THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-2096

South Carolina Insurance Reserve Fund, ... Respondent,

v.

East Richland County Public Service District
and Coley Brown, are ..... Defendants,

of Whom, East Richland County Public Service District, is ..... Appellant,

and Coley Brown, is ..... Respondent.

BRIEF OF RESPONDENT SOUTH CAROLINA INSURANCE RESERVE FUND

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STATEMENT OF THE CASE

This is a declaratory judgment brought by the Respondent South Carolina Insurance Reserve Fund ("IRF") to determine whether it owes a duty to defend or a duty to indemnify to the Appellant 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 Number 2010-CP-40-5616.

The IRF issued a Tort Liability Policy to the District bearing Policy Number T130400210. (R. 173-186). The District sought insurance coverage under the Tort Liability Policy for the claims asserted in Civil Action Number 2010-CP-40-5616, but coverage was denied by the IRF. The District contested that coverage decision, which resulted in the IRF filing this declaratory judgment action. (R. 12-14).

The IRF and the District filed cross motions for summary judgment. Before those motions were heard, the case was called for a non-jury trial before Circuit Judge Alison Renee Lee. The parties agreed that the materials submitted in support of the motions for summary judgment would be admitted into evidence, including deposition testimony, affidavits, copies of the pleadings from the underlying case, and the policies. The District then presented the live testimony of Larry Brazzell, the executive director for the District, who was also subject to cross-examination. (R. 68-78).

By Order filed September 30, 2013, Judge Lee ruled that the IRF "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." (R. 9). The District filed a Rule 59(e) motion which was subsequently denied by an Order filed March 6, 2014. (R. 11).

The District thereafter filed the current appeal.

ARGUMENTS

I. The trial court correctly rejected the Appellant's argument that the Insurance Reserve Fund must provide tort liability coverage for all torts for which sovereign immunity has been waived under the Tort Claims Act.

As an initial argument, the Appellant East Richland County Public Service District claims that the Insurance Reserve Fund is obligated to provide coverage for all risks for which sovereign immunity has been waived by the South Carolina Tort Claims Act. After a bench trial, Circuit Judge Alison Renee Lee rejected that argument. Judge Lee correctly ruled that, contrary to the District's position, the IRF is not mandated by statute to provide coverage for all liability for which sovereign immunity has been waived. As a result, the Tort Liability Policy issued by the IRF may include exclusions of coverage, including the pollution and inverse condemnation exclusions on which Judge Lee relied in concluding that the IRF owed no coverage to the District for the claims brought by Coley Brown.

The District's argument is premised on its claim that the IRF Tort Liability Policy must provide coverage for all risks for which immunity has been waived under the Tort Claims Act. According to the District, "[w]hen the complaint alleges a claim for which the Appellant is liable under the Act, the Respondent Fund must insure such risks and the Respondent Fund's policy must be construed to insure the

Appellant against all risks to which it is exposed under the Act." *See*, Appellant's Brief, p. 12. The District cites two cases for that premise, *Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890 (1973), and *Town of Duncan v. State Budget & Control Board*, 326 S.C. 6, 482 S.E.2d 768 (1997). Neither case is controlling.

Hogan is entirely inapposite. It addresses an uninsured motorist claim against a private insurer. The IRF is not a party to that action, and no insurance policy issued by the IRF is addressed. *Hogan*, in fact, pre-dates the waiver of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), by twelve years. *Hogan* simply does not require the IRF to insure all risks for which immunity is waived under the Tort Claims Act.

In *Town of Duncan v. State Budget & Control Board*, 326 S.C. 6, 482 S.E.2d 768 (1997), the Supreme Court ruled that an action brought pursuant to the Whistleblower Act was covered by the IRF under the Tort Liability Policy issued to the Town of Duncan. The Supreme Court found that the IRF did not provide coverage only for actions brought under the Tort Claims Act. In so ruling, the Supreme Court cited to Section 15-78-140(a), as originally included in the Tort Claims Act, which read 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." *See*, S.C. Code Ann. § 15-78-140(a) (repealed). But, the Supreme Court found that the duty

was not exclusive and did not prevent the IRF from insuring other risks. Thus, the Supreme Court explained that "[t]here is no provision limiting coverage to claims allowed under the Tort Claims Act," and as a result, the IRF's duty to defend or indemnify is not predicated on whether a claim is brought under the Tort Claims Act. 482 S.E.2d at 772. Instead, "the policy itself should be examined to see whether coverage is provided by its terms." *Id.*

In the case at bar, the District relies on *Town of Duncan* for the premise that that IRF must insure all tort liability. That is not what *Town of Duncan* holds; instead, as Judge Lee observes in her Order, the Supreme Court instructed that the insurance policy controls, and it is the policy that "should be examined to see whether coverage is provided by its terms." 482 S.E.2d at 772. In fact, if the Supreme Court in *Town of Duncan* had concluded that all tort liability must be covered by the IRF, there would have been no reason for the Court to even engage in the analysis that the Court undertook to determine if the policy language provided coverage for a Whistleblower Act claim. That analysis would have been entirely superfluous.

Thus, the *Town of Duncan* case only helps the District with its position because of the Supreme Court's brief mention of Section 15-78-140(a). That statute, in fact, would appear to support the District's position; however, in 1997, the General Assembly repealed Section 15-78-140(a). *See*, 1997 Act No. 155, Part II, § 55(E).

The title to Section 55 expressly states the General Assembly's intent "to delete the duty of the Board to purchase insurance to cover risks for which immunity has been waived." *See*, 1997 Act No. 155, Part II, § 55. That legislative change occurred after the Supreme Court issued its decision in *Town of Duncan* and can certainly be construed as establishing (or at least clarifying) the duties owed and not owed by the Budget and Control Board and the IRF in light of the discussion in *Duncan*. *See*, *Duvall v. South Carolina Budget and 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 IRF does not have a duty, as the District continues to argue, to cover every risk for which sovereign immunity has been waived. Quite simply, with the repeal of Section 15-78-140(a), there is no "statutory mandate" that the IRF provide coverage for all torts. The IRF may include exclusions in its policies, including the pollution exclusion at issue in this case. There is no statute that bars the IRF from excluding coverage for pollution.

The District appears to argue, nonetheless, that the District is statutorily required to procure its tort liability insurance only from the IRF and thus has no

options to acquire insurance that covers risks that are currently excluded under the pollution exclusion.[1] The District cites to Section 1-11-140(a), which is the enabling act authorizing the Budget and Control Board (and hence the IRF) "to provide insurance for the State, its departments, agencies, institutions, commissions, boards, and the personnel employed by the State in its departments, agencies, institutions, commissions, and boards so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment." *See*, S.C. Code Ann. § 1-11-140(a). However, the IRF is not the exclusive source for tort liability coverage for political subdivisions of the State. That is explicitly stated in Section 15-78-140(b), which is part of the Tort Claims Act and authorizes political subdivisions to procure coverage in one of four ways: "(1) the purchase of liability insurance pursuant to § 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." *See*, S.C. Code Ann. § 15-78-140(b). Thus, the District, if unsatisfied with the coverage

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[1] In actuality, the District's argument is inconsistent on this point because the District earlier writes in its brief as follows: "If the insurance coverage is purchased privately, the Appellant is under no similar constraint but can procure its insurance from a single private source but [sic] may procure coverage from multiple private sources to comply with the Act." *See*, Appellant's Brief, p. 9.

procured from the IRF, is not without options and can procure coverage from other sources.[2]

In sum, Judge Lee was correct in rejecting the District's argument that the IRF must provide tort liability coverage for all torts for which sovereign immunity has been waived under the Tort Claims Act. The IRF is not statutorily precluded from excluding coverage for such risks as pollution or inverse condemnation.[3] Instead, as the Supreme Court instructs in *Town of Duncan*, which is echoed by Judge Lee, it is the policy language that governs.

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[2] The District also cites to Section 1-11-140(c), which states: "The procurement of tort liability insurance in the manner provided is the exclusive means for the procurement of this insurance." *See*, S.C. Code Ann § 1-11-140(c). However, that provision refers only to the procurement of tort liability insurance by the State and its agencies. That provision does not apply to political subdivisions, such as the District. In fact, if Section 1-11-140(c) were construed to apply also to political subdivisions, then the provision would obviously be in conflict with Section 15-78-140(b), which gives political subdivisions four separate options for procuring tort liability insurance, as discussed above. In that case, Section 15-78-140(b) would control as it is well settled that "later legislation takes precedence over earlier legislation." *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242, 243 (1993). Section 1-11-140(c) pre-dated the 1986 enactment of the Tort Claims Act.

[3] As discussed below, it does not appear that the District has appealed Judge Lee's ruling that Exclusion (P) bars coverage for the inverse condemnation claim. However, to the extent that is incorrect, the IRF would note that inverse condemnation is not a tort that falls within the scope of the Tort Claims Act. As this Court has explained, an inverse condemnation action "is not based on tort, but on the constitutional prohibition of the taking of property without compensation." *Horry County v Insurance Reserve Fund*, 344 S.C. 493, 544 S.E.2d 637, 640 (Ct. App. 2001). *See also*, *Hawkins v City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 562 (Ct. App. 2004). Therefore, there exists no statutory requirement for the IRF to provide insurance coverage for inverse condemnation claims

II. The trial court correctly ruled that each of the causes of action asserted by Coley Brown in his Complaint are excluded under the IRF Tort Liability Policy.

As its second issue on appeal, the District contends that the tort allegations in the underlying lawsuit are covered by the Tort Liability Policy issued by the IRF to the District. Judge Lee, however, found that coverage was excluded under the IRF policy. She ultimately ruled that the IRF "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." (R. 9). That declaratory ruling is correct and should be affirmed.

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, Manufacturers and Merchants Mut. Ins. Co. 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." *South Carolina Medical Malpractice Liability Ins. Joint Underwriting Association v. Ferry*, 291 S.C. 459, 354 S.E.2d 378, 380 (1987). In *USAA Property and 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 a 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 IRF owes a duty to defend the District, it is necessary to focus on the allegations of the Complaint filed in Civil Action Number 2010-CP-40-5616 as well as the facts known by the insurer.

The Complaint filed by Coley Brown in Civil Action Number 2010-CP-40-5616 asserts the following causes of action: (1) inverse condemnation, (2) trespass, and (3) negligence. Brown alleges that the District installed an air relief valve or "burp station" across the street from his property and that the air relief valve releases offensive odors "on a daily basis." *See* Complaint, ¶ 12. (R. 22). Brown alleges that the "offensive odors invaded Mr. Brown's property multiple times per day." *See*, Complaint, ¶ 13. (R. 22).

The IRF policy includes an insuring agreement providing as follows: "The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. Personal Injury or B. Property Damage to which this applies caused by an occurrence." (R. 182). The policy also includes two exclusions that are applicable to the claims brought by Coley Brown,

specifically Exclusion (P) which is the inverse condemnation exclusion, and Exclusion (F) which is the pollution exclusion.

It is unnecessary for this Court to even address coverage for the inverse condemnation claim. The District has not appealed that ruling. The only mention of the coverage ruling on the inverse condemnation claim is a brief footnote where the District writes: "The question of whether the Respondent Fund policy effectively excluded the claim for inverse condemnation is far from clear." *See*, Appellant's Brief, p. 13. It is well settled, however, that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Nonetheless, even if this Court addresses the inverse condemnation issue on the merits, it is clear that the IRF's denial of coverage is correct. That denial is supported by Exclusion (P) which provides no coverage for "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." (R. 185). In its three-sentence footnote, the District cites to the case of *Horry County v. Insurance Reserve Fund*,

344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001), in which this Court concluded that the IRF's Tort Liability Policy did cover inverse condemnation claims. However, this Court pointed out that the policy at that time did not contain an exclusion for inverse condemnation. 544 S.E.2d at 640. Exclusion (P) was adopted subsequent to and as a result of the *Horry County* decision. With respect to the claim at issue, the Tort Liability Policy did include an express exclusion for inverse condemnation claims, namely Exclusion (P), which is valid and enforceable and bars coverage for inverse condemnation claims.[4]

As for the trespass and negligence causes of action, Judge Lee correctly ruled that those claims are not covered based upon Exclusion (F), which is the pollution exclusion. Exclusion (F) provides as follows:

> [T]he 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

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[4] The sole recovery in an inverse condemnation claim is diminution of property value. *See*, *Mibbs, Inc v South Carolina Dept. of Revenue*, 337 S.C. 601, 524 S.E.2d 626, 628 (1999) ("[c]ollateral damages ... are not recoverable on a takings claim"); *Westside Quik Shop, Inc v Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000) (consequential damages are not recoverable by way of a taking or inverse condemnation claim). In 2003, the Supreme Court decided the case of *Auto-Owners Ins Co v Carl Brazell Builders, Inc*, 356 S.C. 156, 588 S.E.2d 112 (2003), in which the Court ruled that diminution of property value is not "property damage" as defined by the policy. As further discussed below, the definition of "property damage" in the IRF's policy is substantially similar to that at issue in the *Auto-Owners* litigation. Thus, for this additional reason, there is no coverage for Brown's inverse condemnation claim.

> water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

(R. 184). (Emphasis added). The highlighted language is an exception to the exclusion. That very exception has been subject to interpretation by the Supreme Court in the case of *Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994), in which 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 Chemical Co. v. Allianz Underwriters Ins. Co.*, 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." 594 S.E.2d at 460.

The *Helena Chemical* case is instructive. Helena Chemical Company was a pesticide manufacturer. The trial court concluded that the pesticide contamination 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 Supreme 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 IRF, 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 noxious odors will be released. The release of the offensive odors thus cannot be deemed to be sudden and accidental, as those terms have been construed in the cases cited above. 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 Complaint and the other information available to the IRF lead to one conclusion – which is the very conclusion reached by Judge Lee in the non-jury trial – "that the discharge of the offensive odors from the air relief valve is part of the ordinary operations of the District." (R. 8).

The District, nonetheless, argues that the exception to the pollution exclusion applies. The District, as the insured, bears the burden of proof to

establish an exception to a policy exclusion. *See*, *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 460, n.5 (2004). 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*, Complaint, ¶¶ 12-13. (R. 22). In answering these allegations, the District claims to lack sufficient information to form a belief as to the truth of those allegations. *See*, Answer, ¶¶ 14-15. (R. 28). Based on the pleadings and information available to the IRF, 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 testimony from Larry Brazzell, who is the District's executive director, supports the finding that the District received numerous odor complaints from residents. (R. 100-101). Brazzell also confirmed that the emission of hydrogen sulfide (which has the odor of rotten eggs) from the air relief valve is "not unusual or unexpected" and occurs "many times a day." (R. 102-103). Brazzell further testified as follows:

> Q. So when Mr. Brown alleged in his lawsuit that odors are released multiple times a day, assuming that he's correct about the odors, you would agree with that, that that's possible?
>
> A. That's very possible.

Q. Because the air relief valve will operate multiple times a day?

A. Yes, sir.

Q. And you, meaning East Richland County Public Service District expects that to happen; right?

A. Yes, sir. It better happen.

Q. Okay. Because obviously these lines could be compromised if these air release valves don't work; correct?

A. Right.

Q. It could create a vacuum?

A. Well, it would make the line burst. You could put too much pressure on the line and then you'd have raw sewage running down the road.

Q. Okay.

A. It has to release that air from that pump cutting on and off. Every time it cuts on and off it forces air into that line.

Q. So the release of air -- if I understand you correctly, the release of air from the lines then is part of the ordinary operation of that force main?

A. Yes, sir.

Q. And the operation of that force main is part of the ordinary operation of the sewage treatment business that East Richland County Public Service District is in; correct?

A. Yes, sir.

(R. 103-104).

Thus, the allegations and information available to the IRF, coupled with the trial testimony of Larry Brazzell, fully 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 and is expected to occur. As discussed above, in *Helena Chemical*, the Supreme Court, while applying an identical pollution exclusion, explained that "property damage caused by pollution arising from ordinary business operations is not covered." 594 S.E.2d at 460. Consequently, Judge Lee was correct to conclude that the District has not shown that the exception to the pollution exclusion applies.

The District also argues that the terms "offensive odors" or "odor" are not expressly listed in the pollution exclusion. Yet, the pollution exclusion does expressly include "fumes," "gases," "waste materials" and "irritants." (R. 184). The word "fumes," in fact, has a dictionary definition of "smoke, vapor or gas especially when irritating or offensive." *See*, Merriam-Webster Dictionary. After noting the dictionary definitions for such terms, Judge Lee concluded that "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." (R. 8). This is an action at law, tried without a jury, and as a result, "the

trial court's findings of fact will not be disturbed unless there is no evidence that reasonably supports the court's findings." *Middleton v. Eubank*, 388 S.C. 8, 694 S.E.2d 31, 34 (Ct. App. 2010). The trial court's finding is amply supported by the following testimony of Larry Brazzell:

> Q. ... And you'd agree with me that hydrogen sulfide is one of the components of the air that is released from the force main through the air relief valves; correct?
>
> A. Yes, sir.
>
> Q. And you've testified that hydrogen sulfide smells like rotten eggs?
>
> A. That's right.
>
> Q. And there's another chemical, methane, is also released; correct?
>
> A. Yes, sir.
>
> Q. And that's typical of raw sewage giving off those components; correct?
>
> A. Yes, sir.

(R. 102).

In addition, there are cases from other jurisdictions finding similar offensive odors as included within the scope of a pollution exclusion. *See e.g.*, *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154 (Minn. App. 2007) (offensive odor from pig manure is covered by pollution exclusion); *City of Spokane v.*

United National Ins. Co., 190 F.Supp.2d 1209 (E.D. Wash. 2002) (holding odors from a composting facility were pollutants triggering pollution exclusion); *Kruger Commodities, Inc. v. United States Fidelity & Guaranty*, 923 F.Supp. 1474 (M.D. Ala. 1996) (holding "offensive odors" emitted from plant that rendered animal carcasses were pollutants triggering pollution exclusion, even absent evidence the odors contained a toxic chemical or the plant was in violation of environmental laws); *City of Bremerton v. Harbor Ins. Co.*, 92 Wash. App. 17, 963 P.2d 194 (1998) (holding "foul and obnoxious odors and toxic gases" emitted from sewage treatment plant were unambiguously pollutants triggering the pollution exclusion).

Finally, the District 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. That very issue is governed by the case of *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005), in which 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. The Supreme Court agreed that "logically, exclusions can only apply to otherwise covered items." 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. 614 S.E.2d at 614. The Court distinguished the case of *S.C. State Budget and Control Board 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. Consistent with the *Owners* decision, there is no ambiguity under those circumstances. Judge Lee was also correct in rejecting that argument.

In sum, Judge Lee was correct in concluding that all of the causes of action asserted by Coley Brown in his Complaint are excluded under the IRF Tort Liability Policy. Hence, the declaratory judgment entered in this case should be affirmed.

III. As an additional sustaining ground, the alleged damages sought by Coley Brown in the underlying action do not qualify as "property damage" as defined by the Tort Liability Policy.

As an additional sustaining ground and coverage defense, the IRF submits that the alleged damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616 do not qualify as "property damage." The Tort Liability Policy defines "property damage" as "physical injury to or destruction of tangible property ... including loss of use thereof" or "loss of use of tangible property which has not

been physically injured or destroyed." (R. 183). A substantially similar definition of "property damage" was at issue in the case of *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). That case involved the presence of potentially hazardous materials on the defendants' properties. The Supreme Court did not reach the issue raised with respect to a pollution exclusion. Instead, applying the policy definition of "property damage," the Court explained that "Claimants do not allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property, as a result of Contractors' knowing sale of homes located on property containing hazardous materials." 588 S.E.2d at 115. The Supreme Court thus concluded that "[u]nder the unambiguous language of the policies, there is no property damage and, therefore, no covered occurrence." 588 S.E.2d at 115-16. In effect, the Supreme Court ruled that diminution of property value is *not* "property damage" as defined by the policy. As a result, there is no coverage for Coley Brown's claim for diminution of property value damages. While Judge Lee did not find it necessary to reach this issue, it remains nonetheless an additional coverage defense that supports Judge Lee's finding of no coverage under the IRF Tort Liability Policy.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent South Carolina Insurance Reserve Fund respectfully requests that this Court affirm the Order of Circuit Judge Alison Renee Lee ruling that the 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."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent South Carolina Insurance Reserve Fund certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent South Carolina Insurance Reserve Fund, does hereby certify that service of the **Brief of Respondent South Carolina Insurance Reserve Fund** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 11th day of March 2015:

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