

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

South Carolina Insurance Reserve Fund,)

Plaintiff,)

v.)

East Richland County Public Service)
District and Coley Brown,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-40-2096

ORDER

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SC Court of Appeals

JEANETTE W. McBRIDE
C.C.P. & G.S.

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RICHLAND COUNTY
FILED

This is declaratory judgment brought by the Plaintiff South Carolina Insurance Reserve Fund ("Fund") to determine whether it owes a duty to defend or a duty to indemnify East Richland County Public Service District ("District") with respect to the underlying civil action captioned *Brown v. East Richland County Public Service District*, Civil Action No. 2010-CP-40-5616 ("2010 Action"). This matter came before me for a non-jury trial the week of June 11, 2012. Although the parties filed competing motions for summary judgment, this matter was heard in a non-jury trial in which testimony was presented by live witnesses as well as deposition excerpts and affidavits. For reasons set forth below, this Court declares that the Fund is not required to defend and indemnify the District.

FACTS

The District is a special purpose district organized under state law to provide sanitary sewer service to Jackson Gills Creek drainage basin in northeast Richland County. The District collects, transports, and treats raw sewage. The District operates by virtue of an NPDES discharge permit issued by the South Carolina Department of Health and Environmental Control ("DHEC").

In 2010, Coley Brown (Brown) filed the 2010 Action against the District alleging causes of action for negligence, trespass and inverse condemnation. The Complaint alleges that an air relief valve on the District's sewage force main installed under Westshore Road in Richland County where Brown resides gave off offensive odors over a period of years and that the continuous or repeated exposure to offensive odors deprived Brown of the use and enjoyment of his property.

In approximately 2000, the District designed and constructed two pump stations within its service territory, one on Percival Road and the other off Decker Boulevard. Each pump station contains a wet well into which sewage flows. When the wet well becomes full, the pumps operate to move the sewage from the well through the force mains to the wastewater treatment plant.

The District also constructed a force main or sewer line which runs beneath Westshore Road in the vicinity of Brown's residence. The force main (like all force mains) was designed and constructed with air relief valves at intervals to control the air pressure within the force main when the sewage is pumped through the line. When stations begin to pump the sewage through the lines, the air relief valve operates to relieve pressure and remains open until the pumps stop at which point the valves close. The valve operates instantaneously once the pressure within the line has built to sufficient force and closes just as quickly once the pressure in the line has been relieved. The system is required to have air relief valves because the pressure must be released to prevent an explosion. The force main was designed to meet industry standards and was approved by DHEC. The air released from the valves may be odorous. Any odors from the system are released when the pumps first operate and the odors dissipate as the system continues to run. It is not a continuous odor while the pumps are operating. The release of the air and any resulting odor when the pumps begin is sudden in that it is not possible to anticipate or predict when the valves will open or close.

Hydrogen sulfide, which has a rotten egg smell, is the byproduct of raw sewage. Methane gas is also released from the force main but it is generally odorless. Other components of the odors given off by raw sewage may be discharged into the atmosphere but none of these components are regulated by DHEC as part of the District's NPDES discharge permit. All of the components of the odors are natural byproducts of raw sewage and are not harmful or toxic to the public when released into the atmosphere. Any danger from the discharge of these odors occurs, if at all, to those maintenance workers who may be required to go into the manhole where the collection of the air is denser. It is not unusual or unexpected to emit hydrogen sulfide from raw sewage in the system.

The District's customers in the vicinity of Westshore Road have complained about odors coming from the force main. Of the over 400 miles of sewer lines operated by the District, the only complaints have originated from the line near Brown's property. However, the complaints

have not been constant or continuous but irregular. Complaints of offensive odors increased during the weekend when residents were most likely to be at home. Offensive odors may not be released through the air relief valve each time the valve opens. Because the odors are not regularly released through the air relief valve, it cannot be anticipated or predicted when offensive odors will be released. District personnel who responded to the complaints were not able to smell any odors when they arrived, except when standing directly over the manhole where it is expected to detect an odor of raw sewage. District personnel are informed and believe that the release of any offensive odors has been infrequent.

To reduce the possibility of odors, the District injected chlorine into the force main from its Percival Road pump station, which was met with some initial success; however, the complaints did not stop. While the chlorine appeared to reduce the odors, chlorine is very corrosive and was beginning to damage the District's equipment. Subsequently, the District took steps to mask the odors by installing charcoal filters or other chemical media in the manholes containing the air relief valves. The filters are designed by the manufacturer to mask any odors which may be released. Again, the filters initially succeeded in eliminating the odors, but again, the filters did not completely eliminate the release of odors into the air. In May 2010, the District modified the air relief valve in the vicinity of the Plaintiff's property to direct the pressure released into a nearby gravity sewer line. This effort appears to have resolved any issue concerning the release of odors from the air relief valve and complaints of odors have stopped. With each effort to eliminate or mask the odors alleged, the District expected that the odors would have ceased.

The District was insured by the Fund at all times relevant to the allegations of the complaint. After service of Brown's complaint, the District tendered the matter to the Fund to defend it under the terms of the insurance policy issued by the Fund. The Fund denied coverage. Historically, the Fund has construed its policy to provide insurance coverage for the release or discharge of raw sewage onto property causing property damage. The discharge in such a case may consist of raw sewage and other items from the sewer system as well as any offensive odors given off by raw sewage.

DISCUSSION

It is well settled law that "the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint." *See Mfrs. & Merchs. Mut. Ins. Co.*

and #3

v. Harvey, 330 S.C. 152, 498 S.E.2d 222, 227 (Ct. App. 1998). "If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." *S.C. Medical Malpractice Liability Ins. Joint Underwriting Assoc. v. Ferry*, 291 S.C. 459, 354 S.E.2d 378, 380 (1987). In *USAA Property & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008), the Supreme Court further explained as follows:

Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a Complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in Complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer.

661 S.E.2d at 798. As a result, to determine whether the Fund owes a duty to defend District, it is necessary to focus on the allegations of the Complaint filed by Brown in the 2010 Action as well as any facts known by the insurer.

The Complaint asserts the following causes of action: (1) inverse condemnation, (2) trespass, and (3) negligence. Brown alleges that the District installed an air relief valve across the street from his property and that the air relief valve releases offensive odors "on a daily basis." Brown Complaint ¶¶11, 12. Brown alleges that the "offensive odors invaded Mr. Brown's property multiple times per day." Brown Complaint ¶13. He also alleges that the "offensive odors which invaded [his] property prevented him from using and enjoying the land." Brown Complaint ¶15.

The Fund issued a Tort Liability Insurance Policy to the East Richland County Public Service District bearing Policy Number T130400210. The District sought insurance coverage under the Tort Liability Insurance Policy for the claims asserted in the 2010 Action but coverage has been denied by the Fund. The District contested that decision, which resulted in the filing of this declaratory judgment action by the Fund.

The District makes several arguments in support of its claim of coverage. As an initial argument, the District claims that the State has waived the defense of sovereign immunity in actions for tort or negligence in which damages are recoverable. S.C. Code Ann. § 15-78-40. Further, the District argues that the Fund is obligated to provide coverage for all risks for which sovereign immunity has been waived by the Tort Claims Act (TCA) citing Section 15-78-140(b) and Section 1-11-140. Importantly, Section 15-78-140(a), as originally included in the TCA, reads as follows:

"It is the duty of the Budget and Control Board to cover risks for which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in Section 15-78-150." That provision supports the District's position; however, in 1997, the General Assembly repealed Section 15-78-140(a) intending to "delete the duty of the Board to purchase insurance to cover risks for which immunity has been waived." 1997 Act No. 155, Part II, § 55. The legislative change occurred after the State Supreme Court issued its decision in *Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 482 S.E.2d 768 (1997), and can certainly be construed as clarifying the duties of the Board and the Fund in light of the adverse ruling in *Duncan*. See *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent."). Consequently, the General Assembly, by repealing Section 15-78-140(a), stated its intent that the Fund does not have a duty to cover any risk for which sovereign immunity has been waived.

In *Town of Duncan*, two complaints were filed against the Town arising out of alleged violations of the Whistleblower Act, codified at S.C. Code Ann. §§8-27-10 et seq., and claims of intentional infliction of emotional distress. The Board refused to defend the action claiming that the insurance policy did not provide coverage. A declaratory judgment action was filed. The trial court found that the Whistleblower Act was not within the purview of the TCA and the policy only provided coverage for those claims for which immunity was waived under the TCA. The Supreme Court disagreed and reversed the trial court. In doing so, the Supreme Court ruled that Section 1-11-140(A) authorized the Board to "provide insurance 'so as to protect the State against tort liability.' The Tort Claims Act is not mentioned." 482 S.E.2d at 772. Further, the Court held that the Board's duty to defend should not be predicated on whether the Whistleblower action is covered by the TCA. Rather the policy itself should be examined to see whether coverage is provided. *Id.* Thus, to determine if the Fund is required to defend the 2010 Action, the terms of the policy itself control.

Under the terms of the insurance policy issued pursuant to state law, the Fund shall pay all sums which the District shall become legally obligated to pay as damages because of "property damage to which this applies caused by an occurrence." Tort Liability Insurance Policy, Section I.B. Under the policy:

“Occurrence” means an accident, including continuous or repeated exposure to conditions, which result in personal injury or property damage neither expected nor intended from the standpoint of the insured.

Tort Liability Insurance Policy, Section III. “Property damage” means:

- (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
- (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Id.

Here, the Brown Complaint alleges a claim giving rise to damages including the loss of use of his property. Brown’s property has not been physically injured or destroyed; therefore, the loss of use must be caused by an occurrence, which is the continuous or repeated exposure to offensive odors that is neither intended nor expected from the District’s standpoint. The District claims there was an occurrence. The Fund asserts there was no occurrence, or even if there was an occurrence, the policy exclusions apply to defeat coverage. Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability. *Owners Insurance Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) citing *Boggs v. Aetna Cas. & Sur. Ins. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979).

The Fund claims that Exclusion (p) specifically excludes from coverage any claims or damages from inverse condemnation. Exclusion (p) provides that insurance does not apply to “bodily injury or property damage arising out of or in any way connected with the operation of the principals [sic] of eminent domain, condemnation proceedings, inverse condemnation, or takings, by whatever name called” The District, on the other hand, cites to the case of *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001), in which the Court of Appeals concluded that the Fund’s Tort Liability Policy did cover inverse condemnation claims. However, the Court of Appeals pointed out that the policy at that time did not contain an exclusion for inverse condemnation. Exclusion (p) was adopted subsequent to the *Horry County* decision and is an express exclusion of inverse condemnation claims. It is a valid and enforceable provision and bars coverage for inverse condemnation claims.

The Fund next argues that the trespass and negligence causes of action are also not

covered because of an exclusion under the policy, specifically the pollution exclusion. Exclusion (f) provides that the insurance does not apply to “personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant[s], contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*” The highlighted language is an exception to the exclusion. While the burden is on the Fund to establish that an exclusion applies, the burden is on the District to demonstrate that an exception to the policy exclusion is applicable. See *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 460, n.5 (2004).

This very exception has been subject to interpretation by the S.C. Supreme Court in the case of *Greenville County v. Ins. Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994). In that case, the Court held that the term “sudden” should be interpreted as “unexpected.” Therefore, to assess the applicability of the pollution exclusion, it is necessary to determine whether the discharge or release of the offensive odors was unexpected and accidental. In *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, *supra* 357 S.C. 631, 594 S.E.2d 455 (2004), the Supreme Court, while applying an identical pollution exclusion, explained that “property damage caused by pollution arising from ordinary business operations is not covered, but if the damage were caused by a ‘sudden and accidental’ discharge, release, or escape of pollutants, then the insurers must provide coverage.” 594 S.E.2d at 460.

Helena Chemical Company was a pesticide manufacturer. The trial court concluded that the pesticide contamination on the property resulted from the “incidental release of pesticides during the routine operations of grinding pesticide into dust, loading, unloading, bagging and formulating pesticides.” 594 S.E.2d at 460. The Supreme Court agreed that “the contamination at the various sites was caused by Helena’s routine business operations.” *Id.* The Court further explained that “routine discharge of pollutants occurred at the various Helena facilities during ordinary operations.” 594 S.E.2d at 461. The Supreme Court held that “the pollution releases were not unexpected and accidental.” 594 S.E.2d at 462. As a result, the Supreme Court concluded that “the exception to the pollution exclusion does not apply, and the insurance companies are not liable for the environmental cleanup.” *Id.*

The same is true in the present case. Based on the allegations of the Complaint and

information readily available to the Fund, the District's discharge of offensive odors from the air relief valve, which are alleged to have occurred multiple times a day for years, is part of the District's ordinary operations. The very purpose of an air relief valve is to release air from the line, and thus, it is reasonably anticipated and foreseeable that odors will be released. The release of the odors, considered offensive by some, cannot be deemed to be sudden and accidental. The release of the offensive odors is no different from the "routine discharge of pollutants" found by the Supreme Court in *Helena Chemical*. Thus, the allegations of the Brown Complaint and the other information available to the Fund lead to the conclusion that the discharge of the offensive odors from the air relief valve is part of the ordinary operations of the District.

The District argues that the offensive odors is not listed in the policy exclusion and is not defined by the policy. Because the terms are not defined there is no evidence that the policy intended to exclude unregulated naturally occurring odors that are a byproduct of raw sewage. According to the District, the policy must be broadly construed against the Fund and in favor of coverage. Based upon the plain meaning of the words used in Exclusion (p), the offensive odors would be covered. The exclusion applied to vapors, fumes, and gases as well as other irritants and pollutants on land or in the atmosphere. The meaning of these terms as defined in the dictionary clearly encompasses the odors released by the sewer system. Gas is defined as "a substance that can be used to produce a poisonous, asphyxiating, or irritating atmosphere;" fume is "a smoke, vapor or gas especially when irritating or offensive;" irritant is "something that irritates ... tending to produce physical irritation". *Webster Collegiate Dictionary*, 481, 472, 620 (3d ed.). Based on these definitions, the odor created by the hydrogen sulfide and other byproducts are gases or fumes that create an irritating atmosphere and are offensive to the neighbors on Westshore Drive.

Additionally, the District contends that the release of offensive odors from the air relief valve across the street from Brown's property is unexpected and accidental. However, that is certainly not consistent with Brown's pleadings where he alleges that the release of offensive odors occurs "multiple times per day" and has occurred since the air relief valve's installation. See Brown Complaint ¶¶12-13. In answering these allegations, the District claims to lack sufficient information to form a belief as to the truth of those allegations. See Answer to Brown Complaint ¶¶14-15. Based on the pleadings and information available to the Fund, there has been

no suggestion that the release of odors was a one time or infrequent event at or near Brown's property, and in fact, the information presented in this case supports the conclusion that the District received numerous odor complaints from Brown and others. Indeed, the allegations and information available to the Fund support the conclusion that the release of the odors at the air relief valve in question is part of the District's ordinary business operations. The Supreme Court, while applying an identical pollution exclusion, explained that "property damage caused by pollution arising from ordinary business operations is not covered." *Helena Chemical*, 594 S.E.2d at 460. The fact that attempts have been made to correct the problem does not alter the analysis.


The District also argues that the pollution exclusion is ambiguous when read together with the definition of "occurrence." The District contends that the policy definition of "occurrence" includes "continuous or repeated exposure to conditions," but the pollution exclusion excludes coverage for the continuous or repeated release of pollutants. In the case of *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005), the Supreme Court addressed a similar claim that the insuring agreement purported to cover certain claims which were then "eliminated" by a policy exclusion. The Supreme Court reversed the trial court and found no ambiguity agreeing that "logically, exclusions can only apply to otherwise covered items." *Id.*, 614 S.E.2d at 613. The Court further explained that where "the coverage 'elimination' is found in one of the policy's exclusions, not in inconsistent definitions," then there is no ambiguity. *Id.*, 614 S.E.2d at 614. The Court distinguished the case of *S.C. State Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991), where the Court had found an ambiguity created by two inconsistent policy definitions. Here, the District is claiming an inconsistency between the definition of "occurrence" and a policy exclusion. As interpreted in conjunction with the *Owners* decision, there is no ambiguity under those circumstances.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Plaintiff S.C. Insurance Reserve Fund does not owe a duty to defend or a duty to indemnify to the Defendant East Richland County Public Service District in the civil action captioned, *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment is **GRANTED**. Defendant's Motion for Summary Judgment is **DENIED** and the District's counterclaim is **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 9, 2013

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