

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

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

Renewable Water Resources,..... Respondent,

v.

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

**RETURN TO RESPONDENT’S
PETITION FOR REHEARING**

The Respondent Renewable Water Resources (“ReWa”) has petitioned this Court for a rehearing of the published decision in *Renewable Water Resources v. Insurance Reserve Fund*, Op. No. 6042 (S.C. Ct. App. filed January 3, 2024). The Appellant Insurance Reserve Fund (“IRF”) has also filed a petition for rehearing on several bases, and therefore, agrees generally that a rehearing is merited, but not for the bases articulated by ReWa.

In its petition for rehearing, ReWa takes the position that this Court did not go far enough in awarding consequential damages including economic loss and loss of use. In addressing the Supreme Court’s decision in *Sullivan Management, LLC v. Firemen’s Fund Ins. Co.*, 437 S.C.

587, 879 S.E.2d 742 (2022), this Court agrees with the IRF’s position that consequential damages, including economic loss and loss of use, do not meet the definition of “direct physical loss or damage.” Citing *Sullivan*, this Court confirms that “‘direct physical loss or damage’ requires a ‘tangible or material element.’” (Slip Op. at 6). Based thereon, this Court correctly ruled that the following categories of consequential damages are not covered under the IRF policy: “(1) testing and sampling; (2) expert consultation regarding DHEC and Environmental Protection Agency requirements; (3) investigating the contamination; and (4) continuing the operation of the wastewater facilities including future protocols for receiving waste.” (Slip Op. at 6).

Yet, without citing any legal authority whatsoever, ReWa asks the Court to reconsider whether expert engineering fees, investigative costs, and testing and sampling expenses are not covered. ReWa makes no attempt to show that such consequential damages – which clearly qualify as intangible economic losses -- constitute “direct physical loss or damage” in spite of the Supreme Court’s discussion in *Sullivan*.¹ As the Supreme Court held, “the loss or damage must be more than mere loss of use or economic loss; instead, there must be a ‘physical alteration, destruction, or permanent dispossession of property.’” 879 S.E.2d at 744. ReWa likewise makes no attempt to distinguish or rebut this Court’s decision in *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), where this Court ruled that “[s]ampling and the performance of chemical tests do not constitute ‘physical injury to or destruction of tangible property.’” 387 S.E.2d at 710.

¹ Remarkably, the term “direct physical loss or damage” – which is the focal point of the coverage dispute – is not mentioned in ReWa’s petition for rehearing.

This Court found that “the master properly awarded costs for cleaning the affected structures.” (Slip Op. at 5). And this Court also found coverage for “a portion of the expenses incurred in preventing imminent damage through further contamination of the structures, such as providing for the sequestration of incoming waste.” (Slip Op. at 6). ReWa argues that there is a “tension” between these findings, and based on that “tension,” ReWa asks the Court – again without citing any authority – to award testing and sampling expenses. As discussed above, the testing and sampling expenses are economic losses as this Court correctly ruled, and as intangible consequential damages, they do not meet the definition of “direct physical loss or damage” per the holdings in *Sullivan* and *Braswell*.

Furthermore, in opposing ReWa’s position, the IRF does not waive and relies on the grounds raised in its own petition for rehearing that the Court did not correctly apply the *Sullivan* decision in awarding even the cleaning and remediation expenses and any “prevention” expenses. The IRF contends that the presence of biosolids containing PCBs on the structure walls did not “alter the appearance, shape, color, structure, or other material dimension” of ReWa’s digesters and holding tanks, as was required per *Sullivan* to constitute “direct physical loss or damage.” *Sullivan*, 879 S.E.2d at 745. None of the structures or fixtures was permanently altered necessitating repairs. Likewise, none of the structures or fixtures was demolished, removed, or replaced – they were simply pressure washed and that constitutes “cleaning” as was addressed in *Sullivan* and found not to qualify as “direct physical loss or damage.” Quite simply, there is no “physical alteration, destruction, or permanent dispossession of property.” *Sullivan*, 879 S.E.2d at 744. In short, the so-called “remediation costs” and “prevention costs” claimed by ReWa in its petition for rehearing are no different from costs

associated with “cleaning” of surfaces and “steps to mitigate the spread” which the Supreme Court found not to qualify as “direct physical loss or damage” in *Sullivan*.

For the foregoing reasons, the Appellant Insurance Reserve Fund opposes the grounds for rehearing as articulated by ReWa in its petition, but the IRF joins ReWa in requesting that this Court rehear this appeal.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Appellant Insurance Reserve Fund

February 9, 2024

RECEIVED

Feb 09 2024

SC Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court’s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant Insurance Reserve Fund, does hereby certify that service of the **Return to Respondent’s Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 9th day of February 2024 as follows:

William S. Brown, V, Esquire
Miles E. Coleman, Esquire
Nelson Mullins Riley & Scarborough, LLP
Email: william.brown@nelsonmullins.com
Email: miles.coleman@nelsonmullins.com

Rivers S. Stilwell, Esquire
Maynard Nexsen, P.C.
Email: rstilwell@maynardnexsen.com

s/ Andrew F. Lindemann



Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

*Also Admitted in North Carolina

February 9, 2024

RECEIVED
Feb 09 2024
SC Court of Appeals

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Renewable Water Resources v. Insurance Reserve Fund, a Division of the State Fiscal
Accountability Authority of South Carolina
Appellate Case Number: 2020-000669
Civil Action Number: 2016-CP-23-5905
Claim Number: A4190
Our File Number: 104.10068

Dear Ms. Kitchings:

Pursuant to Section (b)(2) the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as amended May 6, 2022), please find enclosed for filing the **Return to Respondent's Petition for Rehearing** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: William S. Brown, V, Esquire (w/ Enclosure, Via Email Only)
Miles E. Coleman, Esquire (w/ Enclosure, Via Email Only)
Rivers S. Stilwell, Esquire (w/ Enclosure, Via Email Only)