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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 6042
(S.C. Ct. App. refiled March 6, 2024)
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, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 6, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals and the trial court err in their interpretation and application of the language “direct physical loss or damage" and in awarding consequential and economic loss damages to ReWa as “direct physical loss or damage"?

II. Did the Court of Appeals and the trial court misapply and misread the Supreme Court's decision in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company* so as to impermissibly broaden the scope of the insuring agreement to cover preventative measures to protect from future claims?

III. Did Court of Appeals and the trial court err in requiring the Insurance Reserve Fund to pay the expenses associated with the dewatering and disposal of biosolids as "covered property," including biosolids that did not exceed the 50 mg/kg threshold under Toxic Substance Control Act?

IV. Did the Court of Appeals err in refusing to address the "Ordinance or Law Exclusion"?

V. Did the Court of Appeals and the trial court commit errors of law in its interpretation and application of DHEC regulations governing land application of biosolids and the National Pollutant Discharge Elimination System (NPDES) permits issued to ReWa under the Clean Water Act, with those errors resulting in the trial court awarding substantial damages for the costs of remediation at two facilities and the costs of processing and disposal of biosolids in landfills, all of which were not legally required or necessary?

VI. Did Court of Appeals err in failing to address whether the trial court improperly shifted the burden of proof to the insurer to disprove the claimed loss rather than correctly require the insured to prove its covered loss?

VII. Did the Court of Appeals and the trial court err in admitting into evidence summary exhibits which do not meet the requirements under Rule 1006, SCRE, and in relying on the information in those exhibits to find that every cost item in the 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa’s facilities?

STATEMENT OF THE CASE

This is an action brought by the Respondent Renewable Water Resources ("ReWa"), which is a special purpose district and hence a governmental entity, against the Petitioner South Carolina Insurance Reserve Fund ("IRF"), which is a division of the State Fiscal Accountability Authority. (R. 951). The IRF issued a Building and Personal Property Insurance Policy to the named insured, Renewable Water Resources, bearing Policy Number F130230114, with the effective dates of April 2, 2013 through April 2, 2014. (R. 951). According to its Amended Complaint, ReWa has made a property and casualty claim for losses allegedly suffered at three of its wastewater treatment plants arising from the dumping of PCBs into ReWa' system by a third-party (Timothy Howard). The IRF also issued a Tort Liability Insurance Policy to ReWa. (R. 952). Just prior to the commencement of this litigation, ReWa also made a claim under that policy.

In its Amended Complaint, ReWa alleged causes of action for declaratory relief and breach of contract with respect to both policies. In addition, ReWa alleged that the IRF's handling of this claim was conducted in bad faith and sought unspecified consequential damages. (R. 55-72).

The parties consented to refer the case to the Greenville County Master-in-Equity. (R. 1-2). The case came to trial before Judge Charles B. Simmons, Jr. on January 28, 2020. Following three days of testimony, the trial court took the matter under advisement. Thereafter, on March 18, 2020, the trial court issued an order entering judgment in favor of ReWa in the amount of $5,824,924.49 under the Building and Personal Property Insurance Policy only. (R. 16). In addition, the trial ruled in favor of the IRF on the claims seeking coverage under the Tort Liability Insurance Policy. (R. 12-14). The trial court also ruled in favor of the IRF on the bad faith claim. (R. 14).

The IRF filed post-trial motions, including a Motion for Judgment as a Matter of Law and/or Involuntary Nonsuit, a Motion to Alter or Amend Judgment and/or Motion for Reconsideration, and a Motion for New Trial. (R. 147-177). By order filed April 6, 2020, the trial court summarily denied that motion including the requests that the court amend the order to set forth the findings of fact and conclusions of law with sufficient specificity and detail to allow for proper appellate review. (R. 19-21).

The IRF appealed to the Court of Appeals which affirmed in part and reversed in part by published opinion. The IRF filed a petition for rehearing, which was summarily denied by order issued on March 6, 2024.

ARGUMENTS

I. The Court of Appeals and the trial court erred in their interpretation and application of the language "direct physical loss or damage" and in awarding consequential and economic loss damages to ReWa as "direct physical loss or damage."

While this appeal raises a number of coverage-related issues and burden of proof issues, the predominant issue involves whether ReWa's claimed loss qualifies as "direct physical loss or damage." On this key issue, the Court of Appeals ruled: "We agree the master erred in finding the Policy covered several categories of consequential damages but find the master properly awarded costs for cleaning the affected structures." (Slip Op. at 4-5). The Court of Appeals then points out that in its briefs, the IRF "agreed that 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's Opening Brief, p. 16. The Court of Appeals termed this a "concession" that "the costs associated with cleaning the Pelham facility's holding tanks were covered under the Policy." (Slip Op. at 5).

That "concession" however was made prior to having the benefit of this Court's decision in *Sullivan Management, LLC v. Firemen's Fund Ins. Co.*, 437 S.C. 587, 879 S.E.2d 742 (2022), which is the first decision to focus entirely on the term "direct physical loss or damage," and was limited to the three holding tanks at Pelham for reasons addressed below. In *Sullivan*, this Court found the term "direct physical loss or damage" to be unambiguous and to be applied using the plain and ordinary meaning of the term. This Court held: "in order to trigger coverage, 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. *Sullivan* looked as whether the presence of a contaminant, namely the COVID-19 virus, triggered "direct physical loss or damage." This Court said that it did not. As this Court explained, "the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'" 879 S.E.2d at 745. Significantly, this Court ruled that cleaning due to the presence of the virus represents "acts different from restoring damaged or lost property." 879 S.E.2d at 746. This Court further opined:

> While Sullivan took steps to mitigate the spread, such as increasing cleaning or installing plexiglass, these acts are different than restoring damaged or lost property. In other words, Sullivan had nothing to "repair, replace, or rebuild," thus further demonstrating that direct physical loss or damage requires something material and tangible.

Id.

Applying *Sullivan* to the case at bar, it is clear that the trial court's interpretation and application of "direct physical loss or damage" was in error. The Court of Appeals agreed that "several categories of consequential damages" are not covered. (Slip Op. at 4-5). But the Court of Appeals did find that cleaning costs -- which were not deemed "direct physical loss or damage" in *Sullivan* -- nonetheless meet the definition in this case. The Court of Appeals

erroneously explained that "the adherence of contaminated materials to tank walls meets the triggering language of direct physical loss or damage." (Slip Op. at 5).

In particular, *Sullivan* establishes that "direct physical loss or damage" does not include the mere presence of the COVID virus on surfaces necessitating "cleaning" and other "steps to mitigate." *Sullivan*, 879 S.E.2d at 746. If *Sullivan* is correctly applied to the case at bar, the presence of PCBs that necessitated cleaning of the surfaces of the structures should not be deemed "direct physical loss or damage." To reiterate, in *Sullivan*, the Supreme Court found that the presence of the COVID-19 virus on surfaces "does not constitute a physical loss of or damage to property because it does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'" *Sullivan*, 879 S.E.2d at 745. The same is true here. The presence of biosolids on the structure walls did not "alter the appearance, shape, color, structure, or other material dimension" of those digesters and holding tanks. At most, cleaning of the walls of those tanks was needed, and that consisted of pressure washing of those tanks – that was the extent of the cleaning that was done. The evidence clearly showed that none of the structures were permanently altered. 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."

Moreover, the Court of Appeals applied its ruling to not just the three holding tanks at Pelham where the PCB contamination exceeded the 50 mg/kg threshold under the Toxic Substance Control Act (TSCA) but also to all of the digesters and holding tanks at all three facilities. In effect, the Court of Appeals ruled that the evidence showed that "contaminated biosolids adhered to the walls of those structures even after initial washing." (Slip Op. at 5). That ruling is erroneous for several reasons. Principally, there is no evidence that the biosolids remained after "initial washing." In fact, the evidence reflects that the tanks were cleaned by pressure washing and that there was no damage to the actual structures. There is no evidence of

any measures being taken other than pressure washing using a cleaning solution. Notably, the trial court found that "PCBs physically adhered to concrete and had to be blasted off by pressure washers and cleaned with a special chemical solution." (R. 9). Thus, the evidence shows only that biosolids adhered to the walls *after the tanks were emptied* but not after the pressure washing, i.e., the cleaning of the contaminant off the surfaces. That makes the claim in this case no different than the one in *Sullivan*.

While the trial court found the adherence of the biosolids to the structure walls constituted sufficient "damage" under the policy (which was the ruling before anyone had the benefit of the *Sullivan* decision), there was no evidence presented by ReWa that having some spots of biosolids attached to the walls rendered the digesters and tanks unusable or "damaged."[1] The Court of Appeals made the same error which is contrary to the holding in *Sullivan* that clearly teaches that the mere presence of a contaminant (such as the COVID-19 virus or PCBs) does not cause "damage."

Moreover, as the evidence indisputably shows, levels of PCBs in all but three holding tanks at Pelham did not exceed the 50 mg/kg threshold that required any action under TSCA. (R. 448-449, 1143, 1236-1281). The evidence also indisputably showed that none of the PCB levels at the Mauldin and Lower Reedy facilities even approached the 50 mg/kg threshold. (R. 1143).[2] Based on the low levels of PCBs and the applicable law as addressed in more detail in the IRF's briefs and below, the cleaning that ReWa engaged in at the Mauldin Road and Lower Reedy

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[1] The trial court also found that "ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations." (R. 10). The trial court cites no evidence for that finding. That finding is unsupported in the record. There is no evidence that any of the three facilities were ever shut down or not used for normal operations. In fact, the evidence shows that ReWa took an exceedingly lengthy time period to clean the structures at the three facilities. The cleaning at Lower Reedy did not begin until July 2014, and the cleaning did not begin at Mauldin Road until December 2014. (R. 560). Those facilities were in operation throughout and processed the ongoing flows. (R. 646-647).

[2] 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). Note that mg/kg and ppm are functionally the same.

facilities was not even legally required or necessary. At the very least, the digesters or tanks that did not contain biosolids testing above the 50 mg/kg threshold were not "damaged," and that would include all of the digesters and tanks at the Lower Reedy and Mauldin Road facilities as well as all but three of the holding tanks at the Pelham facility (specifically Biosolid Holding Tanks 3, 4, and 5). The Court is respectfully requested to issue a writ of certiorari to correctly apply this Court's rulings in *Sullivan* and to find no such "direct physical loss or damage" to the structures at the three ReWa facilities. At the very least, the claim should be limited to the cost of cleaning the three holding tanks at Pelham exceeding the 50 mg/kg threshold, although *Sullivan* provides that those costs would not even be covered.

Additionally, as *Sullivan* clearly demonstrates, "direct physical loss or damage" does not include consequential, intangible, or loss of use damages or expenses. This Court correctly explained that business interruption is not covered under a property policy such as at issue in the case at bar. Thus, the vast majority, if not all, of the $5.8 million in expenses awarded by the trial court are precisely that – expenses for consequential, economic, and loss of use damages.

In sum, the Court of Appeals correctly read *Sullivan* as precluding coverage for consequential and loss of use expenses. However, the Court of Appeals limits its ruling to four categories of consequential damages. (Slip Op. at 6). The Court of Appeals fails to explain why some consequential damages are to be rejected and not *all consequential damages*. Likewise, the Court does not explicate what consequential damages are to be included in any future award on remand. Footnote 8 of the opinion suggests that the Court of Appeals ruled as it did based on a preservation issue. The Court of Appeals refers only to "other consequential damages" in footnote 8 in a general sense without providing any particularity. Frankly, this preservation ruling is puzzling because, as the trial record bears out, the IRF did not make any argument on appeal that was not also made to the trial court. At trial, the IRF quite clearly and repeatedly argued that all consequential damages, including loss of use expenses, were not covered by the

policy. As the Court of Appeals itself pointed out, of all the expenses claimed by ReWa, the IRF only "conceded" that the "cleaning" costs associated with the three holding tanks at Pelham may be covered. (Slip Op. at 5). The IRF vigorously opposed coverage for all other costs on numerous bases, including that consequential damages are not recoverable as "direct physical loss or damage." By way of example, the IRF consistently argued that all expenses for dewatering and disposing of all of the biosolids at all three facilities are consequential or economic loss that does not qualify as "direct physical loss and damage" under South Carolina law. The IRF did not have the benefit of *Sullivan*, but it made those same arguments and took that same position at trial using such authorities as *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). In short, the Court of Appeals' preservation ruling in footnote 8 is incorrect, unfair, and merits the issuance of a writ of certiorari. The Court is requested to rule that the IRF policy provides no coverage for any consequential, economic, and loss of use damages, consistent with *Sullivan* and the prior case law and consistent with the IRF's position at trial. As the IRF argued below and on appeal, ReWa and the trial court treated the IRF policy as a business interruption policy and an environmental liability policy. It is neither of those -- those are specialty policies to cover these types of environmental events. The IRF's position was detailed and comprehensive both at the trial level and on appeal. To reiterate, there is no argument made on appeal that was not also made to the trial court.

II. The Court of Appeals and the trial court misapplied and misread the Supreme Court's decision in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company* so as to impermissibly broaden the scope of the insuring agreement to cover preventative measures to protect from future claims.

On appeal, the IRF contends that the trial court misapplied and misread the Supreme Court's decision in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company*, 350

S.C. 268, 565 S.E.2d 306 (2002), so as to impermissibly broaden the scope of the insuring agreement to cover preventative measures to protect from future claims. Citing *Ocean Winds*, the Court of Appeals ruled that "the master correctly 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). There was no "sequestration of incoming waste;" instead, the evidence shows that the facilities continued to operate and there were ongoing flows that continued to be processed. It is unclear precisely which consequential damages the Court of Appeals is allowing based on that ruling.

The Court of Appeals also misapprehended the *Ocean Winds* decision and its impact on this coverage question. Importantly, in *Ocean Winds*, this Court was called upon by way of a certified question from the federal district court to interpret an "additional coverage" provision for building collapses in a property insurance policy. The *Ocean Winds* decision has no application to the present case for several reasons. First, in that case, this Court was construing an ambiguous provision in an insuring agreement specifically for building collapse coverage. The present case involves a different insuring agreement. There is no "collapse" language that is ambiguous. In fact, ReWa has made no argument that the insuring agreement in the IRF policy is ambiguous or is capable of multiple reasonable constructions. Likewise, the trial court made no specific finding that the insuring agreement is ambiguous. Second, in the present case, the parties stipulated and the trial court found that the PCB contamination was caused by vandalism which is a Covered Cause of Loss. (R. 7). The vandalism had occurred. The PCB contamination had occurred. ReWa made one claim for the three facilities, not multiple claims alleging multiple occurrences of vandalism over time. Certainly, there was never any additional or later claim made to the IRF for an "imminent" threat of vandalism or an additional PCB contamination to justify the trial court's award of the expenses for sampling, the FOG program, or the remediation of collection lines. Quite simply, the policy does not cover an insured in

taking measures to prevent a future loss. Moreover, if there was an additional PCB contamination, ReWa could have made a claim for that, but it did not. Any later claims of contamination, which were never made to the IRF, are not properly part of this lawsuit, nor are alleged preventative measures undertaken to prevent a future loss. Third, in *Ocean Winds*, the Supreme Court held that if there is sufficient damage to the point that collapse is imminent, there is coverage, but "substantial impairment" was held to be insufficient to trigger coverage. Therefore, it is a misreading of *Ocean Winds* to suggest that this Court extended coverage to pay for preventative measures to protect from future claims or losses. As indicated, that is not the purpose of a property casualty policy, as differentiated from a specialty policy such as the building collapse coverage at issue in that case. Finally, the insuring agreement in *Ocean Winds* covered "loss or damage" and *not* "direct physical loss or damage" which is the operative language in the insuring agreement in the IRF policy. Consequently, as discussed above, the IRF policy does not cover consequential and economic damages but only "direct physical loss or damage" to covered property which further distinguishes the *Ocean Winds* case. The Court is asked to issue a writ of certiorari to address why its *Ocean Winds* decision is not dispositive of any issue in this case.

III. The Court of Appeals and the trial court erred in requiring the Insurance Reserve Fund to pay the expenses associated with the dewatering and disposal of biosolids as "covered property," including biosolids that did not exceed the 50 mg/kg threshold under Toxic Substance Control Act.

The Court of Appeals did not address the IRF's arguments made below and on appeal regarding the policy requirement that the loss involve "covered property." Notably, "covered property" is a defined term in Section A.1 of the IRF policy and is divided into the buildings or structures (including fixtures and permanently installed machinery and equipment) and the business personal property that is also described in a list of items covered. It is undisputed,

however, that the policy provides no business personal property coverage for the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 865-868, 981-982). That coverage was available to but not purchased by ReWa. (R. 867). Thus, the contents of the physical structures, including the biosolids stored within the structures, are not covered under the policy. As already discussed above, the trial court erred in requiring the IRF to pay for the dewatering and disposal of biosolids, including the biosolids that did not exceed the 50 mg/kg threshold, which is part of ReWa's normal operation. Certainly, the biosolids contained in the digesters and holding tanks do not qualify as "covered property" and are not properly part of any covered loss on that additional basis.

Moreover, the trial court awarded expenses for the remediation of certain collection lines that are outside the premises of the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 11). A review of the policy, however, shows that those collection lines are not "covered property" for several reasons. First, those lines are not identified in the declaration pages as a separately covered "segment" of property. (R. 981-988). Second, the Policy contains a list of "property not covered" which includes "[u]nderground pipes, flues or drains." (R. 991-992). The trial court failed to even address either of these reasons for denying coverage for the remediation of the collection lines. The trial court thus erred in finding that ReWa was entitled to recover expenses related to the remediation of collection lines beyond the premises of the three facilities.

Additionally, while the trial court appears to agree with the IRF that the biosolids themselves did not qualify as "covered property," the court nonetheless required the IRF to pay for the dewatering and disposal of the biosolids -- even those that were not contaminated over the 50 mg/kg threshold. For the reasons already discussed, there is no evidence, however, that the digesters and tanks sustained any "direct physical loss or damage." Importantly, the disposal of the biosolids is part of ReWa's normal operations, which is a critical factor that the trial court failed to consider or address. (R. 953). The biosolids are a natural and ordinary byproduct of

ReWa's wastewater process which, regardless of PCB contamination, must be disposed of either by land application or by placement in landfills. For this additional reason, the costs of the dewatering and disposal of the biosolids cannot qualify as "direct physical loss or damage" to covered property.

IV. The Court of Appeals erred in refusing to address the "Ordinance or Law Exclusion."

The IRF argued at trial and on appeal 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 its opinion, the Court of Appeals failed to address the application of the "Ordinance or Law Exclusion" in its entirety.

The Causes of Loss – Special Form includes an "Ordinance or Law Exclusion" which provides no coverage for a loss caused "directly or indirectly" by the "enforcement of any ordinance or law … (1) regulating construction, use or repair of any property or (2) requiring the tearing down of any property, including the cost of removing the debris." (R. 998). Importantly, this section of exclusions includes an anti-concurrent causation clause that reads: "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (R. 998). As this Court explained in *South Carolina Farm Bureau Ins. Co. v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009), where a policy includes an anti-concurrent causation clause, neither the efficient proximate cause rule nor the concurrent cause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss that is covered. In its final order, the trial court ruled that the Ordinance or Law Exclusion did not apply, and in so ruling, the court committed several errors of law.

First, the trial court wrote: "The Court notes that no evidence was presented to indicate the environmental regulations at issue fall within the categories of ordinance and law specified in

the policy." (R. 11-12). It remains unclear what the trial court means with this statement. The trial court denied the IRF's request to clarify per Rule 52(b). (R. 19-21). The record, however, is replete with evidence that ReWa's remediation was governed, in part, by TSCA, federal regulations promulgated pursuant to TSCA, and DHEC regulations including the Emergency Regulation (while it was in effect). The trial court did rule that ReWa's remediation was, in fact, required by those federal and state laws. (R. 5-6). The exclusion includes within its scope "any ordinance or law … regulating … repair of any property." (R. 998). To the extent the trial court found no evidence of "any ordinance or law … regulating … repair of any property," that is clearly erroneous and merits reversal.

Second, the trial court wrote that "ReWa's mere compliance with the applicable regulation does not trigger this exclusion." (R. 12). The trial court, however, is incorrect because the Ordinance or Law Exclusion applies regardless of whether the loss results, in part, from the insured's voluntary obedience to an applicable law or from a forced obedience to that law. It is the enforcement of that law that triggers the exclusion. In other words, the exclusion applies where the loss resulted, at least in part, from a law that requires the insured to take certain action. As authority, the trial court cites only the Louisiana case of *Haas v. Audubon Indemnity Co.*, 722 So. 2d 1022 (La. App. 1998), which does not support that ruling and is otherwise distinguishable.

Third, the trial court ruled that "vandalism, not the enforcement of an ordinance or law, created ReWa's resulting loss." (R. 12). The trial court further wrote: "Any actions by the EPA and SCDHEC which could be deemed to be 'enforcement' under this exclusion did not, either directly or indirectly, cause ReWa to suffer the damages claimed in this lawsuit." (R. 12). That ruling is unsupported by the evidence and, at any rate, does not negate the application of the anti-concurrent causation clause which the trial court refused to even consider or address despite being asked to do so per the Rule 52(b) motion. As indicated, the record is replete with evidence

that the costs sustained by ReWa were in part caused by the enforcement of federal and state regulations governing the remediation process. ReWa itself has taken the position that the remediation at all three facilities was controlled by EPA and DHEC regulations and that ReWa was required to undertake those remediation efforts, and the trial court adopted that position. The remediation was undertaken pursuant to "plans" that were submitted to EPA (for Pelham) and to DHEC (for Lower Reedy and Mauldin Road). (R. 1113-1137, 1139-1143). ReWa cannot take the position that the remediation was required by federal and state environmental laws and then take the inconsistent position that those very regulations were not a cause for the damages that are being claimed. The trial court similarly cannot make those inconsistent findings. The trial court did, in fact, make the finding that ReWa needed and received "the approval of SCDHEC and the EPA." (R. 15). Thus, the record indisputably supports a finding that the EPA and DHEC regulations were, at the very least, an indirect cause of the resulting damages, even if vandalism was the "efficient proximate cause" that set the chain of events in motion.

In sum, both courts below committed reversible error in refusing to consider or address the effect of the anti-concurrent causation clause and this Court's decision in *Durham*. Where the policy includes an anti-concurrent causation clause, this Court has held that neither the efficient proximate cause rule nor the concurrent clause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss, such as vandalism, which is covered. Here, one of the causes for the loss is the enforcement by the EPA and DHEC of its regulations governing the remediation of PCBs. Quite simply, it is immaterial that vandalism was the only "efficient proximate cause" or that there was no other cause of the PCB contamination itself. The IRF recognizes, of course, that the governmental regulations did not "cause" the PCB contamination. Nonetheless, the anti-concurrent causation clause is not limited to "efficient" causes or "concurrent" causes but to *any* causes -- direct or indirect -- contributing "*in any sequence* to the loss." (R. 998). The trial court failed to consider

the "in any sequence" language. Clearly, the enforcement of the government regulations occurred in the sequence of events that led to the loss claimed by ReWa and for which the trial court awarded in excess of $5.8 million in damages. Based on a proper application of the anti-concurrent causation clause and the *Durham* decision, it is clear that ReWa's claim is barred by operation of the "Ordinance or Law Exclusion." The application of that exclusion should not have been disregarded by the Court of Appeals. It is an important part of the coverage analysis.

V. The Court of Appeals and the trial court committed errors of law in their interpretation and application of DHEC regulations governing land application of biosolids and the National Pollutant Discharge Elimination System (NPDES) permits issued to ReWa under the Clean Water Act.

On appeal, 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 opinion, the Court of Appeals largely did not address these errors of law, and when the Court of Appeals did address the NPDES permits, its reading of those permits was in error and merits the issuance of a writ of certiorari.

A. DHEC Regulations

In the initial section of the Conclusions of Law captioned "ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required," the trial court made several legal rulings that are in error, including the period of time when state regulatory law prohibited land application of the biosolids. Prior to the PCB contamination, ReWa's mode of operation included the land application of all biosolids generated at the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 953). The land application program for those facilities was only suspended

after the PCB contamination, but ReWa did not re-commence that program after legally cleared to do so. ReWa, nonetheless, included as part of its claim the costs for the disposal of the existing stored biosolids and the *ongoing flows* incurred after the DHEC regulations allowed for the biosolids to again be land applied rather than disposed of in a local landfill at the higher expense.

The trial court did address the DHEC Emergency Regulation adopted on September 25, 2013, but in doing so, disregarded the time period that the Emergency Regulation was actually in effect. The Emergency Regulation only temporarily prohibited the land application of the biosolids while it was in effect. The record shows clearly that the Emergency Regulation was effective on September 25, 2013, for a period of ninety days. (R. 1109-1112). Thereafter, on December 23, 2013, DHEC re-filed the same verbatim Emergency Regulation, which was effective for another ninety days, until March 23, 2014, which is a critical point in the timeline that the trial court overlooked. (R. 954). The trial court also overlooked that from March 23, 2014 until June 27, 2014, there were no regulations by DHEC in place. Then, on June 27, 2014, DHEC promulgated pursuant to the APA amendments to Sections 503 (domestic sludge) and 504 (industrial sludge) of DHEC Regulation 61-9 entitled "Water Pollution Control Permits." (R. 1146-1151). The amendments were published in the South Carolina State Register on June 27, 2014 and were effective on that date. (R. 954). ***Importantly, those amendments did not prohibit the land application of PCBs at a level less than 50 mg/kg concentration***. (R. 1149).

The trial court also failed to recognize that ReWa itself admitted in its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities," as submitted to DHEC on April 15, 2014, that "ReWa does not currently intend to land apply this material, ***even though current regulations would allow land application***." (R. 1143). (Emphasis added). In sum, the trial court erred in failing to rule as a matter of law that after the expiration of the Emergency Regulation on March 23, 2014, ReWa

was *not prohibited* by state or federal law from disposing of biosolids containing PCBs at a level less than 50 mg/kg by land application which was its normal mode of operation. Only while the Emergency Regulation was in effect was ReWa required to dispose of biosolids containing PCBs at a level less than 50 mg/kg in a local landfill. (R. 655-656).

In footnote number 3 of its final order, the trial court instead made the following ruling of law: "[S]ince the Emergency Reg. was enacted to address the PCB contamination, it ***likely*** applied to all contaminated materials in ReWa's possession at the time it was implemented." (R. 6). (Emphasis added). The trial court, however, cited no law -- statutory or case law -- to support its premise that the Emergency Regulation "likely" remained in effect after its March 23, 2014 expiration. Clearly, there is *no law* to support that flawed premise. It is elementary that an emergency regulation, like any other law, does not remain in effect and binding after it expires. In sum, the Emergency Regulation was not in effect after it expired on March 23, 2014. The trial court erred in not making that definitive ruling.

Nonetheless, even if the Emergency Regulation applied to the stored biosolids on March 23, 2014, as the trial court found to be "likely," there is certainly no reasonable or cogent argument that can be made that the Emergency Regulation applied *to the ongoing flows after that date*. Yet, the trial court made no such distinction and applies the Emergency Regulation to all stored biosolids *and* all ongoing flows at all three facilities after March 23, 2014 *and all the way into 2016*. In fact, the trial court made no determination of the expenses incurred by ReWa for processing the ongoing flows after March 23, 2014, at which point the Emergency Regulation clearly expired. The trial court also made no mention of the permanent regulation adopted by DHEC on June 27, 2014, which allowed for the land application of PCBs at a level less than 50 mg/kg concentration, *which includes all biosolids processed at Pelham, Mauldin Road, and Lower Reedy on or after June 27, 2014*. In effect, the trial court failed to address whether that permanent regulation was applicable to the disposal of the existing biosolids and the ongoing

flows after June 27, 2014 -- which of course, it was. The Court of Appeals did not even address this critical error despite being asked to do so.

Thus, the trial court erred in failing to rule as a matter of law that the disposal of all stored biosolids and the ongoing flows at the Mauldin Road and Lower Reedy facilities were permitted by law to be land applied. Critically, absent from the trial court's findings of fact, the remediation at the Pelham facility began on November 14, 2013 and was completed on February 19, 2014. (R. 557-558). The remediation at Lower Reedy occurred next and was begun in approximately July 2014 and was completed in mid-November 2014. (R. 560). The remediation at Mauldin Road was started in approximately December 2014 and was completed in June 2015. (R. 560). By June 2015, the PCB remediation at the three facilities was complete. (R. 560). The trial court also failed to make the appropriate findings of fact that -- using ReWa's own language and data 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 -- 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). Indisputably, there were no stored biosolids with PCBs even remotely approaching the 50 mg/kg threshold at either Lower Reedy or Mauldin Road. Thus, those biosolids did not need to be dewatered and disposed of in a landfill after March 23, 2014. Instead, consistent with its normal mode of operation, the stored biosolids at those facilities legally could have been land applied by the time the remediations began for both Lower Reedy and Mauldin Road in July 2014 and December 2014, respectively.

This is critical for several reasons. First, the applicable law, supported by the undisputed evidence, establishes that the biosolids and ongoing flows at those 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. (R. 953). Second, there is absolutely

no legal basis for the trial court to have ruled that the IRF is legally responsible for paying for the processing of the ongoing flows at the Lower Reedy and Mauldin Road facilities. Clearly, there was no evidence of any "direct physical loss or damage" to the existing biosolids or the ongoing flows.

Additionally, in its very brief discussion of the Emergency Regulation, the trial court erroneously concludes that "[t]he Emergency Reg. imposed more stringent limits, prohibiting land application of sludge with *any* quantifiable amount of PCBs. The Emergency Reg. also provided that the process facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has *no* quantifiable amount of PCBs." (R. 6). The trial court never states what "no quantifiable amount of PCBs" even means, but the evidence from the experts, including ReWa's expert, Ted Clark, confirms that the PQL (practical quantifiable limit) was 0.5 micrograms/liter (ug/l). (R. 442-443). Thus, the trial court failed to recognize and rule that the Emergency Regulation did allow for a threshold amount of 0.5 micrograms/liter of PCBs to exist in the aqueous phase. That was not a change from the DHEC requirement that pre-dated the Emergency Regulation. Additionally, the trial court disregarded and made no finding consistent with the "Sludge Removal and Disposal Plan" prepared by AECOM for the Pelham facility. As Ted Clark testified, the dewatered filtrate from the biosolids that had a concentration of less than 50 mg/kg was less than the 0.5 ug/l threshold, i.e., the quantifiable limit under the Emergency Regulation. (R. 445-446). Consequently, 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.

B. <u>National Pollutant Discharge Elimination System Permits</u>

The trial court further ruled that "the fact that ReWa's remediation at those facilities did not take place until after the Emergency Reg. was lifted is immaterial." (R. 6). In so ruling, the court relied on the National Pollutant Discharge Elimination System (NPDES) permits, but the

court's interpretation and application of the permits were in error. Citing not a single specific provision of either of the multi-paged NPDES permits, the trial court states in a conclusory fashion on two separate occasions only that ReWa was prohibited by the permits "from introducing pollutants into its pretreatment process." (R. 6).[3] Notably, this is the *extent* of the trial court's discussion of the NPDES permits.

Similarly, the Court of Appeals' discussion of the PCB requirements under the NPDES permits is legally in error. The Court of Appeals suggests the NPDES permits, and specifically NPDES Permit No. SC0033804, do not permit any level of PCBs to be discharged from a wastewater facility. (Slip Op. at 3). That is not an accurate reading of the permits. The trial court itself already recognized that the Clean Water Act allows for PCB contamination in biosolids of less than the threshold of 50 mg/kg. 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. The permit, like a contract, cannot be interpreted with no consideration of the enabling law or to require a legal absurdity. Yet, that is precisely what the trial court ruled.

Moreover, the NPDES permits are to be interpreted like contracts. *See*, *Piney Run Preservation Association v. County Commissioners of Carroll County*, 268 F.3d 255, 269 (4th Cir. 2001) (applying principles of contract interpretation to NPDES permit). While not considered by the trial court and overlooked by the Court of Appeals, the NPDES permits in the record provide that "the PCBs shall be less than 50 milligrams per kilogram (mg/kg) of total solids (dry weight basis)." (R. 1046). Importantly, NPDES Permit No. SC0033804 includes the following critical language: "The Land Application of sludge program (see ReWa Land Application Permit, SC0048381) approval issued by SCDHEC Water Facilities Permitting

[3] The NPDES permits for the Lower Reedy and Mauldin Road facilities are not in evidence.

Division, dated December 1, 2010 shall be incorporated into and become an enforceable part of this permit." (R. 1086). Thus, the reference to the allowed levels of PCBs is included in both NPDES permits, including the NPDES Permit No. SC0033804. Both lower courts overlooked that clear language from the permits themselves. Thus, the ruling suggesting that the NPDES permits do not allow any level of PCBs to enter or exit the treatment facilities is legally erroneous. The permits state otherwise in express, unambiguous terms. That is also consistent with the expert testimony.

ReWa's expert, Ted Clark, in fact, testified that under the normal TSCA and DHEC regulations that pre-existed the DHEC Emergency Regulation the biosolids with less than a 50 mg/kg concentration of PCBs could be land applied. That was consistent with the NPDES permits issued to ReWa. (R. 441-442). Moreover, according to Clark, TSCA allowed for 3.0 parts per billion (ppb) for PCBs in the aqueous phase. (R. 443). In short, the Court of Appeals and the trial court both erred in concluding that the NPDES permits prohibited the introduction of any PCBs at any concentration into the facility or to exit the facility.

VI. The Court of Appeals erred in failing to address whether the trial court improperly shifted the burden of proof to the insurer to disprove the claimed loss rather than correctly require the insured to prove its covered loss.

The Court of Appeals also erred in failing to recognize the insufficiency of the proof of the expenses as presented by ReWa and the shifting of the burden of proof. The Court of Appeals only addressed whether the trial court abused its discretion in admitting Plaintiff's Exhibits 99 and 100 into evidence. (Slip Op. at 7-8). The Court of Appeals did not address the sufficiency of the evidence presented to delineate what expenses are covered and what expenses are not. The Court of Appeals also never addressed the trial court's shifting of the burden of proof.

Early in its opinion, the Court of Appeals did reference the "almost monthly expense reports" to justify holding the IRF responsible for the costs of cleaning the three Pelham holding tanks; yet, ***those reports are not in evidence***. (Slip Op. at 5). Therefore, the Court of Appeals was actually not in position to say whether any of the so-called "almost monthly expense reports" provided a sufficient breakdown of the specific cleaning expenses that the IRF contends was never provided by ReWa. It is pure speculation. The Court of Appeals then referenced Plaintiff's Exhibit 99 as "a summary of charges separated by facility" and Plaintiff's Exhibit 100 as providing "even more detail about these charges." (Slip Op. at 5). ***Remarkably, that is the extent of any discussion as to the sufficiency of the evidence of damages in a case awarding in excess of $5.8 million in damages***.

However, those two summary exhibits, even if properly admissible, do not satisfy ReWa's burden of proof. Plaintiff's Exhibit 99 is what ReWa referred to as a "pivot table" which provides the totals paid to identified vendors and contractors broken out in certain accounts as established by ReWa. (R. 1338-1343). Additionally, Plaintiff's Exhibit 100 is an Excel spreadsheet that provides a list of all amounts paid that ReWa is claiming from the IRF. (R. 1344-1387). The spreadsheet contains little useful information other than the name of the vendor or contractor and the amount paid. There is no information in that spreadsheet that conveys what product the vendor sold or what service the contractor provided. The useful information -- the invoices themselves -- were never presented to the trial court nor entered into evidence. Hence, based on the record presented, those summary exhibits do not provide the information that the factfinder needs to determine what is covered and what is not.

In actuality, the "summary exhibits" are devoid of useful and necessary information for the trial court to have even made a proper determination of damages. The Court of Appeals overlooked this key point in its opinion. ReWa's primary damages witness at trial was Glenn McManus, who is the Director of Operations for ReWa. In his testimony, McManus admitted

that the entries on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 do not provide any detail or even a brief explanation of the work performed or the item purchased. (R. 571-572). McManus further agreed that if the court attempted to determine what a particular line item in Plaintiff's Exhibit 100 was for, *there is no evidence in the record to make that determination*. (R. 571-573). He admitted that the only way for the court to make that determination was to look at the underlying information *which was not in evidence*. (R. 573-574). Notably, the summary exhibit, Plaintiff's Exhibit 100, does not at the very least include a Bates reference so that the underlying information could even be accessed from the documents produced in discovery. ***In effect, ReWa presented Plaintiff's Exhibit 100 in such a format where it was virtually unverifiable***.

Yet, despite all of the admitted shortcomings, deficiencies, and inaccuracies in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, which represent the sole evidence of ReWa's alleged covered loss under the Policy, the trial court nonetheless ruled that "such costs and expenses incurred by ReWa were ***reasonable and necessary to remediate and repair*** its facilities and prevent further harm." (R. 16). (Emphasis added). There was not, however, sufficient evidence in the record to allow the trial court to make a credible determination of necessity or reasonableness. From the "summary exhibits" the court could not even ascertain what product was sold or what service was provided, let alone have the type of detail needed to determine by a preponderance of the evidence that the expense was necessary, reasonable, or related to remediation work at any of the three facilities. Clearly, the trial court, as factfinder, engaged in impermissible speculation that each and every cost item in a 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa's facilities. The judgment based on such speculation cannot be allowed to stand.

Likewise, the IRF argues that the trial court failed to hold ReWa to its burden of proof.[4] Instead, the court improperly shifted the burden of proof to the IRF to disprove the expenses. The Court of Appeals did not address this issue. Notably, the trial court rejected only three items on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, and those were all entries that the IRF challenged during the cross-examination of Glen McManus. In effect, the trial court accepted each and every expense on Plaintiff's Exhibit 100 unless the IRF presented specific evidence to refute it. Any items that were not challenged by the IRF in its cross-examination were accepted by the trial court as reliable, reasonable, and necessary. That is clearly an impermissible shifting of the burden of proof. It was ReWa's burden to prove its covered loss and not the IRF's burden to disprove it. The Court of Appeals failed to address this critical issue bearing on proof of damages.

VII. The trial court, as affirmed by the Court of Appeals, erred in admitting into evidence summary exhibits which do not meet the requirements under Rule 1006, SCRE.

Finally, the Court of Appeals erred in determining the admissibility of Plaintiff's Exhibits 99 and 100 as summaries under Rule 1006, SCRE. As the IRF pointed out, ReWa presented Plaintiff's Exhibits 99 and 100 through the testimony of Glenn McManus, who admitted that he had no role in the actual preparation of Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100. Yet, he was the witness who purportedly provided the foundation for the trial court to admit those exhibits under Rule 1006. (R. 515-516, 561-570). McManus admitted to not knowing what most of the expenditures set out in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 even were.

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[4] In *Ex Parte Builders Mut. Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020), this Court explained that "the Insureds and the Insurers have the collective burden to show which portions of the general verdict are covered under the CGL policies." 847 S.E.2d at 92. This Court cited to *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523 (1968) as "explaining the initial burden to prove that a loss is covered under an insurance policy is on the insured, and once the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage." *Id.*

He had not verified that each of the entries in those summary documents was accurate and reflected an expense that was actually incurred by ReWa for the remediation of the three facilities. (R. 561-570). McManus admitted that he spent only "half a day" in reviewing Plaintiff's Exhibit 100 and had not taken the necessary steps to review the underlying documentation, which was estimated at 20,000 pages, to verify that the summaries were accurate. (R. 561-562). McManus thus was unable to substantiate that Plaintiff's Exhibit 99 or Plaintiff's Exhibit 100 provides a "faithful rendering of the underlying data" as required by under Rule 1006. *See*, *State v. Warner*, 430 S.C. 76, 842 S.E.2d 361, 370 (Ct. App. 2020). Additionally, as the record reflects, the trial court made no findings on the record or in the final order to demonstrate that it considered the required factors under Rule 1001 and actually exercised discretion in admitting the exhibits. In sum, those summary exhibits were admitted in error under Rule 1006.

CONCLUSION

Based on the foregoing discussion, the Petitioner Insurance Reserve Fund respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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April 5, 2024

RECEIVED
Apr 05 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 6042
(S.C. Ct. App. refiled March 6, 2024)
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, ... Petitioner.

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 Petitioner, does hereby certify that service of the **Petition for Writ of Certiorari** in the above-captioned matter was made upon the Clerk of the South Carolina Court of Appeals and all counsel of record by email only this the 5th day of April 2024 as follows:

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

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April 5, 2024

RECEIVED
Apr 05 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) of the Supreme Court's Order RE: 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 **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has also been filed with the South Carolina Supreme Court.

Thank you for your assistance in this matter.

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)*