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AUG - 7 2014

S.C. Supreme Court

August 7, 2014

BY HAND

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: Ashley II of Charleston v. PCS Nitrogen v. Ross Development Corp.
Appellate Case No. 2013-001766
Our File No.: 6995.001

Dear Mr. Shearouse:

Enclosed please find the original unbound and six copies of Third-Party Defendant Ross Development Corporation's Petition for Rehearing and Motion to Supplement Record with Certificate of Service and filing fee.

With kindest regards, I am,

Sincerely,

PRATT-THOMAS WALKER, P.A.



G. Trenholm Walker

GTW/njd
Enclosures (As Stated)

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG - 7 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.

**PETITION FOR REHEARING AND MOTION TO SUPPLEMENT THE RECORD BY
THIRD-PARTY DEFENDANT ROSS DEVELOPMENT CORPORATION**

Pursuant to Rule 221(a), SCACR, Third-Party Defendant Ross Development Corporation (“Ross”) hereby petitions for rehearing of this Court’s decision filed on July 23, 2014, designated as Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., Op. No. 27420 (S.C. Sup. Ct. filed July 23, 2014) (the “Opinion”). “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, “a *prima facie* case for rehearing has been made.” Covar v. Sallat, 22 S.C. 265, 272 (1885).

First, Ross respectfully submits that the Opinion is based on an erroneous belief that Third-Party Plaintiff PCS Nitrogen, Inc. (“PCS”) has limited its claim for indemnification to litigation expenses and costs that were solely caused by Ross’s conduct before the sale of the

Columbia Nitrogen Site (“Site”) in 1966. In relying on this supposition, this Court appears to have misapprehended Ross’s argument and overlooked the district court’s Order of Certification, which 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.*” **Order of Certification, p.4** (emphasis added).

In response to the Court’s invitation in note 4 to the Opinion,¹ Ross also hereby moves the Court to supplement the Record on Appeal to include certain public filings in the district court confirming the broad scope of PCS’s contractual indemnification claim. PCS never “limited its claim [for indemnification] to fees and costs associated with Ross’s CERCLA liability because of its ownership and operation of the site prior to the 1966 closing,” as stated by the Court on page 5 of the Opinion. Instead, PCS seeks to recover litigation costs and expenses that are *not* solely attributable to Ross’s conduct before the sale in 1966, as set forth in the Order of Certification. But, as this Court held: “The indemnification agreement was limited to any liability attributable to Ross up to the date of the 1966 closing – there was no prospective, post-1966 closing liability for which Ross could be responsible under the indemnification provision.” Opinion, p.5.

¹ In note 4 to the Opinion (at p.5), this Court explained:

We acknowledge the record before us may be incomplete. If, based on the current record, we have misapprehended the scope of PCS’s indemnification claim against Ross, we invite a rehearing petition to specifically identify where in the record PCS seeks indemnification from Ross for any acts or omissions of Ross occurring after the 1966 closing date. The 1966 indemnification agreement, to be sure, does not allow for indemnification for any acts or omissions by Ross occurring after the 1966 closing date. Such result is a function of the clear terms of the indemnification agreement, not an expansion of the negligence rule.

Second, Ross submits that this Court misapprehends Ross's contention with respect to the nature of the "negligence rule" in the context of a *contractual* indemnification claim. In the Opinion, this Court analyzed the "negligence rule" as a public policy exception to the plain language of the contract. However, South Carolina case law establishes that the "negligence rule" is a rule of contractual *interpretation*, not an exception to the general rules of construing a contract. The intent of the parties to the contract should control and, as this Court has previously recognized, when the parties fail to expressly state otherwise, the indemnitee should not be held liable for costs and expenses **jointly** attributable to the acts and omissions of the indemnitor and the indemnitee.

Finally, Ross respectfully offers that this Court overlooks that applying the "negligence rule" to preclude Ross's indemnification of PCS does have a deterrent effect. PCS was not liable in the CERCLA case merely because of its *status* as a prior owner of the Site. Rather, the district court found PCS substantially contributed to the further contamination of the land through its actions over the course of its 19 years of ownership, as recognized by this Court. Opinion, p.3. Further, as this Court noted, CERCLA's complex statutory scheme does apply a fault-based analysis in apportioning responsibility among potentially responsible parties for purposes of their contribution claims under 42 U.S.C. §9613. Opinion, p.4. Here, PCS and Ross are *responsible* parties because they each disposed of hazardous wastes and disbursed them during their respective ownerships. Barring indemnification here under the "negligence rule" would promote the public policy of deterring owners from contaminating or spreading hazardous substances.

For each of the foregoing reasons, as set forth further herein, Ross requests that this Court GRANT Ross's petition for rehearing and permit Ross to supplement the Record on Appeal.

Factual Record

Pursuant to Rule 244(b), SCACR, “[a] certification order shall set forth the questions of law to be answered, all findings of fact relevant to the questions certified, and a statement showing the full nature of the controversy in which the questions arose.” The district court’s Order on Certification provides, in pertinent part:

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.

Order on Certification, p.4 (emphasis and double-emphasis added). This Court’s opinion overlooks the district court’s ruling, italicized above, that Ross’s conduct alone did not cause the Site to have to be remediated and that all of PCS’s litigation expenses were incurred, in part, as a result of PCS’s own conduct—conduct that necessarily occurred after the 1966 sale.

Motion to Supplement the Record on Appeal

In response to the Court’s invitation, Ross hereby moves the Court to supplement the Record on Appeal pursuant to Rule 212(b), SCACR and Rule 244(b), SCACR. Rule 212(b) provides, in pertinent part: “Without [the written consent of all attorneys of record] or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so.” Pursuant to the recent amendment to Rule 244(b), which became effective on April 15, 2014, “[i]n the event a party believes that additional materials

from the record before the certifying court are necessary, it shall notify the Supreme Court and the certifying court so that the certifying court can determine if the additional materials will be submitted.”

Ross hereby notifies this Court that Ross requests that the certifying court provide the following additional materials to this Court to supplement the Record on Appeal:

1. Second Am. Order & Op. (ECF 627) filed 05/27/2011;
2. Hrg. Transcript (ECF 691) dated 12/01/2011, pp.1, 25; and
3. PCS’s Brief re Fees and Costs (ECF 710) filed 02/26/2013.

While the district court’s determination in the Order on Certification should be conclusive, the above filings establish that all of PCS’s purported damages under its contractual indemnification claim arise, in part, from PCS’s own acts and omissions.

For instance, in its Brief Regarding Fees and Costs due Under The Ross Indemnification Agreement (ECF 710), PCS repeatedly asserts that PCS is seeking fees and costs incurred, in part, as a result of its own conduct and that it does not have to prove they were incurred solely as a result of Ross’s pre-1966 conduct:

The agreement does not limit indemnified “cost and expenses” to those that result “solely” from Ross’s conduct. ECF 710, p.2

It is law of the case both that CERCLA claims are indemnified claims, and that Ross bears a share of CERCLA liability. Thus, under South Carolina law, PCS can recover all fees and costs incurred in connection with its CERCLA claim against Ross. ECF 710, p.3

The issue before the Court is what is meant by the language indicating costs, to be indemnified, must “result[] from” Ross’s pre-1966 conduct. ECF 710, p.4.

The plain meaning of the phrase “resulting from” requires merely that indemnified costs and expenses be a consequence or effect of Ross’s pre-1966 conduct and provides no basis for limiting indemnification to losses solely attributable to Ross’s conduct. The term “result” is not ordinarily understood as synonymous with “only result.” There is no requirement that costs and expenses, to be recovered, must result “directly” or “solely” from Ross’s acts and omissions, and such a requirement should not be read into the agreement. ECF 710, p.7.

Interpreting “resulting from” as reaching consequences that flow in any way from Ross’s conduct is not consistent with that intent. ECF 710, p.8.

Ross should not be permitted to now escape its indemnification obligation by shifting to CNC [PCS] responsibility for assessing the extent to which costs and expenses incurred today were caused by pre-1966 conduct. To interpret the indemnification provision as requiring such a showing would render it essentially meaningless. . . . For that additional reason, “resulting from” should be interpreted broadly as meaning consequences that flowed in any way from Ross’s conduct. ECF 710, p.9.

The result is that PCS is allowed to recover its attorney’s fees and litigation costs in the extent they were incurred in connection with an indemnified “act, suit, demand, assessment, [or] proceeding,” (Entry 627 at ¶41), without regard for the “resulting from” requirement. ECF 710, p.10.

There are two approaches that the Court can take to apportioning these fees with intertwined purposes. ECF 710, p.11.

Awarding Intertwined Fees In Proportion to CERCLA Liability: PCS recommends holding Ross liable for the portion of intertwined fees that reflects its share of CERCLA liability. ECF 710, p.11.

Award All Intertwined Fees: Another approach that has a sound basis in the law is the award of all intertwined fees. ECF 710, p.12.

As a practical matter, then, proof of proximate cause is essentially no different than the proof required under the common definition of the phrase “resulting from,” both are satisfied if conduct is part of a series of events that combine to cause harm. ECF 710, p.16.

At an earlier hearing, PCS counsel explained: “We believe [Ross] should be—we believe that but for their conduct, there would be no fees, there would be no case. And so we—our position is that *they would be liable for all of the fees incurred.*” ECF 691, p.25:16-19 (emphasis added). PCS’s counsel continued: “[Ross] should be held liable under the indemnification agreement to us for anything we have to pay that would be our 30 percent” ECF 691, p.25:23-25.

Ross surmises that this Court may have based its Opinion on the statement of PCS’s counsel at oral argument that PCS was “only seeking to recover litigation expenses and costs from Ross to the extent they result from Planters’ conduct at the site prior to 1966.” Ross seeks to supplement the record before this Court with the above-described filings to demonstrate that PCS seeks to recover only litigation expenses and costs caused by both parties’ conduct. As the district court has found, none of PCS’s litigation costs and expenses were entirely the result of Ross’s pre-sale conduct. If this Court determines that the finding in the district court’s Order of Certification suffices on this point, then Ross’s motion to supplement would become moot.

Law/Analysis

I. This Court should rehear the certified question because it misapprehended that PCS is seeking indemnity solely for fees and expenses arising from Ross's pre-sale conduct. The district court has determined PCS has no such fees and expenses and PCS's claim includes none.

As previously stated, if in fact the Court premised its answer to the certified question on its belief that PCS was seeking only litigation costs and expenses caused entirely from Ross's pre-sale conduct, then the Court was mistaken as to the fundamental premise underlying the Court's Opinion, and the Court should grant a rehearing for this reason alone, or simply revise its Opinion and answer the certified question, "yes."

II. In responding to the certified question, the Court overlooked or misapprehended precedent of this Court that the "negligence rule" is based on the fundamental rule of contract construction to carry out the intent of the parties rather than a public policy of deterrence, as argued by PCS. This Court does not address Ross's argument to this effect in the Opinion.

This Court concludes in the Opinion that the rule preventing an indemnitee from being indemnified for losses caused in part by the indemnitee's negligence in the absence of clear and unequivocal language in the indemnity agreement to this effect does not apply because the purpose of the rule is a public policy of deterring negligence. The Court reasons there is no deterrent effect if the indemnitee's liability is based on strict liability rather than negligence. In so reasoning, the Court overlooks that the so-called "negligence rule" is a rule of contractual *interpretation*. It is not, as the Court suggests, a rule of public policy or an exception to the "plain language" rule applicable to contracts generally.²

In Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989), the South Carolina Court of Appeals articulated the "negligence rule" as follows:

² For this reason, the parties' freedom to contract is not at risk. The rule is one of interpretation, not public policy. In this respect, the parties are free to contract around the "negligence rule," so long as their intention to do so is expressed in "clear and unequivocal" language.

“[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.” Other jurisdictions have referred to this rule as the “clear and unequivocal test.” See, e.g., Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 707 (Tex. 1987) (explaining that “clear and unequivocal test” is “whether the contract between the parties expresses in clear and unequivocal language the intent of the indemnitor to indemnify the indemnitee against the consequences of the indemnitee’s own negligence whether such negligence was the sole proximate cause of the injury or a proximate cause jointly and concurrently with the indemnitor’s negligence.”).

Thus, under the “negligence rule,” in the absence of clear and unequivocal language to the contrary, an indemnitor, such as Ross, will not be contractually committed to indemnify an indemnitee, such as PCS, against losses caused in whole or in part by the indemnitee’s own acts and omissions. Here, the district court expressly found that PCS is requesting reimbursement for costs and fees arising—at least in substantial part—from PCS’s own acts and omissions. **Order on Certification, p.4.** Moreover, the various references to the publicly-available record in this action, excerpted above, fully support the district court’s finding in its Order of Certification that “it cannot be said that PCS incurred certain litigation expenses because of Ross’s conduct rather than its own.” **Order on Certification, p.4.**

“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.” Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). “To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal

construction, it alone determines the document's force and effect.” Id. at 498, 649 S.E.2d at 501.

This Court relies on Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, 232 (1934), for the proposition that the “negligence rule” was imposed as a matter of public policy to deter the indemnitee from future negligent conduct. Ross respectfully submits Murray instead establishes that the “negligence rule” rests upon the intentions of the parties to the contract—not public policy considerations of deterrence. In Murray, this Court held that the application of the indemnification provision to relieve the indemnitee of its own negligent conduct was “provocative of some doubt” and, as such, strictly construed the provision *against* indemnification:

[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. 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.* The defendant itself wrote the provision into the contract for its own benefit. *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. (emphasis added).

This Court also relies upon S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 91, 135 S.E.2d 613, 618 (1964), for the proposition that the “negligence rule” will not apply when there is no deterrent effect, but the Court ruled in favor of the indemnitee in that case because the indemnitee’s liability arose *solely* from negligence of the indemnitor that was imputable to the indemnitee. There was no proof of any intervening or independent negligent act of the

indemnitee that caused injury to the plaintiff: “The facts of this case show without any question, that the claim for damages to the person of Mrs. Brant arose *directly out of the faulty performance of the work by the defendant and without even any intervening or independent negligent act of the plaintiff*, as opposed to the negligence of the defendant imputed to the plaintiff.” Id. (emphasis added). The Court did not mention, much less discuss, deterrence as a basis for its decision.

In the present case, the district court held that “*all* of 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.” **Order of Certification, p.4** (emphasis added). In this respect, the district court specifically explained: “[T]he subsequent actions of PCS and others, over a forty-year period, *created new pollution and spread the existing pollution throughout the Site.*” **Order of Certification, p.4** (emphasis added). This is not a case, as in S.C. Electric & Gas, where the indemnitee (PCS) was held liable simply because the acts and omissions of the indemnitor (Ross) were imputable to PCS. Instead, the district court expressly recognizes that PCS’s own operations caused new pollution at the Site, spread existing contamination at the Site, and contributed both to the response costs at the Site and PCS’s litigations costs and expenses.

In fact, the present situation is far more comparable to Fed. Pac., 298 S.C. at 25, 378 S.E.2d at 57, in which 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.” There, the 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 (emphasis added).

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 of Appeals, in language similar to that used in *Murray*, explained that the scope of the indemnification was “provocative of some doubt” and that this doubt would be resolved in favor of the indemnitor: “[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 (emphasis added).

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)); *Ethyl Corp.*, 725 S.W.2d at 708 (refusing to recognize “contractual comparative indemnity” in absence of express language to the contrary).

As another jurisdiction explained, this rule of contractual interpretation applies equally to cases involving strict liability: “[T]he whole purpose of traditional indemnification is to shift

liability from one who is not at fault to one who is at fault.” In re Consol. Vista Hills Retaining Wall Litig., 893 P.2d 438, 445 (N.M. 1995). “It would be improper to allow full indemnification in strict liability when the party seeking indemnification is partially at fault; one is not entitled to restitution for that part of the damages for which the party is responsible.” Id. “Therefore, in all strict liability cases the conduct of the party seeking traditional indemnification must have been passive before that party may recover full indemnification from the manufacturer of a defective product.” Id.

Here, the district court explained that the CERCLA liability of PCS was not passive and that PCS and Ross jointly contributed to the contamination at the Site, causing a single indivisible harm that required remediation and jointly causing PCS’s litigation expenses. Accordingly, as a matter of contractual interpretation, based on the record before the district court and the Order on Certification, Ross respectfully submits the district court properly stated the certified question and this Court should answer the certified question, “yes.”

III. Even though the controlling standard focuses on contractual intent rather than deterrence, this Court misapprehends that applying the “negligence rule” in the CERCLA context supports the public policy of deterrence.

Even though the “negligence rule” is a product of the rules of contract interpretation, rather than an outgrowth of public policy, Ross respectfully submits that the Court overlooked that the application of the “negligence rule” in the CERCLA context does, in fact, serve a deterrent purpose by encouraging owners and operators to take steps to prevent the disposal and spreading of hazardous wastes during their ownership or operation of property.

There is no question that PCS, through CNC, engaged in the active contamination of the Site. The district court expressly imposed liability on PCS for response costs incurred by Ashley II of Charleston, LLC, under section 107(a) of CERCLA due to PCS’s prior ownership *and*

operations at the Site: “The record makes clear that CNC, predecessor to PCS, released arsenic and lead on the Site.” ECF 627, p.72. “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.*” ECF 627, p.72 (emphasis added).

CERCLA effectuates a public policy to encourage the timely cleanup of hazardous waste sites. See Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009) (“The Act was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.” (internal quotation marks omitted)) The public policy behind CERCLA focuses on preventing conduct that contaminates regardless of the whether the conduct constituted negligence. Its purpose is to encourage cleanup of contaminated sites and deter future contamination. This public policy of deterring pollution is furthered by barring an owner who pollutes land from indemnity against a prior owner in the absence of an express provision in the indemnity agreement allowing such indemnity.

In a similar manner the doctrine of products liability that holds sellers of unreasonably dangerous products strictly liable, codified at section 15-73-10 of the South Carolina Code, is meant to deter manufacturers and other sellers from placing unreasonably dangerous products in the stream of commerce. The deterrent value of the doctrine of strict products liability neither increases nor diminishes depending on whether the seller was negligent or not. The purpose is to keep defective products out of the stream of commerce, just as one of the purposes of CERCLA is to deter owners and operators from adding contamination to land.

The deterrent policy inherent in CERCLA is not directed at simply preventing *negligence* that contaminates land. It is directed at a more comprehensive goal – deterring all contamination

of land with hazardous materials regardless of whether or not the owner or operator was exercising due care at the time of the release of the hazardous materials. What matters is that the responsible party *caused* contamination, just as PCS did in this case. Consequently, the application of the “negligence rule” in this case to deny indemnity to PCS affirmatively serves the purpose of deterring contaminating activity by an owner or operator who was not held liable solely because of its mere status as a passive owner. The deterring penalties, so to speak, for causing contamination, as PCS did, are both preventing indemnification of the polluter and increasing the share of responsibility of the polluter for purposes of the contribution claims among the potentially responsible parties.

In sum, the Court was mistaken if the Court based its ruling on the assumption that there is no deterrent effect from preventing an indemnitee from obtaining indemnification based on the strict liability imposed on contaminators under CERCLA. Enforcing the “negligence rule” to prevent indemnity under these circumstances in fact deters owners holding indemnification agreements with prior owners from contaminating the land.

Conclusion

This Court appears to have misapprehended a critical fact underlying the certified question. This Court mistakenly understood the scope of PCS’s indemnity claim to be limited to PCS’s fees and costs in the CERCLA case entirely attributable to Ross’s pre-sale conduct. In fact, PCS is seeking indemnification for all of its expenses and costs in the CERCLA case merely because Ross’s pre-sale conduct was a contributing cause, not the sole cause, of those expenses and costs. As the district court recognized, PCS’s own acts and omissions also contributed to the contamination at the Site, the amount of the response costs, and PCS’s litigation expenses.

As the district court has found, none of PCS's expenses and costs have been solely incurred as a result of Ross's pre-sale conduct. While the "negligence rule" and separate policy of deterrence might have no application if PCS was seeking indemnity for expenses and costs incurred solely because of Ross's pre-sale conduct, PCS is not seeking indemnity for any fees and costs that meet this test.

The negligence rule does not flow from matters of public policy—it is based on the parties' intentions. For this reason, the parties' freedom to contract is not at stake. What is at stake is whether the contractual indemnification provision will be strictly construed in favor of the indemnitor in keeping with the precedent of this Court, or whether an indemnitor will be forced to bear the expenses of an indemnitee whose own conduct is 30% responsible for all the contamination of the Site, significantly increases the necessary response costs to clean up the contaminated site, and partially caused *all* of its litigation costs and expenses.

In addition, application of the negligence rule in the CERCLA context serves a deterrent purpose. To confine the analysis to the strict liability standard of CERCLA ignores that one of the overall purposes of CERCLA is to encourage the timely cleanup of existing pollution and deter further pollution regardless of whether the owner or operator exercised due care. Application of the "negligence rule" to bar PCS's claim for indemnification thus carries out the public policy of deterring owners who purchase a contaminated site from adding to the pollution or spreading it.

For the foregoing reasons, Ross respectfully requests that this Court grant rehearing or issue a new opinion answering the certified question, "yes."

Respectfully Submitted,

BY: 

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August 7, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2013-001766

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 Petition for Rehearing and Motion to Supplement Record 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 7th day of August 2014, in Charleston, South Carolina.

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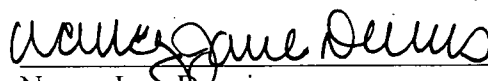
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