

July 10, 2024

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SC Court of Appeals

Sent Via E-Mail

Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211

Re: Zitek v. IBP Asset, LLC, et al.
Appellate Case No. 2023-001401
Our File No.: 6035-0008

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, Respondent Builder Services Group, Inc. d/b/a Gale Contractor Services, provides the following response to Appellant's untimely supplemental citation made by letter dated July 8, 2024.

The case Appellant cited, Midland Insurance Co. v. Delta Lines, Inc., 530 F. Supp. 190 (D.S.C. 1982), is not a new case. Appellant provides no explanation for failing to cite the 42 year old federal case in any of its prior briefing. Not only does the case pre-date the arguments presented to the trial court in this matter, it also pre-dates most of the authorities cited in the initial briefs. See Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc., 393 S.C. 65, 70 n.2, 710 S.E.2d 90, 93 n.2 (Ct. App. 2011) (holding that supplementary citations may not be used to raise new issues on appeal).

Federal opinions are not binding in state courts. Aside from that, Midland lacks persuasive value because subsequent state decisions declined to follow it.

Contrary to Appellant's characterization, this Court did not distinguish Midland, it specifically rejected the holding. Federal Pacific Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) ("We do not ignore Midland . . . ; rather, we elect not to follow it."). In Federal Pacific, this Court considered various interpretations of the "clear and unequivocal" requirement for contractual indemnity provisions that relieve an indemnitee from its own negligence. This Court rejected the view that "words of general import are sufficient." 298 S.C. at 26-27, 378 S.E.2d at 57-58. In so doing, this Court declined to adopt the Midland analysis, and instead elected to follow the South Carolina Supreme Court's decision in Murray

v. The Texas Co., 172 S.C. 399, 174 S.E.231 (1934). This Court subsequently followed Federal Pacific in Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018), which recognized that the South Carolina Supreme Court has (subsequent to Midland) also adopted the strict interpretation of “clear and unequivocal.”

Therefore, Midland does not reflect the law in this State. The controlling case on this issue is Concord and Cumberland, and that case was thoroughly briefed by both parties.

Respondent also disagrees that Midland is factually “on all fours” with this case. In Midland, the indemnitor (Delta) and the indemnitee (Strick) were both named as defendants in the suit. They both cross-claimed, blaming each other. 530 F. Supp. at 191. It was undisputed that the plaintiff’s injury occurred while Delta was using equipment manufactured by Strick. Id. at 192. Based on these allegations, Midland is a “concurrent negligence” case.

In this case, as in Federal Pacific, the respondents were not named as defendants in the suit. 298 S.C. at 26, 378 S.E.2d at 57. Respondents are in a position similar to the innocent tenant in Federal Pacific, making this a “sole negligence” case. Thus, Midland is entirely distinguishable from the facts present in this case.

Respectfully submitted,

s/Alicia N. Bolyard

Alicia N. Bolyard

ANB/ks