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.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

In its brief, the Respondent Renewable Water Resources ("ReWa") accuses the Appellant Insurance Reserve Fund ("IRF") of "attempt[ing] to complicate and confuse the issues." *See*, ReWa Brief, p. 1. However, in reality, ReWa's multi-million dollar property casualty claim is complex -- requiring careful scrutiny of the evidence, extensive fact-finding which the trial court did not provide, and thorough construction of the policy terms. ReWa has responded to the myriad of issues with a limited and overly generalized analysis that mischaracterizes and disregards the key issues of policy construction and the proper application of federal and state law governing PCB remediation. Instead of addressing many issues directly, ReWa repeatedly offers unjustified preservation arguments suggesting that the IRF "abandoned" issues by failing to cite supporting authority, which clearly is not the case. The trial court awarded nearly $6 million in a complex property claim. As the IRF described in its opening brief, the errors committed by the trial court are numerous and wide-ranging. Those issues require more than the generalized analysis urged by ReWa.[1]

I. The trial court erred in its interpretation and application of the term "direct physical loss of damage" as part of the insuring agreement.

The key issue in evaluating ReWa's claim is the interpretation and application of the

[1] It is instructive that ReWa's Counter-Statement of the Facts makes repeated reference to irrelevant facts regarding the limits of insurance, the amount of premiums paid, and the ratio of the award to the limits. None of these facts in any way impacted either the trial of the case nor was even mentioned in the trial court's Findings of Fact and Conclusions of Law. The only conclusion to be reached from the inclusion of such inapposite points is that ReWa's best argument boils down to "There must be coverage. Look at how much my premiums are!"

policy language "direct physical loss or damage." The trial court disregarded South Carolina case law and interpreted "direct physical loss or damage" as including virtually all of the expenses claimed by ReWa including those for consequential and non-physical losses or damages. ReWa's claim is replete with purely economic loss and loss of use expenses.

In its initial discussion of "direct physical loss or damage," ReWa also ignores South Carolina authorities including *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), and *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). Remarkably, ReWa claims that the IRF cites no case law to support its interpretation and application of the key policy terms. *See*, ReWa Brief, p. 10. Yet, the IRF cited extensively to the *Campbell* and *Brazell* cases, which ReWa, like the trial court, disregards in favor of a paucity of cases from other jurisdictions. In short, the IRF's coverage position is fully and completely supported by the existing South Carolina authority.

It is important to also recognize that ReWa mischaracterizes the IRF's coverage position. The IRF did not argue that there was ***no*** direct physical loss or damage resulting from the PCBs. In its opening brief, the IRF "agreed that the costs of cleaning the three holding tanks at Pelham would be covered to the extent that ReWa provided a breakdown of those specific costs, which ReWa never did." *See,* IRF Opening Brief, p. 16. The IRF also explained that the cleaning of the tanks at the Mauldin Road and Lower Reedy facilities was not legally required or necessary because the PCB levels were so far below the 50 mg/kg TSCA threshold; yet, even if the cleaning of those tanks did constitute "direct physical loss or damage," there was no evidence presented by ReWa as to those specific costs. In short, the IRF did not contend that there was not any "direct physical loss or damage" but rather that ReWa never presented those costs either in the claims process (despite many requests) or as evidence at trial.

In its brief, ReWa initially focuses on the existence of contaminated biosolids that adhered to the walls of the tanks. There was no evidence that the PCBs permeated or damaged the concrete walls of the tanks themselves. Instead, the biosolids were cleaned by a pressure washing process. That is the extent of the "direct physical loss or damage." Yet, ReWa quickly veers from that argument to its claims that the tanks were rendered unusable or inoperable, and in doing so, makes the unsupportable assertion that such loss of use constitutes "direct" and "physical" damage. It does not. Quite clearly, that assertion is not supported by the South Carolina authority that ReWa conveniently ignores in its construction of the "direct physical loss or damage" requirement under the policy. If a structure is rendered "unusable," then the damages resulting from that are logically loss of use damages.

As indicated, the *Campbell* case makes that clear. The federal district court was "unable to construe the plain meaning of the policy in such a way as to find that direct physical accidental loss or damage could mean a consequential or intangible damage such as loss of use." *Campbell*, 337 F.Supp.2d at 769. The court also cited to the *Brazell* decision and recognized that "the Supreme Court of South Carolina has found that consequential and intangible damages are unavailable in an instance such as this when the term 'physical' is employed to define property damage." *Id*. Finally, the court in *Campbell* examined the valuation clause of the policy, which required the insurer to pay the costs to reasonably restore or replace the covered property, and concluded that "[t]here can be no dispute that damages for loss of use exceed restoration and/or replacement costs." *Id*. Thus, the court concluded that "[t]he use of the term 'physical' to define property damage negates the possibility that the policy intended to include consequential or intangible damages." *Id*.

The *Campbell* and *Brazell* cases thus fully support the IRF's position -- that "direct

physical loss or damage," as construed under South Carolina law, does not include non-direct and non-physical damages, meaning that economic loss, consequential damages, and loss of use damages are not encompassed within the scope of the term "direct physical loss or damage." The limited case law cited by ReWa from other jurisdictions does not override or overrule existing South Carolina authorities.

Later in its brief, after its discussion of "direct physical loss or damage" as applied to its claim, ReWa does attempt to discredit or distinguish the *Campbell* decision. *See*, ReWa Brief, pp. 26-30. First, ReWa notes that the federal district court was interpreting a commercial liability policy.[2] That is a distinction without a difference. The court in *Campbell* addressed the plain and ordinary meaning of "direct physical loss or damage" under South Carolina law. That meaning will be the same whether in a liability policy or a property policy. Next, ReWa attempts to distinguish the impact of the valuation clause and misses the entire point made by the court. In *Campbell*, the court pointed out that "direct physical loss or damage" cannot be construed as including consequential or intangible damages in part because the inclusion of such damages would be inconsistent with the valuation clause. ReWa deliberately misconstrues that "valuation clause" as a "policy limits" provision and thus illogically argues that loss of use damages were disallowed in *Campbell* only because they exceeded the policy limits. That was not the court's analysis at all. Instead, the court explained that loss of use damages are beyond what is allowed for in the valuation clause. The policy limits are immaterial.

The same is true in the present case. As the IRF points out in its opening brief, the trial court refused to consider the "loss payment" provision in the IRF Policy when construing the

[2] The policy as issue was actually a Commercial Marine Truckmen's Cargo Insurance Owner's or Carrier's Liability Form. *Campbell*, 337 F.Supp.2d at 769.

meaning of "direct physical loss or damage." However, a critical rule of policy construction, as applied by the court in *Campbell*, provides as follows:

> [T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together. Presumably, all portions of a contract are inserted for a purpose and, thus, the contract must be read as a whole, giving the appropriate weight to all of its provisions. Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so.

MGC Management of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 520 S.E.2d 820, 823 (Ct. App. 1999). Thus, the meaning given to the term "direct physical loss or damage" cannot conflict with other policy provisions. The IRF has shown that the "loss payment" provision, which limits the insured's recovery to "the cost of repairing or replacing the lost or damaged property," does not include payments for consequential or economic damages such as loss of use. (R. 994). That reflects the intent that "direct physical loss or damage" is *not* inclusive of such elements of damages. In short, the *Campbell* court's reliance on the "valuation clause" to construe the "direct physical loss or damage" shows that the trial court should have similarly looked to the "loss payment" provision in the IRF Policy in determining whether the term "direct physical loss or damage" includes consequential or economic damages. The trial court clearly erred in failing to even consider that analysis.[3]

[3] In its brief, ReWa remarkably now makes the claim that "if … ReWa had not cleaned the contaminated structures and had left the PCBs in its system, so that the structures and equipment would have eventually needed to be completely replaced, the amount at issue would have been significantly higher" and "the costs of replacing the contaminated structures would have far exceeded the amount of damages that ReWa was awarded by the trial court." *See*, ReWa Brief, pp. 27-28. That claim is pure speculation; there is no evidence in the record to support it. Furthermore, the proposition is unsupportable. The presence of PCBs in the biosolids would never have caused the structures to be demolished and replaced. Indeed, there were only three tanks at Pelham where the biosolids even exceeded the 50 mg/kg threshold that required

ReWa also attempts to distinguish the Supreme Court's decision in *Brazell, supra,* by suggesting that the Court was only denying coverage for economic loss where it is the "sole" damage claimed. That is obviously a misreading of *Brazell*. In that case, the "sole" damage claimed was economic loss that the Supreme Court ruled is not "property damage." However, *Brazell* cannot be read -- as ReWa suggests -- that economic loss would somehow be covered where it is claimed *in addition to* other covered damages. That interpretation strains belief. The holding of *Brazell* is clear: economic damages are not covered as "property damage" under South Carolina law regardless of whether they are the "sole" damage claimed or part of a broader damages claim. To reiterate, the federal district court read *Brazell* as holding that "consequential and intangible damages are unavailable … when the term 'physical' is employed to define property damage." *Campbell*, 337 F.Supp.2d at 769.[4]

ReWa also offers the non-sensical argument that it never presented loss of use damages; yet, the trial court explicitly ruled that "the Covered Property was unusable in its contaminated state, which constitutes 'damage' under the ordinary meaning." (R. 10). Likewise, ReWa has premised much of its claimed expenses on the position that the effected structures were "unusable" or "inoperable." Certainly, it defies logic to suggest that ReWa was not awarded loss

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decontamination under TSCA. Moreover, by ReWa's own admission, the levels of PCBs at Mauldin Road and Lower Reedy were "low-level." In its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" provided to DHEC on April 15, 2014, ReWa advised that there was "low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin Road and from 1.3 ppm to 4.2 ppm at Lower Reedy)" in those two facilities. (R. 1143). Thus, there is no basis for now claiming that the structures would have required demolition and replacement.

[4] Again, ReWa claims that the IRF "abandoned" its argument about the interpretation and application of the term "direct physical loss or damage" for failing to cite supporting authority. *See*, ReWa Brief, p. 29. That is a meritless contention and a needless distraction. Clearly, the IRF has cited supporting authority, namely the *Campbell* and *Brazell* cases which are on point, unlike the out-of-jurisdiction case law cited by ReWa.

of use damages, including, for example, the costs for processing ongoing sewage flows into the year 2016.

Additionally, ReWa makes the argument that the term "direct physical loss or damage" is susceptible to more than one interpretation and thus should be deemed ambiguous. That argument was not made by ReWa in the lower court. A careful review of the record reflects that ReWa made no argument that the insuring agreement in the IRF policy is ambiguous or is capable of multiple reasonable constructions. Indeed, the words "ambiguous" and "ambiguity" do not appear in the 700+ page trial transcript nor in ReWa's trial brief. Likewise, the trial court made no specific finding that the insuring agreement is ambiguous. In addition to being precluded from interjecting a new issue for the first time on appeal, ReWa's argument is also meritless. The term "direct physical loss or damage" is not rendered ambiguous simply because ReWa reads the provision differently than the IRF does, particularly given the controlling South Carolina case law as discussed above which fully supports the IRF's position.

Finally, ReWa makes the argument that the trial court's award "did not make ReWa whole." *See*, ReWa Brief, p. 29. However, the policy at issue is not a third-party liability policy;[5] it is a first-party property policy which provides the benefits stated in the "loss payable" provision. There is no requirement by law or contract for the insured to be "made whole." ReWa certainly cites no authority that indicates otherwise.

In sum, the extent to which ReWa has gone to try to discredit the two South Carolina cases on point -- *Campbell* and *Brazell* -- should be compelling to this Court. ReWa does not like those cases because they fully support the IRF's coverage analysis. The trial court similarly

[5] ReWa also made a third-party claim under its Tort Liability Insurance Policy. The trial court correctly found no coverage under that policy. (R. 12-14). That ruling has not been appealed.

erred in entirely disregarding that controlling South Carolina case law and construing "direct physical loss or damage" to include consequential, intangible, and economic loss, including loss of use. In effect, the trial court erroneously read the words "direct" and "physical" out of the policy language, which of course it cannot do. *See, Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275, 277 (Ct. App. 1993) (holding that "[p]arties to a contract of insurance have the right to make their own contract. It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage"). Accordingly, there are many categories of expenses claimed by ReWa and erroneously awarded by the trial court which are consequential or economic and are not covered, including testing or sampling expenses; expert consultant fees incurred in responding to requirements of DHEC and EPA; expenses incurred in investigating the cause of the PCB contamination; and expenses incurred to continue the operation of the waste water facilities including the future protocols developed and implemented for the receipt of FOG (fats, oil, and grease) at the Mauldin Road facility. The same is also true for the loss of use damages awarded by the trial court.

II. The trial court erred in its consideration and application of the so-called "protection of property" provision.

In its Order, the trial court in a single sentence ruled that "ReWa was directed by the policy to take all reasonable steps to protect its Covered Property from further damage" and then includes such expenses in its award. (R. 11). The trial court, however, never states with specificity what expenses it awarded based on the so-called "protection of property" provision in the policy (which is actually referred to as a "sue and labor clause"). A footnote does indicate that some expenses were indeed awarded based on that provision. (R. 11).

In its opening brief, the IRF identified numerous errors committed by the trial court with respect to its consideration and application of the "protection of property" provision, including the fact that ReWa never pled a claim pursuant to that provision nor raised it as a basis for recovery throughout discovery. The IRF also pointed out that the "protection of property" provision cannot be read to expand on coverage provided in the insuring agreement. Further, the IRF argued that the trial court failed to make appropriate findings of fact to show what expenses were awarded under that provision.

In addressing the failure to plead such a basis for recovery under the Policy, ReWa strangely argues that was unnecessary because the "provision does not provide coverage." *See*, ReWa Brief, p. 18. However, in the only mention of the provision during the trial, ReWa's counsel referred to the provision as providing "coverage for anything outside of the property." (R. 932). That was raised after the close of all the evidence, which is certainly too late to raise a new basis for recovery. Also, there was no motion to amend to even conform to the evidence. Moreover, in its response brief, ReWa argues that the IRF Policy allowed for the recovery of "Covered Expenses." *See*, ReWa Brief, p. 18. In short, the "protection of property" provision should not have been treated as a basis for recovery where it was never pled nor raised in discovery. ReWa's arguments to the contrary are unavailing.

In addition, ReWa remarkably attempts to shift the burden of proof on this unpled claim. ReWa argues that "it was the IRF's burden, not ReWa's, to raise and prove its application." *See*, ReWa Brief, p. 19. In effect, ReWa treats the "protection of property" provision as an exclusion, which it obviously is not. This argument makes no sense.

Next, ReWa misstates the IRF's position -- claiming that the IRF contends the issue cannot be heard because it is "novel." That is not the argument. The IRF contends the issue

should not have been adjudicated because it was not pled and no discovery was done. IRF also points out that that the trial court cited no authority for its ruling, and indeed, improperly applied the "protection of property" provision to create and extend coverage for expenses that are not covered under the insuring agreement. ReWa's counsel, in fact, conceded this point when he stated:

> Your Honor, [IRF counsel] said that there's no coverage for anything *outside of the property*, and we disagree with that. We pointed to the mitigation cause [sic] which specifically said that you had to take all reasonable steps to ensure against further damage. And then the testimony of Mr. Jones was that the testing outside of the plant was to prevent further contamination to protect the property from further damage. We think that falls squarely within that coverage.

(R. 932). (Emphasis added). ReWa counsel thus conceded that the "coverage" claimed under the "protection of property" provision is "outside of" the covered property and includes actions taken outside the plant, i.e., the covered premises. That is the very essence of an extension of coverage beyond what is provided by the insuring agreement and is contrary to the law governing a "sue and labor clause."

Notably, ReWa failed to even address the IRF's arguments regarding the absence of findings of fact to support an award under the "protection of property" provision and the failure of the trial court to identify the expenses and in what amounts that were awarded under this provision. In sum, the IRF reasserts its position that the trial court erred in making any award under the "protection of property" provision for the multiple reasons stated.

III. The trial court erred in finding the "Ordinance or Law Exclusion" did not apply and also in failing to consider or apply the anti-concurrent causation clause.

In its opening brief, the IRF argues that the trial court misapplied the "Ordinance or Law

Exclusion" and failed to consider or address the existence of an anti-concurrent causation clause. In response, ReWa disputes whether the evidence demonstrates that a law or ordinance was even a "cause" of ReWa's loss or damage. Clearly, the record includes *undisputed* evidence that ReWa's remediation was governed, in part, by TSCA, the federal regulations promulgated pursuant to TSCA, and DHEC regulations including the Emergency Regulation at issue. In its brief, ReWa even cites to the National Pollutant Discharge Elimination System (NPDES) permits issued under the Clean Water Act as a legal basis for its actions and the expenditures claimed as damages.

ReWa further contends that vandalism committed by Timothy Howard was the only cause for ReWa's loss and damages, not the enforcement of any law. Citing the case of *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1998), ReWa argues that the subsequent government action based on law is a "confirmation" of the actual cause of loss and is not an additional cause. That represents both an incorrect reading of the policy exclusion as well as an incorrect application of South Carolina law, specifically the Supreme Court's construction of an anti-concurrent causation clause in *South Carolina Farm Bureau Ins. Co. v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009). Importantly, the specific language from the IRF Policy excludes coverage for "loss or damage caused directly or indirectly by … [t]he enforcement of any ordinance or law: (1) [r]egulating construction, use, or repair of any property." (R. 998). Thus, the exclusion anticipates an efficient cause of loss that set the chain of events in motion -- one that causes a need to repair the property. But, where the loss is also caused *directly or indirectly* by the enforcement of a law, that is still a cause. With an anti-concurrent causation clause, which the trial court ignored, the exclusion is triggered where the loss is caused, even in part, by the enforcement of the federal and state regulations

governing the remediation. ReWa cannot reasonably dispute this: ReWa itself insists that it incurred tremendous expense due to the Emergency Regulation and the NPDES permits which it argues prevented ReWa from disposing of the contaminated biosolids and subsequent sewerage flows through its normal processes of land application. In other words, it is ReWa's own interpretation and application of the Emergency Regulation and the NPDES permits -- which the trial court adopted -- that trigger the "Ordinance or Law Exclusion." ReWa cannot have it both ways. It cannot argue on one hand that the remediation undertaken was required by federal and state environmental laws and then take the inconsistent position that those same laws were not at least an indirect cause of the amount of damages claimed and awarded by the trial court.

Finally, ReWa clouds the issue by arguing that its "daily operations" are governed by environmental laws, which is immaterial to whether the damages claimed are at least in part caused by the enforcement of environmental laws. Although not argued in the trial court, ReWa now suggests that coverage under the Building Policy would be illusory because ReWa would never have coverage under "any imaginable circumstance," but that is incorrect as well. *See*, ReWa Brief, p. 22. While it is true that ReWa should have had an environmental liability policy in place for losses such as what it encountered with the PCB contamination, the IRF Policy does still provide building property coverage for numerous risks of loss. This is the same IRF Building Policy written for every building owned by the State of South Carolina and the IRF's other governmental insureds. The coverage would not be illusory, and a building policy is not a substitute for an environmental liability policy. In short, the trial court erred in rejecting the "Ordinance or Law Exclusion," and a reversal is warranted on that issue.

IV. The trial court committed errors of law in its interpretation of the DHEC regulations governing land application of biosolids and the NPDES permits issued to ReWa under the Clean Water Act.

In its opening brief, the IRF identified several errors of law committed by the trial court in its interpretation of the DHEC Emergency Regulation and the NPDES permits issued to ReWa under the Clean Water Act. These errors of law resulted in the trial court awarding substantial damages for the costs of remediation at two facilities -- Mauldin Road and Lower Reedy -- and the costs of processing and disposal of biosolids in landfills, all of which were not legally required or necessary.

In its response brief, ReWa misstates the significance of these errors of law. As the IRF explained in its opening brief, a proper interpretation of the applicable federal and state laws establishes that the biosolids stored at the Mauldin Road and Lower Reedy facilities did not require any remediation *as a matter of law* in order to be legally land applied consistent with ReWa's normal mode of operation prior to the PCB contamination. In addition, the IRF was not legally responsible for paying for the processing of ongoing sewage flows at the Mauldin Road and Lower Reedy facilities. There was no evidence of "direct physical loss or damage" to the stored biosolids or the ongoing flows at those facilities, in addition to the fact that biosolids are not "covered property." Finally, even the tanks at the Mauldin Road and Lower Reedy facilities -- which tested far below the TSCA 50 mg/kg threshold -- did not legally require the remediation that was undertaken. In its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" dated April 15, 2014, ReWa identified only "low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin

Road and from 1.3 ppm to 4.2 ppm at Lower Reedy)" in those two facilities. (R. 1143).[6] The tanks themselves, therefore, had very low levels of PCBs that did not legally require remediation.[7]

Nonetheless, as the IRF explained in its opening brief, even if the court were to conclude that the pressure washing of the tanks with the low levels of PCBs qualify as "direct physical loss or damage," the extent of the IRF's responsibility would be the cost of the cleaning, but ReWa never even presented evidence at trial of the costs to clean those tanks. Those invoices, to the extent they even exist, were lumped in together on the summary exhibit (Plaintiff's Exhibit 100) which does not provide sufficient detail for those specific expenditures to even be identified and the amount spent totaled. (R. 1244-1287).[8]

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[6] While technically incorrect, the experts explained that it is common for parts per million (ppm) to be used interchangeably with milligrams per kilogram (mg/kg). (R. 786-787).

[7] Remarkably, ReWa writes: "The IRF presented no evidence, by testimony or otherwise, that ReWa's process were excessive or unwarranted." *See*, ReWa Brief, p. 34. Yet, perhaps the most critical piece of evidence is Plaintiff's Exhibit 38, which is the "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" prepared by ReWa itself. It is that document that includes the concession that "ReWa does not currently intend to land apply this material, *even though current regulations would allow land application*." (R. 1143). (Emphasis added).

[8] Although ReWa did not offer that proof, the IRF provided the evidence as was available in its cross-examination of Glen McManus. At Lower Reedy, the structures that contained biosolids that tested positive for PCBs were Holding Tanks 4 and 5. The test results for Digester 1 was non-detect for PCBs. (R. 582). The cost for cleaning Holding Tank 4 was $4,075.70. (R. 587). McManus was unable to identify an invoice for cleaning Holding Tank 5. (R. 588-590, 595). The test results showed the Holding Tank 5 had a PCB level of less than one part per million (or 1.0 mg/kg). (R. 590). Thus, it was possible that no cleaning was even done to Holding Tank 5. At Mauldin Road, the structures that contained biosolids that tested positive for PCBs were Digesters 2 and 3, Biosolid Holding Tanks 3, 4, 5, 6, 7, and 8, Biosolid Tanks 1 and 2 (old digesters). (R. 597-598). McManus did not know the costs of cleaning the various structures at Mauldin Road. (R. 601-603). However, the invoices for certain of that work were identified and put into evidence during McManus' cross-examination. (R. 1423-1446). The trial court, however, disregarded that evidence.

ReWa's interpretation of the Emergency Regulation is also in error -- just as the trial court's interpretation is in error. Instead of directly quoting the Emergency Regulation, ReWa engages in paraphrasing that is simply not accurate. For example, in its brief, ReWa writes: "The Emergency Regulation also specified that ReWa must process the sludge such that the returned wastewater had no quantifiable amount of PCBs." *See*, ReWa Brief, p. 33. That is not accurate. The Emergency Regulation in Section 3(b) states: "… if the returned wastewater is below levels of quantification as set by item 'c' below, then such operation is deemed in compliance with state water quality regulations." (R. 1108). Section 3(c) then states: "For purposes of this regulation, the *practical quantification level* for the returned wastewater should be evaluated based on EPA Method 608 for PCBs in wastewater. The wastewater system must collect representative samples to confirm that the returned wastewater is below this level of quantification." (R. 1108). (Emphasis added). Thus, it is inaccurate to claim that the wastewater could have *no quantifiable amount* of PCBs. Instead, it had to be below the practical quantification level, and Ted Clark, ReWa's environmental expert, testified that the PQL (practical quantifiable limit) was 0.5 micrograms/liter (ug/l). (R. 442-443). The trial court made this same error. (R. 6). Thus, ReWa and the trial court erred in interpreting the Emergency Regulation as allowing for *no quantifiable amount* of PCBs, when, in actuality, it did allow for a threshold amount of 0.5 micrograms/liter of PCBs to exist in the aqueous phase. This is significant because Clark also testified that the dewatered filtrate from the biosolids that had a concentration of less than 50 mg/kg was less than the 0.5 micrograms/liter threshold, i.e., the quantifiable limit under the Emergency Regulation. (R. 445-446). That would be inclusive of all biosolids at the Mauldin Road and Lower Reedy facilities, where the PCB concentrations were far below the 50 mg/kg threshold.

In sum, the trial court's conclusion that the filtrate had to be further processed to comply with the Emergency Regulation was in error and contrary to the undisputed expert testimony in the case. Moreover, the remediation at the Mauldin Road and Lower Reedy facilities occurred after March 23, 2014, when the Emergency Regulation expired. The applicable federal and state regulations in effect after that date did not legally require the remediation that was conducted at those two facilities. Unlike the remediation conducted at Pelham which was planned and administered by AECOM and monitored by the EPA, the remediation at Mauldin Road and Lower Reedy was planned and administered in house by ReWa and was not monitored by the EPA or DHEC. The IRF should not be required to pay ReWa for remediation that was not legally required or necessary.

Finally, ReWa's discussion of the PCB requirements under the NPDES permits is also legally in error. ReWa claims that the NPDES permits "do not allow any level of pollutants from being introduced into the pretreatment process." *See*, ReWa Brief, p. 33. The trial court reached this same erroneous conclusion. (R. 6). However, the trial court itself recognized that the Clean Water Act allows for PCB contamination in biosolids of less than the threshold of 50 mg/kg. (R. 5-6, 441-442). In addition, ReWa's expert Ted Clark testified that the Clean Water Act allows for a threshold of 3.0 parts per billion (ppb) for PCBs in the filtrate and wash water. (R. 443-444). Thus, the NPDES permits, which are issued pursuant to the Clean Water Act and must be read with reference to the Act, allow some level of PCBs into the pretreatment process. Moreover, ReWa makes the unsubstantiated assertion that "the NPDES permits for ReWa's three facilities at issue do not contain allowable amounts of PCBs that ReWa could discharge into streams." *See*, ReWa Brief, p. 33. ReWa fails to acknowledge -- just as the trial court did not -- that the NPDES permits provide that "the PCBs shall be less than 50 milligrams per kilogram

(mg/kg) of total solids (dry weight basis)." (R. 1046). In effect, ReWa ignores this express language in arguing that the permits do not allow any level of PCBs to enter or exit the treatment facilities.

In sum, the trial court committed errors of law both with respect to its interpretation of the Emergency Regulation and the NPDES permits. The trial court also erred in applying the Emergency Regulation beyond its expiration date of March 23, 2014. These critical errors of law warrant the reversal of the judgment in ReWa's favor.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Insurance Reserve Fund respectfully renews its request that the Court reverse the judgment entered in favor of the Respondent ReWa, including the award of costs, and remand with direction that the trial court enter judgment in the IRF's favor. The IRF respectfully requests that the Court order entry of an involuntary nonsuit or judgment as a matter of law in favor of the IRF or alternatively grant a new trial absolute or otherwise reduce the amount of the judgment on the bases stated herein.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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