

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, THIRD FLOOR (29401-2240)
POST OFFICE BOX 340 (29402-0340)
CHARLESTON, SOUTH CAROLINA
TELEPHONE 843.722.3366
FACSIMILE 843.722.2266
WEBSITE www.hsblawfirm.com

WM HOWELL MORRISON
DIRECT DIAL NUMBER 843 720 4405
EMAIL hmorrison@hsblawfirm.com

August 25, 2014

BY HAND

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

RECEIVED

AUG 25 2014

S.C. Supreme Court

Re: Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc. v.
Ross Development Corporation, et al.
Appellate Case No. 2013-001766
HSB File No. 35894-1

Dear Mr. Shearouse:

Enclosed please find an original and seven (7) copies of PCS Nitrogen, Inc.'s Return to Ross Development Corporation's Petition for Rehearing in the referenced matter. Please file the Return and return a file-stamped copy to me by way of the bearer of this letter.

By copy of this letter, I am serving all attorney of record with a copy of same.

Sincerely yours,



Wm. Howell Morrison

WHM/kmg

Enclosures

cc (w/encl.): G. Trenholm Walker, Esq.
Daniel Simmons McQueeney, Esq.
T. McRoy Shelley, III, Esq.
Christy Ford Allen, Esq.
John A. Massalon, Esq.
Timothy W. Bouch, Esq.
Amy E. Melvin, Esq.
Jason Scott Luck, Esq.
John P. Seibels, Jr., Esq.
Capers G. Barr, III, Esq.
John B. Williams, Esq.
Sandra Kaczmarczyk, Esq.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 25 2014

Appellate Case No. 2013-001766

S.C. Supreme Court

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.

RETURN TO PETITION FOR REHEARING OF DEFENDANT/THIRD-PARTY
PLAINTIFF PCS NITROGEN, INC.

Wm. Howell Morrison (No. 4106)
Haynsworth Sinkler Boyd, P.A.
134 Meeting St., 4th Floor
Charleston, SC 29401
(843) 722-3366

Of Counsel
John B. Williams
Williams Lopatto PLLC
1776 K Street N.W., Suite 800
Washington, DC 20006
(202) 296-1665

Sandra Kaczmarczyk
Alton Associates PLLC
4443 Alton Place N.W.
Washington, DC 20016
(202) 344-5339

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

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SUMMARY OF ARGUMENT

PCS Nitrogen, Inc. (“PCS”) files this return in opposition to the petition for rehearing of Ross Development Corporation (“Ross”). Rule 221(a) of the South Carolina Appellate Court Rules permits rehearing only if the Court, in issuing a decision, has misunderstood or overlooked an argument made by the parties. Rule 221(a), SCACR. Contrary to what Ross suggests, that did not occur here.

According to Ross, rehearing is necessary to correct the Court’s understanding of PCS’s indemnification claim, but the record in this case demonstrates the Court has not misconstrued PCS’s claim. In issuing its decision, the Court found that the Ross-PCS indemnification agreement, by its terms, reaches costs and expenses associated with Ross’s ownership and operation of property today known as the Columbia Nitrogen Superfund Site (“Site”) between 1906 and 1966. (Decision at 5.) The Court “invite[d] a rehearing petition” if Ross could demonstrate that PCS’s indemnification claim was not limited to those operations and instead extended to costs arising from Ross’s later conduct. (*Id.* at 5 n.4.) The Court requested that the petition “specifically identify where in the record PCS seeks indemnification from Ross for any acts and omissions by Ross occurring after the 1966 closing date.” (*Id.*)

In its petition, Ross purports to accept this invitation by presenting alleged evidence to the Court that PCS seeks to recover *all* of its litigation costs from Ross, but the brief that PCS submitted to the district court in 2013 immediately before it certified the question answered here, demonstrates that PCS’s indemnification claim is limited to litigation expenses and attorney’s fees incurred addressing Ross’s pre-1966 Site operations. (*See supra* at 5.) Between 1906 and the mid-1930’s, Ross used pyrite ore as

a feedstock to manufacture fertilizer and was the only Site owner that did so. Pyrite slag contributed the “vast majority” of the arsenic, “much” of the lead, and low pH to the Site. (*See supra* at 7.) PCS seeks to recover only costs that it has incurred developing evidence to account for Ross’s fertilizer plant operations.

Ross’s real purpose in raising questions regarding the scope of PCS’s indemnification claim is not to correct any misunderstanding, but to argue to the Court, again, that PCS is not entitled to indemnification as a matter of law. Ross’s focus is on its argument that PCS cannot have incurred *any* litigation costs because of Ross given that PCS’s predecessor, Columbia Nitrogen Corporation (“CNC”), owned the Site and contributed contamination to the Site. (Petition at 2, 4.) According to Ross, PCS would have incurred litigation costs regardless of Ross’s conduct. (*Id.* at 8-13.) That argument, which has been made by Ross previously (Ross Brief at 21-22), completely overlooks the fact that PCS had to account for Ross’s ownership of the Site in the underlying litigation precisely because Ross owned the Site.

When the Court answered the certified question, it found that PCS’s CERCLA liability did not bar its indemnification claim. The Court expressly found that CERCLA liability is strict and does not arise from a finding that a CERCLA defendant caused harm. (Decision at 3-4.) Contributions to contamination are taken into account when response costs are apportioned, but that does not change the underlying nature of CERCLA liability, which arises from a defendant’s “status,” not its conduct. (*Id.*) The Court further found that PCS’s claim for “fees and costs associated with Ross’s CERCLA liability because of its ownership and operation of the Site prior to the 1966 closing” is “in strict accordance” with the terms of the Ross-PCS indemnification agreement. (*Id.* at

5.) The plain terms of the agreement demonstrate that it does not limit PCS's indemnification to expenses incurred in litigation caused *solely* by Ross. (*Id.* at 2-3.) There is no need to revisit this issue. *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (holding that "the purpose of the petition for rehearing" is not "to have the case tried in the appellate court a second time"); *Hicks v. Hicklin*, 187 S.C. 355, 197 S.E. 390, 393 (1938) (denying rehearing because arguments set forth in petition had already been presented to and considered by Court).

The second basis that Ross advances in support of its request for rehearing is that the Court, in rendering its decision, overlooked or misunderstood Ross's negligence rule arguments (Petition at 8-15), but Ross provides no evidence that that has occurred. The Court may not have expressly addressed each of Ross's arguments, but such a point-by-point analysis is not necessary to demonstrate that the Court has considered arguments advanced by a party. *Meinhard v. Youngblood*, 37 S.C. 231, 16 S.E. 771, 771 (1892); *Darlington Oil Co. v. Pee Dee Oil & Ice Co.*, 62 S.C. 196, 40 S.E. 169, 178 (1901). It is presumed that the Court considers the arguments presented to it. *Id.* Here, Ross repeats, in its petition for rehearing, arguments regarding the negligence rule that it advanced in its brief on the certified question and at oral argument. Rehearing is not intended to provide parties with the opportunity to present the same arguments to the Court a second time. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322; *Hicks*, 197 S.E. at 393.

Covar v. Sallant, 22 S.C. 265, 272 (1885), cited by Ross for the proposition that the Court has overlooked some of its arguments, is not to the contrary. (Petition at 1.) In that case, this Court considered, *seriatim*, numbered exceptions to a trial court decision set forth by the appellant. In its decision, the Court overlooked exceptions added after

the appeal was initially filed. *Covar v. Sallant* is inapposite as there is no evidence here that the Court intended to address each and every one of the parties' arguments in its decision and inadvertently omitted consideration of any of Ross's points.

With regard to Ross's motion to supplement the record, PCS has no objection to the Court reviewing briefs that describe the costs and expenses for which PCS seeks indemnification, but it is not necessary that the briefs be formally made part of the record. The briefs set forth arguments directed to the district court's interpretation of the Ross-PCS indemnification agreement that are not relevant to the certified question. While the briefs may provide useful context to the Court, the statement made by PCS at a 2011 hearing, which is quoted by Ross (Petition at 7), does not. It has been superseded by subsequent events and no longer accurately reflects PCS's views. PCS further objects to Ross's motion to supplement the record because Ross's request for relief has not been directed to the proper court, which is the district court, the court that certified the question addressed here. Rule 244(b), SCACR.

ARGUMENT

I. THE COURT HAS NOT MISAPPREHENDED THE SCOPE OF PCS'S INDEMNIFICATION CLAIM.

In arguing that PCS's indemnification claim is not limited to expenses and fees resulting from Ross's pre-1966 conduct, but instead encompasses *all* costs incurred by PCS in the underlying case (Petition at 7), Ross dramatically mischaracterizes the scope of PCS's indemnification claim. PCS's claim is limited to costs incurred developing evidence of Ross's Site operations before 1966. There is no need for a rehearing to correct the Court's understanding of PCS's claim.

In challenging PCS's indemnification claim, Ross's real focus is not on the costs that PCS seeks to recover but rather on the litigation in which they were incurred. According to Ross, PCS cannot be indemnified because Ross's pre-1966 conduct was not and could not have been the *sole* cause of the underlying litigation because PCS's predecessor, CNC, contaminated the Site. (Petition at 8-13.) That argument has already been considered and rejected by this Court. It does not provide a basis for rehearing.

A. PCS SEEKS TO RECOVER COSTS AND EXPENSES INCURRED TO ADDRESS ROSS'S SITE OPERATIONS BEFORE 1966.

In arguing that PCS seeks indemnification for *all* of its litigation costs, Ross cites a jumble of excerpts from a PCS brief submitted to the district court in 2013 and a statement made by counsel for PCS at a 2011 hearing. (Petition at 5-7.) As discussed further below in PCS's response to Ross's motion to supplement the record, PCS objects to Ross's reliance on the statement made in 2011 because it no longer accurately represents PCS's claim. PCS has no objection to the Court's reliance on its 2013 brief, which outlines its indemnification claim, but Ross has lost the sense of PCS's arguments by quoting lines from that brief out of context.

Read in its entirety, PCS's brief makes absolutely clear that PCS seeks indemnification only for costs incurred addressing Ross's pre-1966 Site operations and not *all* of its litigation costs. PCS describes at length in the brief which types of expenses and fees it seeks to recover from Ross and which it does not. It is confounding that Ross could read this explanation of PCS's claim and assert that PCS is seeking indemnification for each and every one of its litigation costs.

First, PCS is not seeking indemnification for any costs associated with its investigation of Site owners other than Ross. (Ashley ECF Entry 710 at 11.) Because PCS brought CERCLA Section 113 contribution claims, 42 U.S.C. §9613(f)(1), against all of the current and former Site owners, PCS incurred significant costs developing evidence of what happened at the Site during each ownership period going back to 1906. However, PCS is not seeking indemnification from Ross for any costs incurred developing evidence of any ownership period other than Ross's Site ownership period. For example, PCS conducted a number of depositions and reviewed a large volume of documents and discovery responses to account for Ashley II of Charleston, LLC's ("Ashley") ownership of the Site and the Holcombe and Fair parties' ownership of the Site, but PCS is not seeking indemnification from Ross for costs incurred in connection with that discovery.

Second, Ross and PCS agree that PCS should be indemnified for certain costs and expenses incurred suing Ross. Ross has conceded that PCS is entitled to recover costs incurred identifying Ross and bringing the company into the underlying CERCLA litigation. As Ross's counsel has explained, "Ross would not have been a party [to the CERCLA litigation] but for their own activity" and "any litigation expenses incurred with bringing Ross in and adding them to the lawsuit, obviously that would not have occurred but for any activities of Planters." (Ashley ECF Entry 722 at 11; *see also* Ashley ECF Entry 710 at 11.)

What has given rise to the dispute between the parties is a limited third category of costs—costs incurred to develop evidence and expert testimony regarding Ross's ownership and operation of the Site. (PCS Brief at 4; Ashley ECF Entry 710 at 11.)

Those expenses would not have been necessary if Ross had not owned the Site, and given Ross's long operating period—from 1906 to 1966—and the fact that it was the only owner to contribute pyrite slag to the Site, which accounts for the “vast majority” of the arsenic contamination, “much” of the lead contamination, and low pH contamination, (Ashley ECF Entry 627 at ¶34), those expenses were significant.

As PCS explained in the briefs submitted to this Court, PCS used the evidence that it developed regarding Ross's operations to support both its divisibility defense to joint and several liability and its contribution claim against Ross. (PCS Brief at 4.) For that reason, in briefs submitted to the district court, PCS has referred to this third category of fees and costs as “intertwined fees.” PCS has provided the district court with an interpretation of the indemnification agreement that supports its recovery of either 45% or 100% of this category of fees. (Ashley ECF Entry 710 at 11-13.)

The district court has not yet decided the extent to which these costs are encompassed by the terms of the indemnification agreement at issue. When the case is returned to that court, it will address the scope of the litigation expenses and attorney's fees that can be recovered pursuant to the plain terms of the Ross-PCS agreement and hear evidence of the specific expenses and fees that PCS seeks to recover. Now that the certified question has been answered, this matter should be returned to the district court so that those proceedings can be completed.

B. THE FACT THAT PCS ALSO WAS SUED AS A SITE OWNER DOES NOT PRECLUDE INDEMNIFICATION.

Ross further argues that PCS is not entitled to indemnification because PCS's predecessor, Columbia Nitrogen Corporation (“CNC”), was sued in the underlying litigation, and, therefore, PCS's litigation expenses could not have resulted *solely* from

Ross's conduct. (Petition at 8-13.) This was the essence of virtually every argument Ross made in its brief on the certified question. (Ross Brief at 12-22.)

The Court properly rejected Ross's views in answering the certified question. Both PCS (through CNC) and Ross may have contributed contamination to the Site and "together led to the Site's superfund designation," (Petition at 4), but that is not pertinent to PCS's indemnification claim. Ross made this point in its brief on the certified question, (Ross Brief at 4, 16), and the Court declined to find that the negligence rule bars PCS's claim. In reaching this result, the Court explained that CERCLA liability is fundamentally not "fault-based." (Decision at 3.) The Court recognized that "relative fault does factor into the ultimate liability calculus in the form of CERCLA's contribution provision," but that only occurs after liability has been established based on the defendant's relationship to the Site. (*Id.* at 3-4.) Here, PCS and Ross were found liable by the district court based on their "status" as former Site owners. Application of the negligence rule would not serve a deterrent purpose if applied here because PCS was not found liable, in the first instance, for causing harm.

The result of the Court's ruling is that, according to the terms of the Ross-PCS indemnification agreement, PCS can be indemnified for litigation expenses and attorney's fees that result from Ross's pre-1966 conduct. As the Court recognized, by "limiting its claim to fees and costs associated with Ross's CERCLA liability incurred because of its ownership and operation of the Site prior to the 1966 closing," "PCS seeks to enforce the indemnification provision in strict accordance with its terms." (Decision at 5.) Those terms broadly indemnify PCS for "all acts, suits, demands, assessments, pr[o]ce[e]dings and costs and expenses resulting from any acts or omission[s] of [Ross]

occurring prior to the closing date[.]” (*Id.* at 2.) If the intent was to limit indemnification in the manner suggested by Ross, the parties to the agreement would have drafted a very narrow indemnification provision that would only be effective in the event that litigation arose *solely* or *only* from Ross’s conduct. That is not what occurred.

Ross would have this Court disregard the terms of this agreement. Essentially, Ross asks the Court in its petition as it did in its brief on the certified question to interpret PCS’s claim as an equitable indemnification claim, not a contractual indemnification claim. (PCS Reply Brief at 6-9.) As PCS explained in its briefs addressing the certified question, that would be contrary to basic principles of South Carolina law, which recognize that private parties have the freedom to use contractual indemnification agreements to privately allocate risk. (PCS Brief at 21-22.) The Court recognized those principles in its decision. “[S]trong policy considerations . . . generally permit business owners to allocate risk amongst themselves as they see fit,” and “[a]n indemnification agreement is an ideal method for businesses to allocate costs and expenses that may arise in future litigation.” (*Id.* at 5-6.) Here, “two sophisticated business entities” agreed that CNC, now PCS, should be broadly indemnified for costs resulting from Ross’s conduct. (*Id.*) The plain language of the agreement should govern PCS’s recovery. Ross’s argument to the contrary has already been rejected by this Court and does not provide a basis for rehearing.

II. THE COURT HAS NOT MISAPPREHENDED THE NEGLIGENCE RULE.

Ross next argues that rehearing is necessary because the Court has “misapprehended” the negligence rule. (Petition at 2.) According to Ross, the Court failed to recognize that the negligence rule is a general “rule of contract interpretation”

that requires all indemnification agreements to be construed against indemnification. (*Id.* at 3.) Ross further argues that the Court has erred in not finding that the negligence rule, if applied here, would deter “contaminating or spreading hazardous substances.” (*Id.*; *see also id.* at 13-15.)

Ross has already presented these arguments to the Court in its brief addressing the certified question, (Ross Brief at 17-19), and, in answering the certified question, the Court rejected those arguments. The Court found that the negligence rule is intended to bar indemnification when doing so will deter negligent conduct in the future. (Decision at 4.) The Court declined to apply the rule here “[b]ased on the public policy underlying the negligence rule, the nature of CERCLA liability, and our law respecting the freedom of parties to contract[.]” (*Id.*) The Court further recognized that CERCLA imposes liability without regard for fault. (*Id.*)

With regard to the issue of deterrence, Ross suggests to the Court, as it did in its brief on the certified question, that, because the district court equitably apportioned CERCLA liability, application of the negligence rule would deter polluting conduct. (Petition at 13-15; Ross Brief at 18-19.) The argument has no sound basis in the policy purpose of the negligence rule given that apportionment is *equitable* precisely because it is not based on evidence that a party caused a certain amount of harm. Moreover, the Court has already considered and rejected Ross’s argument as contrary to CERCLA’s strict liability scheme. (Decision at 3-4.) As discussed above, petitions for rehearing are not granted to allow the Court to rehear arguments already presented. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322; *Hicks*, 197 S.E. at 393. For that reason, Ross’s petition should be denied.

Covar v. Sallat, 22 S.C. 265, 1885 WL 3585 (S.C. 1885), cited by Ross for the proposition that rehearing is appropriate because the Court has overlooked some of its arguments, does not require a contrary result. In that case, the appellant was granted leave to add exceptions to the trial court decision to those originally filed with the Court, but the order granting the appellant leave to add the arguments was not noted in the appellant's brief. The Court overlooked the new exceptions in its decision, which addressed each basis for appeal *seriatim* and plainly did not address the additional grounds. *Id.* at 272. Here, there is no evidence that the Court intended to analyze each and every one of the parties' arguments and no evidence that the Court has overlooked any of Ross's points. The Court has heard all of Ross's arguments as they were set forth in both its brief and at oral argument. In rendering its decision, the Court analyzed the significant legal decisions cited by the parties and fully answered the certified question. Nothing more is required to demonstrate that all of Ross's arguments have been considered. *Meinhard v. Youngblood*, 37 S.C. 231, 16 S.E. 771, 771 (1892); *Darlington Oil Co. v. Pee Dee Oil & Ice Co.*, 62 S.C. 196, 40 S.E. 169, 178 (1901).

Nothing has been overlooked, and there is no more that this Court needs to do. The case should now be returned to the district court so that it can determine, based on the plain terms of the Ross-PCS indemnification agreement and PCS's evidence of its litigation expenses and attorney's fees, what amount is due to PCS under its indemnification claim.

III. ROSS'S MOTION TO SUPPLEMENT THE RECORD IS UNNECESSARY AND INCONSISTENT WITH THE GOVERNING RULE.

Finally, PCS respectfully requests that the Court deny Ross's motion to supplement the record, which Ross incorporated into its petition for rehearing. (Petition at 4-7.) PCS opposes Ross's motion on several grounds.

First, it is not necessary that the materials referenced by Ross be made part of the record here. In their briefs on the certified question, both Ross and PCS referenced publicly available materials from the underlying district court proceeding, including both orders issued by the district court and briefs filed by the parties. Here, as there, PCS has no objection to the Court referencing materials on file with the district court to understand the status of the proceedings in that court. The PCS brief discussed by Ross in its petition for rehearing does not need to be made part of the record because the brief is not itself evidence, and it does not relate to the certified question.

Second, if the Court references the materials cited by Ross in its petition, those materials need to be placed into context. The statement from a 2011 hearing that Ross quotes as evidence PCS seeks to recover all of its litigation costs and expenses from Ross, (Petition at 7), pre-dates the district court's recent decisions on PCS's indemnification claim. (Ashley ECF Entry 692; Ashley ECF Entry 705.) Positions taken by PCS at that early hearing are no longer relevant to PCS's indemnification claim. The briefs that PCS submitted to the district court in 2013, accurately set forth the scope of PCS's claim. Those briefs were submitted to the court right before it certified the question addressed here and include:

- PCS Nitrogen, Inc.'s Brief Regarding Fees and Costs Due Under the Ross Indemnification Agreement, (Ashley ECF Entry 710), and
- PCS Nitrogen, Inc.'s Reply Brief Regarding Fees and Costs Due Under The Ross Development Corporation Indemnification Agreement. (Ashley ECF Entry 722.)

These briefs describe which fees and expenses PCS seeks to recover from Ross. PCS has no objection to these materials being referenced by the Court to understand the scope of PCS's indemnification claim. As discussed above, contrary to what Ross suggests, these briefs establish that PCS does not seek indemnification for all of its litigation costs.

Third and finally, PCS respectfully requests that Ross's motion to supplement the record be denied because, in making the motion, Ross has not complied with the applicable rule of the South Carolina Rules of Civil Procedure. Rule 244(b) governs and provides that:

The Supreme Court will not consider any documents or other evidentiary materials unless the certifying court has submitted those materials. The Supreme Court may request the original copies of all or any portion of the record before the certifying court to be filed with the Court, if, in the opinion of the Supreme Court, the record or a portion thereof may be necessary in deciding to accept or in answering the certified questions. In 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.

Rule 244(b), SCRCPP. Ross has not notified the certifying court—the United States District Court for the District of South Carolina—that it believes additional record materials need to be provided to the South Carolina Supreme Court. The certifying court is the court that must decide whether it is appropriate to supplement the record. PCS opposes Ross's motion to add material to the record because, pursuant to Rule 244(b), the motion has not been directed to the proper court.

CONCLUSION

For the reasons set forth above, PCS respectfully requests that the Court deny Ross's petition for rehearing and its motion to supplement the record.

August 25, 2014

Respectfully submitted,



Wm. Howell Morrison (No. 4106)
Haynsworth Sinkler Boyd, P.A.
134 Meeting St., 4th Fl., Ste. 400
Charleston, SC 29401
Ph. 843-722-3366
hmorrison@hsblawfirm.com

And

Of Counsel

John B. Williams
Williams Lopatto PLLC
1776 K Street N.W., Suite 800
Washington, DC 20006
(202) 296-1665
jbwilliams@cozen.com

Sandra Kaczmarczyk
Alton Associates PLLC
4443 Alton Place N.W.
Washington, DC 20016
Ph. 202-344-5339
sandra@altonassoc.com

ATTORNEYS FOR DEFENDANT/
THIRD-PARTY PLAINTIFF
PCS NITROGEN, INC.