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S.C. SUPREME COURT

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.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. Both the Petition for Writ of Certiorari and the Return demonstrate that there are substantial legal issues that warrant further judicial review and a decision from this Court.

In its return to the petition for writ of certiorari, the Respondent Renewable Water Resources ("ReWa") claims that there are no issues in this multi-million dollar property and casualty insurance case (critically not involving an environmental policy) involving novel issues that merit this Court's review. ReWa's return, however, belies that that very notion. There are multiple issues with the trial court's and Court of Appeals' rulings and analyses as addressed in the petition filed by the Petitioner Insurance Reserve Fund ("IRF").

ReWa's return makes clear, at a minimum, that there is not a consensus on the meaning and scope of this Court's recent decision in *Sullivan Management, LLC v. Firemen's Fund Ins. Co.*, 437 S.C. 587, 879 S.E.2d 742 (2022). This case presents an opportunity to further explore whether this Court's decision in *Sullivan* is limited to airborne contaminants such as COVID-19, which appears to the ReWa's position, or whether *Sullivan* is also controling with respect to other forms of contaminants including the PCB contamination in the current case. The IRF contends that this Court's explanation and application of the term "direct physical loss or damage" is not limited to a particular fact pattern but rather has the same meaning and application beyond a COVID-19 case.

Moreover, ReWa's return highlights numerous inconsistencies and the disconnect in the Court of Appeals' decision, particularly where the Court of Appeals correctly ruled that consequential, economic, and loss of use expenses or damages, as a whole, do not qualify as "direct physical loss or damage" consistent with *Sullivan* and other South Carolina precedent; yet, then erred in applying that very ruling by allowing ReWa to recover for substantial consequential, economic, and loss of use expenses.

These points and others from ReWa's return are addressed in greater detail in the IRF's petition for writ of certiorari and in the below discussion.

II. 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."

Rewa argues that *Sullivan*'s interpretation and application of the language "direct physical loss or damage" should be limited to the context of COVID-19 contamination and not to other types of environmental scenarios. This Court in *Sullivan* did not limit its holding in that way. In *Sullivan*, this Court explained 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." As this Court ruled, the presence of a contaminant "does not constitute a physical loss of or damage to property [when] it does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'" *Sullivan*, 879 S.E.2d at 745. That ruling was not limited to COVID-19 cases. Indeed, that is precisely the situation in the case at bar. The presence of biosolids on the walls of digesters or holding tanks did not "alter the appearance, shape, color, structure, or other material dimension" of those structures. At most, cleaning of the walls of those tanks was needed, and that consisted of pressure washing of those tanks with water or a solvent – that was the extent of the cleaning that was done. The evidence clearly showed that none of the structures was 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."

Yet, it is important to also point out that *Sullivan* is not the only precedent from this Court and other South Carolina courts that addresses what constitutes "direct physical loss or damage." ReWa, like the Court of Appeals and the trial court, ignores South Carolina authorities including *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), and this Court's decision in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). ReWa resorts to foreign case law to argue that the PCB contamination qualifies as "direct physical loss or damage," but foreign law does not control over South Carolina precedent, particular that from this Court like *Brazell*, which the Court of Appeals never mentioned.

Based on prevailing South Carolina law even before *Sullivan*, "direct physical loss or damage" meant a loss or damage that is immediate, material, tangible, and not consequential or economic in nature. In *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), the federal district court, applying South Carolina law, addressed "direct physical loss or damage" and explained that "[t]he use of the term 'physical' to define property damage negates the possibility that the policy intended to include consequential or intangible damages." 337 F.Supp.2d at 769. Moreover, "[t]he Court is unable to construe the plain meaning of the policy in such a way as to find that direct physical accidental loss or damage could mean a consequential or intangible damage *such as loss of use*." *Id*. (Emphasis added). The court in *Campbell* relied on this Court's decision in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003), where the Supreme Court held that economic damages do not constitute "physical injury" to property. 588 S.E.2d at 115. Notably, in *Brazell*, his Court cited favorably to the case of *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978), and explained that the "use of term 'physical' to define property damage negates [the] possibility [the] policy intended to include consequential or intangible damage." 588 S.E.2d at 116.

The *Campbell* and *Brazell* cases thus fully support the IRF's position -- that "direct physical loss or damage," as construed under South Carolina law, does not include non-direct and non-physical damages, meaning economic loss, consequential damages, and loss of use damages. The limited case law cited by ReWa from other jurisdictions does not override or overrule existing South Carolina authorities.

Citing *Sullivan*, the Court of Appeals correctly agreed with the IRF's position that consequential damages, including economic loss and loss of use, do not meet the definition of "direct physical loss or damage." (Slip Op. at 6). Yet, the Court of Appeals then limited its ruling to four categories of consequential damages and failed to explain why some consequential damages are to be rejected and not *all consequential damages*. (Slip Op. at 6). In an attempt to justify that dichotomy in the Court of Appeals' decision, ReWa resorts back to the trial court's error. As it did at trial, ReWa argues that the effected structures containing the biosolids were "unusable" or "inoperable." *See*, ReWa Response, p. 11. However, this is precisely the definition of consequential "loss of use" damages which do not meet the definition of "direct physical loss or damage," per *Sullivan*, *Brazell*, and *Campbell*. It defies logic that the Court of Appeals did not reverse the trial court's award of loss of use damages, including all expenses for dewatering and disposing of all of the biosolids at all three facilities. Those expenses are clearly consequential or economic loss that does not qualify as "direct physical loss and damage" under South Carolina law.

Similarly, 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. In response, however, ReWa claims that "[w]itness testimony specifically explained that ReWa tested *and*

sequestered incoming waste as part of its prophylactic efforts to forestall further damage." *See*, ReWa Response, pp. 15-16. (Emphasis in original). Yet, the Court of Appeals proceeded to correctly rule that such expenses for "testing and sampling" as well as "future protocols for receiving waste" -- i.e., future protocols developed and implemented for the receipt of FOG (fats, oil, and grease) at the Mauldin Road facility -- are not covered expenses. That is a prime example of the Court of Appeals ruling on one hand that consequential, economic, and loss of use expenses do not meet the definition of "direct physical loss and damage," which is correct under controlling precedent, and then turning around and allowing consequential, economic, and loss of use expenses to be recovered.

Finally, in footnote 8 of its opinion, the Court of Appeals suggests that it limited its ruling to four categories of consequential damages based on a preservation issue. The Court of Appeals refers only to "other consequential damages" in footnote 8 as having been raised for the first time on appeal. The IRF challenges that preservation ruling 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 and economic damages, including loss of use expenses, were not covered by the policy. Notably, in its response, ReWa made no attempt to justify or support the preservation ruling. While the IRF "conceded" that the "cleaning" costs associated with *only* the three holding tanks at Pelham (with PCBs higher than the federal TSCA 50 mg/kg threshold) may be covered, it vigorously opposed coverage for all other expenses on numerous bases, including that consequential, economic, and loss of use damages are not recoverable as "direct physical loss or damage."

In short, a writ of certiorari is needed to provide needed clarity and consistency to the Court of Appeals' rulings.

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

In its petition, the IRF argues that the trial court misapplied the "Ordinance or Law Exclusion" and failed to consider or address the existence of an anti-concurrent causation clause. In its opinion, the Court of Appeals, nonetheless, failed to address the application of the "Ordinance or Law Exclusion" *in its entirety*. In response, ReWa refuses to concede the obvious – that the Court of Appeals did not address the issue at all, and instead, using the term "lower courts" (note the plural), ReWa represents that "the lower courts did not err in concluding that the 'Ordinance or Law' Exclusion does not apply." *See*, ReWa Response, p. 18. The Court of Appeals, however, made no such ruling, and that is deserving of the issuance of writ of certiorari.

ReWa then offers its defense of the trial court's ruling (not the Court of Appeals' ruling), which is flawed in numerous respects. First, ReWa disputes whether the evidence demonstrates that a law or ordinance was even a "cause" of ReWa's loss or damage. Clearly, the record includes *undisputed* evidence that ReWa's remediation was governed, in part, by TSCA, the federal regulations promulgated pursuant to TSCA, and DHEC regulations including the Emergency Regulation at issue. In its brief, ReWa even cites to the National Pollutant Discharge Elimination System (NPDES) permits issued under the Clean Water Act as a legal basis for its actions and the expenditures claimed as damages.

ReWa further contends that vandalism committed by Timothy Howard was the only cause for ReWa's loss and damages, not the enforcement of any law. Citing the case of *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1998), ReWa argues that the subsequent government action based on law is a "confirmation" of the actual cause of loss and is not an additional cause. That represents both an incorrect reading of the policy exclusion as well as an incorrect application of South Carolina law, specifically the Supreme Court's construction of an anti-concurrent causation clause in *South Carolina Farm*

Bureau Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610 (2009). Importantly, the specific language from the IRF Policy excludes coverage for "loss or damage caused directly or indirectly by … [t]he enforcement of any ordinance or law: (1) [r]egulating construction, use, or repair of any property." (R. 998). Thus, the exclusion anticipates an efficient cause of loss that set the chain of events in motion -- one that causes a need to repair the property. But, where the loss is also caused *directly or indirectly* by the enforcement of a law, that is still a cause. With an anti-concurrent causation clause, which the trial court ignored, the exclusion is triggered where the loss is caused, even in part, by the enforcement of the federal and state regulations governing the remediation. ReWa cannot reasonably dispute this: ReWa itself insists that it incurred tremendous expense due to the Emergency Regulation and the NPDES permits which it argues prevented ReWa from disposing of the contaminated biosolids and subsequent sewerage flows through its normal processes of land application. In other words, it is ReWa's own interpretation and application of the Emergency Regulation and the NPDES permits -- which the trial court adopted -- that trigger the "Ordinance or Law Exclusion." ReWa cannot have it both ways. It cannot argue on one hand that the remediation undertaken was required by federal and state environmental laws and then take the inconsistent position that those same laws were not at least an indirect cause of the amount of damages claimed and awarded by the trial court.

Moreover, ReWa's reliance, like the trial court, on the Louisiana case of *Haas v. Audubon Indemnity Co.*, 722 So. 2d 1022 (La. App. 1998), is misplaced. *Haas*, which if read carefully, does not support the trial court's ruling that "ReWa's mere compliance with the applicable regulation does not trigger this exclusion." (R. 12). In particular, the trial judge cites *Haas* for the quote, "compliance is not enforcement." However, a careful reading of the *Haas* opinion reflects that the Louisiana appellate court has simply re-printed the trial court's opinion on appeal, which includes what appears to be a subheading that states, "Compliance is not enforcement," set out in bold print. It appears at the end of the citation to the trial court's

opinion. 722 So. 2d at 1029. Critically, the portion of the trial court opinion following that subheading was not reprinted by the appellate court and thus was not adopted by the appellate court. The subheading appears to be included as a clerical or printing error. What appears next in the appellate opinion does not address the question as to whether compliance is or is not enforcement. Instead, the Louisiana appellate court writes: "As the trial court correctly found, it was the vandalism that caused damage to Haas' building, not the enforcement of any ordinance or law." *Id*. That is the actual holding of the appellate court. It is notable, however, that the appellate court in *Haas* did not address the effect of the anti-concurrent causation clause in the policy, which is the very same error committed by the trial court in the case at bar. In actuality, it is the enforcement of 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.

Finally, ReWa clouds the issue by arguing that its "daily operations" are governed by environmental laws, which is immaterial to whether the damages claimed are at least in part caused by the enforcement of environmental laws. Although not argued in the trial court, ReWa now suggests that coverage under the Building Policy would be illusory because ReWa would never have coverage under "any imaginable circumstance," but that is incorrect as well. *See*, ReWa Response, p. 19. While it is true that ReWa should have had an environmental liability policy in place for losses such as what it encountered with the PCB contamination, the IRF Policy does still provide building property coverage for numerous risks of loss. This is the same IRF Building Policy written for every building owned by the State of South Carolina and the IRF's other governmental insureds. The coverage would not be illusory, and a building policy is not a substitute for an environmental liability policy. In short, the trial court erred in rejecting the "Ordinance or Law Exclusion," and this issue warrants review by this Court, particularly given that the Court of Appeals, for whatever reason, chose not to address it in any respect.

In addition, this case would allow the Court to interpret and apply the "Ordinance or

Law Exclusion," for which there is no binding precedent in South Carolina. That would allow for the Court to educate the bar and bench on this issue.

IV. 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.

In its petition, 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. As indicated, 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.

In its response brief, ReWa misstates the significance of these errors of law. As the IRF explained in its petition and throughout its briefing at trial and on appeal, a proper interpretation of the applicable federal and state laws establishes that the biosolids stored at the Mauldin Road and Lower Reedy facilities did not require any remediation *as a matter of law* in order to be legally land applied consistent with ReWa's normal mode of operation prior to the PCB contamination. In addition, the IRF was not legally responsible for paying for the processing of ongoing sewage flows at the Mauldin Road and Lower Reedy facilities. There was no evidence of "direct physical loss or damage" to the stored biosolids or the ongoing flows at those facilities, in addition to the fact that biosolids are not "covered property." Finally, even the tanks at the Mauldin Road and Lower Reedy facilities -- which tested far below the TSCA 50 mg/kg threshold -- did not legally require the remediation that was undertaken. In its "Summary

Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" dated April 15, 2014, ReWa identified only "low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin Road and from 1.3 ppm to 4.2 ppm at Lower Reedy)" in those two facilities. (R. 1143).[1] The tanks themselves, therefore, had very low levels of PCBs that did not legally require remediation.[2]

ReWa's interpretation of the Emergency Regulation is also in error -- just as the trial court's interpretation is in error. Instead of directly quoting the Emergency Regulation, ReWa engages in paraphrasing that is simply not accurate. For example, in its brief, ReWa writes: "The Emergency Regulation also specified that ReWa must process the sludge such that the returned wastewater had no quantifiable amount of PCBs." *See*, ReWa Response, p. 22. That is not accurate. The Emergency Regulation in Section 3(b) states: "… if the returned wastewater is below levels of quantification as set by item 'c' below, then such operation is deemed in compliance with state water quality regulations." (R. 1108). Section 3(c) then states: "For purposes of this regulation, the *practical quantification level* for the returned wastewater should be evaluated based on EPA Method 608 for PCBs in wastewater. The wastewater system must collect representative samples to confirm that the returned wastewater is below this level of quantification." (R. 1108). (Emphasis added). Thus, it is inaccurate to claim that the wastewater could have *no quantifiable amount* of PCBs. Instead, it had to be below the practical quantification level, and Ted Clark, ReWa's own environmental expert at trial, testified that the

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

[2] Remarkably, ReWa writes: "The IRF presented no evidence, by testimony or otherwise, that ReWa's process were excessive or unwarranted." *See*, ReWa' s Response, p. 23. Yet, perhaps the most critical piece of evidence is Plaintiff's Exhibit 38, which is the "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" prepared by ReWa itself. It is that document that includes the concession that "ReWa does not currently intend to land apply this material, *even though current regulations would allow land application*." (R. 1143). (Emphasis added).

PQL (practical quantifiable limit) was 0.5 micrograms/liter (ug/l). (R. 442-443). The trial court made this same error. (R. 6). Thus, ReWa and the trial court erred in interpreting the Emergency Regulation as allowing for *no quantifiable amount* of PCBs, when, in actuality, it did allow for a threshold amount of 0.5 micrograms/liter of PCBs to exist in the aqueous phase. This is significant because Clark also testified that the dewatered filtrate from the biosolids that had a concentration of less than 50 mg/kg was less than the 0.5 micrograms/liter threshold, i.e., the quantifiable limit under the Emergency Regulation. (R. 445-446). *That would be inclusive of all biosolids at the Mauldin Road and Lower Reedy facilities, where the PCB concentrations were far below the 50 mg/kg threshold*.

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

Finally, ReWa's discussion of the PCB requirements under the NPDES permits is also legally in error, as was the ruling by the Court of Appeals. ReWa claims that the NPDES permits "do not allow any level of pollutants from being introduced into the pretreatment process." *See*, ReWa Response, p. 22. The trial court reached this same erroneous conclusion. (R. 6). However, the trial court itself recognized that the Clean Water Act allows for PCB

contamination in biosolids of less than the threshold of 50 mg/kg. (R. 5-6, 441-442). In addition, ReWa's expert Ted Clark testified that the Clean Water Act allows for a threshold of 3.0 parts per billion (ppb) for PCBs in the filtrate and wash water. (R. 443-444). Thus, the NPDES permits, which are issued pursuant to the Clean Water Act and must be read with reference to the Act, allow some level of PCBs into the pretreatment process. Moreover, like the Court of Appeals,[3] ReWa makes the unsubstantiated assertion that "the NPDES permits for ReWa's three facilities at issue do not contain allowable amounts of PCBs that ReWa could discharge into streams." *See*, ReWa Response, p. 23. ReWa fails to acknowledge -- just as the trial court and the Court of Appeals did not -- that the NPDES permits provide that "the PCBs shall be less than 50 milligrams per kilogram (mg/kg) of total solids (dry weight basis)." (R. 1046). In effect, ReWa ignores this express language in arguing that the permits do not allow any level of PCBs to enter or exit the treatment facilities.

ReWa also conveniently ignores the testimony *of its own environmental expert*. To recap, Ted Clark 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.

In sum, the Court of Appeals and the trial court committed errors of law both with respect to its interpretation of the Emergency Regulation and the NPDES permits. The trial court also

[3] 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).

erred in applying the Emergency Regulation beyond its expiration date of March 23, 2014, an issue left unaddressed by the Court of Appeals. These critical errors of law, either singularly or in a totality, warrant further judicial review by the issuance of a writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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