THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Alison Renee Lee, Presiding Judge

Appellate Case No. 2014-000728

South Carolina Insurance
Reserve Fund, Respondent,

v.

East Richland County Public Service
District and Coley Brown, Defendants

Of Whom East Richland County Public Service District is Appellant,

And Coley Brown is a Respondent.

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INITIAL REPLY BRIEF OF APPELLANT EAST RICHLAND COUNTY PUBLIC SERVICE DISTRICT

Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Telephone: 803-771-0555
Facsimile: 803-771-8010
Email: selliott@elliottlaw.us
Attorney for Appellant East Richland
County Public Service District

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I.

THE CIRCUIT COURT ERRED IN CONCLUDING THAT STATUTORY LAW DID NOT REQUIRE THE INSURANCE RESERVE FUND POLICY TO PROVIDE COVERAGE FOR THE ALLEGATIONS OF THE COMPLAINT IN THE UNDERLYING ACTION.

The policies issued by the Budget and Control Board must provide coverage for its insureds which cover those risks for which immunity has been waived in conformity with the Tort Claims Act. S.C. Code Ann. Sections 1-11-140, 15-78-140(b). The Respondent Insurance Reserve Fund ("Respondent Fund") seems to argue that it has the unfettered discretion to determine which risks it insures. The Respondent Fund is mistaken.

The General Assembly has authorized the Respondent Fund to provide insurance for the State, its departments and agencies. S.C. Code Ann. Section 1-11-140(A). Political subdivisions of the State such as the Appellant may procure insurance in the same manner provided for the procurement of this insurance for the State. S.C. Code Ann. Section 1-11-140(B). S.C. Code Ann. Section 1-11-140 provides for the exclusive means for the procurement of tort liability insurance by the State, its agencies or political subdivisions. S.C. Code Section 1-11-140(C).

If a political subdivision procures tort liability insurance from private sources, it must procure its automobile liability and property can casualty insurance from other sources and shall not procure these coverages through the Budge and Control Board. S.C. Code Ann. 15-78-140(b)(1). However,

> If a political subdivision procures its tort liability insurance, automobile liability insurance, or property and casualty insurance through the Budget and Control Board, **all liability exposures** of the political subdivision as well as its property and casualty insurance must be insured with the Budget and Control Board; [Emphasis added] S.C. Code Ann. Sections 1-11-140, 15-78-140(b)(2).

Having chosen to procure its insurance through the Respondent Fund, the Appellant must insure all liability exposures as well as its property and casualty insurance through the Respondent Fund. However, the obligations are mutual. Not only does the Appellant have the obligation to insure all liability exposures through the Respondent Fund, but also the Respondent Fund has the obligation to insure the Appellant against all liability exposures. To construe S.C. Code Section 1-11-140 together with S.C. Code Section 15-78-140 otherwise defies logic and leads to an absurd result.

The Respondent Fund argues, and the Circuit Court held, that the General Assembly has deleted the duty of the Budget and Control Board to insure the all risks for which sovereign immunity has been waived, including the allegations of the complaint in the underlying action. However, the Respondent Fund offers no guidance on what risks are required to be insured. In essence, the Respondent Fund argues that by statute it has the unfettered discretion to determine those risks for which immunity has been waived that it will insure. Granting the Respondent Fund the discretion to exclude coverage of the allegations in the complaint in the underlying action, grants it the discretion to exclude all risks. Thus, the Respondent Fund would argue, and the Circuit Court so held, that the statutes in question repose an absolute, unregulated and undefined discretion in the Respondent Fund to determine which risks it will insure, a construction of the statute that impermissibly confers arbitrary powers upon the Respondent Fund. South Carolina State Highway Department v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955).

However, a careful review of the applicable statutory law reveals no such discretion. The purpose of the South Carolina Tort Claims act is to limit a political subdivision's liability for

torts for which sovereign immunity has been waived. S.C. Code Ann. Section 15-78-20(a) provides:

> Thus, while total immunity from liability on the part of the government is not desirable ...neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions. S.C. Code Ann. §15-78-20(a).

Consequently, the General Assembly waived sovereign immunity but in so doing, required the State and its political subdivisions to insure against the risks for which they stood liable. S.C. Code Ann. Section 15-78-140(b). The pollution exclusion in the Respondent Fund's policy is neither expressly nor impliedly authorized by statute. The application of the pollution exclusion arbitrarily operates to defeat the purpose of limiting liability for torts for which sovereign immunity has been waived.

The Respondent Fund has issued a policy insuring all of the Appellant's liability exposures. The Respondent Fund, may not construe S.C. Code Ann. Sections 1-11-140 and 15-78-140 to vest it with the unfettered discretion to determine which liability exposures it will insure. To hold otherwise impermissibly subjects the Appellant to liability against which it is protected under State statute.

ARGUMENT

II.

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE POLLUTION EXCLUSION OF THE RESPONDENT FUND POLICY EXCLUDED COVERAGE OF THE ALLEGATIONS OF THE COMPLAINT IN THE UNDERLYING ACTION.

The Respondent Fund argues that based on the allegations of the complaint and the information readily available to it, the offensive odors from the air relief valve alleged in the complaint constitute pollution and are a part of the District's ordinary operations; and therefore,

the Respondent Fund insurance policy pollution exclusion effectively excludes coverage of the allegations of the complaint. The Respondent Fund's argument fails in several respects.

The pollution exclusion in this case reads as follows:

VI.
Exclusions

> (f) 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, 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 Respondent Fund bears the burden of establishing the applicability of its pollution exclusion. Owners Insurance Co. v. Clayton, 364 S.C. 555, 614 S.E.2d 611 (2005). The complaint in the underlying action alleges that offensive odors were released by the Appellant's air relief valve. However, the pollution exclusion does not include the phrase "offensive odors" or the word "odor." The complaint in the underlying action does not allege that the odors were toxic or otherwise harmful. It is undisputed that the odors are not regulated by the South Carolina Department of Health and Environmental Control as pollution and that the odors released in the atmosphere are not harmful. (2013 Order p. 2). Policy exclusions are to be construed against the Respondent Fund and in favor of coverage. McPherson v. Michigan Mutual Ins. Co., 310 S.C. 316,319,426 S.E.2d, 770,771 (1993). The Respondent Fund has not and cannot demonstrate that mere odor alleged constitute pollution.

The Appellant has demonstrated that the allegations of the underlying complaint and information available to the Respondent Fund fall within the exception to the pollution exclusion.

The Respondent Fund policy is ambiguous in a couple of respects, both of which have to do with whether the Appellant intended the harm alleged in the complaint in the underlying action. First, the word "sudden" found in the pollution exclusion of record is inherently ambiguous and could be construed to mean unexpected or unintended. Greenville County v. Insurance Reserve Fund, 313 S.C. 546, 443 S.E.2d 552 (1994).

In addition, the Respondent Fund's policy is ambiguous by virtue of the similarities in the language of the definition of the term "occurrence" and the exception to the pollution exclusion. As argued in Appellant's brief, the complaint in the underlying action alleges property damage caused by an occurrence which is covered under the provisions of the Respondent Fund's insurance policy. Appellant's brief at pp. 15-16; see also Wakefield Port, Inc. v. Ram Mut. Ins. Co., 731 N.W.2d 154 (Minn. App. 2007). For a discussion of coverage of the policy's property damage provisions, see Argument III *infra*. The policy defines occurrence as:

> "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.** [Emphasis added] Policy Section III.

The Appellant neither expected nor intended the release of the offensive odors.

In determining whether the Appellant intended to release odors from its air relief valve to satisfy the provisions of both the definition of occurrence or the exception to the pollution exclusion, the Circuit Court must determine that not only the act causing the loss was intentional but also that the result of that act was intended by the Appellant. Miller v. Fidelity-Phoenix Insurance Company, 268 S.C. 72, 231 S.E.2d 701 (1977); Vermont Mutual Insurance Company v. Singleton, 316 S.C. 5, 446 S.E.2d 417 (1994).

The Supreme Court in Miller v. Fidelity-Phoenix Insurance Company construed an "intentional exclusion" provision of an insurance policy with respect to facts in which a ten (10)

year old insured burned his house to the ground. The Supreme Court concluded that while the insured intended to burn the house, he did not intend to burn it to the ground but rather the insured set the fire intending to enjoy the thrill of seeing the fire department respond to put out the blaze. Construing the intention exclusion of the policy liberally in favor of the insured, the Supreme Court found the damage to the residence was unintended by the insured and covered under the policy.

Here, the record reflects that the Appellant intended to build a force main sewer line with air relief valves at intervals which operate to release air from the sewer lines to protect the integrity of the sewer line. The construction of air relief valves is an accepted construction practice. No party contests that the Appellant is in compliance with DHEC environmental regulations. However, it is equally clear from the record that the Appellant did not intend to release offensive odors from its air relief valve as alleged in the complaint in the underlying action. It is undisputed in this record that prior to the allegations of the complaint in the underlying action, the Appellant had no history of releasing odors from its 400 miles of sewer lines. The evidence is undisputed that the Appellant took many steps to eliminate or mask the odors. The fact that the Appellant acted to eliminate the odors and in every instance, was initially successful in eliminating odors until its ultimate resolution of the matter, compels the conclusion that the Appellant never intended the release of odor. Moreover, the Appellant's answer contests the allegations that the release of odors was frequent and the Appellant's personnel in responding to the infrequent odor complaints were never able to smell an odor unless standing directly over a manhole. All of these facts are not in dispute and were available to the Respondent Fund. Based on the information available to the Respondent Fund, the only

conclusion to be drawn was that the release of the odor alleged in the complaint was not intentional.

Furthermore, it is clear from the facts alleged in the complaint and available to the Respondent Fund that the release of odors was rare and were not a part of the Appellant's ordinary operations. Accordingly, the decision in Helena Chemical Company v. Allianz Insurance Company, 357 S.C. 631, 594 S.E.2d 455 (2004) provides no support for the Respondent on this issue.

The record is devoid of any evidence that the Appellant's alleged release of odors from its air relief valve was intentional. The Circuit Court erred in failing to hold that the allegations of the complaint in the underlying action fell within the exception to the pollution exclusion, requiring the Respondent Fund to provide coverage of the complaint.

Because the pollution exclusion does not define the odors alleged as pollution, the Respondent Fund is compelled to cite certain case law authority from other jurisdictions in support of its argument that the offensive odors such as those alleged in the complaint fall within the scope of a pollution exclusion. However, these decisions are inapplicable to the facts of this case for a number of reasons. See Wakefield Port, Inc. v. Ram Mut. Ins. Co., 731 N.W.2d 154 (Minn. App. 2007) [odors alleged to be noxious exacerbating health problems]; City of Spokane v. United National Ins. Co., 190 F.Supp.2d 1209 (E.D. Wash. 2002) [odors from municipal composting operation classified as air contaminant by state law allegedly causing health problems]; Kruger Commodities, Inc. v. United States Fidelity & Guaranty, 923 F.Supp. 1474 (M.D. Ala. 1996) [odors from animal carcass processing plant alleged to cause physical illness, an allegation conceded by processor]; City of Bremerton v. Harbor Ins. Co., 92 Wash. App. 17, 963 P.2d 194 (1998) [odors from sewage treatment plant alleged to be toxic]. The allegations of

the complaint in the underlying action allege that the odors are offensive, but unlike the facts set out in the above, do not allege at the odors constitute a health hazard or are otherwise toxic.

The pollution exclusion in each of the cases cited immediately above contains no exception for sudden and accidental discharge of pollutants, distinguishing each from the case before the Court. As set out, the record compels the conclusion that the Appellant's conduct falls within the exception of the pollution exclusion thereby requiring coverage.

The Respondent Fund argues that the Appellant has withdrawn its appeal of its Circuit Court Order denying Appellant relief with respect to its inverse condemnation claim. (Respondent Fund Brief at p. 11). However, the Appellant did preserve this issue for appeal. As argued, the inverse condemnation claim is inexplicably intertwined with the allegations of complaint sounding in negligence militating in favor of coverage. (See Horry County v. Insurance Reserve Fund, 344 S.C. 493, 544 S.E. 2nd 637 (Ct. App. 2001) (Appellant's Brief at p. 13).

The Circuit Court below failed to properly apply the law applicable to the facts and its conclusion that the pollution exclusion contained in the Respondent Fund policy excluded coverage of the allegations of the complaint in the underlying action was in error. The policy exclusion did not apply to the allegations of the complaint in the underlying action and the Circuit Court should be reversed.

ARGUMENT

III.

THE DAMAGES ALLEGED IN THE COMPLAINT IN THE UNDERLYING ACTION QUALIFY AS "PROPERTY DAMAGE" AS DEFINED BY THE RESPONDENT FUND'S TORT LIABILITY POLICY.

The complaint in the underlying action alleges that the offensive odors prevented the Plaintiff homeowner from using and enjoying his property. As such, the allegations are sufficient to qualify as property damage under the Respondent Fund policy.

Under the terms of the policy, the Respondent Fund is required to pay all sums for which the Appellant becomes obligated to pay as damages because of property damage. Property damage is described by the Respondent Fund policy as follows:

"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. [Emphasis added] Policy Section III.

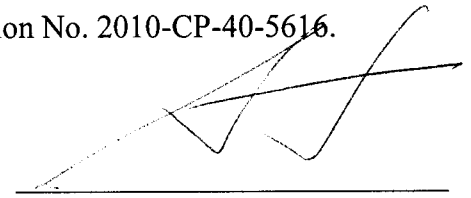
The complaint in the underlying action alleges that the Plaintiff owns a residence on Westshore Road in Richland County; that the Appellant constructed an air relief valve across the street from Plaintiff's property; that the air relief valve released offensive odors which prevented the Plaintiff from using and enjoying his residence; and that as a consequence, the Plaintiff was forced to move from his residence on Westshore Road. (Complaint pp. 2-3). The underlying complaint alleges the Plaintiff's loss of use of his property, a loss insured by the Respondent Fund policy.

The decision in Auto Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003) is of no help to the Respondent Fund. There, the underlying complaint did not allege that the plaintiff lost the use and enjoyment of the affected property but only economic damages such as the diminution of value of the property.

Accordingly, the property damage alleged in the complaint in the underlying action qualifies as property damage covered by the Respondent Fund's policy.

CONCLUSION

For the foregoing reasons and those set out in the Brief of Appellant, the Appellant East Richland County Public Service District submits that the Circuit Court erred in granting summary judgment in favor of the Respondent Fund. The Appellant respectfully submits that the Circuit Court be reversed and the matter remanded with instructions that the Respondent Fund be ordered to defend and indemnify the Appellant in the action captioned Brown v. East Richland County Public Service District, Civil Action No. 2010-CP-40-5616.



Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555 (P)
803-771-8010 (F)
selliott@elliottlaw.us
Attorney for the Appellant East Richland
County Public Service District

Columbia, South Carolina
January 20, 2015

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief and Designation of Matter to be included in the Record on Appeal of Appellant East Richland County Public Service District on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on January 20, 2015.

Andrew F. Lindemann, Esquire Davidson and Lindemann, PA Post Office Box 8568 Columbia, SC 29202-8568 alindemann@dml-law.com Attorney for Respondent South Carolina Insurance Reserve Fund	Kenneth E. Berger, Esquire The Law Office of Kenneth E. Berger, LLC 5205 Forest Drive, Suite 2 Columbia, SC 29206 kberger@bergerlaw.sc.com Attorney for Respondent Coley Brown

Linda B. Kitchens, Legal Assistant
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555

January 20, 2015

ELLIOTT & ELLIOTT, P.A.

ATTORNEYS AT LAW
1508 Lady Street
COLUMBIA, SOUTH CAROLINA 29201
selliott@elliottlaw.us

SCOTT ELLIOTT

TELEPHONE (803) 771-0555
FACSIMILE (803) 771-8010

January 20, 2015

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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: South Carolina Insurance Reserve Fund v. East Richland County Public Service District and Coley Brown
Appellate Case No. 2014-000728

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief and Designation of Matter to be included in the Record on Appeal of Appellant East Richland County Public Service District, together with Proof of Service in the above-captioned matter. I have also enclosed an extra copy of this document, which I would ask you to date stamp and return to me via my courier. By copy of this letter, I am serving all other parties of record with the above-referenced document. If you have questions or require any further information, please do not hesitate to contact me.

Thank you for your time and assistance.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott
S.C. Bar #1872

SE/mlw
Enclosures

cc: Andrew F. Linderman, Esquire (w/encl.)
Kenneth E. Berger, Esquire (w/encl.)