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JAN 06 2014

S.C. SUPREME COURT

OF COUNSEL
THOMAS P. GRESSETTE, JR. (SC, USVI)

January 3, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

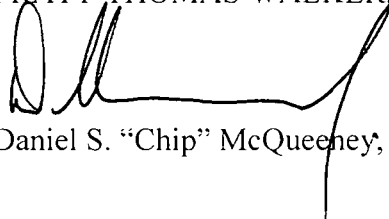
RE: Ashley II of Charleston, LLC v. PCS Nitrogen, Inc. v. Ross Development Corporation
Case Tracking No. 2013-001766
Our File No.: 6995.001

Dear Mr. Shearouse:

Enclosed please find the original unbound and fifteen bound copies of Third-Party Defendant Ross Development Corporation's Brief on Certified Question with Certificate of Service.

With kindest regards, I remain,

PRATT-THOMAS WALKER, P.A.



Daniel S. "Chip" McQueeney, Jr.

DSM/njd

Enclosures (As Stated)

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 06 2014

Appellate Case No. 2013-001766

S.C. SUPREME COURT

Ashley II of Charleston, LLC, 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, J. Holcombe Enterprises, LP,
J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express,
and The City of Charleston, Third-Party Defendants.

BRIEF ON CERTIFIED QUESTION OF THIRD-PARTY DEFENDANT
ROSS DEVELOPMENT CORPORATION

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CERTIFIED QUESTION

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

This matter comes to this Court upon a certified question by the United States District Court for South Carolina from an action designated as Ashley II of Charleston, LLC v. PCS Nitrogen, Inc. v. Ross Development Corp., C/A No. 2:05-cv-02782-MBS (the “CERCLA Action”). **ECF 749, Order of Certification filed 08/19/2013.**¹ The CERCLA Action involved claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) relating to the contamination of an approximately 33.95 acre parcel of real property in Charleston, South Carolina (the “Site”). **ECF 749, p.1; Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.**, 791 F. Supp. 2d 431, 439 (D.S.C. 2011) aff’d sub nom. PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013).

On September 26, 2005, Ashley II of Charleston, LLC (“Ashley II”), the present owner of most of the Site, filed a complaint seeking to hold PCS Nitrogen, Inc. (“PCS”), as the purported successor to Columbia Nitrogen Corporation (“CNC”), a previous owner and operator

¹ The Case Management/Electronic Case Files (CM/ECF) system is the Federal Judiciary’s comprehensive case management system for all bankruptcy, district and appellate courts. CM/ECF allows courts to accept filings and provide access to filed documents over the Internet. For the purpose of the present brief, references to an ECF filing refers to a document filed with the United States District Court for South Carolina in the CERCLA Action. These documents may be accessed on-line at <http://www.scd.uscourts.gov>. Pursuant to Rule 244(b), SCACR, this Court may consider the certification order filed as ECF 749 in the CERCLA Action. All other references herein to an ECF filing or exhibit in the CERCLA Action indicate the filing or document to which the district court cites in the certification order or her published opinion in the CERCLA Action.

of the Site, jointly and severally liable for response costs associated with the Site and to obtain a declaratory judgment as to PCS's liability for future response costs at the Site.² Id. (citing ECF 1). On January 19, 2007, PCS filed a third-party complaint against Ross Development Corporation ("Ross"), a South Carolina corporation which dissolved in September 2006, and eight other parties seeking contribution pursuant to 42 U.S.C.A. §9613(f)(1). Id. at 440 (citing ECF 91).

PCS later amended its third-party complaint against Ross to include a claim for contractual indemnification under a Letter of Agreement purportedly executed by Planters Fertilizer and Phosphate Company ("Planters") in 1966 before the sale of its operations and the Site to CNC. **ECF 749, p.2** (citing ECF 226; PCS Ex. 276). After the sale of the Site, Planters became Ross through a series of name changes. Id. at 444; **ECF 749, p.2**.

From October 26, 2009 to November 6, 2009, and continuing from January 19, 2010 to January 27, 2010, the federal district court held a bench trial in the CERCLA Action. Id. at 440. On October 13, 2010, the district court entered an Amended Order & Opinion in the CERCLA Action. See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 746 F. Supp. 2d 692 (D.S.C. 2010). In its Amended Order & Opinion, the district court did *not* hold Ross liable under PCS's indemnification claim arising from the Letter of Agreement. See id. at 755 ("After considering the indemnification agreement, the court concludes that it has allocated Ross its equitable share of the response costs for remediating the Site. PCS remains liable for PCS's contribution to the costs of the remediation.").

² As used herein, "response costs" include the costs recoverable from a liable party under 42 U.S.C.A. § 9607(a).

On May 27, 2011, after PCS filed a motion to alter or amend the Amended Order & Opinion, the district court entered a Second Amended Order & Opinion, holding, for the first time, that “Ross must reimburse PCS for the 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 PCS.” Ashley II, 791 F. Supp. 2d at 506 (quoting PCS Ex. 276).

On June 14, 2011, PCS moved pursuant to Rules 54 and 59 of the Federal Rules of Civil Procedure for an order establishing a procedure to determine the amount of money due under PCS’s indemnification claim. **ECF 749, p.3** (citing ECF 631, p.6). On February 24, 2012, the district court ruled on PCS’s post-trial motion for a procedural mechanism to determine its indemnification damages claim and held Ross liable for 45% of PCS’s attorneys’ fees, expenses and costs in this litigation. **ECF 749, pp.3-4** (citing ECF 692). On January 15, 2013, the court vacated the February 24, 2012 order. **ECF 749, p.4** (citing ECF 705).³

After a status conference on February 4, 2013, the district court certified the following question to this Court by order entered on August 19, 2013:

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?

ECF 749, p.4.

The district court made the following observations in its order of certification that are pertinent to the question before this Court:

³ While the parties appealed the district court’s various rulings on CERCLA liability to the United States Court of Appeals for the Fourth Circuit, the district court expressly refused to enter a final judgment on PCS’s indemnification claim against Ross. The Fourth Circuit affirmed the district court’s rulings regarding liability under CERCLA. See PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013) cert. denied, 134 S. Ct. 514 (U.S. 2013).

At the outset, the court recognizes that the trial record does not establish that remediation of the site would have been required based on Ross's conduct alone. Although most of the contamination at the Site was deposited by Ross, **the subsequent actions of PCS and others, over a forty-year period, created new pollution and spread the existing pollution throughout the Site. In part because of post-1966 activity, EPA designated the Site a Superfund site.** It cannot be said that PCS incurred certain litigation expenses because of Ross's conduct rather than its own, nor can it be said that the reverse is true, **as all PCS's litigation expenses are jointly attributable to the acts and omissions of PCS and Ross,** which acts together led to the Site's Superfund designation.

ECF 749, p.4 (emphasis added).

Pursuant to Rule 244, SCACR, on October 4, 2013, this Court accepted the certified question.

FACTS

Ashley II's amended complaint in the CERCLA Action asserted that PCS was jointly and severally liable for environmental response costs at the Site. **ECF 749, p.2** (citing ECF 209). PCS's answer and counterclaims asserted causes of action against nine third-party defendants, including Ross, and sought contribution from all of them under 42 U.S.C.A. §9613(f), alleging that the third-party defendants were potentially responsible parties. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 440 (D.S.C. 2011) aff'd sub nom. PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013) (citing to ECF 226); **ECF 749, p.2.** PCS also added a contractual indemnification claim against Ross based on the provision in the 1966 Letter of Agreement. **ECF 749, p.2** (citing to ECF 226).

The district court's Second Amended Order & Opinion contains detailed factual findings referenced by the district court in certifying the question now before this Court. Id.; **ECF 749, p.2.** As the district court explained, Planters, which eventually changed its name to Ross, owned

the Site from 1906 to 1966 and operated a phosphate fertilizer manufacturing plant there. Id. at 444; **ECF 749, p.2.** Ross's manufacturing activities at the Site generated pyrite slag, which caused arsenic and lead contamination at the Site, as well as high acidity levels. Id. at 445; **ECF 749, p.2.**

Planters sold the Site to CNC in 1966. Id. at 447; **ECF 749, p.2.** PCS is the successor-in-interest to CNC.⁴ Id. at 440; **ECF 749, p.2.** The 1966 Letter of Agreement setting forth the terms of upcoming sale of the Site to CNC included the following indemnification provision:

Seller agrees to indemnify and hold harmless Buyer in respect to all acts, suits, demands, assessments, proceedings and cost and expenses resulting from any acts or omission of the Seller occurring prior to the closing date and pertaining herein, provided the Seller receives prompt notice in writing of such claim or demand and Seller shall have the right to litigate or contest such claim.

Id. at 447 (citing PCS Ex. 276, p.10 §VIII); **ECF 749, pp.2-3.**

PCS misleadingly implies throughout its brief that CNC, its predecessor, engaged in no wrongdoing whatsoever and that PCS was held strictly liable under CERCLA simply in its capacity as one of the former owners of the Site. Far from it, the active conduct of CNC, and hence PCS, significantly contributed to the contamination of the Site, as the district court recognized in the CERLA Action.

For instance, PCS's CERCLA liability was *not*, as PCS asserts, based on CNC's status as

⁴ PCS suggests its status as a successor-in-interest to CNC should be considered as part of its contractual indemnification claim; however, it is undisputed that PCS stands in the shoes of CNC for purposes of PCS's indemnification claim against Ross. See, e.g., U.S. Shoe Corp. v. Hackett, 793 F.2d 161, 164 (7th Cir. 1986) ("The merger transferred all contracts to the surviving corporation; relations with outsiders went on as if nothing had happened."); Rosemond v. Campbell, 288 S.C. 516, 522-23, 343 S.E.2d 641, 645 (Ct. App. 1986) ("At common law, an assignee's rights can be no greater than those of his assignor. Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor.").

a passive owner of a Site at which hazardous wastes had previously been disposed or released. "CNC owned the Site from 1966 to 1985." Id. at 448. "PCS operated the acid plant at the Site until June 1970 and operated the fertilizer plant until 1972." Id. "Dust generated by the manufacture of this product contained elevated lead and arsenic, which was deposited on the Site." Id. "Arsenic was present in the raw phosphate ore from Florida used by CNC in its manufacturing processes, but much less arsenic was released when the phosphate rock was burned than when pyrite was burned by Planters." Id. "Lead was also present in the raw phosphate ore used by CNC in its manufacturing processes." Id.

"Every summer CNC closed the acid plant for three months for plant maintenance." Id. "Of the five acid chambers, three were washed out every year, and two were washed out every two years." Id. "CNC personnel washed lead sludge that built up in the acid chambers from a four by six inch hole cut into the bottom of each chamber onto the ground." Id. "This wash out resulted in a pyramid of sludge under each chamber that was two feet wide, and two to three feet high." Id. "Each pyramid of sludge was then hosed with a 225 foot long fire hose into an unlined ditch that ran toward the Ashley River." Id. at 448-49. "The sludge then migrated towards the Ashley River." Id. at 449. "The sludge washed out of the acid chambers was a mixture containing lead sulfate, which was in part comprised of lead and acid." Id.

"In addition, during periodic repairs to the lead acid chambers, pieces of lead were cut out and discarded onto the ground." Id. "From 1969 to 1971, the used lead was 'just thrown and left laying around.'" Id. "In conducting a Site inspection during the Phase I Remedial Investigation, EPA contractor Black and Veatch Special Projects Corp. ('Black and Veatch') noted that the site was 'littered with . . . sheets of lead lining from the lead acid chambers.'" Id. "Lead sheets were seen on the ground by EPA in the 1990's." Id. "If lead sheets were left on the

surface of the ground from the time of the acid plant demolition in 1972, they could have contributed to the contamination at the Site.” Id.

“The onsite manufacturing processes generated liquid process effluent that contained fluorosilicic acid and lead that was discharged into drainage ditches, releasing these contaminants across the Site and into the marsh and the Ashley River.” Id. “Fumes containing fluorosilicic acid were released into the air to be deposited onsite by prevailing winds.” Id.

“Site data show that lead sulfate was released from the acid lines.” Id. at 450. “These acid releases created conditions that allowed the redistribution of lead and arsenic through natural processes including chemical migration, leaching, and chemical dissolution followed by re-precipitation.” Id. “Over time, periodic releases of acid, either from the washing out of the lead chambers or acid spills from line leaks and tank leaks, mobilized both lead and arsenic through the soil.” Id.

“During 1968 and 1969, CNC constructed a new granulation plant.” Id. “CNC dismantled existing components of the old granulation plant and moved them to a new structure.” Id. “New construction involved over 120 tons of steel, creating heavier foundations and running over 4,500 feet of new underground piping, including 500 feet of piping from the acid plant to the new granulation plant.” Id.

“In 1969, the old granulation plant was converted to storage, which required the construction of concrete ramps, the removal of old equipment, and the replacement of support columns.” Id. “Two stories of the old granulation plant were removed and the roof replaced.” Id. “In May of 1970, CNC reported that the acid plant was “in poor repair.”” Id.

“During CNC’s ownership of the Site, material was brought onto the Site and used as fill.” Id. “Locations at which fill material was placed are contaminated and require remediation.”

Id. “On April 23, 1971, a severe wind storm caused extensive damage to the roof of the sulfuric acid plant, the main building, and the plant protection chemicals storage building.” Id. “Estimated loss amounted to \$45,000 to buildings, \$28,000 to fertilizer, and \$20,000 to chemicals.” Id. “This damage resulted in air dispersion of contaminated roof dust, the finished fertilizer product, and chemicals.” Id.

“The acid plant was not repaired after this event.” Id. “Demolition of the plant began in 1971 and was completed by February 28, 1972.” Id. “Demolition involved dismantling and washing out the acid chambers and acid towers, and excavating the acid tank and associated piping.” Id. “Heavy equipment was required to demolish and remove the structures, and to remove the pilings on which the structure was built.” Id. “Demolition of the plant would have disturbed the subsurface soil to a depth of at least two feet.” Id. “Underground piping was dug out with an excavator by digging a trench right over the pipe or next to it and removing the pipe to a staging area.” Id.

“By July 1972, the dismantling of all acid plant equipment was nearly complete.” Id. “By October of 1972, all fertilizer production at the Site had ceased.” Id. “Between 1972 and 1977, the Site was inactive.” Id. “An April 1973 aerial photograph indicates that the roof on the old granulation plant had collapsed.” Id.

“Between February and September of 1977, CNC dismantled most of the remaining structures on the Site.” Id. at 451. “The dismantling of the acid and fertilizer plants left wooden timbers and poles on the Site from late 1977 until 1979.” Id. “In April 1979, CNC’s demolition contractor defaulted on his contract and walked off the Site leaving ‘a lot of rubble and some very difficult concrete structures to remove.’” Id. “Access to the Site was not secure; fencing was down and a gate left open.” Id.

“By January 11, 1981 the demolition of the fertilizer plant was completed.” Id.
“Demolition of the fertilizer plant required the use of substantial heavy equipment, such as large hydraulic excavators, a crane with a wrecking ball, front-end loaders, and bulldozers.” Id.
“Demolishing the large buildings on the Site required using an area around the buildings to position the equipment and to place pieces of the demolished building.” Id. “In addition, grading was likely required to expand site access and prepare an area for staging.” Id. “These processes disturbed the soil.” Id.

“The removal of three separate railroad tracks on the Site, including portions elevated on russle-type structures, would have required the use of heavy excavation equipment to dig out the tracks.” Id. “The piles would either be pulled out or broken off with a bulldozer, disturbing the soil.” Id. “After demolition activities were completed, CNC did not implement a stormwater management system on the Site.” Id. “By early 1981, most of the debris from the demolition process had been removed.” Id.

“The CNC demolition and Site preparation activities that occurred in the 1971-1981 time period impacted an area a little less than eighty percent of the area where contaminated soils and sediments must be excavated.” Id. “Demolition and regrading of the Site by CNC significantly disturbed the soil at the Site.” Id.

“CNC operated three phosphate fertilizer plants located in: Charleston, South Carolina; Moultrie, Georgia; and Macon, Georgia.” Id. “According to the testimony of Thomas Blue, a PCS environmental expert who testified at the first trial, a company with expertise in the manufacturing of phosphate fertilizer would be aware that these processes result in lead and arsenic contamination.” Id. “If pyrite clinkers and pyrite slag were on the land surface of the Site, a person with expertise in the phosphate fertilizer business would know that lead and arsenic

contamination were being released.” Id. “CNC employed more stringent environmental practices at its phosphate fertilizer plant in Moultrie, Georgia than in Charleston, South Carolina.” Id. “The foregoing indicates that CNC knew that hazardous materials had been disposed of on the Site.” Id. at 452.

“CNC continued to own the Site until 1985, roughly five years after CERCLA was enacted.” Id. “CNC did not report any release of hazardous substances at the Site to EPA.” Id. “Prior to the purchase of the Site by Holcombe and Fair in 1985, all of the structures on the Site were demolished and ‘some grading of portions of the Site took place.’” Id. “CNC did not disclose the presence of contamination on the Site to Holcombe and Fair prior to the sale of the Site.” Id.

The district court in the CERCLA Action ultimately held PCS jointly and severally liable for the response costs at the Site under 42 U.S.C.A. §9607(a)(1). While PCS suggests that CNC’s conduct had no bearing on PCS’s liability, the district court held otherwise, establishing that PCS was a responsible party based on the releases of hazardous substances at the Site by CNC: “[T]he list of PRPs includes ‘any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.’” Id. at 480 (quoting 42 U.S.C. § 9607(a)(2)). **“The record makes clear that CNC, predecessor to PCS, released arsenic and lead on the Site.”** Id. (emphasis added). “Thus, PCS is a ‘person’ subject to CERCLA liability because it is the successor of a corporation that owned and operated the facility when hazardous substances were disposed of.” Id.

As further confirmation that CNC’s conduct caused significant, widespread contamination of the Site, the district court disagreed with PCS’s assertion that CNC’s contamination of the Site was divisible and severable under Burlington Northern & Santa Fe Ry.

Co. v. U.S., 556 U.S. 599 (2009), such that PCS would only be liable for the contamination caused by CNC. See U.S. v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988) (“Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm.”).

In rejecting PCS’s argument that the harm was divisible and instead holding the responsible parties’ combined conduct caused a “single harm,” the district court explained:

Although PCS attempted to provide the court with a reasonable basis for determining the approximate volume of contaminants introduced to the Site by Planters **and CNC**, these calculations are based upon a significant assumption in favor of PCS. However, **even if the court had a reasonably accurate calculation of the volume of contaminants released on the Site by Planters and CNC**, this is only half of the equation; the other main factor contributing to the cost of the remediation is the spread of contamination across the Site. None of PCS’s methods of apportionment provides a reasonable estimate of the additional volume of soil contaminated by earth moving and development activities. While the record reveals that construction and earth moving activities occurred throughout the history of the Site, significantly contributing to the cost of the remediation of the Site, **the record provides the court with no reasonable basis for determining approximately how much each party contributed to the volume of contaminated soil through such activities.**

Id. at 489 (emphasis added).

Finally, the district court allocated PCS a thirty percent (30%) equitable share of the response costs at the Site, first emphasizing: “Contribution claims require courts to make an equitable allocation of responsibility among the liable parties.” Id. at 490 (citing ITT Indus., Inc. v. Borgwarner, Inc., 700 F. Supp. 2d 848, 888 (W.D. Mich. 2010)). “In enacting the contribution section of CERCLA, Congress was concerned ‘that the **relative culpability of each responsible**

party be considered in determining the proportionate share of costs each must bear.” Id. (quoting Monsanto, 858 at 173, n. 29) (emphasis added). The district court then recited the following conduct as supporting PCS’s 30% equitable share:

- i. CNC conducted manufacturing operations on the Site for six out of the sixty-six years the fertilizer plant was in operation.
- ii. CNC generated no pyrite slag.
- iii. **All of the lead and arsenic on the Site that was introduced after the Planters period of operations was introduced by CNC.**
- iv. When CNC ceased operations, it demolished all of the structures on the Site. **This demolition was highly disruptive to the Site and took place over several years, leaving contaminants open to the elements.**
- v. Prior to selling the property to the Holcombe and Fair Parties, CNC graded the Site.
- vi. **CNC knew that its manufacturing operations contaminated the Site and yet did not notify the Holcombe and Fair Parties or EPA of the contamination.**
- vii. CNC took more steps to protect the environment than did Planters, but it did not follow the more stringent environmental standards it imposed at its Moultrie, Georgia plant.
- viii. **CNC left lead sheeting discarded on the Site.**
- ix. CNC benefitted economically from manufacturing fertilizer on the Site.
- x. PCS’s predecessor, Arcadian reported the contamination of the Site found by GEL to EPA in response to a request for information.

Id. at 492 (citations omitted).

ARGUMENT

I. Under this Court’s established principles of contractual interpretation and its recognized considerations of public policy, the indemnification provision in this case should not be construed to indemnify the indemnitee against losses and defense expenses resulting from its own strictly liable acts since such intention was not expressed in clear and unequivocal terms.

The question certified by the district court is “one of contractual interpretation and controlled by South Carolina law.” **ECF 749, p.4** (citing Beazer E., Inc. v. Mead Corp., 34 F.3d 206, 212 (3d Cir. 1994) (“[A]ll of the courts of appeals that have considered developing a federal

rule of decision appear to have decided it is better to look to state law in interpreting or construing a contract's indemnification provisions vis-a-vis CERCLA.")).

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). "A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity." Id. "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." Id.

"In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Gamble, Givens & Moody by Gamble v. Moise, 288 S.C. 210, 215, 341 S.E.2d 147, 150 (Ct. App. 1986). "The parties' intention must, in the first instance, be derived from the language of the contract." Id.

PCS has no factual foundation for its argument that this Court should "honor the parties' intentions" and not bar indemnification because this is a matter of contract and the parties determined in the 1966 Letter of Agreement on the allocation of this liability. PCS's argument rests entirely on a false premise as to the parties' intent. CERCLA did not become the law of the land until 1980, well over a decade after the 1966 Letter of Agreement. It is incorrect and misleading to suggest that the parties intended that Ross would indemnify PCS for damages imposed on it and expenses incurred by it as a result of PCS's conduct in the future causing contamination of the Site based on a federal act that had not yet been adopted. In fact, the contrary is true. It would be grossly unfair to require Ross to indemnify PCS for any of its fees and expenses in the CERCLA Action when it would have been impossible, as a matter of law, for the parties in 1966 to have contemplated this particular liability that did not then exist and

was not created until 14 years later.⁵

To the extent the inquiry into the intent of the parties focuses on CERCLA liability, there is utterly no basis in law or fact to support the proposition the parties intended the 1966 Letter of Agreement to require Ross to indemnify PCS for its litigation costs and expenses defending claims of its liability under the strict liability provisions of CERCLA. As for the argument that this indemnity provision included indemnification for strict liability on any basis generally, even though PCS's conduct might be the basis for such strict liability, the case law in South Carolina and law on point from other jurisdictions roundly reject PCS's contention as a matter of law.

In South Carolina, it is clear that joint tortfeasors are *not* entitled to contractual or equitable indemnification. "Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "**This is subject to the proviso that no personal negligence of his own has joined in causing the injury.**" *Id.* (emphasis added). This proviso applies whether the duty to indemnify is implied by law or arises under a contract. See Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) ("[W]e conclude that in actions of indemnity, brought **where the duty to**

⁵ See, e.g., Chrysler Corp. v. Ford Motor Co., 972 F. Supp. 1097, 1110 (E.D. Mich. 1997) ("[T]he KMC asset purchase from KFC took place decades before federal environmental enforcement became a reality. Neither the language nor the implied intentions of the parties indicates any reference to environmental costs whatsoever. Thus even under Beazer's formulation that a pre-CERCLA contract can include CERCLA liability, if it is 'either specific enough to include CERCLA liability or general enough to include any and all environmental liability,' 89 F.3d at 211, there would be no CERCLA liability in the instant case. An assumption of all existing contingent liabilities might be considered 'general enough to include . . . environmental liability' in an era when such liability is a generally understood contingency. In 1956, this simply was not the case.").

indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.”) (emphasis added); see also Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990) aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) (“The same principle may be applicable where a contractual relationship or tortious conduct creates a legal relationship between the parties.”).

Of controlling significance to the question now before the Court, *this rule of law has also been extended to preclude a party who is held strictly liable from obtaining indemnification from another strictly liable party*. In Scott by McClure v. Fruehauf Corp., 302 S.C. 364, 367, 396 S.E.2d 354, 355 (1990), a jury awarded a verdict to the plaintiff in a products liability action against two defendants, Fruehauf and Piedmont. The jury also found in favor of Piedmont on Piedmont's cross-claim against Fruehauf for indemnification. Id.

Notably, the plaintiff's verdict against Fruehauf rested upon strict liability and negligence, while the verdict against Piedmont rested only upon Piedmont's strict liability. Id. at 367, 396 S.E.2d at 356. Nonetheless, this Court reversed the indemnification judgment against Fruehauf on Piedmont's cross-claim. Id. at 367, 396 S.E.2d at 355-56. The Scott court explained the rationale for its ruling that a party strictly liable in a products liability case cannot obtain indemnification from another party: “Under South Carolina law, there can be no indemnity among mere joint tortfeasors.” Id. at 370, 396 S.E.2d at 357-58. “Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them.” Id. at 371, 396 S.E.2d at 358. “Here, Fruehauf and Piedmont shared a common liability to the ultimate

consumer, Scott, under our strict liability law.” Id. “Fruehauf and Piedmont each contributed to the consumer’s injury by selling a defective product.” Id. “We hold common law indemnification does not apply among joint tortfeasors in strict liability.” Id. “This same principle requires reversal of the trial judge’s ruling allowing indemnification for costs and attorney fees.” Id.

Here, the district court has found that “all PCS’s litigation expenses are **jointly attributable** to the acts and omissions of PCS and Ross, which acts together led to the Site’s Superfund designation.” **ECF 749, p.4** (emphasis added). PCS and Ross “shared a common liability.” PCS’s liability was not entirely derivative of Ross’s. Instead, PCS was jointly responsible based on its own “acts and omissions.” This Court need look no further than Scott to answer the certified question posed by the district court.

Moreover, established principles of contract construction dictate that any doubt about the scope of an indemnification provision be resolved against the indemnitee. For instance, in Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 25, 378 S.E.2d 56, 57 (Ct. App. 1989), the South Carolina Court of Appeals addressed an indemnification provision in a lease stating that the tenant shall indemnify and hold harmless the landlord “from and against any damage suffered or liability incurred on account of bodily injury to any person or persons . . . or any loss or damage of any kind in connection with the Leased Premises.” This contractual indemnification claim arose from a suit against the tenant by the landlord’s employees arising from the landlord’s design, manufacture, and installation of an electrical switchgear at the leased premises. Id. at 25-26, 378 S.E.2d at 57. The causes of action included negligence and strict liability claims. Id. at 26, 378 S.E.2d at 57.

The Court of Appeals held that the tenant had no duty to indemnify the landlord under the indemnification provision. Id. at 29, 378 S.E.2d at 59. The Court recognized: “[T]he language

employed by the indemnity provision in the instant case is also broad and comprehensive and is provocative of some doubt; and since the indemnity provision was inserted for [lessor's] benefit and [lessor] seeks to use the provision to absolve itself from liability for its own negligence, that doubt should be resolved in favor of [lessee].” Id. at 28, 378 S.E.2d at 58.

The Court of Appeals continued: “Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee’s own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.” Id. at 26, 378 S.E.2d at 57. “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.” Id.; see also U.S. v. Hollis, 424 F.2d 188, 189 (4th Cir. 1970) (requiring indemnification where provision covered claims “arising or resulting in whole **or in part**” from the fault of the indemnitee) (emphasis added)).

This Court incorporated these principles into the law of South Carolina long ago: “[T]he provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit.” Murray v. Texas Co., 172 S.C. 399, 400, 174 S.E. 231, 232 (1934). “While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company ‘harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station,’ is broad and comprehensive, it is, as stated by the court below, provocative of some doubt.” Id. “The defendant itself wrote the provision into the contract for its own benefit.” Id. “It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all

doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.” Id.

These principles apply with equal force in this case. The district court determined that PCS was legally responsible under CERCLA based on CNC’s extensive operations and activity at the Site that caused contamination and the spread of contamination. **ECF 749**. Under the law of South Carolina, an indemnitor can obtain indemnity only when the liability of the indemnitor is imputed to, vicariously imposed upon, or imposed as a matter of law on the indemnitee. In this case PCS was not held to be vicariously liable for Ross’s conduct. The district court held PCS was liable based on PCS’s own conduct.

PCS is off-base in arguing that the principles underlying the bar of indemnification are inapplicable if there is no finding of negligence against the indemnitee. If the public policy of deterrence is one of the reasons for this Court’s rule barring indemnity where the indemnitee is negligent, as PCS argues, the policy of deterrence has equal force in the context of CERCLA strict liability.

Owners and operators should be deterred from causing pollution just as they should be deterred from being negligent. CERCLA is premised on the public policy that contamination is harmful to the public interest. The principle embraced in this Court’s rule that an indemnitee cannot recover contractual indemnity against an indemnitor if the indemnitee is negligent, unless the contract expressly so provides, also applies where the indemnitee’s conduct is responsible for polluting contamination. This South Carolina rule is meant to deter those seeking indemnity from conduct that causes harm. It does not matter that the legal standard for holding a party liable for contamination does not require a finding of negligence. Despite PCS’s effort to argue to the contrary, conduct causing contamination is still wrongful and actionable, regardless of whether

the conduct was negligent or intentional, and should be deterred. The district court recognized this in her rulings in the present case, when she relied upon CNC's misconduct to find PCS jointly and severally liable, to hold that PCS failed to establish the divisibility of the harm, and to conclude that PCS should be equitably apportioned 30% of the response costs at the Site.

Further, as other jurisdictions recognize, this rule of strict construction extends to circumstances, such as the present case, in which both parties have been held strictly liable based on their own acts or omissions. In Fina, Inc. v. ARCO, 200 F.3d 266, 271 (5th Cir. 2000), the Fifth Circuit Court of Appeals, applying Delaware law, rejected PCS's argument in this case that indemnification provisions permit a strictly liable party to recover from another strictly liable party. The indemnitee, BP, argued that the "clear and unequivocal" rule regarding indemnification for an indemnitee's negligence should not apply to CERLCA claims based on strict liability. Id. The Court emphasized: "No Delaware case has addressed the applicability of the clear and unequivocal test to claims based on strict liability." Id. "Several other jurisdictions, however, have held that the clear and unequivocal test is fully applicable to claims based on strict liability." Id.

"The transfer of liability for any prospective legal claim, whether based on negligence or on strict liability, involves an extraordinary shifting of risk." Id. "We perceive no reason why Delaware would choose to differentiate between the two types of claims for purposes of this rule." Id. "We therefore hold that Delaware's clear and unequivocal rule is equally applicable to indemnification for strict liability claims." Id.

In the same case, the Fifth Circuit applied Texas law to a separate indemnity contract in which the indemnitee sought to recover against the indemnitor for liability incurred under CERCLA. The Court recognized: "The Texas Supreme Court has held that an indemnification

provision is not enforceable as applied to claims based on strict liability unless that provision expressly states the indemnitor's intent to cover such claims." Id. at 273. "Texas law requires that each type of claim be separately referenced by an indemnity provision: 'Indemnification against strict liability is an exception to usual business practices in the same manner as indemnifying against someone else's negligence [F]airness dictates against imposing liability on an indemnitor unless the agreement clearly and specifically expresses the intent to encompass strict liability claims.'" Id. at 273-74 (citation omitted). The indemnification clause under consideration by the Fifth Circuit includes an indemnity for "all claims," etc., just as in this case. Id.

Nevertheless, PCS ignores basic principles of contract law and argues that CERCLA's strict liability scheme should protect PCS as the indemnitee, but punish Ross as the indemnitor. If PCS contends that PCS is strictly liable despite any acts or omissions by CNC, then, likewise, Ross should not be held liable to indemnify PCS in the first place because Planters' liability stems from strict liability under CERCLA, not from any *negligent* act or omission.

PCS also mistakenly relies upon South Carolina cases addressing a right to indemnification based on the indemnitee's conduct, distinguishing these cases and claiming that PCS's liability is not based on any act, omission, responsibility, duty, or misconduct by PCS. See, e.g., Murray v. The Texas Co., 172 S.C. 399, 174 S.E. 231 (1934) (defendant found liable for negligence); Laurens Emer. Med. Specialists, P.A., v. M.S. Bailey & Sons, 355 S.C. 104, 584 S.E.2d 375 (2003) (defendant negligently hired secretary); S.C. Elec. & Gas Co. v. Utilities Constr. Co., 244 S.C. 79, 135 S.E.2d 613 (indemnitee vicariously liable). These cases simply stand for the general proposition that, in South Carolina, indemnification only applies in vicarious or imputed liability situations, i.e. situations in which one tortfeasor committed

misconduct, and a second party is held liable in tort *solely* as a result of the first's misconduct. See Andrade v. Johnson, 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001) rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003) ("The corollary of this proposition is that the right of indemnity exists only in vicarious liability situations, and there is no right to contribution between such parties.").⁶

Here, PCS's liability does not arise solely from Ross's acts or omissions. Instead, as the district court recognized in the CERCLA Action, CNC's own acts or omissions on the Site caused PCS to be held liable as a responsible party under CERCLA. PCS was not held

⁶ PCS's asserted entitlement to indemnification also sits in stark contrast to the long history of South Carolina law, which has recognized indemnification and contribution as distinct concepts, with indemnification entitling the party to shift a loss *in its entirety* and contribution entitling the party to shift *only a portion* of the loss. See Andrade, 345 S.C. at 225, 546 S.E.2d at 669 ("Indemnity has been defined as '[a] contractual or equitable right under which *the entire loss* is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible.'") (emphasis in Andrade) (quoting Black's Law Dictionary 769 (6th ed.1990)).

In fact, South Carolina law in effect at the time of the execution of the Letter of Agreement in 1966 viewed a partial shifting of a loss under any theory with considerable skepticism. As a preliminary matter, this Court in Murray emphasized that contractual indemnification among joint tortfeasors would not be permitted unless clearly and unequivocally stated otherwise in the indemnity provision. See id. at 400, 174 S.E. at 232. Moreover, in 1963, this Court explained that there was no common law right to indemnification *or* contribution among joint tortfeasors, emphasizing that, in South Carolina, this rule rests upon "the doctrine that the Courts are not open to wrongdoers to assist them in adjusting the burdens of their misconduct": "Since the decision in Merryweather v. Nixan, decided in 1799, 8 T.R. 186, 101 Eng.Reprint 1337, it has been said to be an established principle of the common law that as between joint tort-feasors there is no right of contribution or indemnity, the rule being premised on the doctrine that the Courts are not open to wrongdoers to assist them in adjusting the burdens of their misconduct, and that the law will not lend its aid to one who founds his cause of action on a delict." Atl. Coast Line R. Co. v. Whetstone, 243 S.C. 61, 68, 132 S.E.2d 172, 175 (1963). Under these circumstances, it is difficult to see how contracting parties in 1966 would have anticipated shifting a *portion* of a loss in an indemnification provision absent clear and unequivocal language to the contrary.

In this respect, as recognized in Andrade, South Carolina law has consistently required a party seeking contractual *or* equitable indemnification to be *completely* free of any wrong or fault. In the present case, PCS has already shifted a portion of its loss to Ross in the form of a contribution claim under CERCLA, and it is undisputed that CNC's conduct actively contributed to the indivisible harm at the Site.

vicariously liable. Instead, PCS was held primarily liable for the contamination at the Site and allocated 30% of the responsibility for the pollution of the Site.

For these reasons, this Court should answer the certified question in the affirmative, effectively prohibiting PCS from recovering against Ross any portion of its costs and expenses in the CERCLA Action under a contractual indemnification theory.

II. Under South Carolina law, an indemnitee may not recover costs and attorneys' fees associated with establishing the indemnitor's liability.

In addition to the costs and expenses incurred in defending the CERCLA claims, PCS separately contends that PCS should be entitled to recover the costs and attorneys' fees in prosecuting its contribution and indemnity claims against Ross.⁷ This Court previously rejected a similar contention, recognizing that attorneys' fees and costs incurred in holding the indemnitor liable are not recoverable under a theory of contractual indemnification even where, unlike this case, a party is otherwise entitled to indemnity. South Carolina courts have consistently defined indemnity as "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party."

In Laurens Emer. Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003), the Supreme Court of South Carolina applied the well-recognized definition of indemnity as "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." (citation and internal quotation marks omitted). The Supreme Court in Laurens held that an indemnification

⁷ As a side note, even though PCS is not entitled to recover any of its fees and costs from Ross under the indemnity provision, it would be virtually impossible to segregate PCS's fees and costs to come up with some portion reasonably attributable only to Ross. PCS prosecuted its contribution claims against *nine* third-party defendants as well as the plaintiff and spent an enormous effort trying to establish numerous defenses that had nothing to do with Ross, such as its divisibility defense and its assertion Ashley II was not a protected purchaser but instead a responsible party.

agreement does *not* permit the indemnitee to recover attorneys' fees incurred by the indemnitee in bringing a suit directly against the indemnitor: "In a second party action to recover attorney's fees for breach of contract, this Court denied attorney's fees, stating that the standard indemnification clause at issue limited recovery 'to the reimbursement for damages, costs, expenses, etc. incurred in third party actions, not actions between the contracting parties themselves.'" Id. The Court distinguished a case in which the indemnification agreement expressly provided that the indemnity would apply "whether such claims are made by [indemnitee], by [indemnitee's] employees, or by third parties." Id. at 109-10, 584 S.E.2d at 377-78.

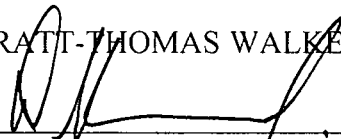
South Carolina courts restrictively construe the obligations of the indemnitor. See id. at 111, 584 S.E.2d at 379 ("Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."). Moreover, if the parties desired costs and expenses incurred in litigation between them under the indemnification provision or otherwise to be recoverable, they could have included a "prevailing party" or similar right to attorneys' fees in the contract. They did not. Consequently, PCS may not recover attorneys' fees and costs associated with holding Ross liable.

CONCLUSION

Ross respectfully requests that this Court answer the certified question in the affirmative. 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 apply where, as here, the indemnitee seeks contractual indemnification for costs and expenses resulting in part from its own strict liability acts.

Respectfully Submitted,

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

JAN 06 2014

Appellate Case No. 2013-001766 **S.C. SUPREME COURT**

Ashley II of Charleston, LLC, 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, J. Holcombe Enterprises, LP,
J. Henry Fair, Jr., Allwaste Tank Cleaning, Robin Hood Container Express,
and The City of Charleston, Third-Party Defendants.

CERTIFICATE OF SERVICE

I hereby certify that the Brief on Certified Question of Third-Party Defendant Ross Development Corporation to which this certificate is affixed was served upon the parties to this action by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorneys of record for such other parties identified below, in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 3rd day of January 2014, in Charleston, South Carolina.

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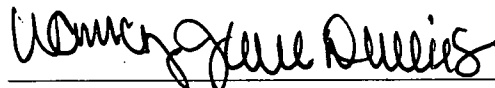
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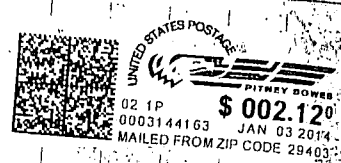
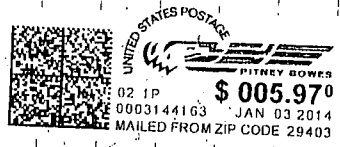
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