SC98227

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL. WOODCO, INC.

Relator

vs.

HONORABLE JENNIFER PHILLIPS, JUDGE OF THE SIXTEENTH JUDICIAL CIRCUIT IN THE COUNTY OF JACKSON DIVISION 12

Respondent,

Writ Proceeding from the Circuit Court of Jackson County, Missouri
Honorable Jennifer M. Phillips, Circuit Judge
Case No. 1816-cv-10399

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement of Relator as permitted by Rule 84.04(b).

INTRODUCTION

The case before the Court presents a unique issue and appears to be one of first impression. In pertinent part this case arises out of claims related to alleged construction defects in the installation of brick, synthetic stone, and cast stone details of the façade of a building known as Gardens at Jackson Creek ("the Project"). Both Haren Laughlin and BSP Masonry were subcontractors of Relator. BSP Masonry's scope of work was for construction of the façade elements at issue. BSP Masonry's subcontract imposed upon it additional contractual obligations including, but not limited to, being solely responsible for the means and methods it utilized to perform its work, performing work in a workmanlike manner and in conformity with the plans and specification, and being solely responsible for its own quality control and quality assurance, Despite BSP Masonry's subcontractor which made it solely responsible for its own quality control and quality assurance Relator alleges Haren Laughlin also had a contractual obligation to supervise BSP Masonry and perform quality control on BSP Masonry's work on the Project.[1] As a result it is alleged these two subcontractors of Relator had competing contractual obligations for quality control and quality assurance of the brick, synthetic stone and cast stone details of the façade of the Project, albeit arising from two separate subcontracts with Relator. The unique question, therefore, is whether both subcontractors with competing obligations for

[1] [1] Haren Laughlin expressly denies its subcontract obligated it to supervise BSP Masonry as alleged by Relator and that any responsibility for supervision and quality control over the work of BSP Masonry it had was transferred to Relator very early in the Project. However, Haren Laughlin's defenses are not germane to this appeal and will not be detailed in this brief.

quality control arising out of separate subcontracts are necessary parties to the lawsuit pursuant to Rule 52.04.

Plaintiff's claims against Haren Laughlin are so intertwined with the work of BSP Masonry they cannot be untangled. In order for Relator to prevail on the claims it asserts in the Second Amended Petition against Haren Laughlin, Relator must prove BSP Masonry breached it subcontract by failing to construct the masonry elements of the Project façade in a workmanlike manner and in conformity with the plans and specifications provided by WSKF. Relator must prove BSP Masonry breached its contractual obligation to be solely responsible for choosing improper means and methods of construction and that it failed to perform its work in a workman like manner. Most significantly, Relator must prove BSP Masonry breached its contractual obligations to be solely responsible for its own quality control.

"Rule 52.04 is the same as Rule 19 of the Federal Rules of Civil Procedure with references to jurisdiction and venue eliminated." Mo. Sup. Ct. R. 52.04 Committee Note - 1974 see also *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo banc 1976). Fed. R. Civ. P. 19 stresses the desirability of joining those parties in whose absence the court would be obliged to grant only partial relief to the parties. See Fed. R. Civ. P. 19 advisory committee notes 1966 Amendment. The use of the plural "parties" indicates the rule is intended to benefit all parties to the action, not to merely benefit the Plaintiff. "The interests being furthered [by Fed. R. Civ. P. 19] are not only those of the parties, but also the public in avoiding repeated lawsuits on the same essential matter." *Id*. Where multiple parties have competing contractual obligations, and the alleged breach of those competing obligations

are the basis of Plaintiff's alleged damages, justice and equity are best served by making all such parties necessary and litigating the issues in one lawsuit.

Relator relies on traditional Missouri pleading rules that allow the Plaintiff to choose the parties to the lawsuit, however when "the reason for a general rule does not apply to a particular factual situation, the court should not blindly follow such rule for no more justifiable reason than that it is ancient and traditional." *Westerhold v. Carroll*, 419 S.W.2d 73, 79-80 (Mo. Div. 2 1967).

Traditional third-party practice is not an alternative in this case because of Relator's own breach of the Prime Contract and negligence in failing to require BSP Masonry, the entity deemed necessary by the trial court, to maintain the liability insurance coverage for its work on the project. As a result of Relator's breach of the Prime Contract and negligence, Moses Davila d/b/a BSP Masonry ("BSP Masonry") are effectively judgment proof and cannot be located. Relator's inability to locate its subcontractor BSP Masonry and its subcontractor's lack of insurance coverage are the reason Relator didn't sue BSP Masonry. Rigidly applying the traditional rules relied upon by Relator in seeking a writ of prohibition would allow Relator to shield itself from in this action from its own breach of contract and negligence in this regard. Requiring the defendants to rely on traditional third-party practice to pursue indemnity from Relator's subcontractor where Relator allowed its subcontractor work without having insurance coverage required by its subcontract for its work shifts the burden of Relator's breach of contract and negligence to defendants and is wholly inconsistent with equity and good conscience and contrary to the purpose of Rule 52.04.

COUNTERSTATEMENT OF FACTS

On August 30, 2012, Woodco, Inc. ("Relator") entered into a construction contract for a United States Department of Housing and Human Development project located in Independence, Missouri known as Gardens at Jackson Creek ("the Project"). The contract was between Relator as the general contractor and the owner of the project Jackson Creek Partners, LLC. ("Construction Contract") (*Id.*) The Construction Contract identified the contract documents which included The General Conditions of the Contract for Construction, AIA Document A201-2007, project drawings prepared by the project architect defendant Williams, Spurgeon, Kuhl & Freshnock Architects ("WSKF"), as well as additional documents not relevant to this dispute. The Construction Contract along with the construction documents are collectively known as the prime contract for the project ("the Prime Contract")

The General Conditions of the Contract for Construction, AIA Document A201-2007 is a standard form contract created by the American Institute of Architects and is commonly used throughout the construction industry ("General Conditions").[2]

Article 5 of the General Conditions defines subcontractor as "person or entity who has a direct contract with the Contractor to perform a portion of the [construction] at the site." Section 5.3 of the General Conditions of the Prime Contract required Relator to

[2] A copy of AIA Document A201-2007 prepared for the Gardens at Jackson Creek has been requested in discovery, but not produced. It is not clear whether a copy of AIA Document A201-2007 identifying the parties to the contract was created for the Gardens of Jackson Creek despite being identified as a contract document.

require each of its subcontractors by an appropriate subcontract to be bound to it by the by terms of the Prime Contract, and to assume toward Relator all the obligations and responsibilities which the Relator assumed toward the Owner and WSKF. Among these obligations and responsibilities Relator assumed toward Owner, was that it would maintain adequate insurance coverage for the duration of the project. Section 5.3 of the General Conditions required Relator's subcontractors to assume the same obligations and responsibilities with regard to insurance coverage.

As the general contractor Relator was responsible to the owner of the project to vet and hire professional subcontractors. (Deposition of Woodco, Inc., p. 18, l. 18 – 24 Appendix A001.) Relator hired BSP Masonry of Snook, Texas as the masonry subcontractor. Moses Davila and Elisa Judith Saenz formed an entity called BSP Masonry, LLC in the State of Texas on March 23, 2010. (Appendix A002.) BSP Masonry, LLC lost its corporate charter in its home state of Texas on February 10, 2012, prior to work commencing on the project and was operating as BSP Masonry at the time it signed its subcontract with Relator and performed work on the Project. (Appendix A005.)

Relator's project manager Gilman Blood negotiated and drafted the subcontract with all of Woodco's subcontractors including BSP Masonry. (Deposition Gilman Blood, p. 16, l. 23 – p. 17, l. 23 Appendix A006; *see also*, Depo. Gilman Blood, p. 44, l. 3-18 Appendix A008.) The scope of work in BSP Masonry's subcontract with Relator included, specifically but not exclusively, installation of brick, synthetic stone, and cast stone details of the façade of the Project. (BSP Subcontract Relator's Appendix A9.) With respect to

this scope of work, BSP Masonry's subcontract, drafted by Relator, made BSP Masonry solely responsible for the means and methods it utilized to complete its scope of work,

> 4.1.1 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict delay in or interference with the Work of the Contractor, other subcontractors and the Owner. ***The Subcontractor shall be solely responsible for its means, methods and techniques in pursuing and completing the Work.***

(BSP Subcontract Relator's Appendix A13) (Emphasis added.)

The BSP Masonry subcontract with Relator made BSP Masonry solely responsible for its own quality control and quality assurance, and solely responsible for assuring its work complied with the plans and specifications provided by WSKF.

> 4.1.11 The Subcontractor ***shall be responsible for its own quality control and quality assurance and is solely responsible for assuring that its work complies with the Subcontract Documents***. Subcontractor should neither expect nor rely on Contractor to perform quality control work or quality assurance of Subcontractor's work.

(BSP Subcontract Sec. 4.1.11, Relator's Appendix A14) (*Emphasis added*.)

Gilman Blood, Relator's project manager who drafted BSP Masonry's subcontract for the Project confirmed Section 4.1.11 of the subcontract means exactly what it says, "[t]hat the subcontractor is responsible for its own quality control." (Depo. Gilman Blood,

p. 42, l. 5 – p. 43, l. 6; p. 44, l. 3 -18 Appendix A085.) The subcontract allowed Relator and WSKF, but no other subcontractor, to reject work performed by BSP Masonry. Specifically, the BSP Masonry subcontract made no provision for Haren Laughlin to reject the work.

> 4.1.6 The Subcontractor agrees that the Contractor and Architect will each have the right to reject Work of the Subcontractor which does not conform to the Subcontract Documents.

(BSP Subcontract Sec. 4.1.6, Relator's Appendix A13).

The BSP Masonry subcontract further required BSP Masonry to warranty the work performed on the Project "will be free from defects and that the Work will conform to requirements of the subcontract documents." (BSP Subcontract Sec 4.5, Relator's Appendix A13.) And, the BSP Masonry subcontract obligated BSP Masonry to indemnify and hold harmless Relator, owner and architect "to the fullest extent permitted by law from and against any claims, damages, losses and expenses . . . arising out of or resulting from performance of Subcontractor's Work under [the subcontract] . . . " (BSP Subcontract Sec 4.6 Relator's Appendix A13.) Relator paid BSP Masonry approximately $565,700 for the work BSP Masonry performed on the Project. (BSP Subcontract Sec. 10 Rel. App. A22.)

Relator filed suit against Haren & Laughlin Construction, Co., ("Haren Laughlin") for both breach of contract and tort based on alleged breaches of Relator's subcontract with Haren Laughlin. Two of the three specific claims asserted against Haren and Laughlin in Relator's Second Amended Petition are based upon BSP Masonry's alleged failures to

construct the brick, synthetic stone, and cast stone details of the façade of the Project in accordance with the Project plans and specifications. (See Relator's Brief, p. 3, See also Second Amended Petition, Ex.10, ¶¶ 30(b), 30(c), 42, 45, 46, 50, 51, 54,-58.)[3]

Haren Laughlin's subcontract on the Project included the following scope of work, Work Description:

> Section 01050-03 Project Management; Section 01100-03 Superintendent: Provide an experienced Project Superintendent and Project Manager throughout the entire duration of the project for coordination of subcontracts and HUD. Project Superintendent will office at the jobsite and provide full time supervision and coordination throughout the course of construction including subcontractor scheduling and coordination, City of Independent Inspections, material testing, safety and quality control.

(See Haren Laughlin Subcontract, Appendix A012.)

Plaintiff now asserts claims against Haren Laughlin based on alleged failure to supervise BSP Masonry and perform appropriate quality control of BSP Masonry's work, even though ***Relator's subcontract with BSP Masonry made these obligations the sole contractual obligation of BSP Masonry.*** (BSP Subcontract Sec 4.1.10.) In this regard,

[3] Paragraph 30 of the Second Amended Petition sets forth four specific conditions present at the Project which are the basis of claims against all defendants. Relators has sued all design professionals, subcontractors and material suppliers allegedly responsible for these conditions except its subcontractor BSP Masonry.

with respect to BSP Masonry's work, BSP Masonry and Haren Laughlin allegedly had competing contractual obligations for "quality control" for BSP Masonry's scope of work.

However, neither the Haren Laughlin nor the BSP Masonry subcontracts gave Haren Laughlin the right or duty to control the means and methods of BSP Masonry's work as Relator's subcontract with BSP Masonry made BSP Masonry solely responsible for the means and methods of performing its work. (BSP Subcontract Sec 4.1.1 Rel. App. A13.) Moreover, Haren Laughlin had no right to reject the work of BSP Masonry, as the subcontract between Relator and BSP Masonry gave the right to reject work exclusively to Relator and WSKF. (BSP Subcontract Sec. 4.1.6 Rel. App. A13) Therefore, while the contractual obligations of Haren Laughlin and BSP Masonry with respect to supervision and quality control were competing, in reality Haren Laughlin's ability to supervise or perform quality control on BSP Masonry were virtually nonexistent as a result of the terms and conditions of BSP Masonry's subcontract with Relator. (See generally BSP Subcontract.)

The terms and conditions of BSP Masonry subcontract were not merely recitals. Relator entered into the subcontract with BSP Masonry for construction of the masonry components of the façade because it relied on BSP Masonry to perform its work in a good and workmanlike manner,

Q: And you would agree with me that the company that was responsible for performing its work in a good and workmanlike manner was BSP, right?

A: **In regard to the masonry work.**

Q: That's correct?

A: Yes.

Q: That's why Woodco entered into a contract with BSP, because it was relying on BSP to perform its work in a good and workmanlike manner. Correct?

A: Yes, sir.

Q: And it was relying on BSP to follow the plans and specifications for the project, because that's part of doing your work in a good and workmanlike manner, correct.

A: Yes.

(Deposition of Woodco, Inc., p. 319, l. 22 – 320, l. 3 Appendix A032.)

Moreover, Relator knew BSP Masonry was in the best position to make sure it was following the subcontract documents and constructing the exterior masonry of the façade correctly. (Depo. Woodco, Inc., p. 327, l. 23 – p. 328, l. 2 Appendix A034.)

Despite BSP Masonry having the contractual obligation to perform the work on the façade of the Project which is the subject of the lawsuit and having contractual obligations to supervise its own work, select its own means and methods of completing the work and performing its own quality control and quality assurance Relator has sued Haren Laughlin based upon the alleged contractual obligations of Haren Laughlin to supervise BSP Masonry and provide quality control for work performed by BSP Masonry.

BSP Masonry had a nearly identical contractual obligations of supervision and quality control of its own work, and was in the best position to perform its work in a workmanlike manner and to conform to the contract document. To put a finer point on it, Relator seeks to leave Haren Laughlin holding the bag for BSP Masonry's breach of contract and negligence because BSP Masonry has no insurance and Moses Davila can't be found, ***a condition Relator created by its own breach of the Prime Contract and negligence.***

Q: And so under this part what we know is that BSP Masonry agreed to defend, indemnify and hold harmless Woodco from any problems with its work, fair to say?

A: Yes.

Q: And what we know is in this case that hasn't happened. You haven't sued them, have you?

A: **No.**

Q: And isn't it true that you haven't sued them because they are out of business and they don't have any insurance.

A: **Well, we've determined that they don't have any insurance. I can't imagine him being completely out of business, he's doing something somewhere, but, you know, trying to find him has been hard to do. We've had – you know, there's been all kinds of people, besides Woodco, looking for him and trying to find him.**

(Deposition of Woodco, Inc., p. 340, l. 17 – 341, l. 10 Appendix A036) (emphasis added).

Despite Relator sending its subcontractors a document detailing certificate of insurance requirements with an example of how the certificate of insurance was to be completed, Relator accepted a certificate of insurance of insurance from BSP Masonry that on its face identified no insurance carrier as providing the required coverages. (See, Woodco Certificate of Insurance Requirements, Appendix A038; see also BSP Masonry Certificate of Insurance, Appendix A040.)

POINT RELIED ON

Relator is not entitled to a writ prohibiting the Trial Court from ordering that BSP Masonry and Moses Davila are necessary parties pursuant to Missouri Rule 52.04 because Haren Laughlin cannot be afforded complete relief, and disposition of the action in BSP Masonry's absence will leave Haren Laughlin subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations and imposing undue hardship on Haren Laughlin potentially subjecting it to excessive liability which is wholly inconsistent with equity and good conscience.

ARGUMENT

I. Relator is not entitled to a writ prohibiting the Trial Court from ordering that BSP Masonry and Moses Davila are necessary parties pursuant to Missouri Rule 52.04 because Haren Laughlin cannot be afforded complete relief, and disposition of the action in BSP Masonry's absence will leave Haren Laughlin subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations and imposing undue hardship on Haren Laughlin potentially subjecting it to excessive liability which is wholly inconsistent with equity and good conscience.

Standard of Review

"'This court will "affirm a trial court's decision under Rule 52.04 unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it misinterprets or misapplies the law [citations omitted]." *Dolphin Capital Corp. v. Schroeder*, 247 S.W.3d 93, 97 (Mo. App. W.D. 2008). "The pleadings are liberally construed and all alleged facts are accepted as true and construed in the light most favorable to the pleader." *Id*. citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 409-10 (Mo. App. W.D. 2000).

"Under Rule 52.04, if the Court determines that a necessary party has not been joined in the action, then the 'court shall order that the person be made a party.' Rule 52.04(a). "If that is not feasible to join the necessary party, then "the court shall determine" whether the party is indispensable – that is whether in 'equity and good conscience the action should proceed with the necessary party or be dismissed.' Rule 52.04(b). *ADP*

Dealer Service Group v. Carroll Motor Co., 195 S.W.3d 1, 9-10 (Mo. App. E.D. 2005). Respondent correctly determined BSP Masonry, LLC, Elisa Judith Saenz d/b/a BSP Masonry and Moses Davila are necessary parties to this action. (Orders, Oct. 25, 2019 Relator's Appendix A1 –A6.) A determination of whether these persons are indispensable parties has not been made as Relator filed its Application for Writ of Prohibition in the Court of Appeals before such a determination was made. The standard of review for a determination of whether a necessary party is an indispensable party pursuant to Rule 52.04(b) is an abuse of discretion standard. See *Baker Group, L.C. v. Burlington Northern and Santa Fe Ry. Co.*, 451 F.3d 484, 490 (8th Cir. 2006.)

a. BSP Masonry and its owners are a necessary parties because Haren Laughlin cannot be accorded just relief in their absence in that Relator's claims against Haren Laughlin are wholly derivative of allegedly defective work performed by BSP Masonry.

Moses Davila and BSP Masonry (collectively "BSP Masonry") are necessary parties to this litigation pursuant to Rule 52.04 in that Haren Laughlin cannot obtain complete relief among those already parties which leaves Haren Laughlin subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations if the litigation proceeds without BSP Masonry as a direct party. Specifically, Haren Laughlin has been sued because BSP Masonry (1) failed to perform its contractual obligations to Relator to construct the masonry elements of the façade of the Project in a good and workmanlike manner; (2) failed to build the Project according to the plans

and specifications; and (3) failed to exercise adequate and effective quality assurance and quality control over the performance of its Work.

Relator's claims asserted against Haren Laughlin are wholly derivative of BSP Masonry's failure of to perform its contractual obligations to Relator. Moreover, because Haren Laughlin has no contractual privity with BSP Masonry or Moses Davila it has no effective means of obtaining contractual indemnity against BSP Masonry. Nor does Haren Laughlin have a clear path to a claim for equitable indemnity under Missouri law. Missouri law does create some equitable causes of action for indemnity, however, those causes of action require a relationship between the indemnitor and the indemnitee that does not appear to exist between Haren Laughlin and BSP Masonry. See *American Nat. Property and Cas. Co. v. Ensz & Jester, P.C., 358 S.W.3d 75 (Mo. App. W.D. 2011).*

This leaves Haren Laughlin at "substantial risk of incurring an . . . inconsistent obligation" by reason of the causes of action Relator asserts against it. As to Haren Laughlin, BSP Masonry fits the definition of a necessary party pursuant to Rule 52.04 and must be made a party to this lawsuit. Specifically, there can be no finding of liability against Haren Laughlin without first making a finding of liability against BSP Masonry.

Supreme Court Rule 52.04 is intended to prevent unjust adjudications. Moses Davila and BSP Masonry are necessary parties without whom any adjudication in this

case would be unjust. It is clear from Realtor's deposition testimony it believes BSP Masonry was responsible for its own quality control and was in the best position to determine whether it was following the plans and specifications when it performed its scope of work.

Q. And you would agree with me that the company that was responsible for performing its work in a good and workmanlike manner was BSP, right?

A. In regard to the masonry work.

Q. That's correct?

A. Yes.

Q. That's why Woodco entered into a contract with BSP, because it was relying on BSP to perform its work in a good and workmanlike manner. Correct?

A. Yes.

(See Depo. Woodco, p. 319, l. 22 through p. 320, l. 3 (Appendix A032; see also BSP Subcontract, section 4.1.10). In light of this clear and unequivocal testimony of Relator as to the party at fault for the alleged failures in the construction of the exterior masonry façade a verdict which holds Haren Laughlin financially responsible for the alleged negligence of Relator's subcontractor subjects Haren Laughlin to double, multiple or inconsistent obligations in this action. A verdict against Haren Laughlin would likely result in a verdict for both the damages for the negligence and breach of contract of Relator's subcontractor BSP Masonry ***AND*** the damages for whatever negligence or breach of contract the jury finds against Haren Laughlin for its discreet acts. The

damages alleged against Haren Laughlin are so intertwined with the damages for the negligence and or breach of contract by BSP Masonry that they cannot be separated.

Finally, the subcontract between BSP Masonry and Relator and the subcontract between Relator and Haren Laughlin incorporate the Prime Contract between Relator and the Owner. The claims alleged by the Owner against Relator which form the basis for Relator's claims against Haren Laughlin, necessarily arise out of the obligations set forth in the Prime Contract. Missouri law provides that all parties who have joint obligations pursuant to a contract must be parties to the litigation. *Justus v. Webb*, 634 S.W. 567, 570 (Mo. Ct. App. 1982). BSP Masonry is a necessary party to this.

b. Allowing Relator to shield itself from its own negligence in failing to ensure BSP Masonry had insurance coverage for its work on the Project by shifting the burden to defendants to locate and serve Relator's missing and very likely judgment proof subcontractor is contrary the public policy underlying Rule 52.04.

Rule 52.04(a) states in pertinent party "[a] person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, and (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

"Rule 52.04 is the same as Rule 19 of the Federal Rules of Civil Procedure with reference to jurisdiction and venue eliminated." Rule 52.04 Committee Note -1974; See also, *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo *banc* 1970). It can be presumed in adopting Rule 52.04 this Court knew of Fed. R. Civ. P. 19, its genesis, the advisory committee notes to the rule and the federal cases interpreting it. It is appropriate to use federal precedents as a guide to the application of Rule 52.04. *Id*.

The purpose of [Fed. R. Civ. P.] 19 is to "permit joinder of all materially interested parties to a single lawsuit so as to protect interested parties and avoid waste of judicial resources." *Moore v. Ashland Oil, Inc*., 901 F.2d 1445, 1447 (7th Cir. 1990) see also *Bank of America, N.A. v. UMB Financial Services, Inc*. 2009 WL 10672210 (W.D. Missouri 2014); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111, 88 S.Ct. 733, 739, 19 L.Ed.2d 936 (1968) (Fed. R. Civ. P. 19 expresses in part "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.") "The interests that are being furthered [by Rule 19] are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." FED. R. CIV. P. 19 Advisory Comm. Notes to 1966 amendment.

Under Rule 52.04(a)(2)(ii) "a person shall be joined in the action if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may leave any of the persons already parties to the action subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." The concept of an indispensable party is grounded in equity. The classic test for determining indispensability in the federal courts

was set out one hundred and forty-five years ago by the United States Supreme Court in *Shields v. Borrow*: indispensable parties are "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." 58 U.S. 130, 139 (1854). "A further reason for finding that a person is indispensable to the trial of a cause has been found where his absence may impose undue hardship on the defendant. Inconsistent determinations of law or fact in successive suits can at times subject the defendant to excessive liability, a result which can be averted by holding the potential litigants indispensable in the first suit." Indispensable Parties in Federal Court, 65 Harvard Law Review 1050, 1054, (April 1952).

c. The traditional Missouri rule which allows plaintiff to select its defendants should not be so rigid that in a unique situation of multiple entities having competing contractual obligations the Plaintiff is allowed to sue one but not both of its subcontractors having such competing obligations when the rigid application of the rule allows plaintiff to shield itself from its own breach of contract and negligence.

Relator has made traditional third party practice of the defendants to this lawsuit adding BSP Masonry as a third-party defendant a practical impossibility by its own negligence and breach of the Prime Contract of failing to require BSP Masonry to have insurance coverage for its work on the project. See Ex 16; see also Ex. 4. Relator's failure to require BSP Masonry to have insurance coverage and its inability to find BSP Masonry's

owners are the sole reasons Relator did not include BSP Masonry as a party defendant when it filed suit. (Exhibit 14.) Relator now attempts shield itself from its own breach of the Prime Contract and negligence by asking this court to rigidly apply traditional Missouri law which allows a plaintiff to choose the defendants and require defendants to engage in the futile attempt to file a third-party action against Relator's subcontractor BSP Masonry. Applying these traditional rules in this rigid manner ignores the equitable basis of Rule 52.04 and would result in an outcome which is wholly inconsistent with equity and good conscience. See, *Shields v. Borrow*, 58 U.S. at 139.

First, Plaintiff controls the pleadings. Nothing prevents Plaintiff from dismissing its tort claims tomorrow, in which case there is no joint and several liability to rely on as a basis for this Court to conclude BSP Masonry is not a necessary party. Even if defendants are able to find and obtain service of process on Mr. Davila or Ms. Saenz the economic loss doctrine likely prevents them from maintaining a third-party tort claim against them. See *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619, 628 (Mo. App. E.D. 2014. ("'The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature.'[citation omitted].")

Second, Relator was the general contractor on the Project and held the subcontract with BSP Masonry. (Ex. 8) Therefore, none of the defendants to this lawsuit have privity of contract with BSP Masonry on which to base a claim for breach of contract or contractual indemnity. See, *Id.* at 628 (The Court of Appeals affirmed order granting summary judgment based on lack of privity of contract between the parties.)

Relator relies on Missouri case law which stand for the proposition that a party is only necessary if it is a party to the contract in controversy. (Relator's Brief, p. 7-9.) However, this rule does not contemplate the unique circumstances present in this case in which Relator drafted its subcontract in such a way that two of its subcontractors had competing contractual obligations in separate contracts where the damages for the alleged breach of these of nearly identical contractual obligations is the basis of the lawsuit.

These general rules relied upon by Relator to shield itself from its own negligence in failing to assure its subcontractor had insurance coverage for its work on the Project do not apply to this unique situation. This Court has in the past has refused to apply its traditional rules when the rule was not applicable to the case before it. *Westerhold v. Carroll*, 419 S.W.2d 73, 80 (Mo. Div. 2 1967). In determining traditional rules of privity of contract did not apply the case before it, this Court stated, "'[w]hile we agree that ancient rules developed in the crucible of experience should not lightly be casted aside, we are also of the opinion that when reason for a rule ceases to exist, or when the reason for the general rule does not apply to a particular factual situation, the court should not blindly follow such a rule for no more justifiable reason than that it is ancient and traditional.'[citation omitted]." *Westerhold v. Carroll*, 419 S.W.2d at 79-80.

In *Westerhold*, plaintiff, the owner of a construction company, was an indemnitor on a performance bond for the construction of a church. *Id*. at 74. The contract between the contractor and the church required the project architect to certify the work had been actually performed and materials actually furnished before payment was made to contractor. *Id*. At various times during construction architect provided owner with false

certifications resulting in overpayment to the contractor. *Id*. at 74-75. The contractor defaulted and was not able to complete the church project. *Id*. at 75. At the time of the default the contractor had been paid 90% of the contract price when substantially less than 90% of work had been performed and substantially less than 90% of materials had been furnished. *Id*. at 74.

The church made demand on the surety to complete and carry out the terms of the construction contact. *Id*. at 75. The surety completed the church and in doing so incurred approximately $95,000 of expense. *Id*. The surety then made demand on the plaintiff as indemnitor of the performance bond, and plaintiff settled the claim for approximately $20,000. *Id*. Plaintiff in turn sued the architect based on allegations defendant was negligent, careless, and wrongfully performed his duties as architect in certifying work performed and materials furnished. *Id*. This Court construed Plaintiff's argument to be that as indemnitor of the performance bond he was entitled to the surety's subrogation rights against the architect. *Id*. at 76. The architect filed a motion to dismiss arguing in part he was not a party to the performance bond contract, and in the absence of privity of contract he had no legal duty to the surety to exercise ordinary care in executing the certificates of completion. *Id*. Therefore, the architect reasoned, in the absence of a duty to the surety the surety suffered no damage which Plaintiff could subrogate against him. *Id*.

This Court reviewed the origins of the rules of contractual privity and acknowledged its application in the case before it. *Id*. at 77-79. However, this Court determined that under the unique facts of the case the reason for the rule of privity did not apply, and allowed plaintiff to sue architect to subrogate the rights of the surety. *Id*. at 79-80.

Here, as in *Westerhold*, the reasons for the general rules relied upon by Relator do not apply. Surely, the reasons for these general rules are not to allow Plaintiff to shield itself from its own negligence by requiring defendants in the action to pursue third-party claims against Relator's subcontractor where the Relator itself has deemed pursuing clams against its subcontractor futile. (See, Ex. 13.) The general rules relied upon by Relator should not be rigidly adhered to in this case to deny defendants to this lawsuit justice.

CONCLUSION

BSP Masonry, Moses Davila and Elisa Judith Saenz d/b/a BSP Masonry are necessary parties to this lawsuit. In this unique case where there are multiple parties with nearly identical contractual obligations expressed in multiple contracts with respect the alleged negligence and breach of contract which Relator alleges caused the damages it seeks. The general pleading rules relied upon by Relator do not apply where the application of those rules allows Relator to shield itself from its own negligence. Rule 52.04 is based on Fed. R. Civ. P 19 which is a rule grounded in equitable considerations. The Respondent's determination that BSP Masonry and its owners are necessary parties serves the interests of equity, avoids judicial waste, eliminates the possibility of inconsistent determinations of law or fact in successive law suits, and protects the defendants to the action from the possibility of double, multiple or inconsistent obligations. Traditional third-party practice is a practical impossibility as a result of Relator's own negligence in failing to require BSP Masonry to maintain insurance. Respondent's determination BSP Masonry and its owners are necessary parties should be affirmed, and Relator's application for a writ of prohibition denied.

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06

I hereby certify, pursuant to Rule 84.06(c), that this Brief for Respondent complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that that this brief contains 6,635 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by Microsoft Word 2010 word-counting function.

/s/ Peter G. Collins

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April 2020, pursuant to Rule 103.08, I electronically filed the forgoing Brief of Respondent with the Clerk of the Court using the Court's electronic filing system, which will send notice of the electronic filing to all counsel of record. I have also served a copy of the brief upon Respondent Hon. Jennifer M. Phillips, Circuit Judge by email to her judicial administrative assistant Jo Saputo at jsaputo@courts.mo.gov and to her law clerk Erica Frank at erica.frank@courts.mo.gov.

/s/ Peter G. Collins