THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

BRIEF OF APPELLANT
EAST RICHLAND COUNTY PUBLIC SERVICE DISTRICT

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STATEMENT OF THE ISSUES ON APPEAL

I. **Did the Circuit Court err in concluding that the insurance policy exclusion provision relied upon by the Respondent Fund to deny coverage of the allegations of the underlying action did not conflict with the statutory provisions governing the South Carolina Tort Claims Act?**

II. **Did the Circuit Court err in concluding that the Respondent Fund had no duty to defend or duty to indemnify the Appellant in the underlying action?**

STATEMENT OF THE CASE

This action for declaratory judgment was brought by the South Carolina Insurance Reserve Fund ("Fund" or "Respondent Fund") to determine whether or not it owed a duty to defend or a duty to indemnify the Appellant East Richland County Public Service District ("Appellant") with respect to the underlying civil action captioned *Brown v East Richland County Public Service District* CA No. 2010-CP-40-5616 ("2010 Action" or "underlying action"). The complaint was filed March 29, 2011. The Appellant filed its answer and counterclaim May 20, 2011 similarly seeking a declaratory judgment for a determination as to whether the Respondent Fund owed a duty to defend and a duty to indemnify the Appellant with respect to the underlying action. The Respondent Fund filed its reply to the Appellant's counterclaim March 23, 2011 denying the allegations of the Appellant's answer and counterclaim.

The Appellant filed its motion for summary judgment June 6, 2012. The Respondent Fund filed its motion for summary judgment on or about June 7, 2012. The matter was heard by the Circuit Court June 13, 2012 without a jury in which testimony was presented by a witness as well as deposition excerpts and affidavits.

The Circuit Court issued its order September 9, 2013 ("2013 Order") holding that the Respondent Fund did not owe a duty to defend or a duty to indemnify the Appellant in the underlying action. The Circuit Court granted the Respondent Fund's Motion for Summary Judgment and denied the Appellant's Motion for Summary Judgment and dismissed the Appellant's Counterclaim with prejudice.

The Appellant by Motion dated September 25, 2013 sought a new trial or to alter or amend the Court's judgment pursuant to Rule 59(e), SCRCP. By Order dated March 4, 2014 the Court denied the Appellant's post trial motion.

On April 8, 2014 the Appellant filed and served its Notice of Appeal. On April 14, 2014 the Appellant filed and served an Amended Notice of Appeal correcting the caption.

STATEMENT OF FACTS

The Appellant 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 Appellant operates by virtue of an NPDES discharge permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). The Appellant collects, transports, and treats raw sewage. With approximately 400 miles of sewer lines, the Appellant serves approximately 18,000 customers (R. p. 1; 2013 Order, p. 1; R. p. 79, ll. 20-25; Tr. p. 14, ll. 20-25).

In approximately 2000, the Appellant designed and constructed two pump stations within its service territory, one on Percival Road and the other off Decker Boulevard. (R. p. 2; 2013 Order, p. 2). The pump stations operate to transport sewage by taking in flow from connecting gravity sewer lines and forcing the sewage from the pump stations through sewer lines exiting the pump station (force mains). (R p. 83, l. 11 – p.84, l. 17; Tr. p. 18, l. 11 – p. 19, l. 17). 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. (R. p. 2; 2013 Order, p. 2; R. p. 82, l. 7 – p. 83, l. 10; Tr. p. 17, l. 7 – p. 18, l. 10).

As a part of its 2000 construction project, the Appellant also constructed a force main running beneath Westshore Road in the vicinity of the Respondent 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 valve closes. 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 damaging the force main (R. p. 2; 2013 Order, p. 2; R. p. 84, l. 23 – p 85, l. 8; Tr. p. 19, l. 23 – p. 20, l. 8). The force main was designed to meet industry standards and was approved by DHEC. The air released from the air relief 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. It is not possible to anticipate or predict when the valves will open or close. (R. p. 2; 2013 Order p. 2; R. p. 83, l. 11 – p. 84, l. 6; R. p. 85, ll. 21 – 24; Tr. p. 18, l. 11 – p. 19, l. 6; p. 20 ll. 21 – 24).

Sewage contains hydrogen sulfide which has a rotten egg smell. Methane gas is also found in sewage but it is generally odorless. Other components of the odors given off by raw sewage may be discharged into the atmosphere but neither hydrogen sulfide, methane nor other component parts of the rotten egg odor are regulated by DHEC as part of the Appellant's NPDES discharge permit. (R. p. 2, 2013 Order, p. 2; R. p. 91, l. 11 – p. 93, l. 6; R. p. 83, l. 14 – p. 95, l. 15; Tr. p. 26, l. 11 – p. 28, l. 6; p. 28, l. 14 – p. 30, l. 15;). 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. To protect sewer maintenance workers from injury upon entering manholes, the standard operating procedure is to force oxygen into the manhole thereby forcing hydrogen sulfide and other gases to escape safely into the atmosphere. (R. p. 44; Way Affidavit p. 2). The rotten egg odor from hydrogen sulfide can be emitted from air relief valves, manhole covers and faulty customer plumbing. (R. p. 2; 2013 Order, p. 2; R. p. 91, l. 24 – p. 92, l. 24; Tr. p. 26, l. 24 - p. 27, l. 24; R. p. 93, l. 14 – p. 95, l. 15; Tr. p. 28, l. 14 – p. 30, l. 15).

The Appellant'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 Appellant, 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 odors are not regularly released through the air relief valve, it cannot be anticipated or predicted when offensive odors will be released. Appellant's 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. (R. pp. 2-3; 2013 Order, pp. 2-3; R. p. 86, ll. 8-25; Tr. p. 21, ll. 8-25).

To reduce the possibility of odors, the Appellant injected chlorine into the force main from its Percival Road pump station which was met with success. The chlorine reduced the odors and the complaints stopped. However, chlorine is very corrosive and was beginning to

damage the Appellant's equipment. (R. p. 88, ll. 1-16; Tr. p. 23, ll. 1-16). Subsequently, the Appellant 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. (R. p. 88, ll. 14-22; Tr. p. 23, ll. 14-22). The Appellant replaced the charcoal filters with filters containing a chemical media, again with success. The Appellant was once again of the belief that it had succeeded in masking the odors. Subsequently, the Appellant had one or two complaints of odor. (R. p. 88, l. 24 – p. 89, l. 10; Tr. p. 23, l. 24 –p. 24, l. 10).

In May 2010, the Appellant 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 Appellant expected that the odors would have ceased. (R. p. 3; 2013 Order, p. 3; R. p. 96, l. 25 – p. 97, l. 1, Tr. p. 31, l. 25 – p. 32, l. 1).

In 2010, Coley Brown (Brown) filed the 2010 Action against the Appellant alleging causes of action for negligence, trespass and inverse condemnation. The Complaint alleges that an air relief valve on the Appellant'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 (R. p. 1; 2013 Order, p. 1; R. pp. 22-23; Complaint at pp. 2-3). The underlying action is the only lawsuit ever brought alleging offensive odors emitted from the Appellant's 400 miles of sewer lines (R. p. 97, l. 25 – p. 98, l. 3; Tr. p. 32, l. 25 – p. 33, l. 3).

The Appellant was insured by the Respondent Fund at all times relevant to the allegations of the complaint. After service of Brown's complaint, the Appellant tendered the matter to the Respondent Fund to defend it under the terms of the insurance policy issued by the Respondent Fund. The Respondent Fund denied coverage. Historically, the Respondent Fund has construed its policy to provide insurance coverage for the release or discharge of raw sewage and offensive odors onto property causing property damage. The discharge in such case may consist of raw sewage and other items from the sewer system as well as any offensive odors given off by raw sewage. (R. p. 3; 2013 Order, p. 3; ; R. p. 98, l. 4 – p. 99, l. 6; Tr. p. 33, l. 4 - p. 35, l. 6).

ARGUMENT

I

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE INSURANCE POLICY EXCLUSION PROVISION RELIED UPON BY THE RESPONDENT FUND TO DENY COVERAGE OF THE ALLEGATIONS OF THE UNDERLYING ACTION DID NOT CONFLICT WITH THE STATUTORY PROVISIONS GOVERNING THE SOUTH CAROLINA TORT CLAIMS ACT, THE ERROR BEING THAT THE SOUTH CAROLINA TORT CLAIMS ACT REQUIRES THE RESPONDENT FUND'S INSURANCE POLCIY TO PROVIDE COVERAGE OF THE ALLEGATIONS OF THE UNDERLYING ACTION AND THE EXCLUSION PROVISION IS THEREFORE VOID.

The parties filed cross motions for summary judgment. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1,

532 S.E.2d 868 (2000). There are no contested material facts here. The matter turns only on legal issues.

The Supreme Court's decision in Hogan v. Home Insurance Company, 260 S.C.157, 194 S.E.2d 890 (1973) and its progeny hold that if a provision of an insurance policy conflicts with State statute, the statute controls. The State has waived the doctrine of sovereign immunity for torts and has required the State and its political subdivisions to procure insurance to cover those risks for which immunity has been waived. The Respondent Fund has issued a liability policy to the Appellant to insure against torts waived by the Act. The complaint in the underlying action alleges torts for which immunity has been waived. The exclusionary provision of the insurance policy issued to the Appellant by the Respondent Fund upon which it relies to deny coverage of the tort allegations of the complaint in the underlying action conflicts with the requirements of the Act and is therefore void.

Tort Claims Act

The South Carolina General Assembly has modified the Doctrine of Sovereign Immunity and as a consequence, the Appellant is subject to suit according to the provisions and terms of the South Carolina Tort Claims Act ("Act"). S.C. Code Ann. Sections 15-78-10 *et seq.*

Under the Act, "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from

liability and damages, contained herein." S.C. Code Ann. Section 15-78-40. The Appellant is afforded certain protections under the Act.

Exposure to liability is limited under the Act. Under the Act, the Appellant's liability is limited as follows:

> (a) for any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
>
> > (1) except as provided in Section 15-78-120 (a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved. Section 15-78-120(a).

The Appellant, as any other public entity, is required to obtain insurance to protect itself against liability for claims brought under the Act. S.C. Code Ann. Section 15-78-140(b). Insurance may be purchased from the Budget and Control Board, from a private carrier, from a pooled self-insurance liability fund or the political subdivision may self-insure. Id.

The Budget and Control Board is authorized to provide insurance for the Appellant and its personnel "so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment." S.C. Code Ann. Section 1-11-140. S.C. Code Ann Section 1-11-140(C) provides that the procurement of insurance as provided for in S.C. Code Ann. Section 1-11-140 "is the exclusive means for the procurement of this insurance." If the Appellant procures its liability insurance, automobile liability insurance or its property and casualty insurance from the Budget and Control Board, it must procure all such coverage from the Budget and Control Board. S.C. Code Ann. Sections 1-11-140, 15-78-140.

S.C. Code Ann. Section 15-78-140(b)(2) provides:

(2) 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;

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 may procure coverage from multiple private sources to comply with the Act. S.C. Code Ann. Section 15-78-140(b)(1). If, as here, the State Budget and Control Board policy limits coverage under a policy exclusion, the Appellant is precluded by statute from purchasing coverage for the excluded risk from another source and is exposed to liability without the benefit of insurance in derogation of the provisions of the Tort Claims Act

The Act defines certain terms relating to liability which are relevant to the issues before this Court. A claim is defined by the Act as follows:

> (b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty. Section 15-78-30(b).

The term loss is defined by the Act as follows:

> (f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recovered in actions for negligence, but does not include the intentional infliction of emotional harm. Section 15-78-30(f).

The term occurrence is defined by the Act as.

> (g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of negligence. Section 15-78-30(g).

The Policy

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

Under the Respondent Fund policy, occurrence is defined as follows:

> "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. Policy Section III.

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. Policy Section III.

The policy contained a "pollution exclusion" which 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;

Mandatory Coverage

The State has waived the defense of sovereign immunity in actions against the State and its political subdivisions for torts, subject to the limitations upon liability and damages and exemptions from liability from damages. S.C Code Ann. Section 15-78-40. The Appellant and all other agencies and political subdivisions subject to the Act are required to procure insurance to protect themselves against liability for claims for damages under the Act. The Budget and Control Board is authorized by law to issue insurance policies covering all such claims. The Appellant must, if insured by the Budget and Control Board, procure all liability, automobile liability and property and casualty insurance from the Budget and Control Board and may not procure such insurance from other sources. The policies issued by the Budget and Control Board must provide coverage for its insured 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). Where the complaint alleges a claim for which the Appellant is liable under the Act, the Respondent Fund must insure against 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. Hogan v. Home Insurance Company, 260 S.C.157, 194 S.E.2d 890 (1973); Town of Duncan v State Budget and Control Board, 326 S.C. 6, 659 S.E.2d 125 (2008).

The Circuit Court held that the Respondent Fund was not required to provide coverage for all risks to which the Appellant was exposed under the provisions of the Act and concluded that the pollution exclusion, discussed in detail in Argument II infra, excused the Respondent Fund from providing coverage for the tort allegations of the complaint in the underlying action. The lower Court reasoned that in response to the decision in Town of Duncan v. State Budget and Control Board, the General Assembly amended the Act by deleting S.C. Code Ann. Section 15-78-140(a) which read, "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." Thus the Circuit Court reasoned, the General Assembly acted in response to the decision in Town of Duncan v. State Budget and Control Board to eliminate the duty of the Budget and Control Board to purchase insurance to cover any risk for which immunity has been waived. (R. p. 5; 2013 Order at p 5).

However, the Supreme Court in Town of Duncan v. State Budget and Control Board concluded that the provisions of S.C. Code Ann. Sections 1-11-140 and 15-78-140 do not provide that the only risks that the Budget and Control Board insures against are those waived under the Tort Claims Act. The General Assembly authorized the Budget and Control Board to act more broadly to provide insurance "so as to protect the State against tort liability." Town of Duncan v. State Budget and Control Board, 260 S.C. 12.

Nevertheless, the Budget and Control Board must provide insurance as required by statute and any provision in the instant policy which conflicts with statute is void. The allegations of the complaint in the underlying action sound in tort The complaint alleges negligent conduct by the Appellant in the design and construction of the force main which emitted offensive odors causing the plaintiff property loss. The complaint in the underlying action seeks to impose tort liability on the Appellant for which sovereign immunity has been waived.[1] To protect the Appellant from exposure to these risks, the General Assembly has required the Appellant to obtain insurance coverage for these risks and has authorized the Budget and Control Board to provide insurance to the Appellant to protect it against these risks. S.C. Code Ann. Section 1-11-140(C) provides that the procurement of tort liability insurance under that statute is the exclusive means of procuring insurance. The mandate for

[1] The question of whether the Respondent Fund policy effectively excludes the claim for inverse condemnation is far from clear See Horry County v Insurance Reserve Fund, 344 S S 493, 544 S E 2d 637 (Ct App 2001) in which the Court of Appeals ordered the Insurance Reserve Fund to provide a defense for the allegations of the inverse condemnation action The allegations of the inverse condemnation action are inextricably intertwined with the allegations of tort which militates in favor of coverage

coverage not only protects the political subdivision and the citizens it serves by providing a fund from which to pay tort liability claims, but also protects claimants by ensuring that the public entity has the financial ability to pay its obligations under the Act. The General Assembly has required that political subdivisions such as the Appellant, when procuring insurance from the Budget and Control Board, must procure insurance for all tort liability exposures from the Budget and Control Board. In those cases, the Budget and Control Board becomes its insureds' exclusive carrier for tort claims. Having the obligation for providing all liability coverage for tort liability claims made against the Appellant, the Budget and Control Board may not limit the protections available to the Appellant under the Act by limiting overage otherwise required by statute. Hogan v. Home Insurance Company, *supra.*

The Circuit Court concluded that the policy pollution exclusion was effective to relieve the Respondent Fund from providing coverage of the tort allegations in the underlying action. The Act does not authorize any such coverage exclusion. Had the General Assembly intend to exclude coverage for claims for pollution as set out in the Respondent Fund's policy, it could have easily done so.

The General Assembly has required the Appellant to procure coverage of the allegations of the complaint in the underlying action and has provided the Appellant a means by which to insure against liability for these allegations. The insurance coverage provided by the Budget and Control Board must offer the Appellant protection against liability for torts for which sovereign immunity has been waived To construe the Act to permit the Respondent Fund to exclude coverage of the torts alleged in the complaint violates the statutory mandate that it provide coverage of torts for which sovereign immunity has been waived. Because the policy exclusion fails to protect the State and its personnel against tort liability as required by statute, the policy exclusion is void. Hogan v. Home Insurance Company, (*supra*).

II

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE RESPONDENT FUND HAD NO DUTY TO DEFEND OR DUTY TO INDEMNIFY THE APPELLANT IN THE UNDERLYING ACTION, THE ERROR BEING THAT THE ALLEGATIONS OF COMPLAINT IN THE UNDERLYING ACTION ARE COVERED UNDER THE RESPONDENT FUND'S INSURANCE POLICY.

Policy Coverage

If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligate to defend. City of Hartsville, v. South Carolina Municipal Insurance & Risk financing Fund, 382 S.C. 535, 677 S.E.2d 574 (2009); Gordon-Gallup Realtors, Inc. v. Cincinnati Insurance Company, 274 S.C. 468, 265 S.E. 2d 38 (1980).

Courts favor an interpretation of insurance policies that favor coverage. Courts have uniformly held that where a clause in an insurance policy is one of inclusion, it should be broadly construed while clauses of exclusion are to be narrowly interpreted This rule is for the benefit of the insured. McPherson v. Michigan Mutual Ins. Co., 310 S.C. 316,319,426 S.E. 2d. 770, 771 (1993); Buddin v. Nationwide Mutual Insurance Company, 250 S.C. 332, 157 S.E.2d 633 (1967).

The tort allegations in the complaint in the underlying action are covered by the Respondent Fund's insurance policy. The policy provides that the Respondent Fund will pay all sums which the insured shall become legally obligated to pay as damages because of property damage resulting from

an occurrence. The Act requires the Respondent Fund policy to insure claims arising out of a single occurrence giving rise to a loss The term "occurrence" as defined by the Tort Claims Act means an unfolding sequence of events which proximately flow from a single act of negligence. In conformity with the statutory definition, the Respondent Fund policy defines "occurrence" similarly to include, "continuous or repeated exposure to conditions," resulting in property damages as alleged in the underlying complaint. The Act broadly defines property damage to include the loss of use of property. Loss of use is covered by the Respondent Fund policy. Policy Section III.

In 2000, the Appellant designed and constructed two pump stations which pump sewage through a force main to the Appellant's wastewater treatment plant. 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 force mains. The force main runs beneath Westshore Road in the vicinity of Brown's residence. The force main was designed and constructed with air relief valves at intervals to control the air pressure within the force main as the sewage is pumped through the line. When the 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 in the line has built to sufficient force and closes just a quickly once the pressure in the line has been relieved. The air released from the valves may be odorous. The release of air and any resulting odor when the pumps begin is sudden, and it is not possible to anticipate or predict when the valves will open or close. Brown's complaint in the underlying action alleges that the Appellant was negligent in its design and construction of the pumps and force mains in 2000, setting in motion an unfolding sequence of events which give rise continuous or repeated exposure to offensive odors from the air release valve depriving the Brown of his loss of use of his residence. Thus, 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. Horry County v Insurance Reserve Fund, 344 S.C. 493, 544 S.E. 2d 637 (Ct. App. 2001); Greenville County v. Insurance Reserve Fund, a Div. of South Carolina Budget and Control Bd., 313 S.C. 546, 443 S.E.2d 552 (S.C. 1994).

The Circuit Court upheld the Respondent Fund's denial of coverage for the trespass and negligence causes of action based on the "pollution exclusion." In particular, the Respondent Fund relies on the following language:

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 the pollution exclusion. Owners Insurance Co. v. Clayton, 364S.C. 555, 614 S.E.2d 611 (2005). The record is devoid of any evidence demonstrating the applicability of the pollution exclusion to the allegations of the complaint in the underlying action. The Respondent Fund failed to establish the applicability of the pollution exclusion.

While the pollution exclusion sets forth a list of pollutants, the term pollution as set out in the pollution exclusion is not defined. The Complaint characterizes the offending conduct as the release of "offensive odors." The term "offensive odors" is not listed in the policy exclusion. Indeed the word "odor" is not listed in the exclusionary language Moreover, the Respondent Fund, which bears the burden of proving that offensive odors constitute pollution under the

provisions of the pollution exclusion, failed to introduce evidence into the record which would prove that offensive odors were in the nature of pollution. The hydrogen sulfide and methane gases are not regulated by DHEC and the record is clear that these gases when released into the atmosphere are not harmful. The Respondent Fund argued below that common sense would dictate the conclusion that a rotten egg smell is pollution. However, a reading of the list of the examples of pollution compels the common sense conclusion that the pollution exclusion provision requires the pollution to be harmful in some way. The Respondent Fund has made assumptions of fact that the offensive odors alleged in the complaint are of the nature of pollutants which bring them within the language of the pollution exclusion.

Because there are no facts either alleged in the complaint or introduced into the record by the Respondent Fund that support the fact that the offensive odors constitute pollution as intended by the parties' insurance policy, it was error to apply the provisions of the pollution exclusion to deny coverage. The policy must be construed against the Respondent Fund and in favor of the insured. There being no evidence bringing the allegations of offensive odors within the pollution exclusion of the insurance policy, the Respondent Fund is required by law to provide coverage and enter a defense to the complaint. Greenville County v. Insurance Reserve Fund, *supra.*

Assuming for the sake of argument that the pollution exclusion is applicable to the allegations of the complaint, the exception to the exclusion operates to bring the allegations of the complaint within the coverage of the policy. The exception to the pollution exclusion reads:

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

The provisions of the pollution exclusion are inherently ambiguous.[2] First, the Supreme Court has held that term "sudden" found in the identical language of the exception to a pollution exclusion is inherently ambiguous. Greenville County v. Insurance Reserve Fund, *supra.* The declaratory judgment action under consideration in Greenville County v. Insurance Reserve Fund involved lawsuits brought against Greenville County by landowners who alleged inverse condemnation of their property through County's maintenance of a landfill over a twelve year period. The complaints alleged contamination through dumping of hazardous waste and chemicals in the landfill. The Insurance Reserve Fund denied any duty to defend Greenville County, contending that the dispersal of pollutants was not "sudden" but was gradual, and coverage was therefore barred by the pollution exclusion. The Supreme Court held that the term sudden as set out in the pollution exclusion was ambiguous in that it could be construed to mean "unexpected" or "unintended" or construed to require an abrupt or precipitous event. Citing McPherson v. Michigan Mutual Insurance Co., the Supreme Court concluded that because the words of the exception to the pollution exclusion was capable of two reasonable interpretations, the exception to the pollution exclusion would be construed in a manner most favorable to the insured. Consequently, the Supreme Court held that the word sudden meant unexpected and required the Insurance Reserve Fund to defend the action.

Here, the Appellant did not expect the force main to emit odors as alleged. The Appellant operates over 400 miles of sewer lines and has never had a similar allegations of odors. The Appellant could not expect to know when odors would be released and by making repeated efforts to eliminate or mask the odors, never intended to allow the release of offensive

[2] While the policy purports to exclude coverage for continuous or repeated releases of pollutants, the policy also insures against property damage caused by an occurrence which is defined by the policy includes a continuous or repeated exposure to conditions resulting in property damage. Accordingly, the policy is inherently ambiguous It cannot be disputed that the complaint alleges a continuous or repeated exposure to offensive odors

odors into the atmosphere. Accordingly, because the release of odors was unexpected and unintended by the Appellant, the release was accidental from the standpoint of the Appellant.

Moreover, the discharge of offensive odors was also precipitous and therefore sudden under any definition. The release of the offensive odors is instantaneous once the pressure conditions require the release of the pressure in the line. It is impossible to predict when the odors would be released. The air release valve opens when the pumps turn on and close when the pumps turn off. Odors are not released every time the air release valve opened. Once an odor is emitted it quickly dissipates.

The allegations of the complaint are no different from those of a typical sewer backup. In the latter, raw sewage and odors are discharged from the Appellant's lines, conduct which the Respondent Fund has determined are covered under the policy. In such cases the discharge is sudden. The discharge will flow until the pressures in the Appellant's line which release or discharge the sewage are relieved or the sewer line is repaired. In such cases, the discharge is continuous. In some cases, the discharge has been repeated. Yet the Respondent Fund has not treated the sewage discharge as a pollutant and has provided coverage for all such claims. The material facts are no different here. The only difference in the instant action is that the discharge is only an offensive odor. Therefore, having accepted coverage of similar claims raised against the Appellant, the Respondent Fund is estopped by its conduct from denying coverage of the instant claim. Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (S.C. 1975). Kitchens v. Lee 221, S.C. 59, 69 S.E.2d 67 (S.C. 1952).

The decision in Helena Chemical Company v. Allianz Underwriters Insurance Company, 357 S.C. 631, 594 S.E. 2d 455 (2004) is not controlling. There, it was undisputed in the record that the contaminants released were pollutants as defined by the pollutant exclusion in the policy.

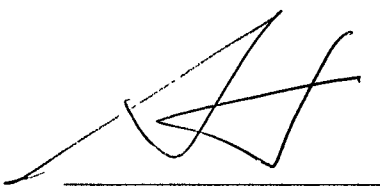
Helena Chemical Company had entered into an agreement with the Environmental Protection Agency ("EPA") and DHEC to clean up pesticide contamination at its manufacturing sites. Helena Chemical Company sought to recover its environmental cleanup costs form its carriers. Understandably, there was no dispute as to whether Helena Chemical Company had polluted its manufacturing sites.

Here, the offensive odors are not regulated by DHEC and there is no evidence that the offensive odors are a pollutant as intended by the parties' insurance policy. There was no evidence of record before the Court in Helena Chemical Company v. Allianz Underwriters Insurance Company, that the contamination was sudden or accidental. The Supreme Court pointed out in its decision that Helena Chemical Company failed to introduce any evidence on this issue. The only evidence was that the pollution was discharged routinely. Here, the evidence introduced by the Appellant reflects that the release of the offensive odors was sudden and unexpected and that the odors were not routinely emitted from the air release valve. The allegations of the Complaint are unique in that the Appellant owns and operates over 400 miles of sewer line and the allegations of this Complaint are the first of its kind.

As set above, the language of the exception to the pollution exclusion is ambiguous. Based on the evidence of record, construing the exclusion most narrowly and favorably to the Appellant, the allegations of the complaint in the underlying action are within the exception to the pollution exclusion. The Respondent Fund has agreed to insure the Appellant for "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." The Appellant's alleged conduct was covered by the policy provisions.

CONCLUSION

For the foregoing reasons, the East Richland County Public Service District submits that the Circuit Court erred in granting Summary Judgment in favor of the Respondent Fund concluding that it had no duty to defend or to indemnify the Appellant in the underlying action. 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 Number 2010-CP-40-5616.



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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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

March 26, 2015

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SC Court of Appeals

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And Coley Brown is a Respondent

PROOF OF SERVICE

I certify that I have served the Brief and Reply Brief 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 March 11, 2015.

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