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November 4, 2013

VIA U.S. MAIL

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: ***Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc. v. Ross Development Corp. et al.*, Appellate Case No. 2013-001766.**

Dear Clerk of Court:

Pursuant to Rule 244(d) and Rule 211(a), please find enclosed 15 copies of the Opening Brief of PCS Nitrogen, Inc. in the above captioned case. Rule 244(d), SCAR; rule 211(a), SCAR. Also enclosed is one additional copy of the brief that can be file-stamped and returned to Wm. Howell Morrison, Esq., at Haynsworth, Sinkler & Boyd, P.A., using the enclosed envelope, which has been addressed to Mr. Morrison with postage pre-paid.

If any questions arise with regard to this filing, please contact Mr. Morrison at (843) 720-4405.

Sincerely,

COZEN O'CONNOR

Kelli E. Hall

By: Kelli E. Hall
Paralegal

Enclosures

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001766

Ashley II Of Charleston, L.L.C., ... Plaintiff,

v.

PCS Nitrogen, Inc., ... Defendant/Third-Party Plaintiff,

v.

Ross Development Corporation, Koninklijke DSM N.V., DSM Chemicals of North America, Inc., James H. Holcombe, and J. Holcombe Enterprises, L.P., J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express, and The City Of Charleston, ... Third-Party Defendants.

Appellate Case No. 2013-001766

BRIEF ON CERTIFIED QUESTION OF DEFENDANT/THIRD-PARTY PLAINTIFF

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STATEMENT OF ISSUES ON APPEAL

On October 2, 2013, this Court agreed to answer the following question certified to this Court by order of the Honorable Margaret B. Seymour, Senior United States District Judge for the District of South Carolina, Charleston Division:

> Does the 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, apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts?

STATEMENT OF THE CASE

The litigation that gave rise to the certified question involves claims filed under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and a contractual indemnification claim. On September 26, 2005, Ashley II of Charleston, LLC ("Ashley") sued PCS Nitrogen, Inc. ("PCS") to impose on it joint and several liability for all response costs at the Columbia Nitrogen Superfund Site ("Site") in Charleston, South Carolina. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 439 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013). Ashley sued PCS as the successor to a former Site owner. *Id.* at 440. PCS itself never owned or operated the Site. Ashley elected not to seek response costs from the entity that owned and operated the Site for most of the time that it was used as a fertilizer manufacturing facility, Ross Development Corporation ("Ross").

Facing the prospect of joint and several liability, after it was sued by Ashley, PCS brought claims for contribution against other current and former Site owners, including Ross, under CERCLA Section 113, 42 U.S.C. § 9613(f)(1), and a contractual indemnification claim against Ross. *Id.* 439-440; *see also id.* at 504. PCS sought

indemnification for both CERCLA response costs and litigation expenses incurred in establishing Ross's liability in the CERCLA action.

The United States District Court for the District of South Carolina ultimately found PCS to be jointly and severally liable for all response costs incurred by Ashley under CERCLA Sections 107(a)(A) to (D) and required all other liable parties except one—the City of Charleston—to contribute to the payment of response costs under CERCLA Section 113(f)(1). Ultimately, the court ordered Ross to pay PCS 45% of the response costs incurred at the Site. *Id.* at 503. PCS was found liable for a 30% share of costs. *Id.*

The district court also granted PCS relief on its contractual indemnification claim against Ross. The Court found PCS entitled to indemnification for both CERLCA claims and "costs and expenses of this case resulting from any acts or omissions that occurred 'prior to the closing date' of the sale of the Planters business to CNC[,]" which took place on June 30, 1966. *Id.* at 506.

The certified question before this Court will determine whether PCS can recover litigation costs and expenses incurred both to establish Ross's liability and to defend PCS from liability in the underlying action in the absence of an express intention to permit this type of indemnification. The district court certified the question presented here on August 19, 2013. This Court agreed to answer the certified question on October 2, 2013. PCS received this Court's certification order on October 4, 2013.

STATEMENT OF FACTS

The indemnification provision at issue here was executed in 1966 by Ross, which was then called Planters Fertilizer and Phosphate Company ("Planters"), and Columbia

Nitrogen Corporation ("CNC"). *Id.* at 444, 505. Planters manufactured sulfuric acid and phosphate fertilizer at the Columbia Nitrogen Superfund Site ("Site") at issue in the underlying case for sixty years, between 1906 and 1966. *Id.* at 444. After acquiring the property and fertilizer plant from Planters, CNC manufactured sulfuric acid there for four years, between 1966 and 1970, and phosphate fertilizer for six years, between 1966 and 1972. *Id.* at 448. PCS has been found to be the successor to CNC. *Id.* at 440.

The Letter Agreement between Planters and CNC set forth the conditions under which CNC would acquire the Site and the Planters fertilizer business. *Id.* at 505. It included certain warranty, insurance, and indemnification requirements intended to protect CNC from loss. *Id.* In Paragraph VIII of the agreement, Planters agreed to broadly indemnify CNC:

> Seller [Planters] agrees to indemnify and hold harmless Buyer [CNC] in respect to all acts, suits, demands, assessments, pr[o]ce[e]dings and cost and expenses resulting from any acts or omission of the Seller [Planters] occurring prior to the closing date and pertaining herein[.]

Id. The deed that subsequently conveyed Planters' assets to CNC provided that the Letter Agreement would survive closing. *Id.*

The district court found PCS indemnified for both costs and expenses incurred in the underlying litigation and CERCLA liability. Based on the Letter Agreement's "broad" terms, which provide indemnification for "all acts, suits, demands, assessments, [and] pr[o]ce[e]dings," the Court found the agreement indemnified CNC, now PCS, for CERCLA claims. *Id.* at 506. Citing the plain terms of the agreement, the Court also found PCS indemnified for all "costs and expenses" from the underlying litigation that "result[] from any act or omission of [Planters] occurring prior to the closing date." *Id.*

The certified question is not directed to the portion of the district court's decision finding PCS indemnified for CERCLA liability.

The district court certified the question before this Court when it became apparent that PCS and Ross could not agree on the scope of litigation costs and expenses due to PCS under the judgment. The vast majority of costs that PCS seeks to recover were incurred for multiple purposes including, but not limited to, the development of evidence and testimony regarding Ross's ownership and operation of the Site. That proof was relevant both to PCS's contribution claim against Ross and to PCS's efforts to establish a divisibility defense to joint and several liability under *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009). PCS had no choice but to develop proof of Ross's ownership and operation of the Site when it was sued by Ashley and faced the prospect of joint and several liability for all response costs at the Site.

PCS and Ross disagree over whether the negligence rule limits the amount of litigation costs and fees due to PCS under the judgment. Because the costs and fees were incurred, in part, to establish PCS's defense, and the indemnification agreement did not expressly indemnify PCS for its own negligence, Ross took the position before the district court that South Carolina's negligence rule prohibits PCS from recovering those expenses. PCS countered that the rule did not apply to loss arising from strict liability acts, and the plain meaning of the terms of the indemnification provision reflects an intent that PCS recover costs and expenses that are in any way a consequence, effect or conclusion of Ross's conduct, even if those losses were also incurred as a result of other conduct.

The district court found that South Carolina courts have not addressed the issue. The court certified the question presented here to resolve whether the negligence rule should apply when indemnification is sought for losses arising from strict liability acts.

ARGUMENT

The South Carolina negligence rule has no relevance to PCS's recovery of litigation costs and expenses incurred to address both its own strict liability acts and those of Ross. The rule provides 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." *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (S.C. 2003) (internal citation omitted). The rule's heightened intent requirement would erect an obstacle to an indemnitee's recovery of litigation expenses that arise, in part, from its own strict liability acts. That is not necessary in the CERCLA context because the nature of CERCLA's liability scheme already deters indemnitees from making overly broad indemnification claims. Further, expansion of the negligence rule to strict liability claims would be contrary to other provisions of South Carolina law.

I. THE NEGLIGENCE RULE SHOULD NOT BE EXTENDED TO ENCOMPASS INDEMNIFICATION FOR CERCLA-RELATED COSTS AND EXPENSES BECAUSE TO DO SO WOULD NOT SERVE THE RULE'S PURPOSE.

Most importantly, applying the negligence rule to indemnification claims like PCS's would not serve the rule's purpose, which is deterrence. The rule ensures that an indemnitee cannot easily escape the consequences of its conduct by requiring courts to strictly scrutinize claims that an indemnitee is indemnified for its own negligence. The difficulty of obtaining indemnification creates an incentive for the indemnitee to act with

due care. Those concerns are not implicated when indemnification is sought for costs and expenses arising from strict liability acts because strict liability is imposed without regard to fault. Liability does not arise from carelessness, and the negligence rule is not required to encourage indemnitees to act with care. (*See infra* at 12-18)

With regard to CERCLA claims, the deterrent effect of the negligence rule also is not needed because CERCLA, by its terms, does not allow an indemnitee to contract away its liability for costs incurred by the United States Environmental Protection Agency ("EPA") in connection with its investigation and clean-up of polluted properties. 42 U.S.C. § 9607(e)(1). That liability remains with the indemnitee. Therefore, to the extent that the public benefits from an indemnitee retaining responsibility for Superfund sites, that benefit is already provided by CERCLA itself. (*See infra* at 18-19.)

A. THE NEGLIGENCE RULE SERVES THE PURPOSE OF DETERRENCE.

That the negligence rule serves a deterrent purpose has been plain since this Court applied the rule and discussed its genesis in *Murray v. The Texas Co.*, 172 S.C. 399, 174 S.E. 231 (1934). There, a defendant found liable for negligence by a jury sought to void the judgment on the grounds that an indemnification agreement relieved it of liability, and this Court's application of the negligence rule to that indemnification claim prevented the defendant from escaping the consequences of its own conduct.

Considering whether the defendant was entitled to indemnification, this Court relied upon the "general rule" governing the extent to which a contract can relieve a party

of liability set forth in the Ruling Case Law volume on contracts, 6 R.C.L. 727.[1] *Id.* at 402, 232. Quoting the volume, the Court explained:

> [A] person cannot by contract relieve himself from a duty[,] which he owes to the public independently of the contract. Whether he can relieve himself from the duties to the other contracting party attaching as a matter of law to the relation created by the contract is more difficult to determine. An analysis of the decisions indicates that even under the view that a person may under some circumstances contract against the performance of such duties, he cannot do so where the interest of the public requires the performance thereof, or where, because the parties do not stand on a footing of equality, the weaker party is compelled to submit to the stipulation.

Id. The general rule, therefore, is that the law disfavors contracts that relieve a party of duties imposed by the law. To allow a party to shift responsibility for its own duties would, of course, eliminate the consequences that the party would otherwise face if the duties were not performed. Limitations are imposed on an entity's ability to relieve itself of duties by contract to ensure that the party remains responsible for the duties and for the consequences that flow from its failure to perform the duties.

The Ruling Case Law volume relied on by this Court in *Murray* explains the purpose of the rule more fully in a passage that immediately precedes that quoted by this Court:

> Undoubtedly contracts exempting persons from liability for negligence induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. It has therefore been declared to be good doctrine that no person may contract against his own negligence.

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[1] The complete publication information for this volume is as follows: Ruling Case Law, edited by William M. McKinney and Burdett A. Rich (1915). The volume is available on Google Books at: http://www.books.google.com (last visited 11/3/2013).

6 R.C.L. 727.[2] Thus, to create "the highest incentive to the exercise of due care," courts are reluctant to enforce indemnification clauses if the indemnitee has acted negligently. By, for example, requiring clear and unequivocal proof of intent to indemnify, courts create an incentive for an indemnitee to police its own conduct. If the indemnitee believed that it could shift financial responsibility for its failure to act with due care to the indemnitor, even in the absence of specific evidence of that intent, the indemnitee would have little incentive to act with such care. To prevent this adverse incentive, courts have raised the bar for indemnification of an indemnitee's negligence.

Based on this concern, in *Murray*, this Court decided to construe the indemnification agreement at issue against the indemnitee and declined to allow the defendant to use an indemnification agreement to void the judgment entered against it for negligence. "[T]here was testimony to the effect . . . that [the indemnitee's] failure to exercise due care in making the repairs had resulted in the practical destruction of the [indemnitor's] business," and the language of the agreement while "broad and comprehensive" was "provocative of some doubt" as to whether the parties' intent was to indemnify the indemnitee for its own negligence. 172 S.C. at 401-04; 174 S.E. at 232. The Court noted that the indemnitee inserted the language in the agreement for its own benefit and "could have plainly stated, if such was the understanding of the parties, that the [indemnitor] agreed to relieve it in the matter from liability for its own negligence."

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[2] This page of the Ruling Case Law volume is available at: http://books.google.com/books?id=WGU8AAAAIAAJ&printsec=frontcover&dq=ruling+case+law+volume+6&hl=en&sa=X&ei=_qt2Urb7HtXLsQSf8YCABw&ved=0CD0Q6AEwAw#v=onepage&q=ruling%20case%20law%20volume%206&f=false. (last visited 11/3/2013).

Id. On this basis, the Court construed the language in favor of the indemnitor as not relieving the indemnitee of liability for its own negligence.

Since *Murray*, this Court and the South Carolina Court of Appeals have applied the negligence rule when the facts and claims at issue plainly demonstrate that the indemnitee's conduct was wrongful, and that the rule served a deterrent purpose. In *Federal Pacific Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), Federal Pacific, the indemnitee, was sued when switchgear it manufactured and installed at property leased by the indemnitor malfunctioned causing injuries. Federal Pacific sought to compel the indemnitor to pay costs incurred defending against third-party claims alleging that it improperly designed, manufactured, distributed and installed the switchgear. The South Carolina Court of Appeals found Federal Pacific "[sought] to use the [indemnification] provision to absolve itself from liability for its own negligence" and denied its indemnification claim on the grounds that the agreement, while broadly drafted, did not specifically confer that benefit. *Id.* at 27, 58.

In *Laurens Emergency Med. Specialists*, the indemnitee and indemnitor accused each other of negligence. The indemnitee, Emergency Medical Services ("EMS"), argued it was harmed when the indemnitor, Laurens County Health Care System (hereinafter "Hospital"), negligently hired a secretary who stole funds from EMS. The Hospital, in turn, alleged that the indemnitee was contributorily negligent in not putting in place procedural safeguards to prevent the theft. 355 S.C. at 106, 584 S.E.2d at 376. This Court found the broadly drafted indemnification agreement at issue "[did] not disclose an intention by the parties to relieve EMS of the consequences of its own negligence." *Id.* at 112, 379.

In each of these cases, the indemnitee caused harm (or was alleged to have caused harm) as a result of its failure to exercise due care. But when an indemnitee does not act wrongfully, the rule is not applied. In *South Carolina Elec. & Gas Co. v. Utilities Constr. Co.*, 244 S.C. 79, 87, 135 S.E.2d 613, 616 (1964), for example, the indemnitee was liable for negligence under a town ordinance, but this Court found that liability did not flow from the indemnitee's wrongful conduct, and thus rejected the argument that, to prevail on its indemnification claim, the indemnitee had to meet the heightened intent standard set forth in *Murray*.

The facts in *South Carolina Electric & Gas Co.* were straightforward. The indemnitee accepted faulty workmanship on a sidewalk repair, and a pedestrian was subsequently injured. It was undisputed that under a town ordinance the indemnitee, an electric company, was liable for the pedestrian's injury. Indeed, the indemnitee settled the pedestrian's claim and then sought to recover the cost of its payment under the terms of an indemnification agreement. *Id.* at 84, 615. This Court permitted the electric company to be indemnified because, when it examined the conduct that caused the harm, it found the indemnitee had not behaved wrongfully. The indemnitee had not acted contrary to any duty of care:

> Here the plaintiff was chargeable as a matter of law, by virtue of the franchise ordinance, with the negligence of the defendant in improperly repairing the sidewalk and failing to restore the same to its prior condition. We see no evidence in this case, however, of any other negligence on the part of the plaintiff. The breach of a legal duty is essential to negligence and such legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence.

Id. at 88, 617. This Court then went on to explain that the electric company did not err in failing to inspect the sidewalk because it did not know of its poor condition and had no affirmative duty to inspect it.

Based on that analysis, this Court found that an indemnification provision "very broad and comprehensive in its terms" required indemnification even though it did not expressly provide for indemnification of the indemnitee's negligence. *Id.* at 91, 618. The construction company had agreed to indemnify and hold harmless the electric company from "any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract." *Id.* at 83, 614. Focusing on the contracting parties' conduct, this Court concluded that "[t]he facts of this case show without any question, that the claim for damages to the person of [the injured party] arose directly out of the faulty performance of the work by the defendant [indemnitor]." *Id.* at 91, 618. "Under any interpretation of the contract, strict or liberal," a duty to indemnify was owed. *Id.*

South Carolina Electric & Gas Co. demonstrates that when liability does not arise from a lack of care, the negligence rule is not applied. By contrast, in *Murray*, *Federal Pacific Elec.*, and *Laurens Emergency Med. Specialists*, there was evidence of the indemnitee's wrongful conduct, and thus the courts held that the indemnification claims should be denied absent a clear and unequivocal expression of the contracting parties' intent that the indemnitee should be indemnified for its own negligence. Under those circumstances, a heightened intent standard makes sense as it served the rule's purpose, which is to ensure that a private party retains liability and with it, the motivation to act

with due care. That concern is not at issue in cases like *South Carolina Electric & Gas Co.*, when liability does not arise from harmful conduct.

B. THE PURPOSE OF DETERRENCE IS NOT SERVED BY APPLYING THE RULE TO INDEMNIFICATION FOR CERCLA-RELATED COSTS AND EXPENSES.

Under *South Carolina Electric & Gas Co.*, there is no need for the negligence rule when indemnification is sought for losses incurred in CERCLA actions. Liability under CERCLA is strict and arises from an entity's relationship to a contaminated property, not just careless conduct that caused the contamination. Given the structure of CERCLA, the ability to obtain indemnification would not be expected to have an effect on a party's conduct.

In addition, CERCLA already prohibits a liable party from using an indemnification agreement to escape its potential liability to the United States Environmental Protection Agency ("EPA"). Thus, the statute ensures that liable parties indemnified for costs due to private entities always retain an incentive to avoid CERLCA liability to EPA, which cannot be contracted away.

i. Because CERCLA Imposes Strict Liability, Allowing Indemnification of CERCLA-Related Costs and Expenses Will Not Encourage Carelessness.

The concept of fault has no role in the imposition of CERCLA liability. "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [statute.]" *New York v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1982). CERCLA provides in Section 601(32) that "liability" should be "construed to be the standard of liability" under the Clean Water Act. 42 U.S.C. § 9601(32). Courts have held that standard to be strict liability. *Shore Realty*, 759 F.2d at 1042.

The strict liability imposed by CERCLA is not, however, reminiscent of tort-based strict liability. Under the common law, strict liability claims were developed to impose liability on entities that choose to engage in ultra-hazardous activities that were so dangerous it made sense to punish participation in them even in the absence of any evidence the activity was undertaken with a lack of care. *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960) (holding negligence did not have to be alleged in action brought to establish liability for harm caused by concussion and vibration from blasting of explosives). The nature of the conduct was such that harm was virtually certain. It could not be undertaken with a degree of care sufficient to eliminate the risk of harm that the activity posed. *See generally* Restatement (Second) Torts § 520, comment h. Liability arose from mere participation in the conduct.

CERCLA does not impose liability on that basis. The goal of CERCLA's broad remedial reach is to further the clean up of hazardous waste contaminated sites. Liability is not premised on participation in ultra-hazardous polluting activity, or even proof that the defendant caused a measurable or identifiable portion of the harm at a contaminated property. Instead, the statute authorizes anyone that incurs costs cleaning up a contaminated property to recover those costs "from anyone who qualifies as a 'responsible person' under the statute." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992).

"CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs [potentially responsible parties]." *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009). Specifically, CERCLA Section 107(a), "the principal mechanism for recovery of costs expended in the clean up of waste

disposal facilities," *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), imposes liability on: (i) current owners or operators of contaminated property, (ii) entities that owned or operated a contaminated property at the time a disposal of hazardous substances occurred, (iii) entities that arranged for the disposal or treatment of hazardous substances at the property, and (iv) entities that accepted hazardous substances for transport and disposal\treatment at the property where the substances were found. 42 U.S.C. §§ 9607(a)(1)-(4). With regard to former Site owners, such as CNC, Section 107(a) provides:

> [A]ny person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of, [and] . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for. . . all costs of removal or remedial action. . . [and] any other necessary costs of response[.]"

42 U.S.C. §§ 9607(a)(2),(4).

Whether a former site owner is responsible for the contamination actually being remediated at a Superfund Site is beside the point. Liability is based on ownership at the time a "disposal" of hazardous substances occurred, and proof that a "release" has occurred at the contaminated property. Both "release" and "disposal" are defined to include the purely passive leaching of contamination through soil. 42 U.S.C. §§ 6901(22), 6901(29), 6903(3); *Nurad*, 966 F.2d at 839 (holding district court misconstrued definition of "disposal" by "requiring proof of affirmative participation in hazardous waste disposal as a prerequisite to liability under § 9607(a)(2)"). Thus, a former owner can be liable under CERCLA if contamination passively migrated through site soils when it owned the site. Liability does not turn on evidence the defendant caused the pollution being remediated. "The traditional elements of tort culpability. . .are simply absent from

the statute. The plain language of [S]ection 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste." *Monsanto*, 858 F.2d at 168.[3]

Congress's decision to expand liability beyond those entities that actually caused the contamination furthered the goal of expediting the clean up of contaminated properties. *Nurad*, 966 F.2d at 846; *see also Monsanto*, 858 F.2d at 170. Often at properties subject to suit under CERCLA the cause of contamination cannot be determined because the pollution occurred so long ago and\or involved many parties and many hazardous waste sources. And if the conduct that caused pollution pre-dated CERCLA and most environmental statutes, it was often perfectly lawful at the time it occurred, and its consequences were not understood. To facilitate the collection of funds for remediation, the statute imposes liability broadly on defined categories of entities that have a connection to the property or the waste found there.

The strict nature of CERCLA liability is illustrated by the Fourth Circuit's application of Section 107(a) in *Monsanto*. There, the district court imposed CERCLA liability on both Site owners and entities that generated hazardous substances. On appeal, the owners claimed that they should not be held liable because they did not contribute hazardous substances to the site. *Id.* at 166-167. The generator defendants argued that they should not be held liable because "the government[] fail[ed] to establish a nexus between their specific waste and the harm at the site." *Id.* at 167. The Fourth Circuit

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[3] *See also Nurad*, 966 F.2d at 846 ("The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination."); *Shore Realty*, 759 F.2d at 1044 ("CERCLA "imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release.").

rejected both arguments. With regard to the Site owners, the court concluded that it was sufficient, under Section 107(a)(2), that they owned the site "when hazardous substances were deposited there[.]" *Id.* at 168. With regard to the generator defendants, the Fourth Circuit affirmed the district court's determination that "the statute was satisfied by proof that hazardous substances 'like' those contained in the generator defendants' waste were found at the site," and no further proof of causation was required. *Id.* at 169.

Here, in the underlying case, the district court found all of the parties to be liable under CERCLA Section 107(a) as either current or former Site owners. CNC was held liable based on its status as a former Site owner, as was Ross. *Ashley II of Charleston*, 791 F. Supp. 2d at 479-80, 491. PCS bears liability for response costs based solely on its status as the corporate successor to CNC, a former Site owner. *Id.* at 440. PCS never itself owned or operated the Site. Yet, today, based on an asset purchase agreement from 1985, PCS bears joint and several liability for remediation costs at the Site. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, Civil Action No. 2:05-2782-CWH, 2007 WL 2893372 (Sept. 28, 2007), *aff'd*, 714 F.3d 161 (4th Cir. 2013).

Once an entity is found liable under Section 107(a) based on its status, it can be required to pay clean up costs. The scope of the defendant's financial responsibility for costs depends on whether suit was filed under Sections 107(a)(4)(A) to (D) or Section 113(f)(1). Sections 107(a)(4)(A) to (D) impose joint and several liability. A defendant found to be a responsible party based on its status under Section 107(a) must pay all of the response costs incurred remediating a contaminated site under Sections 107(a)(4)(A) to (D). 42 U.S.C. § 9607(a)(4)(A)-(D).

Under CERCLA Section 113(f)(1), liability is several, and the court must determine the amount of response costs that each party found liable under Section 107(a) should bear. In making that determination, courts may consider "such equitable factors as the court determines are appropriate[,]" 42 U.S.C § 9613(f)(1), but in practice generally rely on the Gore factors. *Ashley II of Charleston*, 791 F. Supp. 2d at 490. While several of the Gore factors focus the court's attention on certain conduct that may have caused harm at the Site, the allocation of costs under Section 113 does not turn on a determination by the court that a defendant behaved negligently or actually caused a certain portion of the harm at a site.

Thus, in the underlying suit, the district court required CNC to pay a 30% share of response costs based on its ownership and operation of the Site. In quantifying the amount of response costs that CNC should pay, the court considered that it manufactured fertilizer at the Site for six years and, "left lead sheeting discarded on the Site[,]" upon ceasing its operations "demolished all of the structures on the Site," and graded the Site before selling it. *Id.* at 492. With regard to the care with which CNC operated the Site, the court noted that "CNC took more steps to protect the environment than did Planters[.]" *Id.* CNC neutralized both acid leaks and acidic sludge, reducing the quantity of low pH material in the environment that tended to accelerate the leaching of lead and arsenic. *Id.* at 449. In addition, CNC shut down its fertilizer plant at times to reduce air emissions. *Id.*

The negligence rule should not apply here, or to CERCLA claims generally, because the deterrence provided by the rule is not needed. As discussed above, in using the negligence rule to require express proof of intent, courts create an incentive for an

indemnitee to police its own conduct. If the indemnitee believed that it could shift financial responsibility for its failure to exercise due care to the indemnitor, even in the absence of specific evidence of that intent, the indemnitee would have little incentive to act with such care. That incentive is not needed here. The nature of the liability under CERLCA arises from a defendant's status, not its conduct, which means that having the ability to obtain indemnification for CERCLA-related costs does not create an incentive to act carelessly. For that reason, among others, this Court should not erect an unnecessary obstacle to indemnification of CERCLA claims.

ii. By Ensuring That Indemnified Parties Retain Liability To EPA, CERCLA Already Deters CERCLA Violations.

To the extent that the public would benefit if an indemnitee retained an incentive to avoid CERCLA liability, CERCLA already ensures that benefit. For that additional reason application of the negligence rule to CERCLA claims is not necessary.

CERCLA limits the extent to which an entity found to be a responsible party under Section 107(a) can escape liability for response costs through an indemnification agreement. Under Section 107(e)(1), a private party can shift financial responsibility for response costs due to another private party, but cannot use an indemnification agreement to extinguish its underlying status as a CERCLA liable party, or to shift its financial responsibility for response costs due to the United States government. 42 U.S.C. § 9607(e)(1) ("No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer . . . the liability imposed under this section"); *SmithKline Beecham Corp. v. Rohm and Haas Co.*, 89 F.3d 154, 158 (3d Cir. 1996) (interpreting Section 107(e)(1) "to mean agreements to indemnify or hold harmless are enforceable between the parties but not against the government.") (internal quotation omitted). The

result is that private parties cannot use an indemnification agreement as a defense to a claim for costs brought by EPA. *See generally Shore Realty*, 759 F.2d at 1041 (describing actions that can be brought by EPA).

For that important reason, even if indemnification for CERCLA claims is allowed without the requirement of clear and unequivocal expression of intent to indemnify, the relief that indemnification provides does not alter an indemnity's motivation to take steps to avoid CERCLA liability to EPA. Any deterrence provided by the negligence rule is unnecessary in the CERCLA context.

II. EXPANDING THE NEGLIGENCE RULE TO LOSS ARISING FROM STRICT LIABILITY ACTS IS NOT CONSISTENT WITH OTHER PROVISIONS OF SOUTH CAROLINA LAW.

Separate and apart from CERCLA, considerations of South Carolina law also weigh against expansion of the rule. First, the scope of acts subject to strict liability in South Carolina is evolving. Courts determine on a case-by-case basis whether the nature of an activity is such that it should be subject to common law strict liability, and the legislature subjects other acts to strict liability by statute. Given that contracting parties cannot be certain whether acts that are the basis of indemnification will one day be subject to strict liability, they should be permitted to allocate liability for those acts privately, expressing in general terms the conduct encompassed by their agreement. (*See infra* at 20-22.)

Second, when indemnification is sought specifically for litigation costs and expenses, as is the case here, South Carolina decisions other than those applying the negligence rule govern an indemnitee's recovery. Under that case law, South Carolina courts liberally construe indemnification agreements to allow for the recovery of attorneys' fees incurred in defense of an indemnified claim. Engrafting the negligence

rule onto claims seeking the recovery of litigation costs and fees would undermine that rule of law. (*See infra* at 22-24.)

A. THE ALLOCATION OF LOSS FROM STRICT LIABILITY ACTS IS BEST ALLOCATED THROUGH PRIVATE AGREEMENTS.

Because the scope of conduct subject to strict liability in South Carolina is evolving, the allocation of financial responsibility for strict liability acts is best accomplished through indemnification agreements that are liberally, not narrowly, construed.

In South Carolina, courts have been reluctant to impose strict liability under the common law. As the South Carolina Court of Appeals explained in *Snow v. City of Columbia*, 305 S.C. 544, 548, 409 S.E.2d 797, 799 (Ct. App. 1991), tort liability is premised on "the fault principle." "[L]iability follows the tortious wrongdoer," *id.* at 549, 800, and when "a loss is caused by conduct which is wrongful, the common law will apply the fault principle to place the loss on the at fault party." *Id.* at 552, 801. But the concept of fault does not underlie strict liability. Instead, strict liability is imposed based on an evaluation of the risks and benefits posed by particular conduct. Restatement (Second) Torts § 520. Courts are not well suited to undertake that analysis, and do so only sparingly. *Snow*, 305 S.C. at 551, 409 S.E.2d at 801.

The result is that in South Carolina, common law strict liability claims are limited. Common law strict liability has been adopted as a matter of law only for a few activities—such as the use of explosives near homes. *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960) (holding defendant strictly liable for damage caused to home when explosives were used in connection with road repair).

The law, however, is evolving. Common law strict liability is determined on a case-by-case basis. *See, e.g., Snow*, 305 S.C. at 554, 409 S.E.2d at 802-03 (declining to impose strict liability on city for harm caused by water main leak). This Court may one day find that the handling, disposal and transportation of particularly toxic chemicals is a strict liability act, but it has not yet reached that conclusion. The South Carolina legislature has created at least one statutory strict liability claim, for defective products, and may adopt others. *See, e.g.*, S.C. Code Ann. 15-73-10 (Rev'd 2005). As CERCLA demonstrates, liability imposed by statute differs from common law liability and is directed to the accomplishment of specific legislative goals. Future strict liability statutes in South Carolina likely will be narrowly focused to address specific policy concerns that cannot be anticipated today.

That acts giving rise to strict liability are not fixed makes it impossible for contracting parties to know what acts may one day be the basis of a strict liability claim. They cannot anticipate what conduct may be subject to strict liability when their agreement is enforced and cannot expressly itemize those acts with sufficient detail to satisfy the negligence rule. For that reason, the effect of applying the negligence rule to strict liability claims would be to make indemnification impossible except as to acts recognized as giving rise to strict liability at the time an indemnification agreement is drafted.

Rather than engraft the negligence rule's heightened intent standard onto claims for indemnification for loss arising from strict liability acts, the better course would be to allow the intent to indemnify for loss arising from strict liability acts to be set forth indirectly, using terms of general import. As the Court of Appeals noted in *Snow*, "the

imposition of no fault liability involves issues of utility better resolved by individuals, the free market, or the legislature than by courts, which are ill placed to make judgments about individual and social utility and are not accountable to the discipline of the market or the political process." 305 S.C. at 552, 409 S.E.2d at 801. Private parties are well suited to allocate financial responsibility for the consequences that flow from strict liability acts. *Id.* They should be permitted to do so using terms that broadly describe those acts. Their intent as set forth using words of general import should determine the scope of indemnification.

B. APPLICATION OF THE NEGLIGENCE RULE TO CLAIMS FOR LITIGATION COSTS AND EXPENSES IS NOT PROPER UNDER SOUTH CAROLINA LAW.

Finally, the nature of the costs and expenses that PCS seeks to recover is relevant to how the certified question is answered. Those costs and expenses are very specific and narrow: They are costs and expenses incurred in the litigation of indemnified claims. Provisions of South Carolina law separate and apart from the negligence rule already govern recovery of those costs.

South Carolina courts allow the recovery of attorneys' fees incurred in defense of an indemnified claim even if they are not "itemized" in an indemnification agreement. *Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 81-82, 697 S.E.2d 619, 621 (Ct. App. 2010). All "'reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." *Dent v. Beazer Materials & Servs., Inc.*, 993 F. Supp. 923, 941 (D.S.C. 1995), *aff'd*, 156 F.3d 523 (4th Cir. 1998) (authorizing recovery of attorney's fees and costs under a contractual indemnification claim where agreement did not expressly provide for the recovery of fees); *South Carolina Elec.*, 244 S.C. at 85, 91, 135 S.E.2d at 615, 619 (affirming

judgment for "the full amount prayed for" under a contractual indemnification claim including attorneys' fees even though contract did not expressly authorize the recovery of fees).[4] That is because, as the Second Circuit explained in *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 316 (2d Cir. 1985), the purpose of indemnification is to ensure that the indemnitee is truly held harmless from indemnified claims:

> Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims. Legal fees and expenses incurred in defending an indemnified claim are one such cost and thus fall squarely within the obligation to indemnify. Consequently, attorney's fees incurred in defending against liability claims are included as part of an indemnity obligation implied by law . . . and reimbursement of such fees is presumed to have been the intent of the draftsman unless the agreement explicitly says otherwise, . . . [T]his rule simply gives effect to the very nature of indemnity, which is to make the party whole.

Id. (internal quotation omitted).

Thus, application of the negligence rule to claims for indemnification for litigation costs and expenses would undermine the liberal rule that currently governs recovery of those costs and expenses. The import of the rule allowing the recovery of losses incurred in defense of an indemnified claim is that recovery should be allowed unless an indemnification agreement expressly provides to the contrary. The negligence rule works from the opposite presumption. If the negligence rule governed, indemnification of litigation costs and expenses would not be presumed, but rather would be barred unless the intent to indemnify was set forth in clear and unequivocal terms.

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[4] Before an entity may recover litigation costs, the court must determine that the fees awarded are reasonable, taking into account numerous factors—including the time devoted to the case, the difficulty of the legal services rendered, and the beneficial results obtained—that enable it to determine whether fees were recklessly incurred. *Dedes v. Strickland*, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992). Unreasonable fee requests are denied.

That would be a sweeping change in the law, and such a change is not justified particularly given that the negligence rule provides no deterrence benefit when applied to strict liability claims.

* * *

Ultimately, the extent to which PCS should be indemnified for litigation costs and expenses incurred in the underlying case is a question best addressed not by formulating new rules of South Carolina law but by applying basic principles of contract interpretation to the agreement at issue. The parties to this indemnification dispute were both sophisticated business entities when they executed a contract providing broad indemnification. The plain meaning of the terms of their agreement should determine its scope.

The language of that agreement reflects an intent that PCS be indemnified for costs and expenses that are in any way a consequence of Ross's conduct, even if they are also caused, in part, by the actions of the indemnitee. PCS was indemnified for "costs and expenses" "resulting from" Ross's acts and omissions. *Ashley II of Charleston*, 791 F. Supp. 2d at 505. "Resulting from," understood in its ordinary sense, requires a simple and basic connection between "costs and expenses" and Ross's conduct. "Result" means "[t]o proceed, spring, or arise, as a consequence, effect, or conclusion." Webster's New International Dictionary, 2126 (2d ed. 1960). Nothing in the definition of the term implies that a "result" must be the single "consequence, effect, or conclusion" of an event.[5] The other terms of the agreement, which indemnify CNC for "*all* acts, suits,

[5] *See also United States v. Hardage,* 985 F.2d 1427, 1434 (10th Cir. 1993) (indemnification for losses "resulting from" disposal of hazardous waste "so broad and

demands, assessments, precedings[,]" *Ashley II of Charleston*, 791 F. Supp. 2d at 505, confirm that the intent was to broadly protect CNC from loss.

Under the plain terms of the indemnification provision, PCS should be indemnified for litigation costs and expenses that were incurred both to establish Ross's ownership and operation of the Site and to assist PCS in asserting a divisibility defense. The negligence rule has no role in limiting PCS's recovery.

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all inclusive that it necessarily sweeps all events—including those occurring because of the indemnitee's actions—into its coverage").

CONCLUSION

For the reasons set forth above, this Court should answer the certified question as follows:

> The 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, should not apply when the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts.

Dated: November 4, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001766

Ashley II Of Charleston, L.L.C., ... Plaintiff,

v.

PCS Nitrogen, Inc., ...Defendant/Third-Party Plaintiff,

v.

Ross Development Corporation, Koninklijke DSM N.V., DSM Chemicals of North America, Inc., James H. Holcombe, and J. Holcombe Enterprises, L.P. , J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express, and The City Of Charleston, ... Third-Party Defendants.

Appellate Case No. 2013-001766

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