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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-000328

Mark Shaffer, 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; Byers 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 Appellants-Respondents,

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

FINAL REPLY BRIEF OF APPELLANTS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), *reh'g denied* Oct. 18, 2018 .....2, 3, 4

D.R. Horton v. Builder's First Source, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).....3, 4, 5

Federal Pacific Elec. v. Carolina Prod. Ent., 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) 4

S.C. Code Ann. § 32-2-10 (Law. Co-op, as amended).....3

REPLY ARGUMENT

In reply to the arguments in the Briefs of Respondents Olson, DEH, and Stoltz, Ceres relies upon the information and arguments in its Initial Brief filed on August 29, 2022. Ceres does, however, take this opportunity to point out some of the fundamental flaws in the Respondents' arguments, particularly those articulated in Olson's Brief (R. p. [n/a]). For ease of reference, any reference in this Brief to the Appellant-Respondent Ceres Environmental Services, Inc. ("Ceres") shall also incorporate Beaufort County by reference, unless otherwise specified.

In the Orders granting summary judgment (hereinafter, the "Olson SJ Order," R. p. 8; and the "DEH-Stoltz SJ Order," R. p. 1), the Lower Court dismissed Ceres' cross claims against Olson, DEH, and Stoltz. The justification offered for that dismissal was that once the Plaintiff dismissed the direct claims it had against those entities, Ceres had no basis for continuing to pursue indemnity against them. In fact, Ceres has suffered substantial damages which arose out of the negligent acts and omissions of Olson, DEH, and Stoltz, and Ceres must be permitted to adjudicate those indemnity claims.

The Plaintiff began this case by alleging that Ceres was negligent in, among other things, failing to inspect the truck and trailer prior to the accident involving Ms. Shaffer. Plaintiff also alleged that Olson, DEH, and Stoltz, who worked under Ceres in this project, were directly liable to Plaintiff for their negligent conduct that resulted in that accident.

Ceres asserted its indemnity claims against those entities based upon their negligent acts and omissions which resulted in liability claims being asserted against Ceres. Among other things, Ceres suffered damages by virtue of having to defend itself and Beaufort County from Plaintiff's claims against them. On November 25, 2020, Olson, DEH, and Stoltz settled with the Plaintiff by paying the aggregate amount of $1,150,000 (R. p. 254). Ceres was not made aware of those

settlement negotiations; Ceres had no part in the settlement process; and Ceres did not have any input into the settlement or its resulting documentation.

Following that settlement, Plaintiff filed the Third-Amended Complaint (R. p. 199), in which Plaintiff dismissed its direct claims against Olson, DEH, and Stoltz, and also removed the vicarious liability cause of action against Ceres.

There are two basic components in Olson's argument as Respondent in this Appeal: (1) that this Court must ignore all of the contractual indemnity language in the Ceres-Olson Subcontract (R. p. 3568, and quoted in part by Olson in its Brief at pp. 3-4); and (2) that this Court must ignore the existence of any negligent acts and omissions by Olson, DEH, and Stoltz as well as any damages which Ceres may have suffered arising out of those acts and omissions. *See, e.g.,* Olson's Brief at p. 10 (R. p. [n/a]).

Olson attempts to buttress its argument with the following fallacy: "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 this Court to have Olson indemnify [Ceres for] its own, sole negligence . . . ." Olson's Brief at p. 10 (R. p. [n/a]) (emphasis added). Olson incorrectly assumes that its duty to indemnify was automatically extinguished at the moment that it settled Plaintiff's claims along with DEH and Stoltz, and that Ceres must, therefore, have lost any right to seek indemnity for negligent acts and omissions by those parties.

Of course, Olson is unable to erase the existence of the indemnity language in the Ceres-Olson Subcontract (quoted in Olson's Brief at pp. 3-4, R. p. [n/a]). Instead, Olson first seeks to challenge the legality of that indemnity language by reference to *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 639, 819 S.E.2d 166 (Ct. App.

2018), *reh'g denied* Oct. 18, 2018 and *D.R. Horton v. Builder's First Source,* 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

As discussed in Ceres' Brief filed August 29, 2022: "Under South Carolina law, a contract that purports to indemnify an indemnitee for the indemnitee's sole negligence is unenforceable." *Concord & Cumberland*, 424 S.C. at 647, 819 S.E.2d at 170-71, citing S.C. Code Ann. § 32-2-10 (2007). However, the language that the *Concord & Cumberland* Court found to be fatal to indemnity was distinctly different from the language in the Ceres-Olson Subcontract quoted above (R. pp. 3575, 3583). The *Concord & Cumberland* Court clarified the language fatal to indemnity as follows:

> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, ***to the extent caused or alleged to be caused*** in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Concord & Cumberland, 424 S.C. at 643-44, 819 S.E.2d at 169 (emphasis added).

The language emphasized in the passage above, "to the extent caused or alleged to be caused," was what the *Concord & Cumberland* Court specifically found to preclude indemnity for concurrent negligence of the indemnitee. As shown in the Ceres-Olson Subcontract passage quoted by Olson in its Brief at p. 3 *quoting* ¶ 4.16 of the Ceres-Olson Subcontract (R. p. 3575), there was no such "to the extent caused" language.

Instead, the Ceres-Olson Subcontract specifically included language stating that Olson intended to indemnify Ceres for the "sole and/or concurrent fault and negligence of [Ceres]." *Id.* (R. p. 3575). It is that plain and unambiguous language that was missing in the agreement analyzed *in Concord & Cumberland*, and that is why the indemnity language in the Ceres-Olson

Subcontract, *id.*, is neither invalid nor unenforceable as suggested by Olson in its Brief. Indeed, Olson's failure to include that critical analysis in its Brief results in a misdirection and misapplication of this important precedent.

The Lower Court erred in disregarding a substantial and consequential portion of the contractual indemnity language in the Ceres-Olson Subcontract. *See* Olson's Brief at pp. 3-4 (R. pp. [n/a]). By failing to recognize that Olson agreed to indemnify even when liability was concurrent with Ceres (R. pp. 3575, 3583), the Lower Court misapplied the current precedent within *Concord & Cumberland*. Further, the Lower Court failed to recognize the severability clause within the Ceres-Olson Subcontract (R. p. 3586), in which Olson agreed that any unenforceable terms would simply be stricken, and the remaining indemnity obligations would be enforced. (R. p. 3586). As the Court of Appeals held in *Federal Pacific Elec. v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), "[a] contract of indemnity will be construed in accordance with the rules for the construction of contracts generally."

As Ceres further discussed in its Brief filed on August 29, 2022, the Lower Court also erred in its application of *D.R. Horton v. Builder's First Source, supra,* 422 S.C. at 152, 810 S.E.2d at 45. The *D.R. Horton* Court specifically held that even when a contractual indemnity clause includes some language that is void as against public policy, so long as that clause also includes language that is enforceable, the enforceable portions may not be stricken as they accurately set forth the intent of the parties.

In *D.R. Horton,* 422 S.C. at 152, 810 S.E.2d at 45, the South Carolina Court of Appeals recognized that there is nothing impermissible about the portion of Ceres' indemnification clause which requires Olson to be responsible for its own acts and omissions: "This statute ***allows*** D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton ***for damages caused by BFS or its***

subcontractors. To the extent the trial court found ***that aspect of the agreement*** to be against public policy, we disagree." *Id.* (emphasis added).

In its Olson SJ Order, the Lower Court failed to recognize that the *D. R. Horton* Court only excludes the portion of the contractual indemnity clause that purports to indemnify a party for its own negligence. *Id.* The *D. R. Horton* Court did not disregard the entire clause, or the entire contract, as the Olson SJ Order requires. Instead, the *D. R. Horton* Court properly applied the law of contract construction and, in that case, simply deleted the offending portion of that indemnity clause. While Ceres disagrees that its contractual indemnity clause violates public policy or is otherwise unenforceable, the *D.R. Horton* case nonetheless establishes that the contractual indemnity clause upon which Ceres relies is valid and enforceable.

As the second component of its overall argument noted above, Olson further asks that this Court ignore any negligent acts and omissions by Olson, DEH, and Stoltz as well as any damages which Ceres may have suffered as a result of those acts and omissions. In its Brief at p. 12, Olson actually supports Ceres' argument by confirming that the Ceres-Olson Subcontract indemnity language requires Olson to indemnify Ceres "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 by Olson). Olson then concludes that "[t]he 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." Olson's Brief at p. 12 (R. p. [n/a]).

While Olson intended that analysis to support its flawed argument, Olson actually confirmed that Ceres is fully entitled to seek indemnity from Olson for Olson's negligent acts and omissions committed during the project, from which Plaintiff's claims and Ceres' damages arose.

Finally, in its Brief at pp. 13-14 (R. p. [n/a]), Olson clearly sets forth perhaps the most significant logical flaw in its argument, as follows: "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.*" (Emphasis added).

The flaw in the above-quoted language is, of course, that the negligent conduct by Olson cannot be "extinguished" by settlement any more than any previous event in history can be "extinguished" by some agreement. It may be true, *arguendo,* that Olson was able to absolve itself of direct liability to Plaintiff as part of the $1.1 million settlement it entered along with DEH and Stoltz, but that would be only the liability which was extinguished, and not the fact that the Olson actually engaged in the negligent conduct at issue.

Ceres is entitled to assert its indemnity claims against Olson, DEH, and Stoltz, and the Lower Court erred by denying Ceres the opportunity to prove the nature and extent of that negligent conduct. Olson, DEH, and Stoltz ask this Court to believe that their negligent acts and omissions were "extinguished" by their settlement with the Plaintiff. But neither Olson, DEH, nor Stoltz are able to make their previous negligent conduct disappear from history. Neither are they able to make the properly asserted indemnity claims by Ceres and Beaufort County disappear as Olson suggests in its Brief. The Lower Court's Orders granting Summary Judgment to Olson, DEH, and Stoltz (R. pp. 1, 8) must be reversed, and Ceres and Beaufort County must be allowed to properly pursue indemnification through their claims that were erroneously dismissed.

CONCLUSION

For the foregoing reasons, the Lower Court's Orders granting Summary Judgment in Favor of Respondents Spencer Olson Trucking, DEH Disaster Recovery, and Ryan Stoltz and against the Appellants-Respondents Ceres Environmental Services and Beaufort County must be reversed, and the claims asserted by Ceres and Beaufort County against the Respondents must proceed to trial on the merits.

Respectfully Submitted,

February 10, 2023

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

CERTIFICATE OF COUNSEL

The undersigned, R. Patrick Flynn, Counsel for the above-captioned Appellants-Respondents, hereby certifies that the Final Reply Brief of Appellants-Respondents, which is being filed herewith, complies with Rule 211(b), SCACR.

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