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 RELATOR WOODCO, INC.

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JURISDICTIONAL STATEMENT

On November 21, 2019, relator Woodco, Inc. filed a Writ of Prohibition requesting this Court to issue a writ of prohibition ordering Respondent to dismiss and remove BSP Masonry and Moses Davila as defendants because they are not necessary parties. On February 4, 2020, this Court issued a preliminary writ.

This Court has jurisdiction over these proceedings under Mo. Const. Art. V, §4.1, which provides the Court authority to "issue and determine original remedial writs."

INTRODUCTION

It is a longstanding principle in Missouri that a plaintiff may choose who to sue and upon what theories the plaintiff chooses. *See Burg v. Dampier*, 346 S.W.3d 343, 360 (Mo. App. 2011) (holding that "a plaintiff may sue all or any of the joint or concurrent tort-feasors" which plaintiff desires); *see also Wagner v. Bondex International, Inc.*, 368 S.W.3d 340, 359 (Mo. App. 2012) (holding that plaintiffs had the right to sue and seek settlement from the tortfeasors of their choosing). Rule 52.04 sets forth the criteria by which a party not originally sued by the plaintiff can be considered a "necessary party," thereby creating a legal exception to this longstanding principle. However, none of the criteria set forth in Rule 52.04 apply to the facts of this case.[1] Missouri appellate courts have narrowly interpreted a "necessary party" to be "one who is so vitally interested in the subject matter that a valid judgment cannot be effectively rendered without their presence." *Health Care Fund of Greater Kansas City v. HM Acquisition, LLC*, 507 S.W.3d 646, 659 (Mo. App. 2017). Here, Respondent erroneously ordered the masonry subcontractor and its owner to be added as party defendants, even though they are not "necessary parties" to this action. In so doing, Respondent ignored the longstanding legal principle that Relator, as plaintiff, may choose who it wants to sue.

[1] Rule 52.04(b) specifically discusses the criteria for an "indispensable party." The issue of whether a party is an "indispensable party" is not ripe until it is determined that the party is a "necessary party" and is not subject to a circuit court's jurisdiction. *See Pauli v. Spicer*, 445 S.W.3d 677 (Mo. App. 2014); *Sterling Inv. Group, LLC v. Bd. of Managers of the Brentwood Forest Condo Ass'n*, 402 S.W.3d 95, 98 (Mo. App. 2013). Because BSP Masonry and Moses Davila are not "necessary parties" no determination as to whether they are "indispensable parties" needs to be made. *Heitz v. Kunkel*, 879 S.W.2d 770, 771 (Mo. App. 1994) (holding "[a] party must first be found necessary to a lawsuit before we consider whether that party is indispensable").

STATEMENT OF FACTS

In March 2011, Jackson Creek entered into a contract ("Design Contract") with defendant Williams Spurgeon Kuhl & Freshnock Architects ("WSKF") for the design and construction administration of the Gardens at Jackson Creek (the "Project"), a senior living facility in Independence, Missouri. (*See*, Ex. 1, pp. 25-67.)[2] WSKF entered into a contract with defendant Bob D. Campbell & Co. for the structural engineering services on the Project. (Ex. 1, p. 4.)

In August 2012, Jackson Creek entered into a contract ("Construction Contract") with Relator for the general construction of the Project designed by defendant WSKF. (*See*, Ex. 1, pp. 69-109.) Relator hired certain subcontractors to perform construction work on the Project. (*See, e.g.*, Ex. 1, pp. 110-126, 139-158.) These subcontractors included defendant RCC Framing, who performed the framing of the Project and installed the windows, which windows were provided by defendant Alside Supply Center. (Ex. 1, pp. 4, 139-158.) Relator also hired BSP Masonry and Moses Davila to perform the brick masonry work on the Project. (Appx. A9-A28.)

In addition to contracting with various subcontractors for work on the Project, Relator also entered into a contract ("Quality Control Contract") with defendant Haren & Laughlin to provide quality control for the Project, which included ensuring a representative was on site at the Project at all times and providing general oversight and management of the subcontractors. (*See* Ex. 1, pp. 110-126.)

[2] Citations are to exhibits Relator filed with its writ unless otherwise noted.

The Project was completed in early 2014. (Ex. 1, p. 4.) Sometime after completion of the Project, Jackson Creek claimed that the work performed by Relator and/or its subcontractors and defendant WSKF was defective. (Ex. 1, p. 5.) In December 2017, Relator entered into an agreement with Jackson Creek (the "Settlement Agreement") for a certain sum of money as consideration for the release of any claim against Relator. (*See* Ex. 1, pp. 127-138.). Additionally, as part of the Settlement Agreement, Jackson Creek assigned to Relator any and all rights, claims, and interest against any third party arising from or relating to the defects of the Project. (*See*, Ex. 1, p. 129.)

On February 20, 2019, Relator filed the Second Amended Petition for Damages, alleging various contractual and tort claims against the defendants. (*See*, Ex. 1, pp. 1-24.) Specifically, as to defendant Haren & Laughlin, Relator brought claims for breach of contract (Count I), negligence (Count II), negligent supervision (Count III), negligent misrepresentation (Count IV), contractual indemnification (Count V), and breach of express warranty (Count VI); as to defendant WSKF, Relator brought claims for breach of contract (Count VII) and negligence (Count VIII); as to defendant Alside, Relator brought claims for strict liability due to defective product (Count IX), negligence (Count X), and breach of implied warranty of merchantability (Count XI); as to defendant RCC Framing, Relator brought claims for negligence (Count XII), breach of contract (Count XIII), contractual indemnification (Count XIV), and breach of express warranty (Count XV); and, as to defendant Bob Campbell, Relator brought a claim for negligence (Count XVI). (*See* Ex.1, pp. 1-24.)

On September 24, 2019, defendant Bob Campbell filed a Motion to Add BSP Masonry and Moses Davila as Defendants under Rule 52.04, claiming that BSP Masonry and Moses Davila were necessary parties because it would allegedly be subjected to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations if BSP Masonry and Moses Davila were not added as defendants. (*See*, Ex. 2, pp. 159-161, 171-175.) Defendants WSKF and Haren & Laughlin joined defendant Bob Campbell's motion (collectively, defendants Bob Campbell, Haren & Laughlin and WSKF will be referred to as the "moving parties"). (*See* Ex. 2, pp. 176-185.) On October 25, 2019, Respondent Honorable Jennifer Phillips granted the moving parties' motions and ordered BSP Masonry and Moses Davila to be added as defendants. (Ex. 3; Appx. A1-A6.) Interestingly, the Order made no finding that BSP Masonry and Moses Davila were necessary parties as required under Rule 52.04, nor does it describe what the addition of BSP Masonry and Moses Davila means in any practical or procedural sense. (*See id.*)

On November 21, 2019, Relator filed a petition for writ of prohibition to obtain relief from this erroneous order. A trial court's failure to properly apply Rule 52.04 is reversible error. *See*, *e.g. Ward v. Bank Midwest, NA*, 871 S.W.2d 649 (Mo. App. 1994); *Claas v. Miller*, 806 S.W.2d 141 (Mo. App. 1991). It would be unjust and prejudicial to Relator, as well as a waste of judicial resources, to require Relator to wait to appeal this erroneous order until after the trial has been completed in February 2021 and the judgment becomes final. On February 4, 2020, this Court entered a preliminary writ. Accordingly, Relator now requests this Court to make the preliminary writ absolute.

POINT RELIED ON

I. Relator is entitled to an order prohibiting Respondent from taking any further action with regard to parties BSP Masonry and Moses Davila except to dismiss them from this suit because they are not necessary parties under Rule 52.04 in that (a) they are not parties to any of the contracts Relator is suing upon; and (b) they are, at best, joint tortfeasors.

Bunting v. McDonnell Aircraft Corp., 522 S.W.2d 161 (Mo. banc 1975)

Cunningham v. Burke, 705 S.W.2d 120 (Mo. App. 1986)

Kelsey v. Nathey, 869 S.W.2d 213 (Mo. App. 1993)

Christenson v. Freeman Health System, 71 F. Supp. 3d 964 (W.D. Mo. 2014)

Missouri Pac. R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. banc 1978)

Mo. Sup. Ct. R. 52.04

ARGUMENT

I. Relator is entitled to an order prohibiting Respondent from taking any further action with regard to parties BSP Masonry and Moses Davila except to dismiss them from this suit because they are not necessary parties under Rule 52.04 in that (a) they are not parties to any of the contracts Relator is suing upon; and (b) they are, at best, joint tortfeasors.

Standard of Review

An appellate court will affirm a trial court's decision under 52.04 unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it misinterprets or misapplies the law. *Dolphin Capital Corp. v. Schroeder*, 247 S.W.3d 93, 97 (Mo. App. 2008).

Rule 52.04 sets forth the standard by which a trial court determines whether a non-party to an action is a necessary and indispensable party. In applying Rule 52.04, the trial court must first determine whether the non-party is a necessary party. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471 (Mo. banc 1992). If not, no determination of whether the non-party is indispensable is needed. *Id.*

Under Rule 52.04(a), a party is a necessary party if: "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may be as a practical matter (i) impair or impede his 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 his claimed interest."

An interest which compels joinder does not include a mere consequential, remote, or conjectural possibility of being some manner affected by the result of the original action. *Bunting v. McDonnell Aircraft Corp.*, 522 S.W.2d 161, 169 (Mo. banc 1975). Instead, the interest must be such a direct claim upon the subject matter of the action that the joined party will either gain or lose by direct operation of the judgment to be rendered. *State ex rel. Emasco Ins. Co. v. Rush*, 546 S.W.2d 188, 197 (Mo. App. 1977).

Here, the moving parties argue BSP Masonry and Moses Davila are necessary parties because they will be subjected to double, multiple or otherwise inconsistent obligations if BSP Masonry and Moses Davila are not added as defendants. Not only is this argument misguided, Missouri courts have determined that non-parties like BSP Masonry and Moses Davila are not necessary parties under Rule 52.04 for claims based in tort or in contract. Because BSP Masonry and Moses Davila are not necessary parties, no determination as to whether they are indispensable parties is required. *See, Heitz v. Kunkel*, 879 S.W.2d 770, 771 (Mo. App. 1994) (holding "[a] party must first be found necessary to a lawsuit before we consider whether that party is indispensable").

A. BSP Masonry and Moses Davila are not necessary parties to any of the contractual claims asserted by Relator because they are not parties to any of the contracts Relator is suing upon.

Counts I, V, VI, VII, XI, XIII, XIV and XV in the Second Amended Petition for Damages are claims based on contract; however, the contract between Relator and BSP

Masonry is not the basis for any of these contractual claims. In causes of action asserting contractual claims, the only parties necessary to such claims are the parties to the contract sued on, and those who have an interest in the dispute which will be affected by the action. *See, e.g. Bunting v. McDonnell Aircraft Corp.*, 522 S.W.2d 161 (Mo. banc 1975) (holding that, even though the United States had an interest in the patent dispute, the only necessary parties to the lawsuit on a contract was the two parties who executed the contract); *Cunningham v. Burke*, 705 S.W.2d 120 (1986) (holding parties to the contract being sued upon are the only necessary parties to the suit); *Kelsey v. Nathey*, 869 S.W.2d 213 (Mo. App. 1993); *Obaidullah v. Kabir*, 882 S.W.2d 229 (Mo. App. 1994).

The Missouri Supreme Court in *Bunting v. McDonnell Aircraft Corporation* illustrates the application of Rule 52.04 to contractual claims. In *Bunting*, plaintiff was employed by McDonnell Aircraft Corporation (MAC) and, as a condition of his employment, signed an employment contract. *Bunting*, 522 S.W.2d at 163. The employment contract provided, in part, that any invention made by him would become the property of MAC. *Id.* However, the employment contract allowed for compensation to an employee for the invention based upon the "sale or licensing" by MAC of the invention. *Id.*

While employed by MAC, plaintiff invented an optical viewing system with polarized beam-splitting element used in high range data recording cameras and direct radar scope cameras which is standard equipment in airplanes manufactured by MAC. *Id.* at 163-64. Prior to issuance of the patent from the United States Patent Office, plaintiff assigned and transferred his rights and interests in his invention to MAC. *Id.* at 164.

Unbeknownst to plaintiff, MAC also had a contract with the United States wherein MAC agreed to allow the United States government to use and practice the invention without payment of a licensing fee, which MAC argued precluded plaintiff from recovering a percentage of the licensing fee. *Id.*

Plaintiff brought suit against MAC for breach of the employment contract, alleging that he was entitled to ten percent of a reasonable licensing fee for the use of his invention by the United States government. *Id.* While the United States had an interest in the invention, it was not a party to the lawsuit. On appeal, MAC raised for the first time that the United States was a necessary party to the suit under Rule 52.04. *Id.* at 168.

The Missouri Supreme Court rejected MAC's assertion that the United States was a necessary party because it determined that the United States was not a party to the contract on which plaintiff was suing. *Id.* at 169. Specifically, the Court held:

> This is a lawsuit on a contract between the only two parties who executed the same. The United States need not participate in the resolution of the dispute which has arisen as to the rights of the parties therein. This is true, even though it might become necessary for the court to decide what, if any, effect the provisions of the earlier contract between defendant and the government had on the contract between the instant parties. Any interest of the United States in this litigation is such a remote possibility, the Rule 52.04 does not call for compulsory joinder. *Id.*

Here, BSP Masonry and Moses Davila are not parties to any contracts upon which Relator is suing. While Relator entered into an agreement with BSP Masonry and Moses Davila regarding work on the Project, Relator elected not to sue on its contract with BSP Masonry and Moses Davila. Furthermore, BSP Masonry and Moses Davila are not parties to any contracts upon which Relator is suing; nor has BSP Masonry or Moses Davila

executed any contracts upon which Relator is suing. Thus, because BSP Masonry and Moses Davila are not parties to the contracts upon which Relator is suing, nor did they execute any contracts upon which Relator is suing, they are not necessary parties under Rule 52.04 on the contractual claims. *See Bunting*, 522 S.W.2d at 169.

Moreover, the fact that Haren & McLaughlin's Quality Control Contract required it to supervise the subcontractors' work on the Project, including the work of BSP Masonry and Moses Davila, does not make them necessary parties under Rule 52.04. Indeed, like the Court held in *Bunting*, even though it may become necessary for the court to make a determination as to the quality of BSP Masonry's work, does not make them a necessary party to the contractual claims alleged in this suit. *See Bunting*, 522 S.W.2d at 169; *see also Cunningham v. Burke*, 705 S.W.2d 120 (Mo. App. 1986). Therefore, BSP Masonry and Moses Davila are not necessary parties under Rule 52.04 to the contractual claims asserted by Relator.

B. BSP Masonry and Moses Davila are not necessary parties as to the tort claims alleged by Relator because, at best, they are joint tortfeasors, which does not make them necessary parties under Rule 52.04.

Counts II, III, IV, VIII, IX, X, XII and XVI of the Second Amended Petition for Damages are causes of action based in tort. The moving parties argue, in part, that Relator is seeking to hold them liable for the negligent actions of BSP Masonry in performing the brick masonry work on the Project. Not only is this argument false and misstates the pleadings, BSP Masonry and Moses Davila are joint tortfeasors, at best.

Assuming *arguendo* that BSP Masonry and Moses Davila are joint tortfeasors, necessary parties must be more than joint tortfeasors. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (finding that a necessary party must be more than a joint tortfeasor). The case of *Christenson v. Freeman Health System*, 71 F. Supp. 3d 964 (W.D. Mo. 2014) is illustrative of this principle.

In *Christenson*, plaintiff checked into a hotel room in Joplin, Missouri. *Id.* at 966. While plaintiff ate his dinner and watched television in his room, his estranged wife called the front desk and told the desk clerk, falsely, that plaintiff might be suicidal. *Id.* The desk clerk called the Joplin Police Department, which in turn called Christenson's wife. *Id.* Christenson's wife told the police department again, falsely, that Christenson had informed her that he was suicidal, was drinking alcohol, and had overdosed on prescription pills. *Id.*

Police officers went to the hotel and forced their way into plaintiff's room. *Id.* The officers searched the room but did not find any alcohol, prescription pills, or any other evidence to corroborate the allegation that plaintiff was in danger to himself. *Id.* Plaintiff tried to explain to the officers that he was not suicidal, and that his wife had made the false report because she was angry with him. *Id.* Undeterred, the officers deployed a Taser against plaintiff and took him to the hospital for a mental health evaluation. *Id.*

Upon arriving at the hospital, plaintiff was admitted to the hospital for an involuntary mental health hold, even though no medical evaluation was conducted. *Id.* The hospital and its employees ignored plaintiff's requests to be released, to speak to an attorney, and to be evaluated by a licensed mental health professional. *Id.* Instead, they

continued to detain Christenson in the mental health unit, where a physician employed by the hospital diagnosed plaintiff with Bipolar Type I and prescribed certain medications. *Id.* The hospital held plaintiff for approximately thirty hours before it allowed a licensed mental health professional to evaluate him. *Id.* The professional quickly determined that he posed no threat to himself or others and order his release from the hospital. *Id.*

Plaintiff sued the hospital, the City of Joplin, and certain members of the Joplin Police Department. *Id.* A little more than a year later, plaintiff filed a second suit against only the hospital and certain employees of the hospital claiming negligence, false imprisonment, and assault and battery. *Id.* In the second suit, the hospital and one of its employees moved to dismiss the Complaint for failing to join necessary parties—the City of Joplin and its police officers. *Id.* at 969.

The United States District Court for the Western District of Missouri held that the City of Joplin and its police officers were not necessary parties because they did not fit into any of the Fed. R. Civ. P. 19(a) definitions.[3] *Id.* This decision was based upon three reasons. First, the Court reasoned that the Complaint alleged claims only against the hospital and three of its employees, arising out of the medical treatment they provided plaintiff. *Id.* As a result, the Court could grant plaintiff complete relief on any of these claims without the City of Joplin or its police officers being in the case. *Id.* Second, the City of Joplin and its police officers did not have any legal interest in how plaintiff

[3] Rule 52.04 is essentially the same as Fed. R. Civ. P. 19, except that the Missouri rule does not contain references to jurisdiction and venue. Accordingly, this Court has held that Missouri courts may use federal precedents as a guide to application of Rule 52.04. *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo. banc 1976).

resolves his lawsuit against the hospital and its employees, so none of their interests would be impeded by resolving this action without them. *Id.* at 969-70. Finally, the Court found that, proceeding without the City of Joplin and its police officers will not expose any existing party to multiple or inconsistent obligations in the lawsuit. *Id.* at 970.

Here, the moving parties argue that they will be subjected to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations if BSP Masonry and Moses Davila are not added as party defendants. However, the moving parties are unable to articulate how they will be subjected to double, multiple or otherwise inconsistent obligations if BSP Masonry and Moses Davila are not added as party defendants, except to argue that there is no clear path to obtaining indemnity against BSP Masonry and Moses Davila unless they are party defendants. If indemnity is what they are seeking, adding BSP Masonry and Moses Davila as party defendants will not create an indemnity claim for the moving parties.

Furthermore, the moving parties have multiple remedies available to them that evidences they will not be subject to double, multiple or otherwise inconsistent obligations if BSP Masonry and Moses Davila are not added as party defendants. First, the moving parties confuse Rule 52.04, with Rule 52.11. Under Rule 52.11, joint tortfeasors may bring other non-party tortfeasors into the action as third-parties and seek contribution from the joint-tortfeasors for the damages caused by their negligence. Indeed, as the Missouri Supreme Court explained in *Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 474 (Mo. banc 1978):

> The principle of fairness imbedded within our law compels adoption of a system for the distribution of joint tort liability on the basis of relative fault. This would apply whether the tortfeasors were joined as defendants by the plaintiff or a third party defendant was added to a cause under rule 52.11.
>
> In either instance the ability of a plaintiff to sue and ultimately collect judgment against his or her choice of tortfeasor need not be impaired. Plaintiff continues free to sue one or more concurrent tortfeasors as he sees fit and nothing that transpires between them as to their relative responsibility can reduce or take away from plaintiff any part of his judgment. Concurrent or joint tortfeasors not sued by plaintiff, however, may now be brought in by third party practice for a determination in due course of their relative part of the responsibility, if such is the case, for the overall injury and damage to the plaintiff.

Even though this remedy is available to the moving parties, they have not sought to bring BSP Masonry or Moses Davila in as third-party defendants under Rule 52.11.

Not only can defendants seek leave to bring BSP Masonry and Moses Davila in the action as third-party defendants, any of the defendants can elect instead to sue BSP Masonry and Moses Davila for contribution after the conclusion of this action. *See Safeway Stores, Inc. v. City of Raytown*, 633 S.W.2d 727 (Mo. banc 1982).

Finally, the moving parties are not precluded from arguing that BSP Masonry and Moses Davila are the sole cause for the damages sustained by Relator and Jackson Creek. *See Owens v. Dougherty*, 84 S.W.3d 542 (Mo. App. 2002). Such argument can be made without BSP Masonry or Moses Davila being parties to the action. *See id.*

Therefore, BSP Masonry and Moses Davila are not necessary parties to the tort claims asserted by Relator.

CONCLUSION

BSP Masonry and Moses Davila are not necessary parties to the claims asserted by Relator. As to the contractual claims, BSP Masonry and Moses Davila are not parties to the contracts on which Relator is suing. As to the tort claims, BSP Masonry and Moses Davila are, at best, joint tortfeasors, which is not enough to make them necessary parties. Therefore, because BSP Masonry and Moses Davila are not necessary parties under Rule 52.04, Realtor requests this Court to make the preliminary writ absolute.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c), that this Brief for Relator Woodco, Inc. complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 4,623 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 word-counting function.

/s/ Michael F. Barzee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 2020, pursuant to Rule 103.08, I electronically filed the foregoing Brief for Relator Woodco, Inc. with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Michael F. Barzee
Attorney for Relator