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**Jan 25 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
Charles B. Simmons, Jr., Master-in-Equity

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Appellate Case No. 2020-000669  
Civil Action No. 2016-CP-23-5905

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Renewable Water Resources,..... Respondent,

v.

Insurance Reserve Fund, A Division of the State Fiscal  
Accountability Authority of South Carolina ..... Appellant.

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**RENEWABLE WATER RESOURCES’  
PETITION FOR REHEARING**

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Pursuant to Rule 221, SCACR, Renewable Water Resources (“ReWa”) petitions for rehearing of the Court’s opinion in *Renewable Water Resources v. Insurance Reserve Fund*, Op. No. 6042 (S.C. Ct. App. filed Jan. 3, 2024) (Howard Adv. Sh. No. 1 at 17). Although the Court properly found that there was coverage under the insurance policy at issue, ReWa believes the Court overlooked or misapprehended relevant evidence in reaching the erroneous conclusion that certain categories of damages were consequential damages that were not covered by the relevant insurance policy. Accordingly, ReWa requests rehearing of that portion of the Court’s ruling.

In addition, ReWa draws the Court’s attention to one aspect of its ruling that is especially susceptible to misapprehension or misapplication on remand. The potential confusion arises from what could be perceived as tension between two aspects of the Court’s ruling. On the one hand, the Court correctly held that expenses incurred to remediate the contamination and prevent future contamination were covered, but, later in the Opinion, the Court stated that costs of testing and

sampling were not covered. The tension between those two statements arises from the fact that much of the testing and sampling *was part of* the remediation or the prophylactic efforts. The solution to this tension, it seems, is to clarify the Court’s meaning: sampling and testing related to cleanup, remediation, and prevention *are* covered, and testing and sampling performed for other purposes are *not* covered. This clarification would allow the parties and the lower court to implement this Court’s instructions more efficiently and confidently on remand.

### ARGUMENT

In its opinion, the Court correctly held that the relevant insurance policy issued by the Insurance Reserve Fund (“IRF”) covered the costs associated with cleaning up the chemical contamination and the remediation and repair of ReWa’s water treatment facilities. The Court specifically held that two categories of damages were covered: (1) costs for cleaning all three facilities, and (2) the “expenses incurred in preventing imminent damage through further contamination.” *See* Op. at 5–6. In the next paragraph, however, the Court ruled that four specific categories of damage were “consequential damages” that were not covered by the policy. *Id.* at 6. ReWa disagrees with the Court’s conclusion that these four categories or types of damages are not covered or that the trial court erred in how it addressed them. ReWa further believes that some of the Court’s language regarding covered vs. non-covered expenses could be clarified to allow the lower court more confidently to effectuate the Court’s ruling on remand. Both arguments are explained below.

1. The Court’s ruling on “consequential damages” overlooks relevant Record evidence.

The Court’s ruling that some of the categories of damages are excluded misapprehends or overlooks evidence that demonstrates that these expenses should be covered because they were necessary parts of the cleaning and remediation process. *See, e.g.*, R. 4 (noting that ReWa’s

consultation with an engineering firm with specialized expertise in the remediation and removal of contaminants in a way that would be satisfactory to government regulators was an integral part of the cleanup process) (citing Ct.'s Ex. 1 at ¶ 15); R. 1719:20–25 (testimony that investigation into the source and spread of the contamination was necessary to prevent further, additional contamination); R. 1699:12–13 (testimony about the nexus between the investigation of the source of the contamination and the prevention of further damages); R. 337:16 to 338:25 (same).<sup>1</sup> In light of this evidence, ReWa respectfully suggests that rehearing is warranted to allow the Court to clarify that some or all of these categories of expenses are, in fact, covered expenses if they were parts of the cleaning or prevention work.

2. The Court should, at minimum, clarify its ruling regarding “testing and sampling” costs.

In addition to the broader point made in the preceding section, one specific aspect of the Court's ruling is especially susceptible to misapprehension or confusion on remand. Accordingly, even if the Court is not inclined to alter the substance of its ruling regarding the categories of expenses that are or aren't covered, ReWa respectfully requests that the Court clarify at least this one issue to avoid unnecessary confusion or uncertainty on remand.

The potential uncertainty arises from what could be seen as tension between the Court's description of covered expenses and its description of one of the categories of non-covered expenses. Specifically, the Court ruled that the policy covered both (a) the costs of “cleaning the affected structures,” Op. at 5, and (b) the “expenses incurred in preventing imminent damage

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<sup>1</sup> ReWa believes that the trial court did not err in handling the fourth category of damages for which the Court found error related to “continuing operation of the wastewater facilities” Op. at 6. The Court expressly noted that the trial court did in fact deduct \$2,516,054.27 from the damages to account for costs of normal operations. Op. at 4; R. 16 (trial court's Order at 14).

through further contamination,” Op. at 6. In the very next paragraph, however, the Court ruled that costs of “testing and sampling” are *not* covered. *Id.*

These statements regarding coverage, on the one hand, and exclusion, on the other hand, give rise to an inevitable tension. That’s because many of the costs ReWa incurred for testing and sampling were essential parts of the cleaning process—for example, to determine its necessity and, later, its effectiveness—or were necessary to prevent further contamination. *See, e.g.*, R. 10–11; R. 337:16 to 338:25; R. 400:17–20; R. 434:6–12; R. 1701:4–25; R. 1718:21 to 1719:25; R. 1873:1 to 1874:2; R. 1900:17 to 1901:9.

How to resolve this seeming tension, which, on remand, will likely be the source of considerable debate. It seems almost certain that the Court’s intention was to rule that *some* costs of testing and sampling *are* covered—namely, the testing and sampling undertaken as part of the facilities cleanup or to prevent further imminent damage—but other costs of sampling and testing are *not* covered, namely those that were incurred for a purpose *other than* the cleaning of the affected facilities or the prevention of additional, imminent damage. ReWa respectfully suggests that the Court revise the wording in the Opinion to clarify that the meaning described by ReWa in the preceding sentence is, in fact, the meaning of the Court’s ruling.

### CONCLUSION

For the foregoing reasons, ReWa respectfully requests that the Court rehear and reconsider the aspects of the appeal relating to the four categories of damages the Court found were excluded from coverage. Alternatively, and at minimum, ReWa respectfully requests the Court clarify its ruling regarding the costs of testing and sampling to make clear that such expenses are covered if they were undertaken as part of the cleanup or to prevent imminent, additional damage, but that such costs are not covered if they were undertaken for another reason.

Respectfully submitted,

By: 

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January 25, 2024  
Greenville, South Carolina

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**PROOF OF SERVICE**

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Pursuant to Rule 262(c)(3), SCACR, undersigned counsel hereby certifies that a copy of Respondent’s Petition for Rehearing has been served upon the following counsel of record by electronic mail (see attached sent email):

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By:   
Miles E. Coleman

*Attorney for Respondent Renewable Water Resources*

January 25, 2024  
Greenville, South Carolina

## Miles Coleman

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**From:** Miles Coleman  
**Sent:** Thursday, January 25, 2024 8:49 PM  
**To:** Andrew Lindemann  
**Cc:** William Brown; Rivers S. Stilwell (rstilwell@maynardnexsen.com)  
**Subject:** ReWa v. IRF -- service of ReWa's Petition for Rehearing  
**Attachments:** 2024.1.25 -- ReWa v. IRF -- ReWa's Petition for Rehearing.pdf

Andrew, please find attached for electronic service on you a copy of ReWa's Petition for Rehearing, a copy of which will be filed shortly with the Court.

Regards,

Miles



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January 25, 2024

**Via electronic mail**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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RE: Respondent's Petition for Rehearing  
*Renewable Water Resources v. Insurance Reserve Fund*  
Appellate Case No. 2020-000669  
Civil Action No. 2016-CP-23-5905  
Our File No. 006769/01534

Dear Ms. Kitchings:

Please find enclosed Respondent's Petition for Rehearing for filing in the above-referenced appeal. Also enclosed is a Proof of Service of the same. We ask that you file the Petition and, at your convenience, return an electronic version to us bearing the Court's file stamp. Please do not hesitate to contact us with any questions.

Very truly yours,



Miles E. Coleman  
*Counsel for Respondent*

CC: (by email only)  
Rivers S. Stilwell, Esq.  
William S. Brown, Esq.  
Andrew F. Lindemann