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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2020-000669
Civil Action 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.

RESPONDENT RENEWABLE WATER RESOURCES' RETURN TO APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION AND SUMMARY

None of the reasons asserted by the Insurance Reserve Fund ("IRF") warrant rehearing this appeal. The IRF's arguments are neither new nor persuasive. At least three-fourths of the IRF's 26-page Petition for Rehearing simply recycles the same arguments—often verbatim—found in the IRF's merits briefing. Those arguments were wrong then, and they're wrong now. ReWa has already rebutted them, and the Court has already correctly declined to adopt them.

The one "new" argument in the IRF's Petition fares no better. Specifically, the IRF incorrectly argues that *Sullivan Management, LLC v. Firemen's Fund Ins. Co*. (2022)—a case decided by the South Carolina Supreme Court after the parties to this appeal had submitted their final briefs, and which the parties discussed extensively at oral arguments—is analogous to this case and means that ReWa's remediation, repair, and cleaning from PCB contamination are not covered expenses. The IRF is wrong on both the facts and the law. The facts that underly *Sullivan* are starkly different from the facts in this case. Not surprisingly, then, *Sullivan* expressly states that its reasoning and holding do not apply to cases like this one involving persistent chemical contamination.

Nothing in the IRF's Petition shows that the Court erred or misapprehended or overlooked any facts or law in a way prejudicial to the IRF.[1] The IRF's Petition should be denied.

ARGUMENTS

I. Precedent and Record evidence support this Court's conclusion that ReWa suffered direct physical loss or damage.

The IRF admits that it conceded that the costs ReWa incurred to remediate, repair, and clean its contaminated facilities were covered under the policy, *see* IRF's Petition at 1–2, but raises

[1] As explained in ReWa's own Petition for Rehearing, the Opinion erred in other ways that were prejudicial to ReWa and, at minimum, the Opinion should be revised to clarify statements that are susceptible to misinterpretation or confusion on remand.

a number of arguments in an effort to retract that concession, *id.* at 2–7.[2] None of them are availing.

A. The Supreme Court's decision in *Sullivan* supports this Court's holding.

The IRF's primary argument to reverse this Court's holding is that this case is supposedly analogous to and controlled by *Sullivan Management, LLC v. Firemen's Fund Ins. Co*., 437 S.C. 587, 879 S.E.2d 742 (2022). *See* IRF's Petition at 2–3, 5–7. The IRF's argument rests on a faulty analogy that assumes that the presence of PCB contamination in a wastewater treatment facility is the same as the presence of coronavirus particles in a restaurant—a comparison that finds no support in the Record or in *Sullivan*. The IRF also overlooks the fact that *Sullivan* expressly distinguishes the reasoning and holding in *that* case from the scenario presented in cases like *this* one involving chemical contamination. Both of the IRF's errors are explained below.

First, at a basic factual level, *Sullivan* is inapplicable here because PCB contamination is not analogous to the presence of coronavirus particles. Indeed, *Sullivan's* reasoning specifically explains this. The *Sullivan* Court reasoned that the presence viral particles did not constitute physical loss or damage because coronavirus particles do not have a "physical" or "tangible" or "material" impact on "physical structures" *because the virus was temporary and transitory* in nature. *Sullivan*, 437 S.C. at 593–94 and n.3, 879 S.E.2d at 745–46 and n.3 (noting that coronavirus particles differ from traditional contamination cases because the viral particles do not "persist" in the environment); *see also George Washington University v. Factory Mutual Ins. Co*., 626 F.Supp.3d 8, 13 and n.2 (D.D.C. 2022) (concluding that the presence of COVID-19 did not constitute physical loss or damage because, unlike traditional chemical contaminants that "cause long-lasting change to the physical character of the property," "COVID-19 is short-lived" and, on

[2] The IRF filed both a Petition for Rehearing and a Memorandum in Support Thereof. When this Return cites to the "IRF's Petition," it refers to the page of the IRF's Memorandum that makes a particular assertion.

common surfaces, persists for only a few days). Because the virus at issue in Sullivan was so short-lived, it did not require acts to "restor[e]" property since the viral contaminant did not persist in adhering to the physical structures anyway. *Sullivan*, 437 S.C. at 594, 879 S.E.2d at 746.

That's a stark contrast from PCB contamination. The Record is replete with evidence that PCBs—a carcinogen that's sometimes labeled a "*forever* chemical"—had a tangible, material impact on ReWa's facilities and structures by physically adhering to them, and that the PCB's would have persisted in perpetuity, meaning that but for ReWa's actions to restore the property, the affected property would have been rendered permanently inoperable. *See* R. 231:1–4; R. 433; R. 439; R. 472–74; R. 476; R. 478; R. 584; R. 635; R. 811; R. 1102; R. 1282–1337. The facts and reasoning of *Sullivan* are not analogous to ReWa's PCB contamination.

Second, the holding in *Sullivan* is not controlling because the *Sullivan* Court expressly acknowledged that its holding was not applicable to cases like this one that involved persistent chemical contamination. *Sullivan*, 437 S.C. at 593 n.3, 879 S.E.2d at 745 n.3 ("[T]he presence of the coronavirus is different than traditional contamination cases *where coverage may exist*," such as in cases involving "contamination caused by substances such as gasoline particles, toxic torts, odors, smoke, and other similar substances."). The *Sullivan* Court could hardly have signaled more clearly that the conclusion in that case does not control the conclusion in this case.

In sum, the facts, reasoning, and holding in *Sullivan* are all distinguishable from this appeal. If anything, *Sullivan* supports this Court's conclusion in this appeal (and the lower court's conclusion, too) that, under the facts of this case, the adherence of PCBs to the structures in ReWa's facilities constituted physical loss or damage, and ReWa's remediation, repair, and cleaning expenses were covered by the policy.

B. Evidence in the Record supports the Court's conclusion that all three of ReWa's facilities were damaged.

The IRF argues that the Court erred by ruling that *all three* of ReWa's facilities were damaged by PCB contamination. *See* IRF's Petition at 4. The IRF's objection to this ruling appears to arise from the fact that the PCB concentration at two of the facilities was below 50 parts-per-million, which, in the IRF's view, means there is insufficient evidence to support the Court's conclusion that these facilities were damaged by PCB adherence to the structures even after being emptied and rinsed. *Id*. The IRF is wrong on all counts.

First, evidence in the Record demonstrates that ReWa's facilities were rendered inoperable by the presence of PCB's even in sub-50ppm concentrations, and the facilities were, therefore, damaged by the contamination. *See*, *e.g*., R. 358–63.

Second, there is evidence to support the Court's statement that PCBs adhered to the walls even after the initial washing. *See*, *e.g*., R. 476 (explaining why it was necessary to do two pressure washes, the latter of which used an acidic wash to remove PCB contamination that could persist *after* the initial water-only washing); *see also* R. 482–83 (noting that even after a holding tank had undergone the initial wash, there were "solids material accumulated out in the middle of the tank with *some debris remaining on the sides*") (emphasis added).

Third, the IRF is simply wrong when it argues there was no evidence showing that the presence of PCB-contaminated materials in a wastewater treatment plant rendered the plant inoperable. *See* IRF Petition at 4. The record contains such evidence. *See*, *e.g.*, R. 478; R. 439; R. 1491. R. 1514. ReWa's three facilities were damaged by the PCB contamination, and the evidence supports that conclusion.

C. Neither the trial court nor this Court awarded damages for loss of use.

The IRF argues that this Court and the lower court erred by allowing ReWa to recover "loss of use" damages. *See* IRF's Petition at 5–6. The IRF seems to misunderstand both what "loss of use" damages are and what kind of damages the court awarded here. Loss of use damages seek to replace the revenue that a proprietor could have earned from the operation of his facility had it not been shut down due to an accident or other covered cause. *See* 11 S.C. JUR. DAMAGES § 53 ("The measure of damages for loss of use of property is . . . determined by the value of the use of the property during the time its use was interrupted. In the case of a manufacturing plant, the value of this use may be based on past performance and profits.") (citations omitted). A factory owner, for example, might seek loss of use damages to recoup the revenue his assembly lines would have generated during the time they were halted due to flooding caused by a torrential downpour. That's a separate type of damages than the costs the proprietor incurred to remove the floodwaters, clean up the silt and debris, and repairing and remediate the damaged machinery. *Those* costs are not for loss of use. They're for cleanup, remediation, and repair.

Here, ReWa did not present any element of damage which was for loss of use. *See* R. 1338–43 and 1344–87 (Pl.'s Exs. 99 and 100). Rather, ReWa's claimed damages consisted of costs that were necessarily incurred to return its three facilities to the operational condition in which they were before the PCB contamination. *See id.*; *see also* R. 439:4–16; R. 16 (Order (March 18, 2020) at 14 (finding that "such costs and expenses incurred by ReWa were reasonable and necessary to remediate and repair its facilities and prevent further harm")). ReWa did not seek any loss of use damages; the trial court did not award any; and this Court did not err in affirming the award of ReWa's expenses incurred in cleaning and remediating its facilities.[3]

[3] The IRF expresses confusion about the Court's statement in footnote 8 of the Opinion that the

II. This Court and the trial court correctly interpreted *Ocean Winds* and properly found coverage for prevention of additional imminent damage.

The IRF argues that this Court and the lower court erred in their interpretation of *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company*, 350 S.C. 268, 565 S.E.2d 306 (2002), and in applying that case and ReWa's policy language to find that the policy covered efforts undertaken to prevent additional imminent damage. *See* IRF's Petition at 7–9. This argument is a repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 19–20. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here, but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 15–18.

To the extent the IRF's Petition adds anything to its prior argument, it is to criticize this Court's statement that ReWa's efforts to prevent additional damage included, for example, the sequestration of incoming contaminated waste. *See* IRF's Petition at 7. According to the IRF, the Court was wrong because "[t]here was no 'sequestration of incoming waste.'" *Id.* But it is the IRF, not the Court, that is wrong on this point. Witness testimony specifically explained that ReWa tested *and sequestered* incoming waste as part of its prophylactic efforts to forestall further damage. *See*, *e.g.*, R. 369:9–15; R. 400:12–20; R. 1719:11–25. The IRF's assertion to the contrary—and its argument for rehearing—is incorrect.

IRF's other arguments about supposed consequential damages are not properly presented for appellate review. That confusion is easily set to rest, as they relate to the IRF's conclusory argument on appeal (which it repeats in its Petition for Rehearing) that that the trial court should have only awarded the costs of pressure washing ReWa's contaminated digesters and tanks, as opposed to an award that also included expenses for removing and disposing of all the biosolids at the three facilities. *See* IRF's Brief at 17–18; IRF's Petition at 6–7. The IRF's brief cited no authority in support of that argument, and the argument is, therefore, deemed abandoned. *See* ReWa's Final Brief at 29 and n.13; *see also id.* at 34–35, 41–48, and nn.16–17 and n.35 (describing other arguments the IRF failed to preserve or abandoned on appeal by asserting only in conclusory fashion).

III. The remainder of the IRF's arguments were already made in the IRF's prior briefs, already rebutted by ReWa, and already rejected by the Court.

The remainder of the IRF's Petition contains five separate issues, each of which is entirely or very nearly a word-for-word repetition of an argument made in the IRF's primary merits brief. *Compare* IRF's Petition at 9–26 *with* IRF's Final Brief at 25–38, 41–44. ReWa has already thoroughly rebutted those arguments in its own merits brief, and this Court has already considered and rejected them. Copied-and-pasted arguments provide no basis for rehearing of an appeal, and that should mark the end of the road for these arguments. Nevertheless, ReWa discusses each of them briefly below.

A. The damages awarded by the trial court and affirmed by this Court relate to restoration and remediation of "covered property."

The IRF argues that this Court and the lower court erred in awarding or affirming damages for the restoration, repair, and remediation of property that, according to the IRF, is not "covered property" under the policy. *See* IRF's Petition at 9–11. Most of this argument is a nearly verbatim repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 25–26. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here, but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 9 n.3, 20–22.

The IRF's Petition expands slightly on its argument that the costs of removing and disposing of the contaminated biosolids during the cleaning and remediation process are not covered expenses because the biosolids are not themselves "covered property." *See* IRF's Petition at 10–11. That argument is a straw man. The trial court never said that the biosolids were covered property, and that was not the basis on which the removal and disposal were covered. Rather, the costs of removal and disposal of the biosolids were covered because their removal and disposal is a necessary part of the cleaning, repair, and remediation of the covered structures. The Record

contains evidence to that effect, including the IRF's own witness who acknowledged that the removal and disposal was a requisite part of the cleaning and remediation. *See*, *e.g.*, R. 4–5; R. 431:12–17; R. 812:9–15. This is correct as a matter of law and as a matter of common sense. If a tree falls on a house, and the homeowner makes a claim under his homeowner's insurance policy, the covered costs obviously include the removal and disposal of the tree, not because the trunk and limbs are themselves "covered property," but because removal of the tree is necessary before a contractor can repair the roof on which the tree fell. The same is true here.

The IRF's argument about covered property was previously made to the Court, and the Court did not err in rejecting it. Nothing in the IRF's Petition demonstrates error warranting rehearing.

B. This Court and the trial court did not err by concluding that the "Ordinance or Law Exclusion" does not apply.

The IRF argues that this Court and the lower court erred by failing to conclude that the policy's "Ordinance or Law Exclusion" barred coverage. *See* IRF's Petition at 11–15. Most of this argument is a nearly verbatim repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 26–30. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here, but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 22–26. In short, (i) ReWa voluntarily took the actions involved in cleaning and remediating its facilities, and there was no enforcement action, *see* R. 295–96; R. 342; R. 383; R. 546-47; (ii) case law establishes that compliance does not equal enforcement and does not trigger this exclusion, *see*, *e.g.*, *Haas v. Audubon Indemnity Co.*, 722 So.2d 1022 (La. App. 1998);[4] *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1998); and (iii) vandalism, not

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[4] The IRF makes a curious argument that one sentence in the *Haas* opinion was supposedly inadvertently included in the opinion. *See* IRF's Petition at 12–13. Even if the IRF is right (which seems doubtful when one reads the case), its argument fails to acknowledge the remainder of the *Haas* opinion that plainly supports ReWa's position.

the enforcement of any ordinance or law, caused ReWa's loss, *see* R. 12 (Order of March 18, 2020); R. 952 (Joint Stip. of Facts ¶ 6). Neither this Court nor the trial court erred in their interpretation and application of this exclusion.

C. This Court and the trial court did not err in their interpretation of DHEC regulations and the NPDES permits .

The IRF argues that this Court and the lower court erred in their interpretation of the DHEC Emergency Regulation and the NPDES permits issued to ReWa under the Clean Water Act *See* IRF's Petition at 15–22. This argument is a verbatim repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 31–35. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here, but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 32–34.

D. This Court and the trial court applied the correct burden and relied on appropriate evidence.

The IRF argues that this Court and the lower court incorrectly placed the burden on the IRF to disprove damages rather than on ReWa to prove its damages, and, further, that ReWa did not present adequate or appropriate evidence of its damages. *See* IRF's Petition at 22–25. This argument is a nearly verbatim repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 41–44. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here, but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 30–32, 37–39.

E. The trial court properly admitted and relied on summary exhibits .

The IRF argues that the lower court erred by admitting two exhibits that summarized thousands of pages of materials related to ReWa's expenses. *See* IRF's Petition at 25–26. This argument is a nearly verbatim repetition of the argument made in the IRF's merits brief. *See* IRF's Final Brief at 42. ReWa has already thoroughly rebutted it and will not repeat that rebuttal here,

but, rather, incorporates it by reference as if set forth herein. *See* ReWa's Final Brief at 30–32.

CONCLUSION

The arguments and alleged errors raised in the IRF's Petition for Rehearing are neither new nor persuasive. They have already been presented to the Court, and the Court already considered and, correctly, rejected them. Nothing in the IRF's Petition shows that the Court erred or misapprehended or overlooked any facts or law in a way prejudicial to the IRF. The IRF's Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

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

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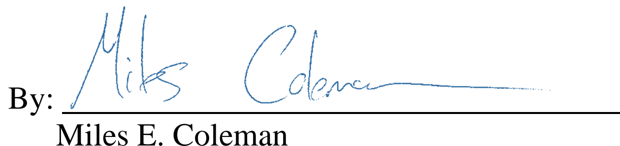
By: 
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February 9, 2024
Greenville, South Carolina

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From: Miles Coleman
Sent: Friday, February 9, 2024 10:09 PM
To: Andrew@ldlawsc.com
Subject: ReWa v. IRF -- service of Return to Petition for Rehearing
Attachments: 2024.2.9 -- ReWa v. IRF -- ReWa's Return to IRF's Petition for Rehearing.pdf

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

Regards,

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