's claim for contractual indemnification is ripe because Appellant has an existing right to enforce its contract with BBNS. See Spivey, 367 S.C. at 160, 624 S.E.2d at 438 (providing the appellate courts must only decide actual controversies injuriously affecting the rights of some party to the litigation). Unlike a claim for contribution that does not ripen until a tortfeasor has paid more than his pro rata share of liability, a claim for contractual indemnification is not hypothetical or contingent. See James, 390 S.C. at 193, 701 S.E.2d at 733 (providing there must be a real and substantial controversy appropriate for judicial determination, as distinguished from a contingent, hypothetical, or abstract dispute). If the First General Court found a claim for equitable indemnification was ripe at the time the third-party complaint was filed, it is even more so here when there is an express contract requiring BBNS to indemnify Appellant for BBNS's failure to supervise the temporary workers at the Michelin plant. Id. at 444, 445 S.E.2d at 448.

C. The Third-Party Complaint Will Not Unduly Complicate the Proceedings.

The Circuit Court also struck the third-party complaint, finding the contractual indemnification claim would unduly complicate the tort action. When considering a request to strike a third-party claim, a 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, this Court 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 distinguishable from Beach. Appellant sought to add only one party to the action—BBNS. Moreover, Respondent already asserted BBNS within the context of this litigation by heavily relying on the Agreement in his Complaint. Plaintiff asserted BBNS was the general contractor who was responsible for installing fiber optic cable and supervising the temporary workers from Cornerstone and Appellant. (R. p. 26, ¶ 14). Respondent's causes of action against Appellant rest on the Agreement. (R. pp. 29-31, ¶¶ 29, 32, 40). Respondent claimed (1) he suffered serious injuries as a direct and proximate result of Appellant 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 Appellant and BBNS;

and (3) the Agreement provides Appellant retained the authority to discipline and terminate its employment contract with Sanders. (R. pp. 29-31, ¶¶ 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 Appellant. Unlike Beach, Appellant only raises one cause of action in its third-party complaint—contractual indemnification based on a provision in the Agreement that Respondent asserted and relied upon multiple times in his Complaint. The Agreement was already at issue in this case through Respondent's own pleading. The Circuit Court's ruling has essentially allowed Appellant to assert the Agreement where it benefits him but prevent Respondent from relying upon the Agreement to assert BBNS is primarily liable for Appellant's claims.

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

Paragraph 43 of the Amended Answer requested any actual and/or statutory employer be listed on the verdict form for purposes of allocation of fault under section 15-38-15. (R. p. 43 ¶ 43; R. p. 54, ¶ 43). The Circuit Court found section 15-38-15(D) allowed a defendant to shift blame to a "potential tortfeasor" only, and as an employer immune from tort liability, BBNS could not be a "potential tortfeasor." Accordingly, the Circuit Court found Appellant did not have a justiciable claim for apportionment of fault against BBNS.[5]

[5] The District Court certified the following issue 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?

In South Carolina, a defendant is liable only for the percentage of the damage that he caused if he is less than fifty percent at fault; however, a defendant is jointly and severally liable for the total damage to the plaintiff if he is more than fifty percent at fault. S.C. Code Ann. § 15-38-15(A). The South Carolina Contribution Among Joint Tortfeasors Act ("the Act") requires the jury to specify the amount of damages, determine the percentage that the plaintiff is at fault, and specify the percentage of fault attributable to each defendant. § 15-38-15(C). 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 the South Carolina 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 Circuit Court cited to Odom and Gordon in support of its ruling, but those cases are again inapplicable to this issue. Odom and Gordon 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 as a non-party for purposes of allocation of fault. Even if BBNS was added to the verdict form as a non-party for the purposes of fault allocation only, BBNS would still remain immune from liability.

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] Allowing a jury to allocate

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Machin v. Carus Corp., C/A No. 3:12-02675-JFA (D.S.C. April 24, 2015). The Supreme Court held oral argument in Machin in December 2015, but the Court has not yet issued an opinion in the case. See Appellate Case No. 2015-000901.

[6] See 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); Ocsio v. Fed. Express Corp., 33 A.3d 1139, 1146-47

fault to a non-party employer allows the plaintiff to obtain benefits, without having to prove the employer's negligence, while the employer remains immune from liability. See e.g., Ocsio, 33 A.3d at 1146-47. Further, if employers were immune from fault allocation, the third party would pay for the employer's liability, and the employee would still recover in tort for his employer's fault through the third party. Id.; see also Mack Trucks, 841 So. 2d at 1115.

More than simply mirroring the common law permitting a defendant to use the "empty chair" defense, the statutory language of section 15-38-15(D) 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 plain language of section 15-38-15(D) provides a defendant has the right to assert another tortfeasor, whether or not a party, contributed to the alleged injury or damages. See State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) ("The legislature's intent should be ascertained primarily from the plain language of the statute."). This section is meaningless if the jury cannot allocate a portion of fault to the non-party on the verdict form. Obviously, Appellant and the other named defendants would absorb any fault attributable to a BBNS or any other actual and/or statutory employer in order for the jury to reach a one hundred percent allocation of fault under section 15-38-15(C). Here, Appellant's liability would be artificially increased if BBNS (or Cornerstone) were not added as a non-party to the verdict form for the purposes of fault allocation. See Nance, 817 F.2d at 1180 (noting jurors likely felt compelled to allot 100% of the fault between the plaintiff and third party, the only parties listed on the verdict

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(N.H. 2011); Glenn v. Union Pac. R.R. Co., 262 P.3d 177 (Wyo. 2011); Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107, 1114-15 (Miss. 2003); Keith v. United States Fid. & Guar. Co., 694 So. 2d 180, 182 (La. 1997); Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996); Allied-Signal, Inc. v. Fox, 623 So. 2d 1180, 1182 (Fla. 1993); Brown v. Boyer-Washington Blvd. Assoc., 856 P.2d 352, 354 (Utah 1993); DaFonte v. UpRight, Inc., 828 P.2d 140 (Cal. 1992); Dietz v. General Elec. Co., 821 P.2d 166, 171 (Ariz. 1991); Bode v. Clark Equip. Co., 719 P.2d 824, 827 (Okla. 1986); Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365 (Haw. 1985); Powers v. Kansas Power & Light Co., 671 P.2d 491, 498-99 (Kan. 1983).

form, even if they deemed the employer to be at least partially responsible for the accident). Further, any employer would be just as immune from liability because the allocation of fault would not be to that employer's detriment. Accordingly, the Circuit Court erred in striking Paragraph 43 of the Amended Answer.

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

In Paragraph 42 of the Amended Answer, Appellant pled application of section 42-1-580 and the right to contribution or indemnity against any actual and/or statutory employer for any recovery by Respondent against Appellant and the other defendants. Paragraph 44 of the Amended Answer pled the right to a proportional credit or offset from any actual and/or statutory employer pursuant to section 15-38-15(E).

The Circuit Court prematurely struck Paragraphs 42 because Appellant properly pled the right to indemnity, contribution, and a proportional credit or offset under section 15-38-15(E). As discussed in this brief, the Workers' Compensation Act does not insulate an employer from liability under an express indemnification agreement. See BET Plant Servs., 941 F. Supp. at 56 ("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"). Thus, Appellant has a right to indemnity under Paragraph 42 of the Amended Answer.

Further, the Circuit Court erred in striking paragraph 44 of the Amended Answer, which requested a credit or offset pursuant to section 15-38-15(E), by relying upon Gordon, 362 S.C. at 406-07, 608 S.E.2d at 427. Section 15-38-15 provides a "setoff from any settlement received

from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability . . . ." Gordon was decided approximately six months before the enactment of section 15-38-15(E). Further, Gordon is limited to a claim of contribution, not Appellant's claim for contractual indemnity. 362 S.C. at 406-07, 608 S.E.2d at 427. Thus, Gordon does not speak to the allocation of fault under section 15-38-15, nor does it address the right to a setoff.

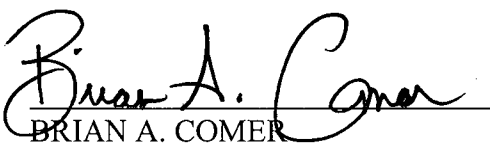
CONCLUSION

For these reasons, Appellant Bennett-Hall Co., Inc. respectfully requests this Court reverse the Circuit Court's Amended Order Striking Portions of the Amended Answer of Defendant Bennett-Hall Co. Inc.

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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