

RECEIVED

Feb 01 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Appellate Case No. 2022-000328

Mark Schaffer, as Personal Representative of the
Estate of Susan Shaffer,.....Appellant,

v.

DEH Disaster Recovery, LLC; Ceres Environmental
Services, Inc.; Beaufort County, a Political
Subdivision of the State of South Carolina;
Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson;
Brandi Dotson; Spencer A. Olson Trucking, LLC;
Buyers Products, Co.; and TruckPro, LLC,.....Defendants,

Of which Ceres Environmental Services, Inc. and
Beaufort County, a Political Subdivision of the
State of South Carolina are the.....Appellant-Respondents,

And Spencer A. Olson Trucking, LLC, DEH Disaster
Recovery, LLC, and Ryan Colter Stoltz are the.....Respondents.

FINAL BRIEF OF RESPONDENT SPENCER A. OLSON TRUCKING, LLC

Kelly Dennis Dean, SC Bar #75372
E. Mitchell Griffith, SC Bar #2287
GRIFFITH, FREEMAN & LIIPFERT, LLC
PO Drawer 570
Beaufort, SC 29901
kdean@griffithfreeman.com
mgriffith@griffithfreeman.com
(843) 521-4242
(843) 521-4247 (fax)
And
Steven D. Pattee
Julius Gernes
DONNA LAW FIRM, PC
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
spatee@donnalaw.com
jgernes@donnalaw.com

*Attorneys for Respondent Spencer A. Olson
Trucking, LLC*

*Attorneys for Respondent Spencer A. Olson
Trucking, LLC*

Beaufort, South Carolina

February 1, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii, iii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....2

STANDARD OF REVIEW.....7

ARGUMENT

 I. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT OLSON HAS NO DUTY TO INDEMNIFY CERES AND BEAUFORT COUNTY UNDER S.C. CODE ANN. § 32-2-10 AND THE LANGUAGE OF THE SUBCONTRACT.....8

 A. The Indemnification Provision is Unenforceable Under S.C. Code Ann. § 32-2-10.....8

 B. Even if S.C. Code Ann. § 32-2-10 Does Not Apply, the Indemnification Provision is Not Clear and Unequivocal.....11

 II. THE TRIAL COURT CORRECTLY DETERMINED THAT SPENCER OLSON TRUCKING HAS NO DUTY TO INDEMNIFY CERES AND BEAUFORT COUNTY UNDER EQUITABLE INDEMNITY.....13

CONCLUSION.....14

CERTIFICATE OF COUNSEL.....15

TABLE OF AUTHORITIES

Cases:

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.
409 S.C. 487, 763 S.E.2d 19 (2014) 11

Beach Co. v. Twillman, Ltd.,
351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002).....10

Clinton v. West American Ins. Co.
364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005) 7

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,
424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) 11, 12

Cope v. Eckert,
284 S.C. 516, 327 S.E.2d 367 (Ct. App. 1985) 7

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC,
422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) 9,10,11

Fed. Pac. Elec. V. Carolina Prod. Enters.,
298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).....11

Fountain v. Fred’s, Inc.,
436 S.C. 40, 871 S.E.2d 166 (2022) 8,13

Gilstrap v. Culpepper,
283 S.C. 83, 320 S.E.2d 445 (1984) 11

Hughes v. Child.’s Clinic, P.A.,
269 S.C. 389, 237 S.E.2d 753 (1977).....7, 8

Inglese v. Beal,
403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013).....13

Laurens Emerg. Med. Specialists v. M.S. Bailey & Sons Bankers,
355 S.C. 104, 584 S.E.2d 375 (2003) 11

McPherson ex rel. McPherson v. Mich. Mut. Ins. Co.,
306 S.C. 456, 412 S.E.2d 445 (1991) 7

Nations Bank v. Scott Farm,
320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995) 7

Shepard v. South Carolina Dept. of Corrections,
299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989) 7

Town of Winnsboro v. Wiedeman-Singleton, Inc.,

303 S.C. 52, 57-58, 398 S.E.2d 500, 503 (Ct. App. 1990), <i>aff'd</i> , 307 S.C. 128, 414 S.E.2d 118 (1992).....	13
<i>Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.</i> , 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).....	13
Statutes:	
S.C. Code Ann. § 32-2-10 (1976)	1, 8, 9, 10, 11
Court Rules:	
Rule 56, SCRCP	7
Rule 220(c), SCACR	14

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court correctly determine that Spencer Olson Trucking Has No Duty to Indemnify Ceres and Beaufort County under S.C. Code Ann. § 32-2-10 and the language of the subcontract?
- II. Did the trial court correctly determine that Spencer Olson Trucking Has No Duty to Indemnify Ceres and Beaufort County under Equitable Indemnity?

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred on May 3, 2017 in Beaufort County, South Carolina, during storm cleanup from Hurricane Matthew. The original Summons & Complaint for this wrongful death/survival action were filed on August 24, 2017. (R. p. 46). The Complaint was then amended a couple of times as additional Defendants were added. (R. pp. 100, 131). In late 2020, Plaintiff Shaffer (“Shaffer”) negotiated with Defendants Spencer A. Olson Trucking, LLC (“Olson”), DEH Disaster Recovery, LLC (“DEH”), and Ryan Colter Stoltz (“Stoltz”), and reached a settlement on Shaffer’s claims against these Defendants (referred to collectively as “the Settling Parties”). A Verified Petition for Settlement Approval of Wrongful Death was filed on November 25, 2020. (R. p. 253). A hearing was held before the Court on December 4, 2020, at which time the Court approved the settlement, and an Order Granting Petition for Approval of Settlement of Wrongful Death was filed on December 28, 2020. (R. p. 33). Specifically, under the terms of that Order, the settlement was for a full and final release of all claims against Olson, DEH, and Stoltz. (R. pp. 34-35).

On January 26, 2021, Shaffer filed a Motion to Amend the Complaint in order to conform the pleadings to the information gathered during discovery and the current status of the parties. (R. p. 265). The Motion was granted by Order dated March 2, 2021. (R. p. 43). The Third Amended Summons & Complaint were then filed on March 5, 2021, and DEH, Stoltz and Olson were not named as Defendants (R. p. 199). Additionally, the Third Amended Complaint did not

include any claims against Defendants Beaufort County or Ceres Environmental Services, Inc. (“Ceres”)¹ based on vicarious liability as to these removed Defendants. (R. pp. 201-217).

On March 18, 2021, Ceres filed an Answer to the Third Amended Complaint, and asserted “Cross Claims” against now non-parties Stoltz, DEH, and Olson, along with Cross Claims against named Defendants Matt T. Dotson; Tim Tod Dotson; Brandi Dotson; Dotson & Sons Logging, Inc.; Buyers Products Company; TruckPro, LLC; ST Sales, LLC; and Tetra Tech, Inc. for contractual and/or equitable indemnity. (R. pp. 218-235). On April 2, 2021, Olson filed a Reply to the Answer to Third Amended Complaint and Crossclaims of Ceres. (R. p. 244). Then, on July 20, 2021, Olson filed a Motion for Summary Judgment and Memorandum in Support of Summary Judgment, and an additional Memorandum in Support of Summary Judgment on August 4, 2021, including as supporting exhibits the Ceres Environmental Master Subcontract Agreement with Olson and the Subcontract with DEH. (R. pp. 293-304). A hearing was held before the Honorable Robert J. Bonds on October 28, 2021. (R. p. 3257). On December 2, 2021, a Form 4 Order was entered, granting Olson’s Motion for Summary Judgment as to the Ceres Crossclaims, with a formal written Order to that effect entered on March 10, 2022 after a February 11, 2022 hearing on Ceres’ Motion to Reconsider filed December 10, 2021. (R. pp. 40, 8). This appeal followed.

STATEMENT OF THE FACTS

This case involves the storm clean-up efforts in Beaufort County, South Carolina following Hurricane Matthew, which struck in September of 2016. Beaufort County engaged Ceres as the prime contractor to clean up the storm debris (R. p. 3235). Ceres subcontracted with Olson (R. pp. 3568-3589), and Olson engaged DEH to provide hauling services (R. p. 3592-

¹ As indicated in the Brief of Appellants-Respondents, Ceres accepted the tender of defense from Beaufort County and, therefore, any reference to Ceres shall also incorporate Beaufort County by reference, unless otherwise specified.

3599). Stoltz was an employee of DEH who was the driver of a DEH truck on May 3, 2017. As Stoltz drove a truck with an attached storm-debris trailer on U.S. Highway 21 in Beaufort County, the storm-debris trailer became detached from the truck. The trailer veered into oncoming traffic, and Susan Shaffer was killed instantly when that trailer collided with her vehicle. (R. p. 393).

Ceres's relationship with Olson is governed by the Ceres Environmental Master Subcontract Agreement ("Ceres Agreement"). (R. p. 3568). The Ceres Agreement was entered into prior to Hurricane Matthew, but was put in place beforehand so that the parties would be ready in the event of a natural disaster. (R. pp. 1110-1111). There is then an amendment to the contract that keeps it up to date. (R. p. 1111-1112). The Ceres Agreement included indemnification provisions where Olson served as the indemnitor and Ceres, the indemnitee. (R. p. 3575). Specifically, the Ceres Agreement states, relevant part:

Subcontractor agrees, to the fullest extent permitted by law, to indemnify, defend, and hold harmless Contractor, the Owner and the project architect and all the employees, agents and representatives of each (collectively "Indemnitees") from and against all liabilities, costs, losses, expenses (including, without limitation, attorneys' and consultants' fees and expenses of litigation), fines, claims, causes of action which any Indemnitee may at any time suffer or sustain or become liable for caused by or resulting from the Subcontractor's, or any of Subcontractor's agents, representatives, subcontractors, suppliers or any one directly or indirectly employed by any of them or anyone for whose acts they may be liable (collectively "Liabilities"): (1) Violation of any law or governmental regulation; (2) breach of any requirement or representation in the Subcontract Documents; (3) any claim by any third party regardless of the fault or negligence of the Contractor; or (4) negligent or willful acts or omissions in performance of the Work, regardless of whether such Liabilities are caused in part by an Indemnitee. The indemnity obligation granted herein in favor of the Indemnitees shall include the sole and/or concurrent fault and negligence of any Indemnitee whether collectively or singularly.

Paragraph 4.16 (R. p. 3575).

This Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons...resulting

from or in any manner connected with, the execution of the work provided for in this Subcontract...Further, the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor, its agents and employees from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable and legal fees and disbursements paid or incurred to enforce the provisions of this paragraph...

Article 11 (R. p. 3583). The Agreement also states “[t]he rights of the parties under this services contract shall be construed in accordance with the law of the state in which the Project is located.” (R. p. 3586).

The nature of the Olson business is hauling debris for FEMA disasters and hauling logs when not performing debris cleanup. (R. p. 1077). Ceres is also in the business of debris cleanup, and they are a prime contractor that performs FEMA contracts. (R. p. 1082). Ceres will bid a job, get the work, and then contract the work out to subcontractors such as Olson. (R. p. 1082). Olson has performed work as a subcontractor for Ceres since 2006. (R. p. 1083). Olson’s responsibilities on this particular job were to drive a truck, load debris onto the truck at a pile site, take the debris to the dump site, unload the debris at the dump site, and return to the pile site to get a new load. (R. p. 1089). Olson then contracted with subcontractor DEH to assist with manpower and equipment for the project. (R. pp. 1191, 1081). Both Olson and DEH hauled debris and vegetation by picking it up along the roadways and bringing it to the dump site. (R. p. 1089, 533-535). Olson and DEH have a 12-year history of working together on numerous debris jobs. (R. p. 1081).

When Olson, DEH, and Stoltz were named Defendants, Shaffer pled vicarious liability against Ceres for the alleged acts and conduct of Olson, DEH and Stoltz. (R. p. 110-112). After the settlement with these parties was reached, Shaffer removed all vicarious liability claims against Beaufort County and Ceres. (R. p. 204-207). In the Third Amended Complaint, the

allegations against Ceres are for its conduct as follows:

- a. In failing to properly inspect the Truck;
- b. In failing to properly inspect the Trailer;
- c. In failing to require proper maintenance of the Truck;
- d. In failing to require proper maintenance of the Trailer;
- e. In failing to properly inspect the pintle hook;
- f. In failing to properly inspect the safety chains;
- g. In failing to require proper maintenance of the pintle hook;
- h. In failing to require proper maintenance of the safety chains;
- i. In failing to require proper inspections of the equipment utilized in the performance of its Contract;
- j. In failing to hire a competent safety director;
- k. In failing to require proper maintenance of the equipment utilized in the performance of its Contract;
- l. In failing to require employment of qualified personnel in the performance of its Contract;
- m. In failing to ensure that all equipment utilized by its subcontractors satisfied all local, state and federal safety requirements;
- n. In failing to require, request or examine the Driver Qualification File for all drivers performing services within the scope of its Contract with Beaufort County.
- o. In failing to require, request or examine inspection logs for all commercial motor vehicles being used in the performance of services within the scope of its Contract with Beaufort County.
- p. In failing to require, request or examine Hours of Service logs for all drivers of commercial motor vehicles performing services within the scope of its Contract with Beaufort County.
- q. In failing to exercise that degree of care, caution and regard for the safety of others that a reasonably prudent company would have exercised under the circumstances then and there existing.

(R. p. 205-206).

The allegations against Beaufort County are as follows:

- a. In being vicariously responsible for the acts and conduct of the Defendant Ceres;
- b. In being vicariously responsible for the acts and conduct of the Defendant Tetra Tech, Inc.;
- c. In hiring the Defendant Ceres when it knew or should have known that the Defendant Ceres was unqualified;
- d. In allowing, permitting, condoning, or approving a Truck which was in a defective condition and unreasonably dangerous to be used in the performance of the Ceres contract;
- e. In allowing, permitting, condoning, or approving a Trailer which was in a

- defective and unreasonably dangerous condition to be utilized in the performance of the Ceres contract;
- f. In allowing a pintle hook which was in a defective and unreasonably dangerous condition to be utilized in the performance of the Ceres contract;
 - g. In allowing safety chains which were in a defective and unreasonably dangerous condition to be utilized in the performance of the Ceres contract;
 - h. In failing to properly inspect the Truck;
 - i. In failing to properly inspect the Trailer;
 - j. In failing to properly inspect the pintle hook;
 - k. In failing to properly inspect the safety chains;
 - l. In failing to require proper maintenance of the pintle hook;
 - m. In failing to require proper maintenance of the safety chains;
 - n. In failing to require proper maintenance of the Truck;
 - o. In failing to require proper maintenance of the Trailer;
 - p. In failing to hire a competent safety director;
 - q. In failing to properly oversee and monitor the performance of its Contract with Ceres;
 - r. In failing to ensure that all equipment utilized in the performance of the Contract was in compliance with local, state and federal rules and regulations;
 - s. In failing to require proper inspections and maintenance of vehicles and equipment utilized in the performance of its Contract;
 - t. In failing to hire qualified personnel so as to ensure that the equipment utilized in the performance of its Contract complied with all local, state and federal rules and regulations and was safe;
 - u. In allowing the Trailer to be overloaded;
 - v. In failing to properly monitor and provide qualified personnel to inspect and maintain safe equipment;
 - w. In failing to have a safety officer appointed to ascertain and ensure that the contractors and subcontractors complied with safety rules and regulations;
 - x. In failing to properly monitor the safety management practices of its contractors and subcontractors;
 - y. In failing to require routine safety maintenance and inspections of the equipment being utilized by its contractor and subcontractors;
 - z. In failing to require, request or examine the Driver Qualification File for all drivers performing services within the scope of its Contract with Beaufort County;
 - aa. In failing to require, request or examine inspection logs for all commercial motor vehicles being used in the performance of services within the scope of its Contract with Beaufort County;
 - bb. In failing to require, request or examine Hours of Services logs for all drivers of commercial motor vehicles performing services within the scope of its Contract with Beaufort County;
 - cc. In failing to exercise that degree of care, caution and regard for the safety of others that a reasonably prudent County would have exercised under the circumstances then and there existing.

(R. p. 206-208). No allegations of fact are made as to the Settling Parties in the Third Amended Complaint. Rather, the Third Amended Complaint alleges negligence only on the part of the Defendants named as parties to the Third Amended Complaint.

STANDARD OF REVIEW

In reviewing a summary judgment, the Court of Appeals applies the same standard which governs the trial court: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCF; *Clinton v. West American Ins. Co.* 364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005). To resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. *Nations Bank v. Scott Farm*, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995).

ARGUMENT

It is well recognized that an act or omission need not be the sole cause of an injury to be a proximate cause. A given injury may result from multiple causes. *McPherson ex rel. McPherson v. Mich. Mut. Ins. Co.*, 306 S.C. 456, 412 S.E.2d 445 (citing *Hughes v. Child.'s Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (1977)); *Shepard v. South Carolina Dept. of Corrections*, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989); *Cope v. Eckert*, 284 S.C. 516, 327 S.E.2d 367 (Ct. App. 1985). After reaching a settlement with the Settling Parties, Shaffer amended the Complaint to sue Beaufort County and Ceres for their own independent acts of negligence, and not vicariously for the negligence of the Settling Parties.² The allegations against Beaufort County and Ceres are independent and separate of any conduct by Olson or the other Settling Parties. Stated differently, even assuming that Olson was negligent, and its negligence was a proximate cause of

² “This Complaint omitted DEH, Stoltz and Olson as Defendants and did not include any claims against Beaufort County or Ceres based on vicarious liability as to these omitted defendants.” See Shaffer Initial Brief, p.1

Shaffer's injuries, both Olson's negligence and Ceres' failure to inspect (or any of the other acts alleged in the Third Amended Complaint) could have proximately caused the injury to Shaffer. *See Fountain v. Fred's, Inc.*, 436 S.C. 40, 871 S.E.2d 166 (2022) (quoting *Hughes*, supra, at 398). ("When we speak of proximate cause, we are not referring to the 'sole cause.' In order to establish actionable negligence, the plaintiff is required to only prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury."). Therefore, the settlement operated to extinguish Shaffer's claims of negligence as to the Settling Parties, and, in turn, any vicarious liability to Beaufort County and Ceres attributable to those acts. Specifically, the Court approved Plaintiff's Petition for an order approving the settlement of the Wrongful Death claims and included two paragraphs releasing Plaintiff's claims against the settling defendants. (R. p. 34-35). Shaffer acknowledges that he has no further claim against the Settling Defendants and the acts of Olson, DEH, and Stoltz have been released.

It is the alleged negligent acts of conduct by Beaufort County and Ceres that survived the settlement, and it is through this lens that the Court must look in its analysis of this case.

I. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT OLSON HAS NO DUTY TO INDEMNIFY CERES AND BEAUFORT COUNTY UNDER S.C. CODE ANN. § 32-2-10 AND THE LANGUAGE OF THE SUBCONTRACT.

The express language in the Ceres Agreement requires that the agreement be interpreted under the law of the state where the project occurred. The project and cleanup efforts in the wake of Hurricane Matthew occurred in Beaufort County, South Carolina, and therefore, South Carolina law applies.

A. The Indemnification Provision is Unenforceable Under S.C. Code Ann. § 32-2-10.

In South Carolina, an indemnitor cannot be required to indemnify an indemnitee's own negligence in certain construction contracts. Specifically, the South Carolina statute reads, in relevant part:

[N]otwithstanding any other provision of law, a promise or agreement in connection with ...repair or maintenance of a...highway, road, appurtenance or appliance...including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable...

S.C. Code Ann. §32-2-10 (1976). The cleanup project of debris left by Hurricane Matthew squarely falls under this statute. The cleanup involved picking up debris and vegetation along the roadways in Beaufort County and taking it to a dump site. (R. p. 533). In addition to the operation of trucks, DEH also had grounds people whose job duties included cutting trees that were too long to fit in the truck, raking up the scene after the debris was picked up, and flagging traffic if traffic control was needed. (R. p. 535). Therefore, the agreement in question falls within the statute because it was made in connection with the repair or maintenance of a highway, road, or appurtenance and included moving debris away from the roadways to dump sites.

This statute was examined in some detail in *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). In that case, a general contractor, D.R. Horton ("DR Horton"), attempted to have its subcontractor, Builders FirstSource ("BFS") agree to indemnify D.R. Horton for D.R. Horton's own negligence via an indemnification agreement.

The provision in question read as follows:

To the fullest extent permitted by law, contractor hereby agrees to protect, defend, indemnify, and hold owner, its parent corporation, subsidiaries and affiliates, and any of their respective officers, directors, partners, employees, agents and insurers,...free and harmless from and against any and all claims, demands, causes of actions, suits, or other litigation of every kind and character (including

all costs thereof and attorney's fees),...on account of bodily or personal injury, death, or damage to or loss of property,...in any way occurring, incident to, arising out of, or in connection with: (I) a breach of the warranties, representations, obligations, and covenants provided herein by contractor; (II) the work performed or to be performed by contractor or contractor's personnel, agents, suppliers, or permitted subcontractors; or (III) any negligent action and/or omission of the indemnitee related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee.

Horton at 147. This provision is remarkably similar to the language of the Ceres Agreement, and the Court in *D.R. Horton* determined it to be an illegal contract because it violated the statute. *Id.* at 152. Specifically, the Court found that the specific provision was in violation of S.C. Code Ann. § 32-2-10 because “the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by [D.R. Horton’s] negligence or the negligence of its subcontractors.” *Id.* at 152. Because the agreement violated the statute, it was an illegal contract and therefore the indemnification provision was unenforceable. *Id.*, citing *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). Thus, the Court could not require BFS to pay for damages caused by D.R. Horton’s own negligence. *Id.*

In the case at hand, the only allegations against Beaufort County and Ceres are for their own acts, independent of any acts of the Settling Parties. Therefore, Ceres is asking the Court to have Olson indemnify its own, sole negligence through the operation of an illegal indemnification provision which states: “[t]he indemnity obligation granted herein in favor of the Indemnitees shall include the sole and/or concurrent fault and negligence of any Indemnitee.” (R. p. 3575). Under a plain reading of S.C. Code Ann. §32-2-10 and *D.R. Horton*, *supra*, this provision is illegal and therefore void and unenforceable.

As a result of its illegality, the entire indemnity provision must be stricken. The issue of whether to modify the contract language was briefly addressed in *D.R. Horton*. In Footnote 2, the

Court pointed out that D.R. Horton did not appeal the circuit court's finding that the provision violated the statute. Rather, the issue before the Court was D.R. Horton's argument that the remaining indemnification provisions should require BFS to indemnify D.R. Horton regardless of the court's decision finding this provision unlawful. The Court then declined to modify the offending provision to make it enforceable. This decision follows well-established precedent that Courts have no authority to alter contracts or make new contracts for the parties. *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Thus, it would be improper to strike the offending language just to make the indemnification provision enforceable, and this was an argument that failed in the *D.R. Horton* case.

B. Even if S.C. Code Ann. § 32-2-10 Does Not Apply, the Indemnification Provision is Not Clear and Unequivocal.

When an indemnity clause purports “to relieve an indemnitee from the consequences of its own negligence,” South Carolina law requires strict construction of the clause. *Laurens Emerg. Med. Specialists*, 355 S.C. at 111, 584 S.E.2d at 378-79. Indeed, “most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018), quoting *Fed. Pac. Elec. V. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). The policy basis behind the heightened standard of clear and unequivocal is deterrence. *Concord & Cumberland* at 649, discussing *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.* 409 S.C. 487, 490-91, 763 S.E.2d 19, 21 (2014). Therefore, the clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent. *Id.*

In *Concord & Cumberland*, supra, the Court discussed several cases and examined the language of their respective indemnity provisions, which are very similar to language in the Ceres Agreement. As discussed above, the Ceres Agreement basically contains two indemnification provisions. The first provision appears in Paragraph 4.16 and the second appears in Article 11, as fully set forth under the Statement of Facts, supra. Paragraph 4.16 specifies that it applies to the acts of Olson and its Subcontractors (“caused by or resulting from the Subcontractor’s, or any of Subcontractor’s agents, representatives, subcontractors, suppliers or any one directly or indirectly employed by any of them or anyone for whose acts they may be liable.”). Therefore, this language limits the indemnitor’s promise to indemnify to only the losses resulting from the indemnitor’s negligence or that of its subcontractors. The paragraph then goes on to state, “regardless of whether such Liabilities are caused in part by an Indemnitee,” which is the same language that the Court in *Concord & Cumberland* found failed to alter the limiting phrase under the strict construction standard. *Id.* at 654. The paragraph then ends with “the indemnity obligation granted herein in favor of the Indemnitees shall include the sole and/or concurrent fault and negligence of any Indemnitee whether collectively or singularly.” Like the subcontract at issue in *Concord and Cumberland*, when read together, these two sentences show only the parties’ intent that Olson’s obligation to indemnify for Olson’s negligence is not diminished or affected in the event Ceres was concurrently negligent. It does not show an intention by the parties to indemnify Ceres for its concurrent negligence.

This point is further highlighted when read with Paragraph 11: “This Subcontractor agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons...resulting from or in any manner connected with, *the execution of the work provided for in this Subcontract.*” (Emphasis added). The work provided for in the

subcontract was Olson's work and that of its subcontractors. Therefore, there is no indication in Paragraph 11 that Olson intended to indemnify Ceres for its sole or concurrent negligence arising out of its separate contract with Beaufort County. As a result, the language of the Ceres Agreement does not meet the clear and unequivocal standard, and, strictly construing the subcontract, it fails to indemnify Ceres for losses resulting from its own sole or concurrent negligence.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT SPENCER OLSON TRUCKING HAS NO DUTY TO INDEMNIFY CERES AND BEAUFORT COUNTY UNDER EQUITABLE INDEMNITY.

After demonstrating a sufficient relationship exists, a party seeking equitable indemnification must prove: (1) the indemnity defendant (Olson) is at fault in causing the damages of the third party (Shaffer); (2) the plaintiff has no fault for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party's claim. *Fountain v. Fred's, Inc.*, 436 S.C. 40, 871 S.E.2d 166 (2022), citing *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013). A party is not entitled to equitable indemnification if any "negligence of his own has joined in causing the injury." *Id.* A party may be entitled to equitable indemnification only if "no personal negligence of his own has joined in causing the injury." *Id.*, quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53 at 60, 518 S.E.2d 301 at 305 (Ct. App. 1999). "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.*, quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57-58, 398 S.E.2d 500, 503 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992).

In the Third Amended Complaint, Beaufort County and Ceres were sued for their own

independent negligence—not vicariously for the negligence of Olson. Therefore, Beaufort County and Ceres are not entitled to indemnification against Olson in this context because they cannot be held liable for any negligent conduct by Olson, as it has been extinguished by settlement. There is no fault of Olson left at issue in this case. Axiomatically, Beaufort County and Ceres cannot seek equitable indemnification for their own alleged fault.

CONCLUSION

For the reasons stated, this Court should affirm the grant of summary judgment to Olson. Additionally, Olson also respectfully requests that this Court affirm for any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

GRIFFITH, FREEMAN & LIIPFERT, LLC

s/Kelly Dennis Dean

Kelly Dennis Dean, SC Bar #75372

E. Mitchell Griffith, SC Bar #2287

PO Drawer 570

Beaufort, SC 29901

kdean@griffithfreeman.com

mgriffith@griffithfreeman.com

(843) 521-4242

(843) 521-4247 (fax)

And

Steven D. Pattee

Julius Gernes

Donna Law Firm, PC

7601 France Avenue South, Suite 350

Minneapolis, MN 55435

spatee@donnalaw.com

jgernes@donnalaw.com

Attorneys for Respondent Spencer A. Olson Trucking, LLC

Beaufort, South Carolina
February 1, 2023

RECEIVED

Feb 01 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Appellate Case No. 2022-000328

Mark Schaffer, as Personal Representative of the
Estate of Susan
Shaffer,.....Appellant,

v.

DEH Disaster Recovery, LLC; Ceres Environmental
Services, Inc.; Beaufort County, a Political
Subdivision of the State of South Carolina;
Ryan Colter Stoltz; Matt T. Dotson; Tim Tod Dotson;
Brandi Dotson; Spencer A. Olson Trucking, LLC;
Buyers Products, Co.; and TruckPro,
LLC,.....Defendants,

Of which Ceres Environmental Services, Inc. and
Beaufort County, a Political Subdivision of the
State of South Carolina are the.....Appellant-Respondents,

And Spencer A. Olson Trucking, LLC, DEH Disaster
Recovery, LLC, and Ryan Colter Stoltz are the.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Spencer A. Olson Trucking, LLC complies with Rule 211(b), SCACR.

s/Kelly Dennis Dean

Kelly Dennis Dean, SC Bar #75372

E. Mitchell Griffith, SC Bar #2287

GRIFFITH, FREEMAN & LIIPFERT, LLC

PO Drawer 570

Beaufort, SC 29901

kdean@griffithfreeman.com

mgriffith@griffithfreeman.com

(843) 521-4242
(843) 521-4247 (fax)
And
Steven D. Pattee
Julius Gernes
Donna Law Firm, PC
7601 France Avenue South, Suite 350
Minneapolis, MN 55435
spatee@donnalaw.com
jgernes@donnalaw.com

Attorneys for Respondent Spencer A. Olson Trucking, LLC

***Attorneys for Respondent Spencer A. Olson Trucking,
LLC***

Beaufort, South Carolina

February 1, 2023