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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2024-000549
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 ..... Petitioner.

RESPONDENT RENEWABLE WATER RESOURCES' RETURN TO PETITIONER'S PETITION FOR CERTIORARI

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INTRODUCTION AND SUMMARY

This case arises from vandalism in 2013 that introduced dangerous, persistent, and damaging PCB chemicals into the wastewater treatment facilities of Renewable Water Resources ("ReWa"). ReWa promptly informed its insurer—the Insurance Reserve Fund ("IRF")—and, in coordination with government agencies, began the process of remediating, repairing, and cleaning its damaged facilities. Although ReWa repeatedly requested a coverage decision and consistently updated the IRF regarding the repair efforts and costs, the IRF did not provide a coverage letter to ReWa until over a year later, after ReWa had incurred millions of dollars in expenses. Even then, the IRF didn't say if the expenses were covered under the primary provision of ReWa's property policy.

ReWa sued the IRF in 2016, asserting breach of contract and declaratory judgment claims. At that time, the IRF *still* had not given ReWa a coverage determination. The case proceeded to a bench trial in 2020. Judge Simmons heard 3 days of testimony including 7 witnesses and 130 exhibits. ReWa had incurred over $8 million of expenses caused by the PCB contamination, but sought to recover only the $6.2 million it had spent on repair, remediation, and cleaning. Judge Simmons ruled for ReWa, excluded certain expenses, and entered judgment for $5.8 million. On appeal, the Court of Appeals affirmed the trial court's coverage conclusion, reversed a few specific categories of damages, and remanded for the trial court to apply those rulings to the facts.

None of the reasons asserted in the IRF's Petition warrant a writ of certiorari. On the question of coverage, the policy language, South Carolina precedent, and persuasive precedent in similar situations all speak with one voice—there is coverage. That conclusion is not altered by *Sullivan Management*, a case decided while this appeal was pending. The facts in *Sullivan* were starkly different from the facts in this case, and *Sullivan* expressly explained that its reasoning and holding do *not* apply in situations that, like this one, involve persistent chemical contamination.

The IRF's remaining arguments fare no better. The policy language and this Court's

precedent reveal that the lower courts did not err in finding coverage for ReWa's efforts to prevent further damage that would have been caused had ReWa not acted to stop the flow or spread of PCB-contaminated wastewater. Also, the policy language, precedent, and common sense all support the conclusion that the removal and disposal of contaminated biosolids was covered because removing them was a necessary first step in the remediation and repair of the covered property. Furthermore, although those remediation efforts were *governed* by state and federal regulations, they were not *caused* by those regulations, and, therefore, did not fall within the exclusion for actions compelled by government enforcement actions.

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

COUNTER-STATEMENT OF THE CASE AND FACTS

(1) Vandalism contaminated three of ReWa's facilities with dangerous, persistent PCBs.

ReWa is a special purpose district that provides wastewater treatment services in the Upstate of South Carolina. In 2013, ReWa discovered the presence of PCBs at three of its facilities during routine testing. *See* Joint Stip. of Facts ¶¶ 8–9 (R. 952). Once testing confirmed the presence of PCBs at its facilities, ReWa promptly contacted the United States Environmental Protection Agency ("EPA") and South Carolina Department of Health and Environmental Control ("DHEC") and put an emergency action plan into place. ReWa ultimately determined that the PCBs were introduced into the ReWa facilities as a result of vandalism by a third party illegally dumping contaminants into ReWa's system. Joint Stip. of Facts ¶¶ 5–6 (R. 952).

Three of ReWa's facilities were impacted and suffered damage: (1) the Pelham Road Plant, (2) the Lower Reedy Plant, and (3) the Mauldin Road Plant. ReWa engaged an engineering firm

[1] As explained in ReWa's own Petition for Rehearing, the Opinion erred in other ways that were prejudicial to ReWa and warranted clarification.

to develop a plan for repairing and remediating the Pelham Road facility,[2] which necessarily included removing and disposing of the PCB-contaminated waste. PCBs physically adhered to the concrete, which is a porous surface, and had to be blasted off by pressure washers and cleaned with a special chemical solution. Pl.'s Ex. 94 (R. 1282–1337); Tr. 262:11 to 263:3, 265:5–19, and 373:16–18 (R. 473:11 to 474:3, 476:5–19, and 584:16–18). No witness disputed that the PCB contamination inhibited or prevented the use of the contaminated structures and equipment.

(2) ReWa notified the IRF but did not receive a determination of coverage.

At all relevant times, ReWa maintained a Building Policy and a Tort Policy issued by the IRF. Joint Stip. of Facts ¶¶ 3–4 (R. 951–52); Pl.'s Exs. 8, 9, and 10 (R. 991–97, 998–1003, and 1004–09). The three facilities involved are each listed in the declaration page for the Building Policy as a "Covered Premises." Pl.'s Ex. 2 (R. 964–72). For the Pelham Road Plant, the Building Policy provided a limit of insurance of $87.3 million. Pl.'s Ex. 2 (R. 964–72). For the Lower Reedy Plant, the Building Policy provided a limit of $43.8 million. Pl.'s Ex. 2 (R. 964–72). For the Mauldin Road Plant, the Building Policy provided a limit of $120 million. Pl.'s Ex. 2 (R. 964–72).[3] Additionally, during the time at issue, ReWa paid over $134,000 annually in premiums for these three facilities, for the coverage of the Building Policy. Pl.'s Ex. 2 (R. 964–72).

On September 24, 2013, ReWa notified the IRF of the damage and asked for guidance in making a claim under any policies that would have coverage for the damage caused by the dumping of the PCBs. Pl.'s Ex. 47 (R. 1152–53). The IRF did not initially respond, so ReWa tried again

[2] The Pelham Road facility was the first facility found to have been impacted and was the first to be repaired and remediated. Tr. 34:13–17 (R. 245:13–17). The same process for repair and remediation was then used at the other plants. Tr. 280:25–281:8 (R. 491:25–492:8); Tr. 265:20–266:4 (R. 476:20–477:4); Tr. 383:15–19 (R. 594:15–19); Tr. 245:12–19 and Pl.'s Ex. 94 (R. 456:12-19 and 1282–1337); Tr. 258:7–9 (R. 469:7–9); Tr. 257:25–258:2 (R.468:25–469:2).

[3] The IRF's witness acknowledged that any one of these facilities has far more insurance coverage than the total value of the claim. Tr. 697:2–4 (R. 908:2-4).

16 days later. Pl.'s Ex. 48 (R. 1154–55). The IRF indicated that a claim had been opened and that an adjuster would contact ReWa about the loss. Pl.'s Ex. 48 (R. 1154–55). The IRF, not ReWa, limited the claim to the Building Policy. Before the IRF ever told ReWa that the claim had been opened or that an adjuster had been assigned, internal communications at the IRF indicated that the IRF planned to deny coverage. Pl.'s Ex. 48 (R. 1154–55). The IRF's coverage position was based on its assessment that there was "no direct physical damage." *Id*. This coverage assessment was never conveyed to ReWa. Tr. 466:14 to 467:11 (R. 677:14 to 678:11).

ReWa repeatedly requested a coverage decision during the year after the notice of the damage was reported to the IRF. *See, e.g.*, Pl.'s Exs. 54 and 65 (R. 1189–90 and 1201–02); Tr. 481:7–15 (R. 692:7–15). The IRF, however, did not provide any coverage letter or determination to ReWa until October 30, 2014, more than a year after the claim was accepted by the IRF, and after ReWa had incurred millions of dollars in repair expenses. Pl.'s Ex. 77 (R. 1209–17). In this "Coverage Position Letter," the IRF admits that the dumping of PCBs was vandalism, and that vandalism is a "Covered Cause of Loss" for primary coverage under the Building Policy. *Id*. The Coverage Position Letter, however, neither addresses nor denies coverage under the primary coverage of the Building Policy. It only discusses an "additional" coverage in the policy. At no time prior to suit did the IRF deny coverage under the primary insuring provisions of the Building Policy or provide any coverage determination under the Tort Policy.

(3) ReWa coordinated with the EPA and DHEC to repair, remediate, and clean the facilities.

ReWa's daily operations are subject to DHEC, the EPA, and federal and state regulations. *See* Pl.'s Exs. 14–15 (R. 1010–60, 1061–1101); Tr. 38:15–39:13, 70:22–71:4, and 111:1–113:21 (R. 249:15–250:13, 281:22–282:4, and 322:1–324:21). Accordingly, once testing confirmed the presence of PCBs, ReWa contacted the EPA and DHEC to put an emergency action plan in place.

On September 25, 2013, DHEC issued an emergency regulation (the "Emergency

Regulation") that specifically addressed the dumping of PCBs in this case. *See* Order (R. 5) (citation omitted). In addition, the federal Toxic Substance Control Act ("TSCA") regulates remediation of PCB levels equal to or greater than 50 parts per million ("ppm"). The Emergency Regulation, however, imposed more stringent limits than the TSCA, and prohibited land application of sludge with *any* quantifiable amount of PCBs. *Id*. The Emergency Regulation also provided that the facility impacted by the PCBs must be operated in a manner so that the returned wastewater, after processing, has no quantifiable amount of PCBs. *Id*. In addition, ReWa was prohibited under its National Pollutant Discharge Elimination System ("NPDES") Permits from introducing pollutants into its pretreatment process. *Id*.

ReWa retained AECOM—an engineering firm with expertise in the remediation and removal of contaminants like PCBs—to develop and implement a plan for remediation and repair at the Pelham Road facility. *Id*. (R. 4). ReWa submitted a plan to DHEC on October 17, 2013, which was approved by letter five days later. *Id*. The remediation and repair work, recommended by AECOM and approved by DHEC, required ReWa first to remove the sludge contained in the contaminated equipment and fixtures. *Id*.

ReWa incurred millions of dollars in expenses to repair and restore its facilities, machinery, and equipment to usable condition. Holding tanks, digesters, machinery, equipment, and structures at each of these three facilities were impacted by the contamination. Pl.'s Ex. 94 (R. 1282–1337); Tr. 265:20–266:4 (R. 476:20–477:4); Tr. 364:1–7 (R. 575:1–7); Tr. 371:1–4 (R. 582:1–4); Tr. 386:16–387:12 (R. 597:16–598:12); Young depo. 27:1–10 (R. 1490:1–10). Each witness who addressed this issue agreed that the repair and decontamination of the facilities could not occur unless and until contaminated sludge was first removed. Tr. 220:12–17 (R. 431:12–17); Tr. 601:9–15 (R. 812:9–15). The removal was a necessary first step in any repair efforts.

To save costs and limit the impact on resources, ReWa did the repair and remediation work

at its facilities one at a time. Tr. 295:7 to 296:19 (R. 506:7 to 507:19). The work at the Pelham Plant was done first, then the Lower Reedy Plant, and finally the Mauldin Road Plant. Tr. 280:25 to 281:8 (describing order and method of repair and remediation) (R. 491:25 to 492:8). During ReWa's cleanup efforts, there were ongoing investigations by DHEC and the EPA into the source of the vandalism and the number of instances in which PCBs were introduced into the system. Tr. 40:21 to 42:1 (R. 251:21 to 253:1). Neither of those agencies and no other governmental agency or entity filed any enforcement action against ReWa.

Throughout the time the repair work was being done, ReWa provided the IRF adjuster with a monthly spreadsheet that identified the costs being incurred because of the loss and damage from the PCBs. Pl.'s Exs. 52, 53, 62, 65, 67, 69, 71–73, 78, and 83 (R. 1187–1188, 1199, 1201–1203, 1205–1208, and 1218–1219); Tr. 472:9–24 and 479:19–21 (R. 683:9–24 and 690:19–21); Young depo. 25:13–16 (R. 1488:13–16); Byers depo. 37:3–9 (R. 1508:3–9). The IRF never notified ReWa that these expense reports should be submitted in a different form or that certain expenses were not covered or appropriate under the policies at issue. Tr. 479:1–21 (R. 690:1–21). ReWa also provided any information that was requested by the IRF. *See* Pl.'s Exs. 60 and 73 (R. 1193–98 and 1208); Tr. 477:24–478:1 (R. 688:24–689:1); Young depo. 35:24–36:6 (R. 1493:24–1494:6); Byers depo. 38:14–22 (R. 1509:14–22).

(4) After three years and millions of dollars spent, ReWa sued the IRF and recovered some of its costs of repair, remediation, and cleanup.

ReWa filed suit on October 17, 2016 and filed an Amended Complaint on June 15, 2018. *See* Compl. (R. 36–54); Am. Compl. (R. 55–72). ReWa asserted breach of contract and declaratory judgment claims under the Building Policy and Tort Policy, and a bad faith claim. At no time prior to suit did the IRF deny coverage under the primary insuring provisions of the Building Policy or provide any coverage determination under the Tort Policy.

With consent of both parties, the matter was referred to the Greenville County Master-in-Equity to decide the case non-jury. Order of Reference (Sept. 14, 2018) (R. 1–2). The trial began on January 28, 2020 before the Honorable Charles B. Simmons, Jr. In lieu of opening statements, the parties submitted extensive written pretrial explanations of their positions on the facts and law. IRF's Pretrial Brief and ReWa's Pretrial Brief (R. 128–46 and 91–127). The Court heard three days of live testimony including seven witnesses and around 130 exhibits. *See* Tr. 1–739 (R. 212–950). The Court also received deposition excerpts to review outside of the courtroom. After the close of evidence, the trial court and counsel engaged in an extended colloquy in which the court asked counsel questions and permitted them to summarize their positions on key issues in the case. See Tr. 708:16 to 737:11 (R. 919:16 to 948:11). Also, the parties were asked to provide written statements in the form of proposed findings of fact and conclusions of law. *See* IRF's Proposed Findings and Conclusions (R. 1933–44); ReWa's Proposed Findings and Conclusions (R. 1923–32). The trial court then took the matter under advisement.

On March 18, 2020, the trial court issued Findings of Fact and Conclusions of Law in which the court ruled that judgment be entered for ReWa in the amount of $5,824.924.49. Order (R. 3–18). On March 30, 2020, the IRF filed a post-trial motion pursuant to Rules 41, 52, and 59, SCRCP. A week later, the trial court issued an Order denying the IRF's post-trial motion. Order (April 6, 2020) (R. 19–21). The IRF filed its Notice of Appeal on April 23, 2020 (R. 1958–79) and filed an amended notice of appeal on June 22, 2020 (R. 1980–2008).

After the parties had submitted their appellate briefing, but before oral argument had been scheduled, the South Carolina Supreme Court issued its opinion in *Sullivan Management, LLC v. Firemen's Fund Ins. Co.*, 437 S.C. 587, 879 S.E.2d 742 (2022). ReWa submitted a supplemental citation alerting the Court of Appeals of the *Sullivan* opinion. Later, at oral argument, both parties' counsel and the panel discussed *Sullivan* extensively.

On January 3, 2024, the Court of Appeals issued its opinion. *Renewable Water Resources v. Ins. Reserve Fund*, Op. No. 6042 (S.C. Ct. App. filed Jan. 3, 2024) (Howard Adv. Sh. No. 1 at 17). The court held that expenses incurred by ReWa to remediate the contamination and prevent further contamination were covered damages but deemed four specific categories of expenses to be "consequential damages" that were not covered. The Court of Appeals instructed the lower court to apply and effectuate these rulings on remand to determine the proper revised judgment amount.

Both parties moved for rehearing. The IRF disagreed with the Court of Appeals coverage conclusion. ReWa disputed the court's exclusion of certain damages. The Court of Appeals denied both motions for rehearing. The IRF filed this petition for certiorari.

STANDARD OF REVIEW

This Court reviews petitions for certiorari under the standard in Rule 242, SCACR. A petition "will be granted only where there are special and important reasons" like those enumerated in the rule, *e.g.*, a novel question of law, a dissenting opinion at the Court of Appeals, where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, a substantial constitutional issue, or a conflict with the United States Supreme Court on any question of federal law. *See* Rule 242(b), SCACR. At the petition stage, the question is not whether the lower court erred but whether there is a "special and important reason" to grant the petition. *See* Rule 242, SCACR; *see also* Jean H. Toal et al., *Appellate Practice in South Carolina*, 12 (2d ed. 2002) ("The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.").

ARGUMENTS

I. The lower courts correctly determined that there was coverage for the damage caused by the PCB contamination.

The trial court correctly determined—and the Court of Appeals correctly affirmed—that coverage existed under the Building Policy for the damages ReWa sustained as a result of the PCB contamination. The Building Policy states that the IRF "will pay for direct physical loss of or

damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." Pl.'s Ex. 8 at ¶ A (R. 991–97). Thus, coverage requires (1) direct physical loss of or damage to property that (2) is Covered Property at the premises described in the Declarations and (3) is caused by or resulting from a Covered Cause of Loss. *See* Order (R. 3–18). The factor at issue in this appeal is the first one.[4]

As an initial matter, the IRF's arguments about coverage are a moot point because the IRF has conceded there is coverage. *See* IRF's Reply Brief (Feb. 8, 2021) at 2 (describing the IRF's coverage position and stating, "The IRF did not argue that there was ***no*** direct physical loss or damage resulting from the PCBs. . . . 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.") (emphasis in original). The IRF now attempts to claw back that concession by arguing that the *Sullivan* decisions changed the law. None of the IRF's arguments are persuasive, much less correct, and they provide no basis to grant certiorari.

A. The lower courts' determination that ReWa suffered "direct physical loss or damage" is supported by the Record.

The IRF's primary argument regarding the lower court's determination of coverage under the Building Policy incorrectly asserts that the courts misinterpreted and misapplied the phrase "direct physical loss or damage." IRF's Petition at 3 ("[T]he predominant issue involves whether ReWa's claimed loss qualifies as "direct physical loss or damage."). The IRF contends that the phrase "direct physical loss or damage" means immediate structural damage to the Covered Property. *Id*. at 4–7. This definition, however, is not contained in the Building Policy. Instead,

[4] For the second factor, the IRF's witness acknowledged that "[t]he tanks, the digesters, the pumps, the structures at the wastewater treatment plants are covered property." Tr. 695:16–20 (R. 906:16–20). That witness also acknowledged that the three facilities are identified on the declaration page. Tr. 695:21–696:11 (R. 906:21–907:11). For the third factor, the parties stipulated that the dumping of PCBs was vandalism, which is a Covered Cause of Loss. *See* Joint Stip. of Facts ¶ 6 (R. 952).

the trial court and, later, the Court of Appeals, relied on case law from South Carolina and other jurisdictions to conclude that the PCB contamination at ReWa's facilities caused damage that was both direct and physical in nature. *See* Order (R. 3–18).

The evidence demonstrates that PCB contamination causes damage that is direct and physical. PCBs physically adhere to concrete, and, therefore, had to be blasted off ReWa's structures and machinery by pressure washers and cleaned with a special chemical solution in order to extract them from the concrete. Tr. 222:7–16, 261:17–263:3, 265:5–19, and 373:16–18 (R. 433:7–16, 472:17–474:3, 476:5–19, and 584:16–18). The IRF's own expert admitted that the PCB contamination was physically adhered to the walls *after* the tanks were emptied, Tr. 600:6–25 (R. 817:6–25), and evidence supports the lower court's statement that PCBs adhered to the walls even *after* the initial pressure washing. *See* 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).

Multiple witnesses, including the IRF's witnesses, testified that the impacted structures and equipment were unusable or inoperable when filled with PCB-contaminated materials. *See* Tr. 267:3–14 (structures "unusable" when full of PCB contaminated materials) (R. 478:3–14); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R. 439:4–16); Young depo. 28:10–19 (could not be used in contaminated state) (R. 1491:10–19); Byers depo. 75:2–5 (R. 1514:2–5). ReWa carried its burden to prove the structures at its three facilities suffered direct physical damage.

The trial court considered analogous case law from other jurisdictions to determine that "direct physical loss of or damage to" property includes the contamination of such property even in absence of structural damage. *See* Order (R. 3–18). For example, the trial court cited *Western*

Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968), which was one of the first cases to address the issue of what constitutes "direct physical loss." In that case, the insured church had to close its building because of the infiltration of gasoline in the soil under and around the building, which caused vapors to infiltrate and contaminate the foundation, halls, and rooms of the church, making it uninhabitable and rendering use of the building dangerous. *Id*. at 54. The central issue in the case was whether the insured suffered "direct physical loss." The court noted that while loss of use of the premises, standing alone, did not in and of itself constitute a "direct physical loss," this loss of use was the result of the accumulation of gasoline in and around the building. *Id*. at 55. Although there had been no structural change to the building, the premises became so infiltrated and saturated with gasoline that they were uninhabitable. *Id*. All such harm, the court held, "equates to direct physical loss within the meaning of that phrase" as used in the policy. *Id*.

Here, the trial court correctly found that "ReWa's three facilities and the equipment and machinery located there were not able to be used for their normal operations." *See* Order (R. 3–18). The IRF is incorrect when it asserts that this finding is unsupported. It is amply supported by the record. *See* Tr. 267:3–14 (structures "unusable" when full of PCB contaminated materials) (R. 478:3–14); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R. 439:4–16); Young depo. 28:10–19 (could not be used in contaminated state) (R. 1491:10–19). PCBs physically adhered to the structures at each of the three facilities and had to be blasted off by pressure washers and cleaned with a special chemical solution. Pl.'s Ex. 94 (R.1282–1337); Tr. 265:5–19, 373:16–18, and 600:8–20 (R. 476:5–19, 584:16–18, and 811:8–20). No witness disputed that the contamination inhibited or prevented the use of the structures and equipment. The issue was whether this constituted "damage" to the property and, if so, if it was "direct" and "physical."

The term "damage" is not defined in the policy. Tr. 679:13–16 (R. 890:13–16). Thus, the law applies a plain and ordinary definition. *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23,

743 S.E.2d 827, 829 (2013). The dictionary defines "damage" as something that reduces the value, usefulness, or normal function of property. *See* Damage, Dictionary.com ("damage" is "injury or harm that reduces value or usefulness"), https://www.dictionary.com/browse/damage (last visited May 5, 2024); Damage, Oxford English Dictionary (3d ed. 2010) ("damage" is "[p]hysical harm caused to something in such a way as to impair its value, usefulness, or normal function").[5] The IRF gave no alternative definition. In this case, the vandalism that introduced PCBs into ReWa's facilities meets the elements of the ordinary meaning of "damage." The usefulness and ordinary function of the structures was impaired. *See* Tr. 267:3–14 (structures "unusable" when full of PCB-contaminated materials) (R. 478:3–14); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R. 439:4–16); Young depo. 28:10–19 (could not be used in contaminated state) (R. 1491:10–19). The PCBs directly and physically adhered to the surfaces of the structures. Pl.'s Ex. 94 (R. 1282–1337); Tr. 265:5–19, 373:16–18, and Tr. 600:8–20 (R. 476:5–19, 584:16–18, and 811:8–20).

The IRF's witness agreed that if a vandal spray paints on the wall of a covered building, it constitutes damage to the building because the paint physically adheres to the wall such that it alters or defaces the building, and therefore would need to be removed. Tr. 697:5–13 (R. 908:5–13). The PCBs that physically adhered to the walls of ReWa's structures were equally or more damaging than spray paint, and the money spent to remove the PCBs constitutes covered damages.

The trial court further relied upon the factually similar case of *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995), in which the plaintiff operated a mobile home park that had its own sewage treatment facility. *Id*. at 600. The plaintiff maintained a commercial

[5] The IRF witness was presented with these plain, ordinary dictionary definitions but refused to agree that any definition of "damage" was proper. Tr. 683:9–687:7 (R. 894:9–898:7). The trial court took judicial notice of these pursuant to Rule 201, SCRE. Tr. 686:23–687:7 (R. 897:23–898:7). During depositions, the adjusters in the claim gave definitions which focused on the usability or operability of the property. Byers depo. 28:25 to 29:6 and 34:6–9 (R. 1505:25–1506:6 and 1507:6–9); Young depo. 27:22–28:4 (R. 1490:22–1491:4).

property and liability insurance policy, which covered "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." *Id*. During the policy period, an unknown substance was dumped into the sewage treatment facility. *Id*. at 601. The plaintiff immediately took steps to prevent discharge of the unknown pollutant into the river. *Id*. The court noted that "the chemical residue from the dumped substance adhered to the interior and caused the destruction of a bacteria colony which was part of the sewage treatment process." *Id*. As a result, the plaintiff was required to completely drain the system, steam clean the entire interior of the sewage treatment plant, and remove the chemical residue via hand chiseling. *Id*. The insurer denied coverage on the ground that there was no direct physical loss to the sewage treatment facility. *Id*. The court found that coverage existed because there was direct damage to the sewage treatment structure, as "the residue from the dumped substance actually covered and adhered to the interior of the structure causing destruction of the bacteria colony which was an integral part of the covered facility." *Id*. at 602.

The record in this case confirms that the PCB contamination adhered to ReWa's structures and machinery at the affected facilities. *See* Tr. 365:1–9 and 424:13–19 (R. 576:1–9 and 635:13–19). The trial court's finding that ReWa suffered "direct physical loss or damage" is supported by jurisdictions across the country which have interpreted similar policy language to include coverage for contamination of covered property even in the absence of structural alteration. *See* Order (R. 3–18). Thus, the lower courts' determination that the PCB contamination at ReWa's facilities constituted "direct physical loss or damage" was not erroneous.

B. The Court's opinion in *Sullivan Management* strengthens, not undermines, the lower courts' determination in this case.

In its petition, the IRF argues that this Court's opinion in *Sullivan Management* changed the law and applies here. *See* IRF's Petition at 4. 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 ignores 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. The IRF's errors are explained below.

At a basic factual level, *Sullivan* is inapplicable here because PCB contamination is not analogous to the presence of coronavirus particles. Indeed, *Sullivan* specifically explains this. The *Sullivan* Court reasoned that the presence of viral particles did not constitute physical loss or damage since 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 Univ. 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"). Because the virus at issue in *Sullivan* was transitory, it did not require action to "restor[e]" the property since the contaminant did not persist in adhering to the 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.

Furthermore, 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.") (emphasis added). 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 distinguishable from this appeal. *Sullivan* supports the lower courts' conclusion in this appeal 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. The lower courts did not err, and nothing in *Sullivan* casts doubt on their rulings.

C. The lower courts correctly interpreted the insurance policy and *Ocean Winds* to conclude the policy covered efforts to prevent additional damage.

The lower courts determined that because the Building Policy covered "risks of direct physical loss," it covered ReWa's efforts to prevent additional damage from incoming PCBs. The IRF argues that this conclusion was an error that supposedly "broadened" the scope of the policy based on an alleged misinterpretation of *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company*, 350 S.C. 268, 565 S.E.2d 306 (2002). *See* IRF's Petition at 8–10. The IRF is wrong.

As an initial matter, the IRF starts its argument on the wrong foot by arguing that the Court of Appeals erred by finding coverage for ReWa's efforts to sequester incoming contaminated waste. *See* IRF's Petition at 9. According to the IRF, this was error because there was no such sequestration. *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* R. 369:9–15; R. 400:12–20; R. 1719:11–25. The IRF's assertion to the contrary—and its argument for certiorari—is incorrect.

The IRF's attempt to distinguish *Ocean Winds* fares no better. In *Ocean Winds*, the Court was asked to answer a certified question to interpret a property insurance policy that provided coverage for "risks of direct physical loss" involving a collapse of a building. The Supreme Court explained the significance of the word "risks" as it relates to the scope of coverage:

> In our view, to construe the phrase "*risks* of direct physical loss *involving* collapse" as requiring actual collapse is too narrow an interpretation. This phrase is more expansive than the word "collapse" and appears to cover even the threat of loss from collapse. Further, as noted by courts rejecting the actual collapse standard, such an interpretation encourages an insured to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured's duty to mitigate damages.

Id. at 271, 565 S.E.2d at 208 (emphasis in original). Applying that interpretation to this case, the trial court determined that the Building Policy covers not only the direct physical loss of or damage to ReWa's Covered Property, but also the costs incurred by ReWa in addressing the risks of PCBs infiltrating deeper into its facilities, equipment, and machines. *See* Order at 8–9 (R. 10–11). The IRF asserts four argument disputing the lower courts' rulings. Each argument is wrong.

First, the IRF asserts that *Ocean Winds* has no application to this case because *Ocean Winds* involved building collapse coverage in which the policy language was ambiguous. IRF's Brief at 9. The IRF incorrectly states that ReWa never made an argument that the Building Policy is ambiguous. *Id*. However, South Carolina case law is clear that if a provision is susceptible to more than one interpretation, it is deemed ambiguous. *Padgett v. S.C. Ins. Reserve Fund*, 340 S.C. 250, 254, 531 S.E.2d 305, 307 (Ct. App. 2000). Here, ReWa and the IRF have presented two different interpretations of the phrases "direct physical loss or damage" and "risks of direct physical loss." Like the Supreme Court in *Ocean Winds*, the trial court in this case was faced with differing interpretations of the policy language, and therefore was required to construe the phrase

"risks of direct physical loss." The analysis in *Ocean Winds*, then, is analogous to this proceeding.[6]

The IRF's second and third arguments are likewise flawed. Specifically, the IRF attempts to distinguish *Ocean Winds* by arguing incorrectly that *Ocean Winds* involved the risk of *future* damages, whereas the instant proceeding (according to the IRF) involved only *past* damages. *See* IRF's Brief at 9–10 (arguing that *Ocean Winds* should not be applied because the PCB contamination had already occurred and ReWa never filed additional coverage claims). The IRF's supposed distinction rests on an incorrect premise regarding the nature and timing of the damages ReWa sought to prevent. In *Ocean Winds*, the Supreme Court interpreted policy language in circumstances in which there was a threat of building collapse. Here, the trial court was asked to interpret the Building Policy under similar circumstances. The nature of ReWa's operations and the continued receipt of wastewater at ReWa's affected facilities posed a threat that *further* contamination (*i.e.*, additional, future contamination) could occur. During ReWa's cleanup efforts, there were ongoing investigations by DHEC and the EPA into the source of the vandalism and the number of instances in which PCBs were introduced into the system. Tr. 40:21 to 42:1 (R. 251:21 to 253:1). In other words, while ReWa's facilities had already experienced damage, ReWa also had to take necessary actions related to the risks of continued and additional PCB contamination. The South Carolina Supreme Court's interpretation of the policy language in *Ocean Winds* is therefore directly applicable in this case.

The IRF's fourth argument is no better. According to the IRF, *Ocean Winds* is distinguishable because the insuring agreement in that case only "covered 'loss or damage' and

[6] The Building Policy does not define "damage," and the record reflects that the IRF's representatives refused to provide a definition of the term. Tr. 683:9–687:7 (R. 894:9–898:7). The trial court properly noted that because the Building Policy does not include a definition of "damage," the court must apply the "plain, ordinary and popular meaning" of the word. *See* Order at 7 (citing *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013)) (R. 9).

not 'direct physical loss or damage.'" IRF's Petition at 10 (emphasis in original). But a review of *Ocean Winds* rebuts this argument. In the relevant section of *Ocean Winds*, the Court expressly endeavors "to construe the phrase 'risks of *direct physical loss* involving collapse.'" *Ocean Winds*, 350 S.C. at 271, 565 S.E.2d at 208 (emphasis altered). That's very nearly the same language as the policy in this case, and the IRF's supposed distinction turns out to make no difference. The lower courts did not err in in their reliance on *Ocean Winds* or in their determining and affirming coverage for ReWa's efforts to prevent continued, additional damage.

D. The removal and disposal of biosolids from ReWa's three impacted facilities was necessary to remediate and repair ReWa's Covered Property

The IRF argues that because the contaminated biosolids were not *themselves* "Covered Property," the lower courts erred by finding coverage for ReWa's removal and disposal of them. *See* IRF's Petition at 10–12. That argument is a straw man. The lower courts never said that the biosolids were covered property, and that was not the basis on which their removal and disposal were covered. Rather, those costs 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 include the removal and disposal of the tree because removal of the tree is necessary before a contractor can repair the roof on which the tree fell. The same is true here.

E. The lower courts did not err in concluding that the "Ordinance or Law" exclusion does not apply.

The IRF conceded that the PCB contamination was caused by acts of vandalism, which is a Covered Cause of Loss under the Building Policy. *See* Pl.'s Ex. 9 (R. 998–1003); Joint Stip. of

Facts ¶ 6 (R. 952). The IRF now argues, however, that the lower courts erred by failing to conclude that ReWa's loss is excluded or limited by the Ordinance or Law Exclusion. *See* IRF's Petition at 12–15. The IRF argues that because ReWa's remediation efforts were governed by federal and state regulations, coverage is excluded under the Ordinance or Law Exclusion. *Id.*

As an initial matter, if the IRF's interpretation of the Ordinance or Law Exclusion were to apply, then in any imaginable circumstance, ReWa would have no coverage under the Building Policy. As a wastewater treatment facility, ReWa's daily operations are subject to DHEC, EPA, and other federal and state regulations. *See, e.g.*, Pl.'s Exs. 14 and 15 (R. 1010–60 and 1061–1101); Tr. 38:15 to 39:13, 70:22 to 71:4, and 111:1 to 113:21 (R. 249:15 to 250:13, 281:22 to 282:4, and 322:1 to 324:21). In effect, the exclusion would so engulf the coverage provisions of the policy that coverage would never exist. This is not (and should not be) the effect of the exclusion, because such an interpretation would be absurd.

The trial court correctly found that the Ordinance or Law Exclusion does not apply because it was vandalism, not the enforcement of an ordinance or law, that created ReWa's loss. *See* Order at 10 (R. 12); Joint Stip. of Facts ¶ 6 (R. 952). Stated differently, PCB contamination and the resulting damages that ReWa suffered were not, either directly or indirectly, caused by the enforcement of any ordinance or law. The trial court's finding was based, in part, upon a determination that mere compliance with applicable regulations does not trigger the Ordinance or Law Exclusion. Order at 10 (R. 12).

While the IRF conceded that neither DHEC nor the EPA ever filed an enforcement action against ReWa, the IRF contends that the trial court erred in relying upon *Haas v. Audubon Indemnity Company*, 722 So.2d 1022 (La. App. 1998) as standing for the proposition that mere compliance is not enforcement. The trial court's interpretation and application of *Haas* was proper.

In *Haas*, unknown persons broke into a large vacant building and caused damage to its

interior. *Id*. at 1023–24. The intruders removed pipes from the building, which caused flooding. *Id*. After the flood, the floors had to be removed and replaced. *Id*. The flooring contained asbestos, which had previously been contained and was safe prior to the flooding. *Id*. Once the flooring was loosened by the water, however, the floor had to be treated as asbestos-containing materials. *Id*. Haas' policy included an ordinance or law exclusion that contains the same language in ReWa's Building Policy. *See id*. at 1028. The insurer claimed that the ordinance or law exclusion applied, and therefore it was not liable for the increased costs of abatement of asbestos in the flooring which was required by EPA regulations concerning asbestos. *Id*. The Louisiana Court of Appeals found that "it was the vandalism that caused damage to the Haas' building, not the enforcement of any ordinance or law." *Id*. at 1029. Therefore, "[t]he costs of asbestos abatement were necessary because of the flooding which arose out of the vandalism to the building." *Id*.

Here, like in *Haas*, the Ordinance or Law Exclusion does not apply because any compliance with an ordinance or regulation merely served as confirmation of the circumstances surrounding the actual cause of loss—vandalism that resulted in the presence of PCBs at ReWa's treatment facilities. In other words, any actions by the EPA and DHEC did not cause, either directly or indirectly, ReWa to suffer the damages claimed in this lawsuit.

The trial court also properly relied upon *Throgs Neck Bagels, Inc. v. GA Insurance Company of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1998) in determining whether the exclusion applies. In *Throgs*, the plaintiff owned and operated a bagel store in a leased premises. *Id*. at 67. An accident between an automobile and a gas truck occurred at the intersection where the building was located, resulting in 1,500 gallons of gasoline being spilled into the street and ignited. *Id*. This catastrophe resulted in five deaths and destroyed three stores located nearby. *Id*. While the bagel shop was damaged by smoke and water, it was not consumed in the blaze. *Id*. However, the Department of Buildings immediately issued a Peremptory Vacate Order directing

that all persons occupying the building vacate until it was declared safe. *Id.* The plaintiff filed a claim under a business owners' policy which provided for coverage for losses resulting from fire or explosion. *Id.* at 67–68. The policy contained an ordinance or law exclusion with the same language as ReWa's Building Policy. *Id.* The insurer denied coverage based on this exclusion. *Id.* at 68–69. The insurer argued that "it does not matter whether the fire was, in the first instance, the efficient cause of the losses, since the policy excludes coverage for losses caused, either directly or indirectly, by ordinance or law." *Id.* at 71. The court found, however, that the Vacate Order from the Department of Buildings "served merely as a confirmation of the circumstances regarding the actual cause of loss, *i.e.*, the fact that the premises had been rendered structurally unsound and unfit for continued use as a result of the fire." *Id.* "[W]hen the order was served, the need to vacate the premises and all the immediate and consequential losses stemming from the fire and explosion, both direct and indirect, had already been 'caused.'" *Id.* at 71–72. The court noted that "[t]o hold that the law or ordinance exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy." *Id.*

Based upon this case law, the trial court properly found that the Ordinance or Law Exclusion does not apply because it was vandalism, not the enforcement of an ordinance or law, that caused the damage to ReWa's three treatment facilities. Contrary to the IRF's assertion, this Court's decision in *South Carolina Farm Bureau Insurance Company v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009) does not change this analysis. In *Durham*, the Court found that where a policy includes an anti-concurrent causation clause, neither the efficient proximate cause rule nor the concurrent clause rule applies. *Id.* at 511–12, 671 S.E.2d at 613. Stated differently, if something is "a cause of the loss," then "the exclusion applies." *Id.* Without directly citing any evidence, the IRF asserts that one cause of ReWa's loss was the enforcement of an ordinance or law. But, as previously stated, the trial court found that vandalism was the only cause here. The fact that

ordinances or regulations applied to ReWa's remediation efforts *after* the damage occurred, does not mean that such ordinances and regulations were a direct or indirect cause of ReWa's losses. Therefore, the trial court correctly determined that the Ordinance or Law Exclusion does not apply.

II. The lower courts' damages calculations are supported by the evidence.

A. The lower courts correctly interpreted DHEC's Emergency Regulation and ReWa's NPDES permits in awarding ReWa's damages.

The IRF argues that structures, equipment, or biosolids testing below TSCA's 50 mg/kg threshold did not sustain any "direct physical loss or damage," and ReWa's costs for repairing and cleaning the equipment or disposing of those biosolids (rather than land-applying them to farmland) are not covered. *See* IRF's Petition at 15–21. The IRF's argument is wrong.

As an initial matter, the DHEC Emergency Regulation was adopted to specifically address the illicit dumping of PCBs at issue in this case. Pl.'s Ex. 29 (R. 1103–08). While the TSCA regulates remediation after contamination of PCB levels equal to or greater than 50 parts per million, the Emergency Regulation imposed *stricter* limitations. *Id.* Pursuant to the Emergency Regulation, ReWa was prohibited from land applying sludge with *any* quantifiable amount of PCBs. *Id.* The Emergency Regulation also specified that ReWa must process the sludge such that the returned wastewater had no quantifiable amount of PCBs. *Id.* The trial court's award of damages is further confirmed by ReWa's NPDES permits, which do not allow any level of pollutants from being introduced into the pretreatment process. Pl.'s Exs. 14 and 15 (R. 1010–60 and 1061–1101); Tr. at 111:1–13 (R. 322:1–13).

In other words, ReWa could not pass any contaminated sludge or wastewater through its routine pretreatment process. This necessitated ReWa's disposal of the sludge in a qualified landfill. The NPDES permits required ReWa to "take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood

of adversely affecting human health or the environment." Pl.'s Ex. 15 (R. 1071). Notably, the NPDES permits for ReWa's three facilities at issue do not contain allowable amounts of PCBs that ReWa could discharge into streams. Pl.'s Ex. 15 (R. 1061–1101); Tr. at 117:11 to 118:6 (R. 328:11 to 329:6). When read in conjunction, the Emergency Regulation and NPDES permits prohibited ReWa from introducing PCBs into its pretreatment process, returning wastewater or effluent with any quantifiable amount of PCBs, or land apply sludge with any quantifiable amount of PCBs.

The IRF asserts that after the Emergency Regulation expired on March 23, 2014, ReWa should have started land applying sludge that contained less than 50 mg/kg. IRF's Petition at 16–17. The IRF cites no authority for its assertion that ReWa was mandated to start land applying once the Emergency Regulation expired. To the contrary, ReWa's permit does not mandate that solids with less than 50 mg/kg of PCBs be land applied. Pl.'s Ex. 14 (R. 1010–60). To ensure that there were no cumulative effects of land applying PCBs at levels below 50 mg/kg, ReWa did not resume land application until Spring 2016. *See* Tr. 57:17–23, 194:7–11, and 438:3–9 (R. 268:17–23, 405:7–11, and 649:3–9). Additionally, the handling of the material had to be the same whether the PCB levels were above or below 50 mg/kg because ReWa could not knowingly introduce PCBs into the headwaters of the facilities under its permits. Tr. 147:23 to 148:9 (R. 358:23 to 359:9).

The lower courts correctly determined that ReWa's remediation and repair process was reasonable in light of the Emergency Regulation and ReWa's NPDES permits. The IRF presented no evidence, by testimony or otherwise, that ReWa's processes were excessive or unwarranted.

B. The lower courts properly applied the burden of proof in assessing ReWa's damages relying on summary exhibits pursuant to Rule 1006, SCRE.

The IRF asserts the trial court misapplied the burden of proof by shifting the burden to the IRF to disprove ReWa's claimed expenses. *See* IRF's Petition at 21–25. The IRF specifically assigns error to the trial court's admittance of Plaintiff's Exhibits 99 and 100 into evidence as

summaries under Rule 1006, SCRE. Under Rule 1006,

> [t]he party seeking to admit a summary must demonstrate (1) the contents of the documents upon which the summary is based are so voluminous it would be inconvenient to examine them in court; (2) the underlying documents are admissible in evidence; (3) the summary is a faithful rendering of the underlying data, and any inferences it contains are supported by the contents and are neutral and non-argumentative; and (4) the originals or duplicates of the underlying data have been made reasonably available to the other parties.

State v. Warner, 430 S.C. 76, 95, 842 S.E.2d 361, 370 (Ct. App. 2020). The record in this case reveals that ReWa met each of these requirements in introducing Plaintiff's Exhibits 99 and 100, and therefore the trial court did not abuse its discretion in admitting them into evidence.

Through testimony of Glen McManus and Patricia Dennis, ReWa established that the costs directly related to the PCB contamination were allocated by the department managers and coded with a special tracking code so that the costs could be segregated in ReWa's accounting system. Tr. 300:17 to 302:23 and 498:22 to 499:10 (R. 511:17 to 513:23 and 709:22 to 710:23). The PCB costs were then pulled into a Microsoft Excel spreadsheet to create Plaintiff's Exhibits 99 and 100. Tr. 302:24 to 303:24 and 496:11 to 497:10 (R. 513:24 to 514:24 and 707:11 to 708:10). Each entry on the summary exhibits is supported by invoice and/or check in ReWa's accounting system. Tr. 498:25 to 499:21, 500:16–22, 501:10–17 (R. 709:25 to 710:21, 711:16–22, and 712:10–17). These financial records were kept in the ordinary course of ReWa's business. Tr. 303:25 to 304:2 and 497:11–20 (R. 514:25 to 515:2 and 708:11–20).

Based upon the foregoing testimony, ReWa sustained its burden of proving that the damages set forth in Plaintiff's Exhibits 99 and 100 were those incurred in repairing ReWa's contaminated equipment and machinery. ReWa introduced these summary exhibits for the court's convenience and in order to avoid the cumbersome task of introducing each and every page of documentation backing up these costs. ReWa produced the voluminous Bates numbered documents (well over 20,000 pages) summarized in Plaintiff's Exhibits 99 and 100. Certainly,

this instance is exactly the type of scenario that Rule 1006, SCRE, aims to address.

ReWa sustained its burden of proving the damages set forth in Plaintiff's Exhibits 99 and 100. The IRF merely challenged a few specific charges on ReWa's damages spreadsheet. *See generally* Tr. 392:4 to 448:5 (R. 603:4 to 659:5). The IRF's assertion that the trial court improperly applied the burden of proof is unfounded. ReWa sustained its burden through the presentation of evidence and the testimony of its witnesses at trial.

CONCLUSION

Nothing in the IRF's Petition shows that the lower courts erred in any way prejudicial to the IRF, much less in a way that would warrant a grant of certiorari. The Petition should be denied.

Respectfully submitted,

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