

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

RECEIVED
MAR 11 2015
SC Court of Appeals

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.

RECORD ON APPEAL

Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Tel.: (803) 771-0555
Attorney for Appellant
East Richland County Public Service
District

Andrew F. Lindemann, Esquire
Davidson & Lindemann, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, SC 29202
Tel.: (803) 806-8222
Attorneys 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
Tel.: (803) 790-2800
Attorney for Respondent Coley Brown

INDEX TO THE RECORD ON APPEAL

Order, dated September 9, 2013	000001
Order, dated March 4, 2014	000011
Complaint, dated March 29, 2011	000012
Answer and Counterclaim, dated May 19, 2011.....	000015
Reply to Counterclaim, dated May 23, 2011.....	000018
Complaint in underlying action, dated August 18, 2010.....	000021
Answer in underlying action, dated October 22, 2010.....	000027
Motion for Summary Judgment, dated June 6, 2012.....	000033
Motion for Summary Judgment, dated June 7, 2012.....	000035
Affidavit of Larry Brazell, dated June 12, 2012.....	000037
Affidavit of Donnie Way, dated June 12, 2012.....	000043
Plaintiff's Trial Memorandum, filed June 15, 2012.....	000045
Appellant's Memorandum of Law, dated June 12, 2012.....	000054
Trial Transcript.....	000066
Direct Examination of Witness Larry Thomas Brazell by Attorney Elliott.....	000079
Cross Examination of Witness Larry Thomas Brazell by Attorney Lindemann.....	000100
Re-Direct Examination of Witness Larry Thomas Brazell by Attorney Elliott.....	000107
Appellant's Notice of Motion and Motion, dated September 23, 2013.....	000157

Exhibits

1.....	000164
2.....	000173
3.....	000180
4.....	000187
5.....	000193

Depositions

Deposition transcript of Larry Brazell 3/22/11.....	000196
Deposition transcript of Donnie Way 3/22/11.....	000208
Certificate of Counsel.....	000213

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

South Carolina Insurance Reserve Fund,

Plaintiff,

v.

East Richland County Public Service
District and Coley Brown,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-40-2096

ORDER

RICHLAND COUNTY
FILED
2013 SEP 10 AM 9:20
JEANETTE W. McBRIDE
C.C.P. & G.S.

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

FACTS

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

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

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

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

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

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

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

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

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

DISCUSSION

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

ad
#3

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

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

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

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

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

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

and
#4

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

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

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

an
#5

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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



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

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

ORDER

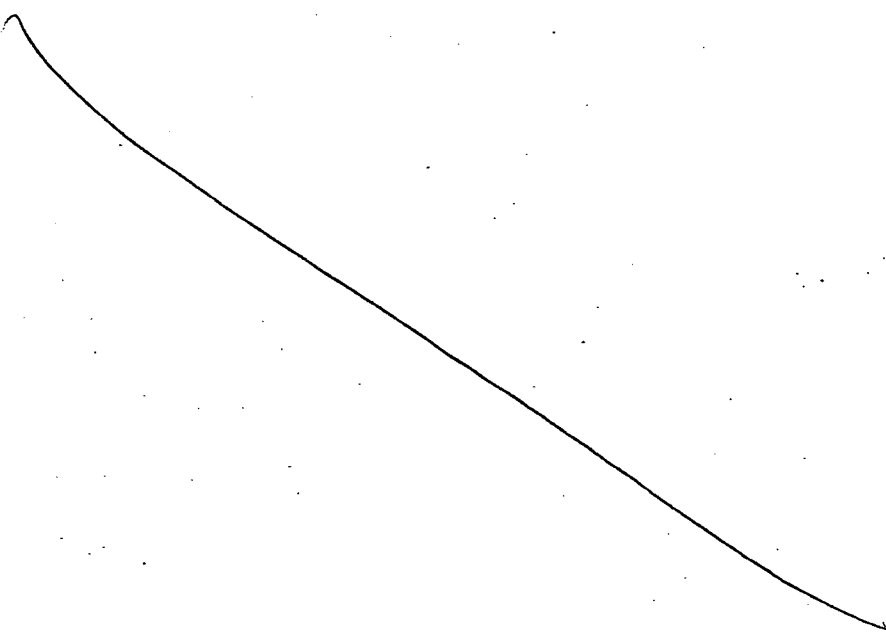
Based on the foregoing, **IT IS ORDERED** that the Plaintiff S.C. Insurance Reserve Fund does not owe a duty to defend or a duty to indemnify to the Defendant East Richland County Public Service District in the civil action captioned, *Brown v. East Richland County Public Service District*, Civil Action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

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

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 9, 2013


af
110

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

South Carolina Insurance Reserve Fund,

Plaintiff,

vs.

East Richland County Public Service
District and Coley Brown,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-40-02096

ORDER

RICHLAND COUNTY
FILED
2014 MAR -6 PM 2:52
JEANETTE W. McBRIDE
C.C.P. & G.S.

After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. In its Motion dated September 25, 2013, Defendant East Richland County Public Service District did not present any fact or argument that was not considered and ruled upon in the Court's Order filed September 10, 2013. Accordingly, this Court hereby **DENIES** Defendant's Motion for a New Trial or to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

March 4, 2014
Columbia, South Carolina

000011

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,)
)
Plaintiff,)
)
v.)
)
East Richland County Public Service)
District and Coley Brown,)
)
Defendants.)
_____)

Civil Action No. _____

COMPLAINT
(Declaratory Judgment Action)
(Non-Jury Trial Requested)

2011 MAR 29 PM 4:08
JEANE M. WILSON
CLERK OF COURT
S.C. & C.S.

The Plaintiff South Carolina Insurance Reserve Fund, which is a Division of the South Carolina State Budget and Control Board, alleges herein as follows:

1. The Plaintiff South Carolina Insurance Reserve Fund is a division of the South Carolina State Budget and Control Board, which is an agency of the State of South Carolina created and administered under state statutory law.
2. The Defendant East Richland County Public Service District is a special purpose district organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.
3. The Defendant Coley Brown is a resident and citizen of Richland County, South Carolina.
4. This action is commenced pursuant to the provisions of the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, *et seq.*
5. On August 9, 2010, Coley Brown filed a civil action against the East Richland County Public Service District in the Court of Common Pleas for Richland County asserting

000012

causes of action for (1) inverse condemnation, (2) trespass, and (3) negligence. That action is captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616.

6. In his Complaint, Coley Brown alleged that the East Richland County Public Service District owns and operates a sewage force main on Westshore Road on which it installed an air relief valve or "burp station" across the street from Brown's property. Brown further alleges that the air relief valve releases offensive odors multiple times per day.

7. The South Carolina Insurance Reserve Fund issued a Tort Liability Insurance Policy to the East Richland County Public Service District bearing Policy Number T130400210, for the policy period of July 15, 2009 through July 15, 2010.

8. The East Richland County Public Service District has sought insurance coverage under the Tort Liability Insurance Policy for the claims asserted in Civil Action Number 2010-CP-40-5616.

9. The South Carolina Insurance Reserve Fund has denied coverage.

10. East Richland County Public Service District disputes that denial of coverage.

11. The various terms, conditions and exclusions set forth in the Tort Liability Insurance Policy afford no coverage for the claims asserted and damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616. Specifically, the Plaintiff South Carolina Insurance Reserve Fund alleges as follows:

- (a) Coverage under the Tort Liability Insurance Policy issued to East Richland County Public Service District is excluded in whole by the Pollution Exclusion, which is Exclusion (f).
- (b) Coverage under the Tort Liability Insurance Policy issued to East Richland County Public Service District for the inverse condemnation cause of action is excluded by the Takings Exclusion, which is Exclusion (p).

000013

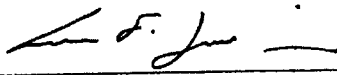
- (a) There is no coverage under the Tort Liability Insurance Policy issued to East Richland County Public Service District because alleged damages in the underlying action do not qualify as "property damage" caused by an "occurrence."

12. The Plaintiff South Carolina Insurance Reserve Fund is entitled to a declaratory judgment that the South Carolina Insurance Reserve Fund does not have a duty to defend nor a duty to indemnify East Richland County Public Service District for the claims and damages alleged by Coley Brown in Civil Action Number 2007-CP-10-546.

WHEREFORE, the Plaintiff South Carolina Insurance Reserve Fund prays that this Court inquire into these matters and issue a declaratory judgment that the South Carolina Insurance Reserve Fund does not have a duty to defend nor a duty to indemnify the East Richland County Public Service District for claims and damages alleged by Coley Brown in Civil Action Number 2007-CP-10-546 pursuant to the terms of the Tort Liability Insurance Policy issued to the East Richland County Public Service District.

The Plaintiff South Carolina Insurance Reserve Fund further prays for the costs of this action and for such other and further relief that this Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 
ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Plaintiff
South Carolina Insurance Reserve Fund*

Columbia, South Carolina

March 29, 2011

000014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
South Carolina Insurance Reserve)
Fund,)
Plaintiff,)
v.)
East Richland County Public)
Service District and Coley Brown,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-2096

**ANSWER
AND
COUNTERCLAIM**

FILED
2011 SEP 20 PM 9:07
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
SOUTH CAROLINA

TO: ANDREW F. LINDEMANN, ESQUIRE, ATTORNEY FOR PLAINTIFF

The Defendant East Richland County Public Service District (hereinafter "East Richland" or "District"), answering the Complaint of Plaintiff herein alleges:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained is expressly denied.

2. The allegations of Paragraph 1 are admitted.

3. The allegations of Paragraph 2 are admitted.

4. The allegations of Paragraph 3 are admitted.

5. The allegations of Paragraph 4 are admitted.

6. The allegations of Paragraph 5 are admitted; in further answer to the allegations of Paragraph 5, the Defendant East Richland craves reference to the Complaint in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 for the allegations contained therein.

7. The allegations of Paragraph 6 are admitted; in further answer to the allegations of Paragraph 6, the Defendant East Richland craves reference to the Complaint in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 for the allegations contained therein.

8. The allegations of Paragraph 7 are admitted; in further answer to the allegations of Paragraph 7, the Defendant East Richland would allege that at all times alleged in the Complaint in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616, the Plaintiff had issued tort liability insurance policies to the Defendant East Richland.

9. The allegations of Paragraph 8 are admitted.

10. The allegations of Paragraph 9 are admitted.

11. The allegations of Paragraph 10 are admitted.

12. The allegations of Paragraph 11 are denied.

13. The allegations of Paragraph 12 are denied; in further answer to the allegations of Paragraph 12, the Defendant East Richland would allege that the Plaintiff not only has a duty to defend the Defendant East Richland in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 but also to indemnify the Defendant East Richland for any claims and damages alleged therein.

BY WAY OF COUNTERCLAIM

14. The allegations of Paragraph 1-13 above are realleged as if repeated verbatim.

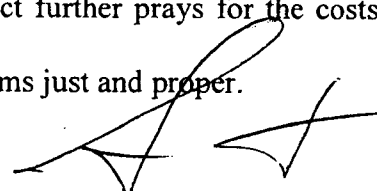
15. This counterclaim is brought pursuant to the provisions to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. Section 15-53-10, *et seq.*

16. The terms and conditions set forth in tort liability insurance policies issued by the Plaintiff South Carolina Insurance Reserve Fund to the Defendant East Richland provide

coverage for the claims asserted and damages sought in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616.

17. The Defendant, East Richland Public Service District is entitled to a declaratory judgment that the Plaintiff South Carolina Insurance Reserve Fund has a duty to defend the Defendant against the allegations alleged in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 and a duty to indemnify the East Richland County Public Service District for the claims and damages alleged therein.

 WHEREFORE, having fully answered the complaint herein and having counterclaimed against the Plaintiff South Carolina Insurance Reserve Fund, the Defendant East Richland County Public Service District prays that the Court inquire into these matters and issue a declaratory judgment that the Plaintiff South Carolina Insurance Reserve Fund has both a duty to defend and a duty to indemnify the Defendant East Richland County Public Service District for claims and damages alleged in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 pursuant to the terms and conditions of the tort liability insurance policies issued to the East Richland County Public Service District. The Defendant East Richland County Public Service District further prays for the costs of this action and for such other and further relief as the Court deems just and proper.



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

May 19, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,)
)
Plaintiff,)

Civil Action No. 2011-CP-40-2096

v.)

REPLY TO COUNTERCLAIM

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

The Plaintiff South Carolina Insurance Reserve Fund, which is a Division of the South Carolina State Budget and Control Board, answers the Counterclaim filed by the Defendant East Richland County Public Service District herein as follows:

FOR A FIRST DEFENSE

1. The Plaintiff South Carolina Insurance Reserve Fund denies each and every allegation of the Counterclaim not hereinafter specifically admitted, qualified, or explained.
2. The allegations set forth in Paragraph 15 of the Counterclaim are admitted.
3. The allegations set forth in Paragraphs 16 and 17 of the Counterclaim are denied.
4. The allegations and relief sought in the Prayer for Relief are denied.

FOR A SECOND DEFENSE

5. The Plaintiff alleges that there is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged claims asserted and damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616, are excluded by the Pollution Exclusion, which is

000018

Exclusion (f).

FOR A THIRD DEFENSE

6. The Plaintiff alleges that there is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged claims asserted and damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616, are excluded by the Takings Exclusion, which is Exclusion (p).

FOR A FOURTH DEFENSE

7. The Plaintiff alleges that there is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616, do not qualify as "property damage" caused by an "occurrence."

WHEREFORE, the Plaintiff South Carolina Insurance Reserve Fund prays that this Court ~~inquire into these matters and issue a declaratory judgment that the South Carolina Insurance~~ Reserve Fund does not have a duty to defend nor a duty to indemnify the East Richland County Public Service District for claims and damages alleged by Coley Brown in Civil Action Number 2010-CP-40-5616 pursuant to the terms of the Tort Liability Insurance Policy issued to the East Richland County Public Service District.

The Plaintiff South Carolina Insurance Reserve Fund further prays that this Court dismiss the Counterclaim filed by the Defendant East Richland County Public Service District and deny the relief requested therein.

The Plaintiff South Carolina Insurance Reserve Fund further prays for the costs of this action and for such other and further relief that this Court deems just and proper.

000019

DAVIDSON & LINDEMANN, P.A.

BY: 
ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Plaintiff
South Carolina Insurance Reserve Fund

Columbia, South Carolina

May 23, 2011

000020

RECEIVED

AUG 26 2010

JUDGE RESERVE PENDING

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
Coley Brown,) C/A No
) Plaintiff,)
))
vs.)
))
East Richland County Public Service District,)
))
Defendant.)

COMPLAINT
(Jury Trial Demanded)
JEANETTE W. MCBRIDE
CLERK & G.S.
2010 AUG 26 PM 3:36

FILED

Plaintiff Coley Brown (hereinafter styled "Mr Brown") brings this action against Defendant East Richland County Public Service District (hereinafter styled "Defendant ERCPSD") based upon the allegations set forth below.

PARTIES, JURISDICTION, VENUE

1. At all times relevant to this action, Mr Brown was a resident of South Carolina
2. Defendant ERCPSD is a governmental entity located in and established under the laws of the State of South Carolina
3. At all times relevant to this action, persons acting on behalf of Defendant ERCPSD were acting individually and as agents, servants, and/or employees, and within the scope of their agency and/or employment with Defendant
4. At all times relevant to this action, Defendant ERCPSD is liable for the acts and/or omissions of their agents, servants, and/or employees within the scope of their agency and/or employment with Defendant, under the doctrine of respondeat superior.
5. Plaintiff's First Cause of Action (*Inverse Condemnation*) is brought pursuant to Article I, Section Thirteen, of the Constitution of the State of South Carolina.

000021

6 Plaintiff's Second and Third Causes of Action (*Trespass, Negligence*) are brought pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et. Seq

7. Venue and jurisdiction are proper in this Court, as the most substantial act and/or omission giving rise to this action occurred in Richland County.

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

7 Mr. Brown owns and has owned a residential property located at 6436 Westshore Road in Richland County.

8. During the time Mr. Brown owned and possessed this property, a sewage force main was installed on Westshore Road.

9. The sewage force main was under the control of Defendant ERCPSD at all times relevant to this action

10. An air relief valve (i.e. "burp station") associated with the sewage force main, and located on Westshore Road, was also controlled by Defendant ERCPSD at all times relevant to this action

11 The air relief valve was located across the street from Mr. Brown's property

12 This burp station released offensive odors on a daily basis beginning shortly after its installation.

13 The offensive odors invaded Mr. Brown's property multiple times per day

14 The offensive odors which invaded Mr. Brown's property resulted in a severe diminution in the property's economic and non-economic value

15. The offensive odors which invaded Mr Brown's property prevented him from using and enjoying the land.

16 Mr Brown made repeated requests to ERCPSD that the stench be remedied, but the odors continued to invade his property

17 Several years ago, Mr Brown purchased a residential property in the Spring Valley subdivision, located near Columbia, South Carolina, as he could no longer endure the stench emanating from the burp station on Westshore Road

18 Several years ago, Mr. Brown placed the property located at 6436 Westshore Road on the real estate market, but the property was never sold.

18. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has suffered and in the future will suffer: economic damages, mental anguish; shock; embarrassment, humiliation, and loss of his enjoyment of life

FOR A FIRST CAUSE OF ACTION
(Inverse Condemnation)

19 The allegations of the foregoing paragraphs are incorporated as if repeated verbatim.

20. During the time Mr. Brown owned property located at 6436 Westshore Road, Defendant ERCPSD committed an affirmative, positive, aggressive act in the form of its installation and operation of a sewer main line and air relief valve along Westshore Road

21 ERCPSD's action resulted in a taking of Mr Brown's property

22. The taking was for a public use

23. The taking has some degree of permanence

24. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has suffered and in the future will suffer. economic damages, mental anguish; shock, embarrassment, humiliation, and loss of his enjoyment of life.

25 As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr. Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, and such further relief as the Court may deem just and proper.

28. Mr. Brown is further entitled to damages based in part on the property's diminution in value, all costs incurred as a result of the Defendant's act and/or omissions, and attorney's fees

FOR A SECOND CAUSE OF ACTION
(Trespass)

25 The allegations of the foregoing paragraphs are incorporated as if repeated verbatim

26 During the time Mr Brown owned and possessed property located at 6436 Westshore Road, Defendant ERCPSD interfered with his right to exclusive, peaceable possession of said property

27. Mr. Brown had and still has legal possession of the property located at 6436 Westshore Road

28. Defendant ERCPSD voluntarily entered Mr. Brown's property by way of the offensive odors emanating from an air relief valve controlled by the Defendant.

29 By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has

suffered and in the future will suffer. economic damages, mental anguish, shock, embarrassment; humiliation, and loss of his enjoyment of life.

29. As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, all costs incurred as a result of the Defendant's act and/or omissions, attorney's fees, and such further relief as the Court may deem just and proper

FOR A SECOND CAUSE OF ACTION
(Negligence)

30. The allegations of the foregoing paragraphs are incorporated as if repeated verbatim

31. Defendant ERCPSD, acting through its agents, servants and/or employees failed to exercise the care necessary under the circumstances when it allowed offensive odors to emanate multiple times per day from an air relief valve it controlled on Westshore Road.

32. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr. Brown has suffered and in the future will suffer: economic damages, mental anguish, shock; embarrassment; humiliation, and loss of his enjoyment of life.

33 As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr. Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, all costs incurred as a result of the Defendant's act and/or omissions, attorney's fees, and such further relief as the Court may deem just and proper.

WHEREFORE, the Plaintiff prays as follows. (a) that the Plaintiff recovers a judgment against the Defendant in an amount sufficient to compensate him for his damages as described above; (b) that the Plaintiff recovers all costs associated with this action; (c) that the Plaintiff recovers all attorney's fees; and (d) that the Plaintiff recovers such other relief as the court may deem just and proper

LOURIE LAW FIRM, LLC



Neal M. Lourie
Kenneth E Berger
1224 Pickens Street
P O. Box 12089
Columbia, South Carolina 29211
Telephone (803) 799-9805
Facsimile (803) 799-9571
Attorneys for the Plaintiff

8/18, 2010
Columbia, South Carolina

RECEIVED

AUG 26 2010

**INSURANCE RESERVE FUND
CLAIMS DEPARTMENT**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Coley Brown,)
)
Plaintiff,)
)
vs.)
)
East Richland County Public)
Service District)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2010-CP-40-005616

ANSWER

FILED
2010 OCT 25 AM 10:09
JEANETTE M. BRIDGE
C.C.P. & G.S.

TO: KENNETH E. BERGER, ESQUIRE, ATTORNEY FOR PLAINTIFF

The Defendant East Richland County Public Service District (hereinafter "ERCPSD" or
"District"), answering the Complaint of Plaintiff herein alleges:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained is expressly denied.
2. The allegations of Paragraph 1 are admitted.
3. The allegations of Paragraph 2 are admitted.
4. The Defendant admits so much of the allegations of Paragraph 3 as allege that it acts through its employees and agents; the balance of the allegations of Paragraph 3 are denied.
5. The allegations of Paragraph 4 are denied.
6. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 5 and therefore denies same.

7. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 6 and therefore denies same.

8. The allegations of Paragraph 7 (first numbered Paragraph 7) are admitted on information and belief.

9. The allegations of Paragraph 7 (second numbered Paragraph 7) are admitted on information and belief.

10. The Defendant admits so much of the allegation of Paragraph 8 as allege that a force main was constructed on Westshore Road; the Defendant lacks sufficient information to form a belief as to the truth of the balance of the allegations of Paragraph 8 and therefore denies same.

11. The allegations of Paragraph 9 are admitted.

12. The Defendant admits so much of the allegations of Paragraph 10 as allege that there exists an air relief valve on the force main located on Westshore Road; in further answer to the allegations of Paragraph 10, the Defendant would allege that the term "burp station" is not a technical term associated with the air relief valve.

13. The Defendant admits so much of the allegations of Paragraph 11 as allege that an air relief valve is located in the vicinity of the Plaintiff's property on Westshore Road.

14. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 12 and therefore denies same.

15. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 13 and therefore denies same.

16. The allegations of Paragraph 14 are denied.

17. The allegations of Paragraph 15 are denied.

18. The allegations of Paragraph 16 are denied.

000028

19. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 17 and therefore denies same.

20. The Defendant admits so much of the allegations of Paragraph 18 (first numbered Paragraph 18) as allege that the Plaintiff's property is advertised for sale. The balance of the allegations of Paragraph 18 are denied.

21. The allegations of Paragraph 18 (second numbered Paragraph 18) are denied.

22. The Defendant realleges the allegations of Paragraph 1 through 21 above in response to the allegations of Paragraph 19.

23. The allegations of Paragraph 20 are denied.

24. The allegations of Paragraph 21 are denied.

25. The allegations of Paragraph 22 are denied.

26. The allegations of Paragraph 23 are denied.

27. The allegations of Paragraph 24 are denied.

28. The allegations of Paragraph 25 (first numbered Paragraph 25) are denied.

29. The allegations of Paragraph 28 (first numbered Paragraph 28) are denied.

30. The Defendant realleges the allegations of Paragraphs 1 through 29 above in response to the allegations of Paragraph 25 (second numbered Paragraph 25).

31. The allegations of Paragraph 26 are denied.

32. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 27 and therefore denies same.

33. The allegations of Paragraph 28 (second numbered Paragraph 28) are denied.

34. The allegations of Paragraph 29 (first numbered Paragraph 29) are denied.

35. The allegations of Paragraph 29 (second numbered Paragraph 29) are denied.

000029

36. The Defendant realleges the allegations of Paragraphs 1 through 35 above in response to the allegations of Paragraph 30.

37. The allegations of Paragraph 31 are denied.

38. The allegations of Paragraph 32 are denied.

39. The allegations of Paragraph 33 are denied.

FOR A SECOND DEFENSE

That the causes of action alleged in the Complaint fail to state facts sufficient to constitute a cause of action or claim against this Defendant, and the Defendant therefore moves to dismiss the Complaint.

FOR A THIRD DEFENSE

That the Defendant District, its agents, servants, employees, officials or representative at all times relevant hereto, during the performance or non-performance of the acts alleged in the Complaint, did not perform any acts or fail to perform any acts in bad faith, in a malicious manner, or with corrupt motives; and thus, the Defendant is, therefore, immune from suit.

FOR A FOURTH DEFENSE

That the Plaintiff's claims and causes of action are barred by the doctrine of sovereign immunity applicable to the Defendant.

FOR A FIFTH DEFENSE

That Plaintiff's claims and causes of action are barred under the doctrines of estoppel and waiver which are pled as and serve as affirmative defenses to the within action.

000030

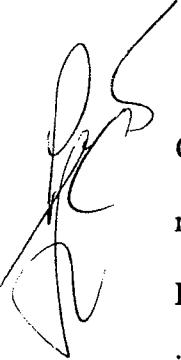
FOR A SIXTH DEFENSE

That Plaintiff's claims and causes of action are barred under the applicable statute of limitations which are pled as and serve as an affirmative defense and bars to the within action.

FOR A SEVENTH DEFENSE

That Plaintiff's claims and causes of action are barred under the doctrine of laches which is pled as and serves as an affirmative defense and bar to the within action.

FOR A EIGHTH DEFENSE



That any injuries and/or damages sustained by the Plaintiff as set forth in the Complaint were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness, and/or comparative negligence of the Plaintiffs, which negligence exceeded any (potential) negligence of the Defendant, which is expressly denied, so as to be proximate cause of the set of injuries and damages and without the same would not have occurred; and, thus, the Defendant pleads the comparative negligence and comparative willfulness of the Plaintiff as a complete bar to the within action, or, in the alternative, as a partial bar or limitation to the recovery and relief sought by Plaintiffs.

FOR A NINTH DEFENSE

That the conduct of this Defendant, and its employees and agents, was not the proximate cause of the Plaintiff's alleged injuries.

FOR A TENTH DEFENSE

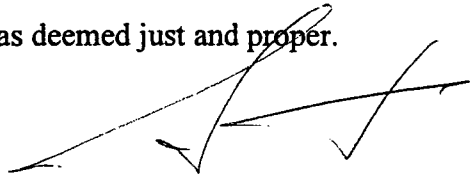
That Plaintiff has failed to mitigate any damages allegedly suffered.

000031

FOR A ELEVENTH DEFENSE

That the Defendant would respectfully show that this action is governed by the South Carolina Tort Claims Act and the Defendant asserts the applicable provisions, immunities and limitations on recovery set forth in the Act as affirmative defenses.

26
1
WHEREFORE, having fully answered the Complaint herein, the Defendant East Richland County Public Service District demands that the Complaint be dismissed with prejudice as to it, and that the Plaintiff be taxed with the Defendant's costs and attorney's fees and that the County award such other relief as deemed just and proper.



Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555
803-771-8010
Attorney for Defendant East Richland
County Public Service District

October 22, 2010

000032

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Insurance Reserve)
Fund,)
)
Plaintiff,)
)
v.)
)
East Richland County Public)
Service District and Coley Brown,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-2096

**MOTION FOR
SUMMARY JUDGMENT**

2012 JUN -6 PM 4:09
JEANETTE M. NORRIS
Clerk of Court
S.C.

TO: ANDREW F. LINDEMANN, ESQUIRE, ATTORNEY FOR PLAINTIFF AND
KENNETH E. BERGER, ATTORNEY FOR DEFENDANT COLEY BROWN:

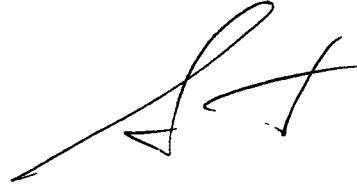
PLEASE TAKE NOTICE that the Defendant East Richland County Public Service District, by and through its undersigned counsel, hereby moves pursuant to Rule 56, SCRCP, for an order granting the Defendant East Richland Count Public Service District Summary Judgment. The record herein will demonstrate that there exists no genuine issue of material fact and that the Defendant East Richland County Public Service District is entitled to a declaratory judgment that the Plaintiff South Carolina Insurance Reserve Fund has both a duty to defend and a duty to indemnify the Defendant East Richland County Public Service District for claims and damages alleged in *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 pursuant to the terms and conditions of the tort liability insurance policies issued to the East Richland County Public Service District.

This motion is based upon the pleadings, discovery, depositions, affidavits,

000033

exhibits, memoranda, case law, statutory law and any other material the Court may receive or review at the time of hearing on the motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'S. Elliott', written over a horizontal line.

Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555
803-771-8010

Attorney for Defendant East Richland
County Public Service District

Columbia, South Carolina

June 6, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,)
)
Plaintiff,)

Civil Action No. 2011-CP-40-2096

v.)

NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT

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

TO: KENNETH E. BERGER, ESQUIRE, COUNSEL FOR DEFENDANT COLEY BROWN

SCOTT ELLIOTT, ESQUIRE, COUNSEL FOR DEFENDANT EAST RICHLAND
COUNTY PUBLIC SERVICE DISTRICT

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Plaintiff South Carolina Insurance Reserve Fund will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Judicial Center, Columbia, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCF, granting summary judgment to the Plaintiff and issuing a declaratory judgment that the South Carolina Insurance Reserve Fund does not owe a duty to defend nor a duty to indemnify to the Defendant East Richland County Public Service District with respect to the civil action captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616.

The Plaintiff's motion is based on the following grounds:

1. There is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged claims asserted and damages sought by Coley Brown in Civil Action

000035

Number 2010-CP-40-5616, are excluded by the Pollution Exclusion, which is Exclusion (f).

2. There is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged claims asserted and damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616, are excluded by the Takings Exclusion, which is Exclusion (p).

3. There is no coverage under the Tort Liability Insurance Policy, as issued by the Insurance Reserve Fund to the named insured, East Richland County Public Service District, because the alleged damages sought by Coley Brown in Civil Action Number 2010-CP-40-5616, do not qualify as "property damage" caused by an "occurrence."

The Plaintiff's motion is based upon the pleadings filed in this case; the pleadings in civil action captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616 (attached); any Stipulations as may be submitted by the parties; excerpts from the Deposition of Larry Brazell (attached); excerpts from the Deposition of Donnie Way (attached); the certified copy of the Tort Liability Insurance Policy issued by the Insurance Reserve Fund to East Richland County Public Service District (attached); and such other matters as may be presented to the Court at or prior to the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Plaintiff South Carolina
Insurance Reserve Fund*

Columbia, South Carolina

June 7, 2012

000036

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Insurance Reserve)
Fund,)
)
Plaintiff,)
)
v.)
)
East Richland County Public)
Service District and Coley Brown,)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-2096

AFFIDAVIT

FILED
2012 JUN 12 AM 11:46
JANET L. HARRIS
C.C.P. & C.S.

Personally appeared before me Larry Brazell who on oath deposes and says:

1. He is the Executive Director of the East Richland County Public Service District ("East Richland" or "District"), a position which he has held since May of 2010.
2. Prior to his tenure as Executive Director he served as the Superintendent of the Maintenance Department of the District for 25 years.
3. East Richland is a special purpose district organized under the laws of the state for the purpose of collection or treatment of sewage in the Jackson Gills Creek Drainage Basin located in the northeast portion of Richland County.
4. He is familiar with the facts alleged and circumstances in the action captioned Coley Brown vs. East Richland County Public Service District, Civil Action No. 2010-CP-40-5616.
5. The sewage force main concerned in the underlying action was constructed in the year 2000.
6. The District is subject to regulation by the South Carolina Department of Health and Environmental Control ("DHEC").

000037

7. Prior to the construction of the force main in question, the District was required to obtain approval of the design and construction plans of the force main from DHEC; that the force main was constructed as authorized by DHEC.
8. The force main lying beneath the roadbed on Westshore Road was part of a larger project designed to collect sewage from the northernmost portion of the District and to transport it to the District's wastewater treatment plant off White House Road near the Congaree River for treatment. In addition to the force main, the District constructed two pumping stations, one on Percival Road and one off Decker Boulevard, to pump (or force) the sewage as it was collected from the District's collection lines through its force mains, including the one under Westshore Road, to its wastewater treatment plant for treatment.
9. Each pump station was constructed with a wet well into which sewage flows and at such point as the wet well becomes full, the pumps operate to pump sewage from the wet well through the force mains to the wastewater treatment plant. These pumps do not operate constantly but intermittently. It is not possible to anticipate or predict when these pumps will start pumping or for how long they will operate before emptying the wet well.
10. The force main in question, like all force mains, is designed with air relief valves located at the highest points along the line. The air relief valves are required to control the outflow and inflow of air into the lines as the pumps at the Percival Road and Decker Boulevard pump stations begin pumping sewage through the lines, so as to permit the flow of sewage through the force main; when these pumps cease pumping, the air release valves will close. As with the operation of the pumps, it is not possible to anticipate or predict when the air relief valves will open or close.

11. As is apparent from the record, the District experienced complaints from its customers along Westshore Road of odors coming from the air relief valves. However, the District did not expect to receive complaints about odors and certainly did not intend to discharge odors from its force main as alleged in Coley Brown vs. East Richland County Public Service District. The frequency of customer complaints concerning odor was not constant or continuous but was irregular. In response to these complaints, the District took a number of steps to mask or eliminate any odors.
12. After having received complaints, the District first injected chlorine into the sewage at the Percival Road pump station to eliminate the discharge of odor; the chlorine seemed to eliminate the odors initially; however, the complaints did not stop. Because the chlorine is corrosive and damages the District's equipment, the District stopped applying chlorine and placed filters in the affected manholes in an effort to eliminate the odors. The filters were designed by the manufacturer to mask the odors released from the force main thereby eliminating them. Initially, filters were comprised of charcoal and subsequently, the District used a chemical media to filter the odors. The media seemed to have masked the odors. The filters were to be replaced every six (6) months; however, the District again received complaints about odor and replaced the media in the filters more frequently to mask the odors. I am not aware of any other instance where charcoal or chemical media filters were used to mask unpleasant odors associated with raw sewage.
13. As the maintenance supervisor for the District during the period in question, I would personally respond to odor complaints along Westshore Road and arriving promptly after any odor complaint was received, I was never able to smell any odors, except when

standing directly over the manhole in question where you would expect to detect an odor of raw sewage. As the maintenance supervisor, it was impossible for me to anticipate or predict when an odor complaint could be expected.

14. The release of odors from East Richland's sewer system is not regulated by DHEC. As the record will reflect, the component of the air released from the air relief valves giving rise to unpleasant odors is hydrogen sulfide. Hydrogen sulfide has a rotten egg smell; methane gas is released but is generally odorless. There may be other components of the odors that are given off from raw sewage; however, neither hydrogen sulfide, methane nor any other component of these unpleasant odors is regulated by DHEC as a part of the District's NPDES discharge permit. The component parts of the odors are a natural by-product of raw sewage and are not toxic or harmful when released into the air. The only danger these substances pose of which he is aware is to sewer maintenance workers who must from time to time go into manholes on the sewer system for maintenance. In such instances, the substances, which are heavier than air, collect in the manhole and an unprotected sewer maintenance worker may be overcome not from the toxicity of the hydrogen sulfide but from the lack of oxygen in the manhole. To prevent such occurrences, the standard procedure is to force oxygen into the manhole thereby forcing hydrogen sulfide and other gases to escape into the atmosphere and making the air in the manhole safe to breathe for the sewer maintenance worker. Only if a customer of the District or a member of the public opens the manhole and climbs down inside the manhole for some reason would he or she be subjected to danger from the presence of hydrogen sulfide or any of the other substances one might find within the East Richland County Public District sewer system. Accordingly, East Richland is not required to take

steps to control odors released from its sewer system. Of course, courtesy to our customers compelled our decision to attempt to mask, redirect or eliminate odors.

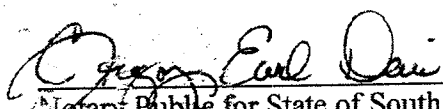
15. In May of 2010, the District determined to vent the air relief valve in front of Coley Brown's home on Westshore Road into a nearby gravity sewer line. The rationale was that as any odor was released from the air relief valve, the odor would be directed into another sewer line and carried away with the flow of the sewage in the gravity line. I am aware of no engineering precedent for this step. However, this process appears to have resolved any odor issue with our customers on Westshore Road, including Coley Brown.
16. The District was frustrated in its efforts to address the odor to eliminate or mask the odor because it could not anticipate when the odors would be so severe so as to give rise to complaint. According to our customers, the odor would be released suddenly from the air relief valve, but by the time I or my staff would arrive to replace the filter, the odor would have dissipated. The release of odors was certainly sudden and unintentional. Moreover, the District personnel were of the view that each step taken to eliminate or mask the odors would resolve the odor issue and the District staff was always surprised when an odor complaint was received.
17. The District owns and operates over 400 miles of sewer lines and the complaint in Coley Brown vs. East Richland County Public Service District is the first and only complaint of its kind.
18. East Richland has been insured by the South Carolina Insurance Reserve Fund for many years. During the course of its dealings with the insurer, the Insurance Reserve Fund has provided coverage of the discharge of sewage into buildings and homes of our customers. In all such cases, raw sewage and odors have been discharged onto the property of these

customers. These occurrences have been sudden, accidental and unintended on the part of the District. I see the release of unpleasant odors in this instance as being no different.


Larry Brazell

Sworn to and Subscribed before me

this 12th day of June, 2012


Notary Public for State of South Carolina

My Commission Expires: SEP 27, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Insurance Reserve)
Fund,)
)
Plaintiff,)
)
v.)
)
East Richland County Public)
Service District and Coley Brown,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-2096

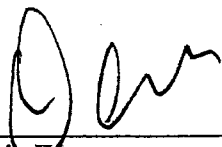
AFFIDAVIT

2012 JUN 12 AM 11:46
RECEIVED
CLERK OF COURT
C.C.P. & G.S.

Personally appeared before me Donnie Way who on oath deposes and says:

1. He is employed by the East Richland County Public Service District ("East Richland" or "District") as an engineer.
2. He is a 1997 graduate of the University of South Carolina with a degree in Civil Engineering.
3. He is familiar with certain matters alleged in Coley Brown vs. East Richland County Public Service District, Civil Action No. 2010-CP-40-5616.
4. In particular, he is aware that odors are released from the sewer lines, pumps and manholes operated by the East Richland County Public Service District. These odors are created by certain substances found in raw sewage, such as hydrogen sulfide and other materials which are introduced into the sewer system. These substances are naturally occurring and are released from a sewer system through manholes, manhole covers, air release valves and at those places where the process is open to the atmosphere.

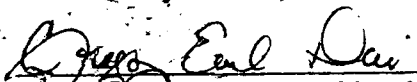
5. When substances such as hydrogen sulfide, which has a rotten egg odor, and methane are released into the atmosphere, they are not released at a level to be toxic or harmful to the District's customers or the public at large.
6. The only danger these substances pose of which he is aware is to sewer maintenance workers who must from time to time go into manholes on the sewer system for maintenance. In such instances, the substances, which are heavier than air, collect in the manhole and an unprotected sewer maintenance worker may be overcome not from the toxicity of the hydrogen sulfide but from the lack of oxygen in the manhole. To prevent such occurrences, the standard procedure is to force oxygen into the manhole thereby forcing hydrogen sulfide and other gases to escape into the atmosphere and making the air in the manhole safe to breathe for the sewer maintenance worker. Only if a customer of the District or a member of the public opens the manhole and climbs down inside the manhole for some reason would he or she be subjected to danger from the presence of hydrogen sulfide or any of the other substances one might find within the East Richland County Public District sewer system.



Donnie Way

Sworn to and Subscribed before me

this 12th day of June, 2012



Notary Public for State of South Carolina

My Commission Expires: SEP 27, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,
Plaintiff,

Civil Action No. 2011-CP-40-2096

v.

PLAINTIFF'S TRIAL MEMORANDUM

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

RICHLAND COUNTY
FILED
JAN 15 11:10:01
JEANETTE W. MCBRIDE
CLERK, P. & G.S.

This is declaratory judgment brought by the Plaintiff South Carolina Insurance Reserve Fund ("IRF") to determine whether it owes a duty to defend or a duty to indemnify East Richland County Public Service District ("District") with respect to the underlying civil action captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616.

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 & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008), the Supreme Court further explained as follows:

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

000045

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 East Richland County Public Service 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 the Defendant 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, para. 12. Brown alleges that the "offensive odors invaded Mr. Brown's property multiple times per day." *See*, Complaint, para. 13. The pre-suit correspondence from Brown's counsel confirms that attempts have been made by the District to correct the release of the offensive odors but to no avail.

The IRF issued a Tort Liability Insurance Policy to the East Richland County Public Service District bearing Policy Number T130400210. The District sought insurance coverage under the Tort Liability Insurance Policy for the claims asserted in Civil Action Number 2010-CP-40-5616, but coverage has been denied by the IRF. The District contested that coverage decision, which resulted in the filing of this declaratory judgment action.

The District makes several arguments in support of its claim of coverage. As an initial argument, the District claims that the IRF is obligated to provide coverage for all risks for which sovereign immunity has been waived by the Tort Claims Act. However, contrary to the District's position, the Fund is mandated by statute to provide coverage for all liability for which sovereign immunity has been waived. Importantly, Section 15-78-140(a), as originally included in the Tort Claims Act, read as follows: "It is the duty of the Budget and Control Board to cover risks for

000046

which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in Section 15-78-150." That provision supports the District's position; however, in 1997, the General Assembly repealed Section 15-78-140(a). 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 State Supreme Court issued its decision in *Town of Duncan v. State Budget & Control Board*, 326 S.C. 6, 482 S.E.2d 768 (1997), and can certainly be construed as establishing (or at least clarifying) the duties owed and not owed by the Board and the Fund in light of the adverse ruling 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 Fund does not have a duty, as the District appears to argue, to cover any risk for which sovereign immunity has been waived.¹

As for the inverse condemnation cause of action brought by Coley Brown, the denial of coverage by the IRF 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." The District cites to the case of *Horry County v. Insurance Reserve Fund*, 344 S.C. 493,

¹ To the extent that the District argues that inverse condemnation is a tort that falls within the scope of the Tort Claims Act, it is mistaken. As the Court of Appeals 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). There is no statutory requirement for the IRF to provide insurance coverage for inverse condemnation claims.

544 S.E.2d 637 (Ct. App. 2001), in which the Court of Appeals concluded that the IRF's Tort Liability Policy did cover inverse condemnation claims. However, the Court of Appeals pointed out that the policy at that time did not contain an exclusion for inverse condemnation. Exclusion (P) was adopted subsequent to 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.²

As for the trespass and negligence causes of action, those claims are not covered by operation of Exclusion (F), which is the pollution exclusion. Exclusion (F) provides that "the insurance does not apply to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant[s], contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*" The highlighted language is an exception to the exclusion. That very exception has been subject to interpretation by the State 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

² 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 inverse condemnation claim.

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 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

000049

lead to one conclusion – that the discharge of the offensive odors from the air relief valve is part of the ordinary operations of the District.

The District argues that the 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*, paras. 12-13. In answering these allegations, the District claims to lack sufficient information to form a belief as to the truth of those allegations. *See, Answer*, paras. 14-15. 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 information learned subsequently during discovery supports the conclusion that the District received numerous odor complaints from Brown and others. Indeed, the allegations and information available to the IRF 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. 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. The fact that attempts have been made to correct the problem does not alter the analysis.

The District also argues that the pollution exclusion is ambiguous when read together with the definition of "occurrence." The District contends that the policy definition of "occurrence" includes "continuous or repeated exposure to conditions," but the pollution

000000

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 & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991), where the Court had found an ambiguity created by two inconsistent policy definitions. Here, the District is claiming an inconsistency between the definition of "occurrence" and a policy exclusion. Consistent with the *Owners* decision, there is no ambiguity under those circumstances.

As an additional 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." 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

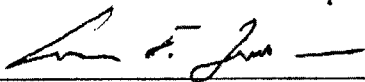
000051

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.

Based on the foregoing, the Plaintiff South Carolina Insurance Reserve Fund respectfully requests the Court to issue a declaratory judgment that the IRF does not owe a duty to defend nor a duty to indemnify to the Defendant East Richland County Public Service District with respect to the civil action captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616. The Court is further requested to deny the District's motion for summary judgment and to dismiss the District's counterclaim with prejudice.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Plaintiff South Carolina
Insurance Reserve Fund*

Columbia, South Carolina

June 12, 2012

000052

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,)
)
Plaintiff,)
)
v.)
)
East Richland County Public Service)
District and Coley Brown,)
)
Defendants.)
_____)

Civil Action No. 2011-CP-40-2096

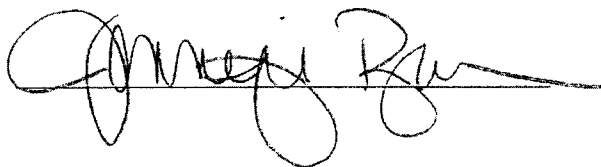
CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2012 JUN 15 AM 10:01
JENNIFER W. MCBRIDE
CLERK, C.P. & G.S.

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Plaintiff, does hereby certify that service of the **Plaintiff's Trial Memorandum** in the above-captioned matter was made upon all counsel of record by email and by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of June 2012:

Kenneth E. Berger, Esquire
Law Office of Kenneth E. Berger, LLC
5205 Forest Drive - Suite Two
Columbia, South Carolina 29206
Email: kberger@bergerlawsc.com

Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, South Carolina 29201
Email: selliott@elliottlaw.us



000053

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Insurance Reserve Fund)
)
Plaintiff,)
)
v.)
)
East Richland County Public Service)
District and Coley Brown,)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-40-2096

MEMORANDUM OF LAW

JANET L. W. MCNEERIDE
C.C.P. & G.S.

2012 JUN 12 AM 11:46

RICHLAND COUNTY
FILED

The Defendant East Richland County Public Service District (“East Richland” or “District”) seeks an order of this Court declaring that the South Carolina Insurance Reserve Fund (“SCIRF”) is required by virtue of its insurance policy issued to East Richland to defend and indemnify East Richland, if necessary, from liability in the underlying action captioned Coley Brown v. East Richland County Public Service District, CA. No. 2010-CP-40-5616 (“underlying complaint”). For the reasons set out, East Richland submits that it is entitled to a declaratory judgment requiring the Defendant SCIRF to defend and indemnify East Richland.

FACTS

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

In 2010, Coley Brown filed an action against East Richland alleging causes of action for negligence, trespass and inverse condemnation. Coley Brown v. East Richland County Public Service

District, CA No. 2010-CP-40-5616. The Complaint alleges that an air release valve on East Richland's sewage force main installed under Westshore Road in Richland County where Mr. Brown resides gave off offensive odors over a period of years and that the continuous or repeated exposure to offensive odors deprived Mr. Brown of the use and enjoyment of his property.

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

In approximately 2000, the District designed and constructed pump stations on Percival Road and near Decker Boulevard within its service territory and constructed a force main or sewer line which runs beneath Westshore Road in the vicinity of Mr. Brown's residence. The force main was designed and constructed with pressure relief valves at intervals to relieve the pressure within the force main which builds as a result of the forces created by pumping the sewage through the line. When the air relief valve operates to relieve pressure within the line, the release of the air and any resulting odor is sudden. 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 force main was designed to meet industry standards and East Richland did not expect or intend to release offensive odors from its force main as alleged. The District's customers in the vicinity of Westshore Road have complained about odors coming from the force main. However, the complaints have not been continuous or routine. Offensive odors are not released through the air

relief valve each time the valve opens. Because the offensive odors are not regularly released through the air relief valve, it cannot be anticipated or predicted when offensive odors will be released. District personnel are informed and believe that the release of any offensive odors has been infrequent. To reduce the possibility of odors, the District has closed certain of the air relief valves on Westshore Road. East Richland has attempted to eliminate odors by injecting chlorine into the force main from its Percival Road pump station which met with some initial success. While the chlorine appeared to reduce the odors (at least judging from the number of complaints), chlorine is very corrosive and was beginning to damage the District's equipment. Subsequently, the District took steps to mask the odors by the installation of filters in the manholes containing the air relief valves which were still functioning. 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 judging from the number of complaints, the filters did not completely eliminate the release of odors into the air. The District could not determine when the filters would fail to mask the odor and for what reason. Most recently, the District modified the air relieve valve in the vicinity of the Plaintiff's property to direct the pressure released into a nearby gravity sewer line. The District believes that this effort has resolved any issue concerning the release of odors from the air relief valve and complaints of odors have stopped. With each effort to eliminate or mask the odors alleged, the District expected that the odors would have ceased.

TORT CLAIMS ACT

The South Carolina General Assembly has modified the Doctrine of Sovereign Immunity and as a consequence, the District is subject to suit according to the provisions and terms of the South Carolina Tort Claims Act ("Act"). Sections 15-78-10 *et seq.* The State Budget and Control Board is authorized to provide insurance for the District 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.”

Section 1-11-140. Under the Tort Claims 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.” Section 15-78-40.

Under the Tort Claims Act, the District’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).

Under the Tort Claims Act, a claim is defined 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 or 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 Tort Claims 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).

Occurrence is defined by the Tort Claims 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 SCIRF shall pay all sums which the District shall become legally obligated to pay as damages because of “property damage to which this applies caused by an occurrence.” Policy Section I. B.

Under the IRF 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 SCIRF 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 SCIRF’s coverage has been recently expanded by the South Carolina Supreme Court.

Our Supreme Court held as follows:

Although the cases addressing an insurer’s duty to defend generally limit this duty to whether the allegations in a Complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer’s duty to defend is not strictly controlled by the allegations in Complaint. Instead, the duty to defend may also be determined by facts outside of the Complaint that are known by the insurer. USAA Property and Casualty Insurance Company v. Clegg, 377 S.C. 643, 661 S.E. 2d 791, 798 (2008)

Therefore, if there are facts known to the carrier outside the four corners of the complaint that may trigger coverage, the IRF has a duty to provide coverage and defend. USAA Property and Casualty Insurance Company v. Clegg; City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund, 382 S.C. 535, 677 S.E. 2d 574 (2009).

COVERAGE

By virtue of the Tort Claims Act, the State has waived the defense of sovereign immunity in actions, as here, for damages recoverable in actions sounding in negligence or torts. Section 15-78-40. As a consequence, the District, and all other agencies and political subdivisions subject to the Tort Claims Act, must be insured against all claims for damages defined by the Tort Claims Act. The Budget and Control Board is authorized by law to issue insurance policies covering all such claims. However, 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. Section 15-78-140 (b) and Section 1-11-140.

Here, the Complaint alleges a claim giving rise to damages including the loss of use of Plaintiff's property. Loss of use is covered by the SCIRF policy. Policy Section III. The property damage alleged in the Complaint falls within the coverage of the policy. Horry County v. Insurance Reserve Fund, 344 S.C. 493, 544 S.E. 2d 637 (Ct. App. 2001).

The SCIRF also relies on the "pollution exclusion" to the policy. The SCIRF construes its policy to exclude coverage of the loss alleged to have resulted from the release of offensive odors. To the extent that the language of the pollution exclusion of the SCIRF policy purports to limit coverage required by the coverage requirements of the Tort Claims Act, the exclusion is ineffective to exclude coverage of the claim herein alleged. Hogan v. Home Insurance Company, 260 S.C. 157, 194 S.E.2d 890 (1973). The Tort Claims Act requires the Budget and Control Board to insure against claims for losses arising from the alleged torts of the District. In exchange for the waiver of sovereign immunity, the Act provides that the District will be protected by the coverage mandated by the Act. In denying coverage based on a pollution exclusion, which is nowhere authorized by the Act, the SCIRF impermissibly acts to expose the District to liability not authorized by the Act. Therefore, any

language in the pollution exclusion in the SCIRF policy purporting to limit coverage of the claims raised against the District is void.

In addition, the Tort Claims Act requires the SCIRF policy to insure claims arising out of a single occurrence. 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. The SCIRF policy defines "occurrence" similarly to include, "continuous or repeated exposure to conditions," resulting in property damages as alleged in the underlying complaint. The District designed and built the force main and air release valves in 2000 setting in motion the sequence of events which give rise to the allegations that the District has been negligent in releasing offensive odors from the air release valve. Yet, in spite of the similarity of the policy definition to the statutory definition of the term "occurrence," the SCIRF construes its policy to exclude coverage of this claim arising out of a single occurrence for which the Tort Claims Act requires coverage and for which the language of its policy would provide coverage. By operation of law, the SCIRF policy may not be construed to be in conflict with the requirements of the Tort Claims Act and therefore, the allegations of the Complaint must be covered by the SCIRF policy. Hogan v. Home Insurance Company, supra.

Moreover, the allegations of the Complaint allege an "occurrence" for which the SCIRF policy provides coverage. For these reasons, the Defendant East Richland is entitled to summary judgment and the Plaintiff SCIRF should be ordered to provide coverage of the underlying complaint.

The "pollution exclusion" can be found in the following language:

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 above quoted language does not exclude coverage of the facts surrounding the allegations of the Complaint herein.

The terms set out in the pollution exclusion are 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. Offensive odors are not “pollution” as intended by the SCIRF and District in the policy. Because the SCIRF policy must be construed against the SCIRF and in favor of the insured, this ends the inquiry and the SCIRF is required by law to provide coverage and enter a defense to the Complaint. 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).

Furthermore, East Richland is not required by DHEC as a part of its regulatory authority to contain or control odors released by its sewer lines, pumping stations or wastewater treatment plant. The odors in question are the result of hydrogen sulfide and other matters found in raw sewage. Hydrogen sulfide gives off a “rotten egg” odor. Hydrogen sulfide as a component of raw sewage is not regulated by DHEC and East Richland is not required to take any steps to contain hydrogen sulfide or any substance emitting offensive odors in its collection or treatment of sewage. These odors are not harmful when released into the air. There is no language in the policy which suggests that unregulated, naturally occurring odors are excluded by the “pollution exclusion.” Moreover, neither facts surrounding the Complaint nor the allegations of the Complaint describe any offensive odors in a manner which would suggest that they were a pollutant or in the nature of a pollutant intended to be excluded from coverage by the policy. The SCIRF 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 alleged in the Complaint or known by the SCIRF

that support the fact that the offensive odors constitute pollution as intended by the parties in their insurance policy, the SCIRF's refusal to provide coverage of and a defense to the allegations of the Complaint constitutes error.

In addition, the policy pollution exception provides coverage for discharges which are sudden and accidental. First, the discharge of offensive odors was both sudden and accidental. The release of the offensive odors is sudden by any definition. It is instantaneous once the pressure conditions require the release of the air pressure in the line. In addition, the release was accidental and unintended from the standpoint of the District. The design of the force main was approved by DHEC and the force main was constructed as designed. East Richland has not experienced circumstances involving release of offensive odors such as those alleged. Last, East Richland took steps which it expected would succeed in eliminating the odors. Here, the Complaint alleges a continuous or repeated exposure to the release of the offensive odors. However, the District made repeated effort to eliminate or mask the odors, with the expectation that each effort would succeed in eliminating or masking the odors. Accordingly, each release of odor was a separate accident. The allegations are no different from the release of raw sewage from the District's lines which the SCIRF has determined are covered under the policy. In such cases the discharge is sudden. Odors accompany the discharge of raw sewage. The discharge will flow until the pressures in the District's line which release or discharge the sewage are relieved or the sewer line is repaired. In such cases, the discharge is continuous. Last, sewage spills are neither expected nor intended by East Richland. Yet the SCIRF 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 is that the discharge is only an offensive odor. Therefore, having accepted coverage of similar claims raised against the District, the SCIRF 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).

Under the terms of the insurance policy, the IRF shall pay all sums which the District shall become legally obligated to pay as damages because of “property damage to which this applies caused by an occurrence.” Under the 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. [Emphasis added]

Yet the pollution exclusion provides as follows,

(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**; [Emphasis added]

The SCIRF policy is inherently ambiguous. First, the Supreme Court has held that term “sudden” is inherently ambiguous. Greenville County v. Insurance Reserve Fund, *supra*. As explained by the Supreme Court, the term sudden as set out in the pollution exclusion can be construed to mean “unexpected” or “unintended.” The Court also pointed out that the word “sudden” can be construed to require an abrupt or precipitous event. Here, the District did not expect the air release valve to emit an offensive odor. Indeed, the District took steps to mask and eliminate any offensive odor. Clearly, the District never intended the release of the offensive odors.

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 to include a continuous or repeated exposure to conditions resulting in property damage. Accordingly, the policy is inherently ambiguous and any question of coverage should be resolved to include coverage.

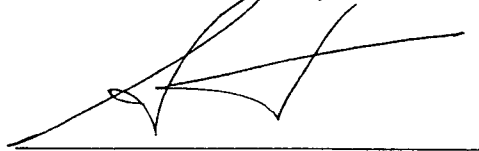
The allegations and facts and circumstances giving rise to the allegations of inverse condemnation are inextricably intertwined to the tort allegations. In Horry County v. Insurance Reserve Fund, 344 S.S. 493, 544 S.E.2d 637 (Ct. App. 2001), the Court of Appeals ordered the Insurance Reserve Fund to provide a defense for the allegations of the inverse condemnation action. The SCIRF relies upon an exclusion in its policy to exclude the inverse condemnation cause of action from coverage. However, the allegations giving rise to the inverse condemnation cause of action falls within the definition of “occurrence” under the policy. Moreover, as argued above, the SCIRF policy must provide coverage as required by the Tort Claims Act. Accordingly, the inverse condemnation exclusion is ineffective to exclude coverage under the facts of this case. The facts surrounding the allegations of the Complaint and the policy language compel the decision in favor of coverage for claims alleged in the Complaint.

In summary, the SCIRF policy may not be construed to limit coverage required by the Act. The SCIRF’s construction of the pollution exclusion and inverse condemnation exclusion to deny coverage violates the terms of the Tort Claims Act. The term “sudden” as used in the policy exclusion has been held by the Supreme Court to be ambiguous compelling the IRF to provide coverage and a defense. Greenville County v. Insurance Reserve Fund, *supra*. Further, the pollution exclusion and inverse condemnation exclusion when read in context with the definition of “occurrence” creates an ambiguity. The policy must be construed favorably to the District so as to provide coverage for this claim for alleged exposure to the continuous, repeated release of the offensive odor alleged in the Complaint. Greenville County v. Insurance Reserve Fund, *supra*. Last, assuming for the sake of argument that the pollution exclusion is valid, the release of the offensive odors was at all times sudden and accidental as described in the exception to the pollution exclusion and therefore the allegations of the Complaint are covered by the SCIRF policy.

For the foregoing reasons, the East Richland County Public Service District submits that the allegations of the Complaint are covered under the SCIRF policy. The Defendant East Richland County Public Service District is entitled to a declaratory judgment that the Plaintiff South Carolina Insurance Reserve Fund has both a duty to defend and a duty to indemnify the Defendant East Richland County Public Service District for claims and damages alleged in *Brown v. East Richland County Public Service District*, Civil Action No. 20120-CP-40-5616 pursuant to the terms and conditions of the tort liability insurance policies issued to the East Richland County Public Service District.

Respectfully submitted,

ELLIOTT & ELLIOTT, P.A.

A handwritten signature in black ink, appearing to read 'Scott Elliott', is written over a horizontal line.

Scott Elliott
1508 Lady Street
Columbia, SC 29201
803-771-0555 (P)
803-771-8010 (F)
Attorney for Defendant East Richland
County Public Service District

Columbia, South Carolina

June 12, 2012

1 STATE OF SOUTH CAROLINA

CIRCUIT COURT

2 COUNTY OF RICHLAND

2011-CP-40-02096

3
4 SC INSURANCE RESERVE FUND,
5 Plaintiff,

6 -vs-

TRANSCRIPT OF RECORD

7 EAST RICHLAND COUNTY PUBLIC
8 SERVICE DISTRICT, and COLEY
BROWN,
9 Defendant.

10 Heard on Wednesday, June 13, 2012

11 Columbia, South Carolina

12
13 BEFORE:

14 THE HONORABLE ALISON RENEE LEE

15
16 APPEARANCES:

17 Counsel on Behalf of the Plaintiff:
18 Andrew F. Lindemann, Esq.

19 Counsel on Behalf of the Defendant:
20 Scott Elliott, Esq.
Kenneth E. Berger, Esq.

21
22
23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29804-5232
25

000066

RECEIVED 2012 JUN 13 11:14 AM

EXAMINATION INDEX

LARRY THOMAS BRAZELL

DIRECT BY MR. ELLIOTT	14
CROSS BY MR. LINDEMANN	35
REDIRECT BY MR. ELLIOTT	42

EXHIBIT INDEX

MAR ADM

Plaintiff's:

1	Civil action	5
2	Policy	5
3	Policy	5
4	Answer	5
5	Deposition excerpts	10

000067

1 ON WEDNESDAY, JUNE 13, 2012 AT 9:55 A.M.:

2 THE COURT: Good morning.

3 MR. LINDEMANN: Good morning.

4 MR. BERGER: Good morning.

5 THE COURT: We're here on Docket Number
6 2011-CP-40-2096, South Carolina Insurance Reserve Fund
7 versus East Richland County Public Service District and
8 Coley Brown. The Plaintiff is represented by Andrew
9 Lindemann. The Defendant, East Richland County, is
10 represented by Scott Elliott. And for Coley Brown?

11 MR. BERGER: Kenny Berger.

12 THE COURT: Thank you.

13 MR. BERGER: Yes, Your Honor.

14 THE COURT: We are here for a non-jury trial. I
15 understand also that there are pending motions for summary
16 judgment and I also understand that -- I've read the
17 motions for summary judgment. I've read the affidavits
18 and deposition excerpts. And I've had a copy of the
19 policy. I've read the memoranda and there were pretrial
20 memorandum sent as well, and I've reviewed those. So --
21 and the competing motions for summary judgment.

22 As I understand it, it's more or less a legal issue
23 not a factual issue, but I'm willing to handle it however
24 you all want to handle it, whether you want to present
25 testimony or just make legal arguments. Either way.

000068

1 MR. LINDEMANN: May it please the Court. Good
2 morning, Your Honor.

3 Andrew Lindemann on behalf of the Insurance Reserve
4 Fund. Mr. Elliott and I went back and forth in trying to
5 figure out the best way to present this case as succinctly
6 as possible to the Court. And we filed cross motions for
7 summary judgment. Yesterday I received affidavits from
8 Mr. Elliott and I knew that they were coming. In fact, I
9 agreed that he could file them after he filed his motion.

10 After looking at the affidavits, and again, going sort
11 of back and forth on it myself, I believe that to make a
12 proper record for this case it would be best to take
13 testimony in the Defendant's case in chief from
14 Mr. Brazell as opposed to relying completely on his
15 affidavit. Most of his affidavit I don't challenge.
16 There's some conclusory statements and some inferences
17 that I think I need to at least explore through cross-
18 examination.

19 For my case in chief and I'll handle this however Your
20 Honor would like, we have pre-marked as exhibits and I
21 believe there's no opposition from the Defendants. We've
22 marked two different policies. They're actually
23 identical. They're the two that were attached to my
24 motion for summary judgment.

25 I believe those are Exhibits Two and Three and then

000069

1 the first exhibit is a copy of the complaint that was
2 filed by Coley Brown in the underlying action.

3 I know Your Honor's probably seen that because that's
4 attached to my motion for summary judgment.

5 (Plaintiff's Exhibits, No. 1, civil action complaint;
6 No. 2, Policy 7-15-10; No. 3, policy; No. 4, answer,
7 received into evidence.)

8 THE COURT: I did, but I did not pull the file in that
9 particular case to look at any other documents. I just
10 read the compliant.

11 MR. LINDEMANN: And that will be fine. Now that I
12 think about it, Your Honor, I also -- and I didn't
13 pre-mark this, but if there's no opposition I made
14 reference to it in my memo, a copy of the answer. I'll
15 have to find you -- a copy of the answer that was filed in
16 the underlying case. I'd like so make that part of the
17 record.

18 MR. ELLIOTT: No problem.

19 MR. LINDEMANN: If I could also make a copy of the
20 answer an exhibit as well.

21 (Plaintiff's Exhibit No. 4, answer, received into
22 evidence.)

23 MR. LINDEMANN: As far as my case in chief, as
24 indicated, I was going to publish certain portions of the
25 deposition. And, again, those were attached to my motion

000070

1 for summary judgment.

2 I provided counsel yesterday or Monday with a
3 designation list and I could handle this however Your
4 Honor wants. We could make an exhibit the designations
5 and Your Honor could just read those yourself as long as
6 we've got an agreement that that testimony was part of the
7 case in chief, or Mr. Berger has kindly agreed to read the
8 part of the witnesses that, it would be helpful to Your
9 Honor if Your Honor's preference procedurally is to treat
10 this as we would obviously in a jury trial and actually
11 publish the depositions allowed.

12 I'll handle it however Your Honor wishes. But that's
13 going to be the Plaintiff's case in chief because as Your
14 Honor's correctly recognized, this case really turns on
15 legal arguments.

16 THE COURT: Mr. Elliott.

17 MR. ELLIOTT: I am -- I think Mr. Lindemann has set
18 out our position, I think, very faithfully. I think that
19 we would call then Mr. Brazell however. And what I will
20 do, rather than just tender him for cross-examination, I
21 guess I would -- I think Mr. Lindemann wants to cross-
22 examine him as to some of the statements in the affidavit,
23 perhaps not all of them, but I thought it might be, out of
24 fairness to Mr. Brazell and to make it more complete I
25 might just call him and question him briefly, just to kind

000071

1 of follow the outlines of this affidavit.

2 THE COURT: And, Mr. Berger, anything you want to add
3 at this time?

4 MR. BERGER: No, Your Honor. I won't be presenting
5 any argument on behalf of Mr. Brown. I'll limit it to
6 co-counsel to Mr. Elliott.

7 THE COURT: Okay. And as I understand it, the
8 underlying case that your client brought against the East
9 Richland County Public Service District, that has already
10 been resolved in one way or the other. That is, it has
11 gone through the court process and has resulted in a
12 verdict or a judgment or is that still --

13 MR. BERGER: No, Your Honor. The underlying action
14 has been stayed pending the resolution of this declaratory
15 judgment action.

16 THE COURT: Okay. And like I said, I had not pulled
17 that file but that's helpful to know.

18 MR. BERGER: Yes, Your Honor.

19 MR. LINDEMANN: One last point I failed to mention.
20 There were two affidavits that were submitted by
21 Mr. Elliott. One by Mr. Brazell which is the one I
22 referenced. That's the more in depth affidavit. The
23 second affidavit is from an individual named Donnie Wray.

24 And I told Mr. Elliott that I didn't find anything
25 that I needed to cross-examine Mr. Wray about but I have

000072

1 no problems with the Defendant relying on Mr. Wray's
2 affidavit in lieu of live testimony, Your Honor.

3 THE COURT: And his affidavit was much shorter than --

4 MR. LINDEMANN: That's correct.

5 THE COURT: -- Mr. Brazell's affidavit?

6 MR. LINDEMANN: Correct.

7 THE COURT: Then procedurally, I have no problem
8 handling it that way. If Mr. Lindemann, what you would do
9 is you got two exhibits that have been marked and --

10 MR. LINDEMANN: Actually four, Your Honor; two
11 policies, the complaint and the answer from the underlying
12 case.

13 THE COURT: And then you also wanted to use deposition
14 excerpts?

15 MR. LINDEMANN: That's correct, Your Honor.

16 THE COURT: From the deposition of?

17 MR. LINDEMANN: Of Larry Brazell and also from the
18 deposition of Donnie Wray.

19 THE COURT: And you have those designations and you
20 have the original depositions?

21 MR. LINDEMANN: Actually Mr. Berger has the original
22 deposition here we can submit to the Court.

23 THE COURT: Okay. I don't know whether they're the
24 same pages that were attached to the --

25 MR. LINDEMANN: They are, Your Honor.

000073

1 THE COURT: They are? So they're the exact same
2 pages?

3 MR. LINDEMANN: They are. I think there's one page
4 that I ended up not designating something for testimony
5 from, but everything that I've designated was attached to
6 my motion for summary judgment. So they're in the Court's
7 file at least.

8 THE COURT: They are. And I've read all of that. I
9 just -- if you've got the lines.

10 MR. LINDEMANN: I do. And, Your Honor, I apologize.
11 In my haste this morning I didn't make an extra copy of
12 the designations but I have the original. We either mark
13 these as a Court Exhibit perhaps and then I'll give these
14 to you.

15 THE COURT: You can. Yes, if you want to mark it --

16 MR. LINDEMANN: Just so there's a record of it.

17 THE COURT: -- as a Court Exhibit and we'll make
18 copies of it.

19 MR. LINDEMANN: Thank you, Your Honor.

20 (Pause.)

21 MR. ELLIOTT: We can mark it as a Plaintiff's Exhibit.

22 MR. LINDEMANN: Do you want us to put originals in,
23 Your Honor, or does it suffice to have them in the record
24 as attached to my motion?

25 THE COURT: I think it will be fine just to just to

000074

1 use what's here.

2 MR. LINDEMANN: Great.

3 THE COURT: Okay.

4 MR. ELLIOTT: That's fine with me.

5 THE COURT: You have extra copies and y'all can have
6 them for whatever else you all need them for.

7 MR. ELLIOTT: I think that will be fine.

8 MR. LINDEMANN: Okay. Thank you, Your Honor.

9 MR. BERGER: That will be fine.

10 (Plaintiff's Exhibit No. 5, deposition excerpts,
11 received into evidence.)

12 THE COURT: And just for the record, this is a
13 declaratory judgment action in which there's a question
14 about whether the policy that's held by the South Carolina
15 Insurance Reserve Fund will cover the, I guess, the
16 allegations of Mr. Brown's complaint against the East
17 Richland County Public Service District. And I understand
18 that there are a few provisions that you're claiming,
19 Mr. Lindemann, that would indicate that the policy would
20 not apply to the allegations by Mr. Brown.

21 MR. LINDEMANN: That is correct, Your Honor.

22 THE COURT: One related to pollution, one related to
23 occurrence if I --

24 MR. LINDEMANN: Actually there's the pollution
25 exclusion as Your Honor indicated which was Exclusion F.

000075

1 There's the inverse condemnation or takings exclusion
2 which is Exclusion P. And then there's the argument that
3 any type of economic loss that has been alleged by
4 Mr. Brown, including diminution of property value would
5 be, would not qualify as property damage as defined by the
6 policy. Those are the three coverage arguments, Your
7 Honor.

8 THE COURT: The pollution one is F, inverse
9 condemnation is P, and then diminution. What was the
10 other one? It does not --

11 MR. LINDEMANN: It's not an exclusion.

12 THE COURT: Diminution of property, property damage?

13 MR. LINDEMANN: That's correct, Your Honor.

14 THE COURT: For some reason I had occurrence, the
15 occurrence marked.

16 MR. ELLIOTT: Well, that's put at issue by us.

17 THE COURT: Okay. So at least I did properly mark it.

18 MR. ELLIOTT: Yes, ma'am.

19 THE COURT: I think I've got the pages marked. Tell
20 me the difference again between the two policies.

21 MR. LINDEMANN: There's none, Your Honor. There were
22 just two consecutive policy periods.

23 THE COURT: So even though the date that's on the
24 front of them, whatever date's signed is the same date --

25 MR. LINDEMANN: The operative language of both

000076

1 policies is the same.

2 THE COURT: Okay.

3 MR. LINDEMANN: It's just two consecutive policy
4 periods, one the '09 to 2010 policy period, and then the
5 subsequent policy period from 2010 to 2011 but the policy
6 language that's applicable in this case --

7 THE COURT: Is the same.

8 MR. LINDEMANN: -- is identical in both.

9 THE COURT: Okay. Is there anything else you'd like
10 to make in the way of introductory comments,
11 Mr. Lindeman?

12 MR. LINDEMANN: Your Honor, I could, we could
13 certainly do openings. I think probably perhaps the best
14 way to do it, and again, I'm open to handling this however
15 Your Honor wishes me to is to go through the testimony
16 particularly since you've read that and then make the
17 legal arguments at the end as opposed to --

18 THE COURT: Okay. That's fine. I just want to make
19 sure that at least there will be some clarity for the
20 record because I assume that no matter what I do it's
21 going to go up.

22 MR. LINDEMANN: I can't say, but I could probably
23 guess.

24 MR. BERGER: Yes.

25 THE COURT: Somebody's going -- somebody's not going

000077

1 to like the decision so it's going to go up beyond me. So
2 at least I have some comfort in that.

3 (Laughter.)

4 THE COURT: Okay. Then that's fine. Mr. Elliott?

5 MR. ELLIOTT: Your Honor, again, I think Mr. Lindemann
6 has faithfully outlined, you know, our discussions and
7 negotiations and agreement as to how to proceed. I'm
8 happy to put up at some point Mr. Brazell for brief
9 testimony and cross-examination.

10 And then I think my thought was at the conclusion of
11 at least the testimony phase or the evidence phase,
12 perhaps we might have a time for argument.

13 THE COURT: Sure. That's fine. And so since
14 Mr. Lindemann has given me his, then we can go forward
15 with what you want to present.

16 MR. ELLIOTT: Very fine. Thank you, sir -- thank you
17 ma'am. Excuse me.

18 THE COURT: Okay.

19 MR. ELLIOTT: We call Larry Brazell to the stand.

20 LARRY THOMAS BRAZELL, having been duly sworn, was
21 examined and testified as follows:

22 THE CLERK: Have a seat on the witness stand, please.
23 State your name for the record.

24 THE WITNESS: I'm sorry?

25 THE COURT: State your name, please, for the record.

000078

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 THE WITNESS: Larry Thomas Brazell.

2 THE COURT: Spell your last name, please.

3 THE WITNESS: B-R-A-Z-E-L-L.

4 THE COURT: Thank you. Yes, sir.

5 DIRECT EXAMINATION

6 BY MR. ELLIOTT:

7 Q. Mr. Brazell, by whom are you employed and what do you
8 do there?

9 A. East Richland County. I'm the executive director.

10 Q. And how long have you been the executive director?

11 A. Two years.

12 Q. And prior to becoming executive director, did you work
13 for the District then?

14 A. Maintenance superintendent for about 25 years.

15 Q. So maintenance superintendent. And what were your
16 duties and responsibilities as maintenance superintendent?

17 A. To maintain all the sanitary sewer pump stations,
18 treatment plant throughout the whole Northeast District of
19 East Richland.

20 Q. Would you just describe East Richland for us? Just
21 ever so briefly, what it does and what its territory is.

22 A. We're a special-purpose district that handles the
23 Northeast area of Columbia. We collect and transfer and
24 treat all the sewer for the Northeast, about 18,000
25 customers.

000079

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 Q. All right, sir. Are you generally familiar with the
2 facts alleged and the circumstances in the action
3 captioned Coley Brown versus East Richland County Public
4 Service District?

5 A. Yes, sir; I am.

6 Q. Good. And tell me, when was the force main that is
7 the subject of that lawsuit on West Shore Road, when was
8 that built?

9 A. Late '99, 2000, somewhere in that neighborhood.

10 Q. All right, sir. And before we describe that project
11 let me ask you this: Is East Richland regulated by DHEC,
12 the Department of Health and Environmental Control?

13 A. Yes, sir. We're regulated under MPDS permit, and we
14 have to follow all the directions of EPA and DHEC.

15 Q. So you're regulated by DHEC and EPA?

16 A. (Nods head.)

17 Q. With respect to the construction of the force main in
18 question, did DHEC have to give any approval for that?

19 A. Yes, sir. We have an engineering firm to make us a
20 set of plans. We go over them, do a PER on them which is
21 a preliminary engineer report. We send it to DHEC and
22 then they look at it and if it's good they send it back to
23 us and issue us a construction permit.

24 Q. So DHEC reviews it and issues a construction permit?

25 A. Yes, sir.

000080

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 Q. Did you submit this plan to DHEC for the construction
2 of this force main?

3 A. Yes, sir.

4 Q. And did you get approval for this force main?

5 A. Yes, sir.

6 Q. And did you build a force main as approved by DHEC?

7 A. Yes, sir; according to plans and specifications. Yes
8 sir.

9 Q. Now, let me ask you -- stepping back just a moment.
10 What else, what other parts of the construction project
11 were there that ultimately gave rise to this force main on
12 West Shore?

13 A. I'm sorry. I didn't catch the last part of the
14 question.

15 Q. The project, was it just to build the sewer line on
16 West Shore or was it --

17 A. No, no. That was coming from Decker Boulevard and
18 from Spring Valley Mobile Home Park. It was -- we had
19 some lines that was overloaded, some gravity lines. So we
20 had to build some pump stations to force the sewer to that
21 point on West Shore where we have a new 54-inch line that
22 we could dump the sewer into.

23 Q. And where did it go once it got to West Shore?

24 A. And it goes from there to Quail Lane Pump Station,
25 from Quail Lane Pump Station to our treatment plant on

000081

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 White House Road, and from the treatment facility it dumps
2 back into the Congaree River.

3 Q. All right, sir. And, again, the pump stations that
4 were built as a part of this project were at Percival Road
5 and Decker Boulevard?

6 A. Yes, sir.

7 Q. Could you please describe briefly the pump station,
8 either the pump station or pump stations in general and
9 how they operate?

10 A. Well, all pump stations operate in general. Some are
11 larger, some are smaller. But as the gravity lines feed
12 to that station, we have a wet well. And that wet well
13 collects from the gravity line and when it gets to a
14 certain elevation the pumps will come on and it will force
15 that through the force main to the discharge pond which is
16 on West Shore Road. And there's two wet wells. There's
17 two force mains, two pump stations.

18 From the smallest one, from a house, to the one that
19 we have on the Quail Lane that pumps 18,000,000 gallons a
20 day, they all work the same.

21 Q. All right, sir. And -- but in the case of this
22 particular force main, the pumps, the District's pump
23 station at Percival Road and Decker pump sewage through
24 that line on to the treatment plant?

25 A. Yes, sir.

000082

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 Q. And, to be very clear, you talked about gravity lines
2 filling up a wet well and the pump station. It's filling
3 it up with raw sewage?

4 A. Raw sewage. Anything and everything comes down those
5 lines.

6 Q. Now the wet well. Let's take, if you know, Percival
7 Road, do you know approximately how big it is?

8 A. It's probably pumping 250,000 gallons, maybe 400,000
9 gallons a day, somewhere in that range, just according to
10 the weather.

11 Q. And do we know -- do you in the District know when
12 those pumps are going to turn on at any given point in the
13 day?

14 A. No, sir. That would be impossible for anybody to
15 know.

16 Q. And why is that?

17 A. Because as the flow -- you know, if everybody's home
18 on a Saturday or Sunday or late in the afternoons, you
19 have more flow so it will come on more frequent. So, you
20 know, you have peak flow. Well, you know, when a peak
21 flow comes or when a low flow comes at two o'clock in the
22 morning, but any other time it's just sporadic. Whatever
23 the flow is, if it's a holiday and everybody's home, it
24 may come on 10 times an hour. It may come on once an
25 hour. So there's no way of telling. It's according to

000083

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 the flowing of the gravity lines, the speed that it fills
2 that wet well to determine when a pump is going to come on
3 and go off.

4 Q. And again, the Decker Pump Station and the Percival
5 Pump Station are similar in that regard; correct?

6 A. Yes, sir.

7 Q. Now, let's talk a little bit about force mains, and
8 then the one on West Shore in particular. What is a force
9 main?

10 A. It, it's just -- the pump's sitting in the pump house
11 where the wet well from the suction side, it actually
12 forces it. It's not led by gravity. It's pushed by force
13 by the power of that pump. It can push it up hills, down
14 hills. It don't have to be at a certain elevation. It
15 can be -- follow the contour of the ground. And that's
16 what it -- exactly what it is. It's a force main because
17 it's being forced through. It's not flowing by gravity.

18 Q. All right, sir. And there are allegations in the
19 underlying complaint brought by Mr. Brown against the East
20 Richland Public Service District concerning odors coming
21 out of a valve of some sort. Are you familiar with that?

22 A. Yes, sir.

23 Q. Would you please describe the kind of valve that the
24 complaint alleges?

25 A. It's a air vacuum valve that you have to have at every

000084

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 high point to release the air. When the pump comes on
2 it's going to release the air that's in the line. When
3 the pump goes off it, it draws a vacuum to shut the pumps
4 back down without putting so much pressure on the lines
5 and on the pumps. If it didn't it would explode the
6 line. It has to relieve the air. Whatever is in that
7 line is air, whether it's pure oxygen or whatever, it's
8 got to come out of that air release valve at a high point.

9 Q. All right. And when you submitted the design of this
10 force main that runs on West Shore Road with air release
11 valves, when you submitted those to DHEC, DHEC approved
12 that design?

13 A. Yes, sir.

14 Q. And did you construct this force main with the air
15 relief valves according to the design approved by DHEC?

16 A. Yes, sir.

17 Q. And in fact any force main for any sewer company or
18 provider is going to have air relief valves?

19 A. Anyone in this state or any other state, they have to
20 have air release valves to operate.

21 Q. And so as the maintenance supervisor and now the
22 director of East Richland, do you have any idea when the
23 air relief valves are going to open or close?

24 A. No. That would be impossible to tell.

25 Q. Okay.

000085

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 A. If you're standing out there over that manhole and it
2 opens you can hear it, and you can hear it when it closes
3 but it may happen -- and it may go two hours before it
4 happens, it may go six hours before it happens and it may
5 open 10 times an hour.

6 Q. But you have to be standing over it?

7 A. You have to be standing over the hole, yeah.

8 Q. Now at some point did you get complaints from your
9 customers in the vicinity of Mr. Coley Brown's house about
10 odors coming out of that sewer line?

11 A. Yes, sir; we did.

12 Q. And were you surprised to have these odor complaints?

13 A. Yes, we were, because, you know, we've got, I don't
14 know, 100 miles of force main in the District, a lot
15 bigger force mains than that force main. We have a 24 and
16 a 30 that runs across Hampton Hill, seven miles long.
17 Never had an odor. We have them in Spring Valley. We
18 have them in Wildwood. Never had a problem with odor from
19 them.

20 Q. And, you know, how would you describe the regularity
21 of these odor complaints over a period of time?

22 A. It wasn't any regularity. I mean, some -- most of the
23 time it would be on the weekend when people were out
24 walking and -- walking by those manholes, they could smell
25 an odor.

000086

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 Q. Now, I want to ask you: Are you required by DHEC to
2 take any steps to contain or control those odors coming
3 out of the manhole?

4 A. No, not in our MPDS permit. There's nothing --
5 something we've never done before.

6 Q. All right. But, did you try to take steps to address
7 the odors after the complaint?

8 A. Yes, sir. When we had the complaint and then, you
9 know, we tried to be -- take care of our customers and
10 take care of that complaint. And we tried putting in
11 chemical at Percival Road. Thought we had it. I spent
12 thousands of dollars on the chemical. And then three or
13 four months it popped back up again.

14 And then we started, we researched and found out we
15 could put in charcoal filters. We went and put in
16 charcoal filters several months, maybe -- I don't know,
17 I'd have to look back in the record to see exactly how
18 long it had been. We got more complaints that we're still
19 having an odor.

20 So we got in touch with the company that specializes
21 in masking odors and we had them to come and try to get a
22 smell of what was coming out and design us a media that
23 would mask that odor.

24 And we spent quite a bit of time and money putting in
25 filters, masking agent that would mask that odor.

000087

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 Q. All right. So let me understand. At first you tried
2 to put a chemical in the raw sewage at the percival Road
3 Pump Station?

4 A. Yes, sir.

5 Q. What was that chemical?

6 A. It's a Chlorox. It's a acid base. I can't right now
7 recall the exact name.

8 Q. It's a chlorine base?

9 A. Chlorine base. It's chlorine-based chemical.

10 Q. And did I understand you to say that initially you
11 thought that --

12 A. Yeah.

13 Q. -- would solve the odor problem?

14 A. We went seven, eight months, maybe a year, didn't have
15 a compliant because we thought we had taken care of it.
16 But it was so corrosive we just had to quit using it.

17 Q. And then you tried the charcoal filters?

18 A. Tried the charcoal filters.

19 Q. Did that seem to solve the problem?

20 A. Yes, sir; we thought the problem was solved.

21 Q. And, again, it's over some period of time, another
22 complaint?

23 A. And then another complaint; yes, sir.

24 Q. And did you put a chemical -- you mentioned a chemical
25 media?

000088

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 A. We put -- it's a powder. It's a granulated, two
2 powder -- two granulates that you mix together. It's a
3 masking agent that's supposed to -- when the air release
4 valves sets down in a manhole it releases the air and it
5 has to come through this filter to dissipate out into the
6 air.

7 Q. And did you -- you thought that solved the problem?

8 A. Thought that solved the problem; yes, sir.

9 Q. But complaints, you had other complaints?

10 A. We did have another complaint or two; yes, sir.

11 Q. Are you -- in your 27 years in the sewer business, are
12 you aware of any other circumstances where some charcoal
13 or some chemical medium was put in a filter in a manhole
14 cover to try to mask or eliminate odors?

15 A. No, sir; never did that before.

16 Q. Now with respect to your work as the maintenance
17 supervisor, were you made aware of a complaint, an odor
18 complaint when it would come into the office?

19 A. Yes, sir.

20 Q. Did you go to West Shore Road?

21 A. Many a time. Many a time.

22 Q. And --

23 A. I instructed all of my fellows if they got that call
24 to let me know. I wanted to be there to see if I could
25 determine exactly where it was coming from.

000089

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 See, we have gravity lines in that area too. So I
2 wasn't sure that all the smell was coming from that air
3 release valve. So that's the reason I wanted to go
4 myself. On the weekends I'd been out several times.
5 After a rainy period we'd go, and every time we'd have a
6 call we would go and see if we could detect that smell.
7 Q. And when you were there, when you arrived did you
8 smell anything?

9 A. No, sir. If the air release valve come on while I was
10 there, you'd get a little odor right, you know, for a
11 second or two because it may run five minutes. It may
12 run -- it don't discharge air the whole time the pump
13 runs. Just when the pump starts up it will (makes noise),
14 and if you're standing right over the manhole, yes, you'd
15 get an odor.

16 Q. But you'd have to be right over --

17 A. You'd be right over the manhole; yes. Not 10 feet
18 away.

19 Q. So I think I was simply asking, you would be standing
20 directly over the manhole to get the odor?

21 A. That's correct.

22 Q. And when you testified just a moment ago and I asked
23 this for the record, you testified that the, that the air
24 relief valve would open and you kind of gestured, you made
25 a noise like a shushing noise. Were you trying to

000090

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 demonstrate that the relief is instant?

2 A. Just the air pressure coming out of the valve for a
3 few seconds.

4 Q. And standing there, were you able to anticipate or
5 predict when that air relief valve would open?

6 A. No, sir.

7 Q. As the District's maintenance supervisor for a period
8 of 25 years, was it ever possible for you to anticipate or
9 predict when an odor complaint would be expected?

10 A. No, sir.

11 Q. Now I asked you a moment ago whether odors were
12 regulated by DHEC. And I think your answer was that they
13 were not.

14 Now, what -- you know, what makes up, what goes into
15 these odors as a general rule that would be found escaping
16 from a manhole or a sewer treatment plant or a pump?

17 A. Anything you can imagine is flushed down a sewer line,
18 gas, oil -- should not be. That stuff is regulated. If
19 you get caught you're in trouble, but anything from
20 clothes to things I'd rather not even talk about --

21 Q. Right.

22 A. -- before these ladies. But everything is -- anything
23 that can come down the line, believe me, comes down it.

24 Q. All right. And then the odor itself, can you tell the
25 Court, please, some of the components of what goes to make

000091

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 up that odor?

2 A. The chemicals in that, whatever they're putting in
3 there. And whatever, just the flow of the water with the
4 sewer as it moves it causes a gas. It causes methane,
5 hydrogen sulfide and many more, but...

6 Q. Well, in particular, methane and hydrogen sulfide you
7 mentioned. How would you -- can you smell the hydrogen
8 sulfide? And if so, how would you describe that odor?

9 A. Just like a bunch of rotten eggs. The smell is just
10 like rotten eggs.

11 Q. And does methane actually have an odor?

12 A. Very little if any odor to methane.

13 Q. Now are you required by DHEC to control or contain
14 hydrogen sulfide or methane or any other gases as a part
15 of your discharge permit?

16 A. No, sir.

17 Q. And the hydrogen sulfide naturally occurs in sewage?

18 A. Yes, sir.

19 Q. And the hydrogen sulfide would be released in the air
20 anyplace where there might be an opening in the sewer
21 system?

22 A. A clean-out cap, a crack in the line, a manhole lid.
23 In your house if you have a crack in a p-trap, hydrogen
24 sulfide can come out.

25 Q. Now, I think that there was some discussion in the

000092

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 depositions in this case about hydrogen sulfide and its
2 being dangerous. Do you recall that line of questioning?

3 A. Yes, sir. Some.

4 Q. I want to ask you, is hydrogen sulfide or methane for
5 that matter released into the atmosphere, is it dangerous?

6 A. Not in the atmosphere.

7 MR. LINDEMANN: I object to the question, Your Honor.
8 I don't think he's established a foundation for this man
9 to have the chemical background to be able to testify to
10 that. And I believe in his deposition he in fact
11 indicated he doesn't have that experience.

12 THE COURT: Rephrase the question.

13 BY MR. ELLIOTT:

14 Q. Are there any circumstances where -- you've testified
15 that the hydrogen sulfide was not regulated by DHEC. Are
16 there circumstances where you as a sewer worker must take
17 precautions against hydrogen sulfide or the methane?

18 A. Oh, yeah. We have to go -- if we have to go down in a
19 manhole and work we have to use a gas detector. And
20 before gas detectors you done it a lot different, but now
21 we have gas detectors.

22 And you put it down and if you have anything down
23 there -- it measures for six gases. And you put it down,
24 and if it reads, then you take a big fan with a tube and
25 you blow air into that manhole until you blow the methane,

000093

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 the hydrogen sulfide, or whatever else is down there up
2 into the atmosphere until the air gets clean enough to
3 breathe for the workers to go down into the manhole.

4 Q. I guess for the record to be clear, would you
5 describe, you know, sort of a typical manhole?

6 A. It's, most typical manholes are 48 inches in
7 diameter. Every turning point a grade change on a gravity
8 sewer line. The District probably has 40,000 manholes in
9 the District.

10 Q. And what purpose do they serve in a sewer line?

11 A. Most times when you have gravity lines where you have
12 most of your problems is at a grade change or a
13 directional change. And it's put there for that reason;
14 so a man can go down in that hole, clean it out. If
15 debris gets hung in it or something that shouldn't be in
16 it is in there, they have to go in there and take it out
17 by hand or put a jet machine in so that you can clean the
18 line, a camera that you can camera the main lines. That's
19 what the manhole is there for. That's exactly what it
20 says, a manhole, so a man can go in.

21 Q. And so, if -- if you detect that there are gases in
22 that manhole, what's the dangers -- what's the danger to
23 the sewer worker if he goes into that manhole and a gas in
24 there?

25 A. No oxygen in the bottom of that manhole. I mean, this

000094

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 is heavier than oxygen. It settles to the bottom. And he
2 can't breathe, he'll choke to death.

3 Q. Okay. So he just -- so it's the lack of oxygen?

4 A. Lack of oxygen is what will get you in a manhole.

5 Q. And I think as I understand it, the standard procedure
6 is to blow air or oxygen into the manhole?

7 A. Yes, sir. We have little duct fans with an eight-inch
8 flexible tube that we set on the ground and it just
9 propels the air down into the manhole until it cleans out
10 the atmosphere that it's safe for us to go in.

11 Q. And the hydrogen sulfide and the methane, whatever
12 else are --

13 A. Goes right up into the atmosphere, yeah.

14 Q. And are they harmful in that condition?

15 A. No, sir.

16 MR. LINDEMANN: Your Honor, again, objection. He's
17 not been qualified as someone who can testify as to
18 whether this hydrogen sulfide is harmful or dangerous when
19 it goes into the environment.

20 In fact, in his own deposition he testified he's not a
21 chemist and cannot offer opinions regarding whether it's
22 harmful or not. And so we would object and move to strike
23 that testimony.

24 MR. ELLIOTT: Well, I think with all due respect, he
25 was for 25 years the maintenance supervisor for the

000095

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 District. He knew enough about the hydrogen sulfide and
2 the methane and these other gases to be alerted to check
3 for it because with it came the risk of asphyxiation as I
4 understand his testimony. And that the standard operating
5 procedure was to blow it out into the atmosphere. He's
6 also aware that it's not regulated at all by DHEC as a
7 part of our -- as a part of our discharge permit.

8 And last, I think Mr. Lindemann will get a chance to
9 cross-examine him.

10 THE COURT: I understand what the objection is. And
11 to the extent that it relates -- I think if I understand
12 your objection, Mr. Lindemann, it's primarily that he
13 can't -- he doesn't have the education or training to
14 understand exactly what effect it has on the environment
15 itself once it's released out of the manhole, but as
16 relates to the individuals that have to encounter it, I
17 think he's qualified to talk about that.

18 And so I'll allow it only to the extent that it,
19 whatever testimony he gives about what effect it has when
20 it comes out of the manhole relates to the individual who
21 comes in contact with it for purposes of going into the
22 manhole.

23 MR. LINDEMANN: Thank you, Your Honor.

24 MR. ELLIOTT: Thank you.

25 Q. Let me draw your attention, Mr. Brazell, to May of

000096

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 2010. And do you recall taking some steps on behalf of
2 the District to modify the air relief valve at least in
3 front of, or practically in front of Mr. Coley Brown's
4 house?

5 A. Yes, sir; we did.

6 Q. What did you do, please?

7 A. We actually went in the manhole that was in question
8 and piped it up, and laid it under the ground down to an
9 existing manhole that had some flow. And so when the air
10 was released from the air release valve, it could release
11 back under the water instead of into the atmosphere and
12 carry it on down a larger line so if there was any smell
13 it would be dispersed in smaller amounts down that larger
14 line.

15 Q. All right. Have you ever made any kind of a change or
16 modification to an air relief valve such as this in your
17 career?

18 A. That was a first.

19 Q. Are you familiar with any other instances where that
20 kind of treatment was given an air relief valve?

21 A. No, sir.

22 Q. And in that regard, how many miles of sewer line does
23 East Richland have?

24 A. About four- to 500 miles of sewer line.

25 Q. And have you had any complaints such as the one

000097

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 alleged by Mr. Brown involving these 400 miles of line
2 before?

3 A. No, sir; not with air release valve.

4 Q. And -- well, in that regard, we do have -- we've been
5 insured by the Insurance Reserve Fund for some period of
6 time; correct?

7 A. Ever since I can remember; yes, sir.

8 Q. And we do have -- there have been occasions where our
9 lines, our collection lines might get clogged up causing a
10 backup into a home or building owned by a customer;
11 haven't there?

12 A. Oh, yeah.

13 MR. LINDEMANN: Your Honor, Your Honor, objection. I
14 know where he's going with this. Objection to any type of
15 testimony dealing with sewage backups and whether or not
16 that's been covered by the Insurance Reserve Fund.

17 That's a totally different issue than what's been
18 brought by Mr. Brown in his underlying case. He has not
19 alleged a sewer backup or raw sewage that was disposed of
20 into his house. That's a totally different type of claim.

21 So I believe eliciting testimony from this witness as
22 to whether or not sewage backup claims have been covered
23 in the past by the Insurance Reserve Fund is irrelevant.

24 THE COURT: I'll allow it only because it deals with
25 the course of dealing and certainly those are questions

000098

LARRY THOMAS BRAZELL - DIRECT BY ELLIOTT

1 that you can ask on cross-examination and make as part of
2 your argument.

3 MR. LINDEMANN: Thank you, Your Honor.

4 MR. ELLIOTT: Thank you, Your Honor.

5 Q. And with respect to these, generally speaking these
6 sewer backups, what sort of -- what's released through the
7 sewer line?

8 A. There again, it could be anything. Any kind of gas,
9 oil, household detergent, anything that's flushed down a
10 commode-it can be found and throwed in. And, you know,
11 you get -- a sewer is a bad odor. I've never dealt with
12 anything that smelt good. So, you know, when it backs up
13 and gets into a person's house, then they got a bad odor
14 and they got a mess to clean up.

15 Q. And during your course of dealings with the Insurance
16 Reserve Fund, has the Insurance Reserve Fund always
17 provided coverage for those claims that included discharge
18 and odor?

19 A. Yes, sir -- if, if, -- yes, sir.

20 Q. And with the sewer, the sewer backups, have you -- are
21 you able to anticipate or predict at all when those will
22 occur?

23 A. No, sir.

24 Q. They arise suddenly?

25 A. Just, you know, if something gets down that line, you

000099

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 could have a brand new line in today and some kid or some
2 person could pull a manhole lid, sabotage your line and it
3 would go down to a lower point and stop up. And if your
4 house is at a lower point than the high manhole, you don't
5 have a back flow preventer, it's going to run into your
6 house or your basement, or whatever, at the lowest point.

7 MR. ELLIOTT: That's all the questions I have. Please
8 answer any questions Mr. Lindemann has.

9 CROSS-EXAMINATION

10 BY MR. LINDEMANN:

11 Q. Good morning, Mr. Brazell.

12 A. Good morning.

13 Q. I believe you testified as far as customer complaints
14 specifically with regard to the force main that's at issue
15 in the case, the one that runs by Mr. Brown's house, that
16 you had received numerous complaints over the years; is
17 that correct?

18 A. That's correct.

19 Q. And was that from the point of 2000 when that force
20 line was put into place through May of, I guess, 2010 when
21 you finally resolved the issue?

22 A. No, I don't think it started just as the force main
23 was put in but I'd say probably -- and I'd have to go back
24 and look at the record to see, but probably from 2002 on.
25 I think it was in, maybe a year or a little longer before

000100

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 we started having any complaints about it.

2 Q. All right. And those complaints came from Mr. Brown;
3 is that right?

4 A. No, sir.

5 Q. No complaints from Mr. Brown?

6 A. I don't have a work order with Coley Brown's name on
7 it nowhere.

8 Q. But there were complaints?

9 A. From people in the neighborhood. West Shore. Yes,
10 sir. And some on Rock Bridge.

11 Q. And those complaints dealt with the same force main
12 that we're dealing with in this litigation?

13 A. Different discharge points but the same, same force
14 main; yes, sir.

15 Q. All right. And what we're really dealing with here is
16 something called an air relief valve; correct?

17 A. That's correct.

18 Q. And an air relief valve does exactly what its name
19 suggests?

20 A. Yes, sir.

21 Q. It relieves the air from the line itself?

22 A. That's exactly --

23 Q. So, you would agree with me, would you not, that it
24 would be expected for an air relief valve to release air
25 from the pipes into the atmosphere?

000101

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 A. Yes, sir.

2 Q. Okay. And you'd agree with me that hydrogen sulfide
3 is one of the components of the air that is released from
4 the force main through the air relief valves; correct?

5 A. Yes, sir.

6 Q. And you've testified that hydrogen sulfide smells like
7 rotten eggs?

8 A. That's right.

9 Q. And there's another chemical, methane, is also
10 released; correct?

11 A. Yes, sir.

12 Q. And that's typical of raw sewage giving off those
13 components; correct?

14 A. Yes, sir.

15 Q. So it's not unusual or unexpected for the air relief
16 valve to emit hydrogen sulfide; correct?

17 A. No.

18 Q. Is that correct?

19 A. That's correct; yes, sir. Yes, sir.

20 Q. And it happens multiple times a day; correct?

21 A. Yes. Many times.

22 Q. And you said you can't predict when it is because it
23 happens actually when the pumps turn on and starts
24 pumping?

25 A. That's right.

000102

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 Q. And the pumps turn on based upon the amount of sewage
2 that collects in the wet wells?

3 A. That's correct.

4 Q. When it reaches a certain level the pumps
5 automatically kick on?

6 A. Yes, sir.

7 Q. Okay. But you indicated that happens at least daily;
8 correct?

9 A. Oh, yes.

10 Q. And usually many times?

11 A. Many times a day.

12 Q. Okay. It could be several times an hour or you said
13 it could be two hours or so between times when the pumps
14 activate?

15 A. That's correct.

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

20 A. That's very possible.

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

23 A. Yes, sir.

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

000103

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 A. Yes, sir. It better happen.

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

5 A. Right.

6 Q. It could create a vacuum?

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

10 Q. Okay.

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

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

17 A. Yes, sir.

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

22 A. Yes, sir.

23 Q. Okay. Now you've made attempts in the past to try
24 mask the odors; correct?

25 A. Yes, sir; we did.

000104

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 Q. And you would agree with me that those haven't been
2 always successful?

3 A. No, sir, because we had complaints afterward --

4 Q. Okay.

5 A. -- after each attempt.

6 Q. And you don't believe that those complaints were made
7 up or fraudulent; do you?

8 A. No, I don't think so. Had too many people said they
9 smelled it. So, I mean, I -- well, no, I don't think so.

10 Q. So with respect to that particular line, from 2002 to
11 2010, it wasn't unexpected or unusual for you all to get
12 complaints regarding that line?

13 A. It was unexpected because every time we went and
14 worked on it we thought we had the odor taken care of.
15 And it would, may go to three, four, five months and not
16 have a call. And, you know, after the initial calls it
17 got where you'd just maybe have one person calling.

18 I mean, in the depositions we got the work orders from
19 every call we had. And it wasn't that great a number of
20 calls. I can't recall that without refreshing my memory
21 on that.

22 Q. Well, I think in your deposition you testified that
23 there were a lot of complaints; correct?

24 A. We have -- I mean, yeah, we had complaints; yes, sir.

25 Q. Okay. And you said they stretched over an eight-year

000105

LARRY THOMAS BRAZELL - CROSS BY LINDEMANN

1 period?

2 A. That's right.

3 Q. Okay. And it was in dealing with this particular
4 line?

5 A. Yes, sir.

6 Q. So it wasn't out of the ordinary for you to get
7 complaints about odors on that particular line; isn't that
8 a fair statement?

9 A. I guess that's a fair statement; yes, sir.

10 Q. Court's indulgence. (Pause.)

11 You testified, Mr. Brazell, that you can't predict
12 when those air relief valves will open; correct?

13 A. That's right.

14 Q. But you can predict that as soon as the pumps turn on,
15 those air relief valves will open?

16 A. They will.

17 Q. Okay. So what you're really testifying to is you
18 don't know when the pumps will turn on because you don't
19 know when the wet well will reach that certain point to
20 trigger the pumps?

21 A. Yes, sir. It's all contributed with the gravity line
22 that fills that wet well.

23 Q. But you know --

24 A. Yeah, I know it's coming on. I know it's coming on.

25 Q. The Public Service District knows that when that pump

000106

LARRY THOMAS BRAZELL - REDIRECT BY ELLIOTT

1 comes on those air relief valves will operate; correct?

2 A. Yes, sir.

3 Q. And those air relief valves will then release air into
4 the environment; correct?

5 A. Yes, sir.

6 Q. And that air will include hydrogen sulfide?

7 A. Yes, sir.

8 MR. LINDEMANN: No further questions. Thank you.

9 THE COURT: Any redirect?

10 MR. ELLIOTT: Just briefly.

11 REDIRECT EXAMINATION

12 BY MR. ELLIOTT:

13 Q. I just want to hone in on a line of questions that
14 Mr. Lindemann had for you a moment ago.

15 You understand that the complaint that Mr. Brown makes
16 is about the rotten egg odor --

17 A. Yes sir.

18 Q. -- in the air? And when East Richland designed that
19 force main, did it anticipate that or expect that it would
20 have odor complaints about an odor of the magnitude that
21 Mr. Brown alleges in his complaint?

22 A. No, sir.

23 Q. And to be clear, in your 27 years at East Richland are
24 you familiar with any other complaints of the nature
25 brought by Mr. Brown in his lawsuit?

000107

1 A. No, sir.

2 MR. ELLIOTT: Thank you. Nothing further.

3 THE COURT: You may step down. Thank you.

4 MR. ELLIOTT: As soon as Mr. Brazell comes down, I
5 would restate for the record that we would also in
6 addition to the testimony of Mr. Brazell outlined in the
7 affidavit of Mr. Lindemann, that I think it's in the
8 record without objection.

9 MR. LINDEMANN: That's correct, Your Honor. We're not
10 stipulating to what it says but we're --

11 MR. ELLIOTT: But it's in --

12 THE COURT: It's in. It's just a piece of evidence.

13 MR. ELLIOTT: Yes.

14 THE COURT: And that's the affidavit of Donnie Wray as
15 presented by the Defendant in their attachment to the
16 summary judgment.

17 MR. ELLIOTT: Yes, ma'am. Memorandum, I think.

18 THE COURT: Is there anything further from the
19 District?

20 MR. ELLIOTT: I think not, Your Honor.

21 THE COURT: Is there anything from Mr. Brown?

22 MR. BERGER: No, Your Honor.

23 THE COURT: Is there any rebuttal from the Reserve
24 Fund in terms of evidence or testimony?

25 MR. LINDEMANN: There is none, Your Honor.

000108

1 THE COURT: And so the only thing we have left then
2 would be the arguments.

3 MR. LINDEMANN: That's correct.

4 MR. ELLIOTT: Yes, ma'am.

5 THE COURT: Yes, sir. Mr. Lindemann?

6 MR. LINDEMANN: Thank you, Your Honor.

7 Your Honor, let me hand up to you, this is a copy of
8 the cases that are cited in my memorandum so that you
9 don't have to try to hunt those down. And this is a copy
10 of the Section 55 of the Act that is described in the
11 memorandum as well. And I'll give a copy of those to
12 Mr. Berger and Mr. Elliott.

13 MR. ELLIOTT: Thanks.

14 MR. LINDEMANN: Your Honor, as we discussed at the
15 beginning of the hearing, this case is a declaratory
16 judgment action to determine whether or not the Insurance
17 Reserve Fund who provides the tort liability insurance
18 policy to East Richland County Public Service District,
19 whether that policy provides coverage for the underlying
20 lawsuit brought by Coley Brown against East Richland
21 Public Service District. And that's civil action Number
22 2010-CP-40-5616, and I'll be referring to that suit as the
23 underlying case.

24 As Your Honor's well aware, the law in this state is
25 you look at the four corners of the complaint to determine

000109

1 the duty to defend and the duty to indemnify. That was
2 expanded somewhat by the Supreme Court a few years ago and
3 said you not only look at the four corners of the
4 complaint but any information that would be reasonably
5 available to the insurer at the time they're making the
6 assessment of coverage in assessing the claim.

7 In this particular case, Your Honor, the Insurance
8 Reserve Fund was tendered in the Coley Brown underlying
9 lawsuit. They evaluated coverage and made a decision to
10 deny coverage. As a result of a disagreement with that
11 decision by its insured, the Public Service District, we
12 filed this declaratory judgment action in order to get a
13 judicial determination as to whether or not there was
14 coverage or not.

15 The Insurance Reserve Fund continues to believe that
16 its initial decision was correct and take the position
17 obviously in this litigation that there's no coverage
18 whatsoever in the underlying case.

19 We relied on three primary arguments which were
20 outlined for the Court earlier. First of all, let me
21 backtrack and mention to the Court that the underlying
22 lawsuit itself includes allegations that the Public
23 Service District, and I don't think this has been
24 disputed, operates an air relief valve near his home and
25 that air relief valve releases multiple times a day air.

000110

1 I know it's disputed in the underlying case whether or
2 not that the odors are offensive and how -- the extent of
3 the offensive odors, but obviously the allegations of
4 Mr. Brown's complaints is what governs here for purposes
5 of coverage. And he has described in his lawsuit that
6 they're offensive odors.

7 The Public Service District does not challenge the
8 fact that hydrogen sulfide is one of the components of the
9 air that is emitted from the air relief valve. And as you
10 just heard from Mr. Brazell, and it's also in the
11 deposition testimony that we presented in our case in
12 chief, there is no question that the odor that is emitted
13 from the air relief valve, the hydrogen sulfide, smells
14 like rotten eggs. It is what would qualify, I believe, as
15 an offensive or obnoxious odor.

16 The underlying case as I indicated, those three causes
17 of action one of which is inverse condemnation. I believe
18 that is the easiest issue for this Court to decide in this
19 case because the Insurance Reserve Fund includes as part
20 of its policy Exclusion P. Exclusion P which is -- I have
21 the exact language in the memorandum before Your Honor.
22 It does not provide coverage for bodily injury or property
23 damage arising out of or in any way connected with the
24 operation of the principles of eminent domain,
25 condemnation proceedings, inverse condemnation or takings

000111

1 by whatever name called.

2 In this particular case Mr. Brown brought an inverse
3 condemnation claim. Exclusion P clearly does not cover --
4 or, it bars coverage for such a claim.

5 Now, the Plaintiff has cited in its memorandum a case
6 from 2001 where the Court of Appeals addressed an inverse
7 condemnation coverage and whether there was coverage under
8 a policy issued by the Insurance Reserve Fund. And that's
9 the Horry County versus Insurance Reserve Fund case that's
10 cited in both of our memorandum.

11 In this case the Court of Appeals found that there was
12 coverage under a tort liability policy issued by the
13 Insurance Reserve Fund but it's very important and
14 critical for this Court to recognize that Exclusion P was
15 not part of the policy at that particular time.

16 In fact, Exclusion P was added to the IRF tort
17 liability policy as a result of the Court of Appeals'
18 decision in that case because the Court of Appeals
19 essentially determined that there was no exclusion that
20 expressly barred coverage in an inverse condemnation claim
21 and therefore in the Horry County case they found that
22 therefore there would be coverage without such an
23 exclusion. So as a result of that decision in 2001, the
24 fund added Exclusion P.

25 And I don't think there's any dispute that that

000112

1 exclusion was in place at the time of the claims in this
2 particular case. So we believe the inverse condemnation
3 claim is clearly barred by that exclusion.

4 As a secondary argument on that point we have also
5 raised the fact that property damage as defined by the
6 Insurance Reserve Fund policy which is using the same
7 language that is common in ISO forms and common in most of
8 the decisions that our appellate courts have decided in
9 this case.

10 Property damage is defined as physical injury to or
11 destruction of tangible property including loss of use
12 thereof, or loss of use of tangible property which has not
13 been physically injured or destroyed. That exact same
14 definition was at issue in the very important case decided
15 by our Supreme Court, Auto Owners versus Carl Brazell
16 Builders, Inc.

17 In that particular case which dealt with hazardous
18 materials being found during the construction of the
19 Summit subdivision here in Richland County, the primary
20 issue before the Supreme Court in that case, even though
21 there was a pollution exclusion argument raised, the
22 Supreme Court didn't reach it. What the Supreme Court
23 focused on was whether or not diminution of value of
24 property or other similar types of economic loss
25 constitutes property damage under that definition that I

000113

1 just read to Your Honor. And the Supreme Court concluded
2 that economic loss does not qualify as property damage.

3 So, in this particular case that's important because
4 in an inverse condemnation claim the only measure of
5 damages is the diminution of property value. And any type
6 of collateral damages, any type of consequential damages
7 are not recoverable in an inverse condemnation. They may
8 be recoverable as negligence or trespass or other torts,
9 but not in inverse condemnation which incidentally is not
10 a tort.

11 THE COURT: Does that apply to both definitions of
12 property damage under the policy? There's one for
13 physical injury and there's one for loss of use of
14 tangible property.

15 MR. LINDEMANN: Well, that's the dual definition. The
16 definition of property damage includes both of those
17 definitions.

18 THE COURT: And I guess what I'm asking you is maybe
19 I'm -- I didn't hear or misunderstood you. Obviously
20 there's not physical injury to the property. So what
21 we're talking about is economic loss. In other words,
22 loss of use of -- and the definition in the policy says
23 loss of use of tangible property which has not been
24 physically injured or destroyed.

25 And I'm asking you, would the allegations in

000114

1 Mr. Brown's complaint fall under that, those provisions?

2 MR. LINDEMANN: The diminution of value, of property
3 value assertion damages clearly does not. And that's what
4 the Carl Brazell case holds. The question of loss of
5 enjoyment is an open-ended question. And in fact the
6 Supreme Court did not reach that question in the Carl
7 Brazell case.

8 I would certainly -- I'm not going to concede, but
9 I'll certainly acknowledge that it's a much closer
10 question as to whether or not the second definition of
11 property damage which is loss of use of tangible property
12 which has not been physically injured or destroyed may
13 provide coverage or may include -- not necessarily provide
14 coverage, but may include enjoyment -- loss of enjoyment
15 of the property because that's different than the economic
16 loss which constitutes diminution of the property value.

17 But that's not -- those damages are not recoverable in
18 an inverse condemnation claim.

19 Consequential damages, collateral damages, and we've
20 cited a couple of cases in our footnote in our memorandum
21 and I've handed up a case, it's the Mims case and the --
22 I'm blanking out on the name of other case -- West Side
23 Quick Shop versus Stewart case. Those cases both stand
24 for the proposition that consequential damages are not
25 recoverable for inverse condemnation.

000115

1 And I'll go beyond my memo. There's a case called
2 Raven versus Greenville County which also indicates that
3 the measure of damages for an inverse condemnation is the
4 diminution of property value and you cannot recover for
5 consequential-type damages in an inverse condemnation
6 case. May be recoverable, as I indicated, in a tort, tort
7 claims but not for the constitutional taking claim.

8 And that's, I believe that's well settled not only in
9 South Carolina juris prudence under inverse condemnation
10 but also the United States Supreme Court case law for any
11 type of fifth amendment taking.

12 So, again, just to basically back up and summarize.
13 Inverse condemnation, we contend, is clearly not covered
14 by the policy because it falls squarely within Exclusion
15 P. And the diminution of the property value which was the
16 sole damages that can be recovered under such a claim does
17 not qualify as property damage under the Carl Brazell
18 case.

19 And that brings us to the trespass claims as well as
20 the negligence claims. We contend -- we raise two
21 defenses in those claims as well. Number one, just so I
22 don't have to go back to it, based on the Carl Brazell
23 case to the extent that Coley Brown is attempting to
24 recover for diminution of property value under those
25 causes of action that -- those elements of damages do not

000116

1 constitute property damage for the same reason I just
2 argued based on the Carl Brazell case. That would be one
3 issue or argument on the trespass and negligence cause of
4 action.

5 But the primary argument on those causes of action is
6 that those claims are not covered as a result of Exclusion
7 F which is the pollution exclusion. The pollution
8 exclusion is adopted from ISO language. It's known as the
9 absolute pollution exclusion in the case law. And it is
10 very broad. It provides that there's no personal injury
11 or property damage that's covered. And this is the quote,
12 the exclusion. It says: Arising out of discharge,
13 dispersal, release or escape, smoke, vapors, soot, fumes,
14 acids, alkalis, toxic chemicals, liquids or gases, waste
15 materials, or other irritants, contaminants or pollutants,
16 into or on the land, the atmosphere or any water course or
17 body of water.

18 Now there is an exception to that exclusion that
19 says: But this exclusion does not apply if such
20 discharge, dispersal, release or escape is sudden and
21 accidental. Now an exception to the exclusion, which is
22 what that last phrase is, is really probably the principal
23 issue that's before Your Honor as I look at the issues
24 that have been framed by the parties.

25 And since that is an exception to an exclusion, the

000117

1 burden of proof is actually not what is typical.
2 Typically an exclusion, the burden of proof is on the
3 insurer. But for an exception to an exclusion, the burden
4 of proof is actually on the insured. In this case, the
5 Public Service District.

6 And, that actually was spelled out in case that I
7 think is probably the most controlling case in -- of the
8 issue dealing with the pollution exclusion and that is the
9 Helena Chemical Company versus Alliance Underwriters
10 Insurance Company case, 2004 decision by the South
11 Carolina Supreme Court. In a footnote in that particular
12 case the Supreme Court does explain that an exception to
13 an exclusion, the burden of proof falls upon the insured.

14 Now in this particular case looking at that
15 exception -- but before I get to that exception, let me
16 make this point.

17 Exclusion F, as I indicated, is very broad. I do not
18 read and I might be mistaken, but I do not read the Public
19 Service District's arguments in this case to challenge
20 whether or not the emission of hydrogen sulfide from those
21 lines qualifies as a pollutant.

22 In the event that they are taking that position, we
23 believe that clearly the language of the exclusion deals
24 with vapors. It deals with fumes. It deals with liquids
25 or gases, waste materials, or other irritants,

000118

1 contaminants or pollutants. Clearly that is very broad
2 and would include, we submit, the hydrogen sulfide that is
3 being emitted from the lines.

4 Clearly that's a gas and clearly those are fumes.
5 Clearly that's the by-product of waste materials. For all
6 of those reasons we would contend that those types of
7 emissions, for lack of a better word, are included as
8 pollutants.

9 And as I indicated, I am not sure whether or not from
10 their memorandum whether or not that's going to be
11 challenged by the District. But I do want to hand up --
12 and this is -- it's not included in my memorandum. But I
13 did want to hand up a couple of cases where other
14 jurisdictions have found that hydrogen sulfide under
15 similar circumstances do qualify as pollutants that are
16 not covered by a -- are not covered under a general
17 liability policy and specifically a pollution exclusion
18 such as what we have in this particular case.

19 And specifically I'm handing up three decisions. And
20 I want to go through them at length but they stand for the
21 proposition, in fact they deal with very similar issues of
22 what we have here, basically the operation of sewage
23 plants. One of them's a salt water sewage disposal
24 facility where hydrogen sulfide gas is emitted. But in
25 each of these particular cases it's concluded that they

000119

1 fall within a pollution exclusion and qualify as a quote-
2 unquote pollutant.

3 The three cases are, one's from the Southern District
4 of Mississippi, USF&G versus Stanley. There's a case from
5 the Fifth Circuit, United National Insurance Company
6 versus Hydro Tank. And the third is from the Northern
7 District of Florida, a case called Rock Hill Insurance
8 Company versus Coyote Land Company.

9 And based on my research there's a number of other
10 cases that I can cite to the Court. The bottom line is I
11 think that it's pretty clear in this particular case that
12 the pollution exclusion applies in this particular
13 instance and the real question for this Court to decide is
14 whether or not it fits within the exception to the
15 exclusion.

16 And we contend on that particular point that the South
17 Carolina Supreme Court's decision in the Saint Helena case,
18 or, I'm sorry, Helena Chemical Company case is right on
19 point and certainly encourage the Court to take a close
20 look at how the Supreme Court evaluated that particular
21 case.

22 And they applied, followed a pollution exclusion
23 identical, practically identical to the one that we have
24 at issue in this particular case. And they ultimately
25 concluded -- this was dealing with a company that

000120

1 manufactured pesticides. And they ultimately concluded
2 that the pollution exclusion barred coverage. And they
3 concluded that because while the company did not intend to
4 release pesticides into the environment, the release of
5 pesticides were part of their routine business operations.

6 The Supreme Court focused obviously on the verbiage of
7 that exception, which again requires for there to be
8 coverage for that exclusion not to apply that the
9 discharge be sudden and accidental. And they looked back
10 at the previous case from 1994 of Greenville County versus
11 the Insurance Reserve Fund. In that particular case the
12 Supreme Court had actually found that the use of the word
13 sudden in that exclusion was ambiguous and the Court
14 actually interpreted that the word sudden should be
15 interpreted as unexpected. And then they applied the
16 exclusion as if the word sudden was changed to
17 unexpected. And we've done the same thing in this
18 particular case in light of the Greenville County versus
19 the Insurance Reserve Fund.

20 So what this Court really needs to focus on is whether
21 or not the discharge was unexpected and accidental. And,
22 again, what the Helena Chemical Company case focuses on is
23 whether the release was part of the routine and ordinary
24 business operations.

25 And we believe Your Honor has just heard testimony

000121

1 from Mr. Brazell which is square with the testimony that
2 the Supreme Court relied on in the Helena case. And that
3 is that while they may not want and certainly intend for
4 the Helena case, the pesticides to be released into the
5 environment, it was something that routinely occurred.
6 And in fact simply because there were safeguards that were
7 attempted to prevent the discharge of the pesticides into
8 the environment in the Helena Chemical case, the Supreme
9 Court still found that the pollution exclusion applied and
10 that exception is not applicable.

11 And I would point out that they cited some testimony
12 from an individual named Bobby Pace who worked for Helena
13 Chemical Company. And Mr. Pace -- in there they were
14 dealing with the issue of dust and dust that was created
15 while the pesticide was manufactured. And Mr. Pace
16 testified and they actually quoted his, a couple of
17 questions and answers from his testimony. He testified
18 that the process creates a lot of dust. And he said, no,
19 you normally call it -- I'm sorry -- yeah. He says, you
20 normally call it a bag palace that collects the dust but
21 it did not collect a hundred percent of it. So some dust
22 would get out into the atmosphere. He was then asked too,
23 is it possible that some of the dust would escape. And he
24 said it's possible if the dust collectors were not
25 operating 100 percent.

000122

1 The reason why I point that out, Your Honor, is
2 because you've heard testimony in this case that East
3 Richland County Public Service District attempted to
4 remedy the problem by putting chlorine first of all in it,
5 the wet wells, by then trying to use masking agents and
6 things of that nature in order to mask the odors, but that
7 it did not always work. And that as part of their
8 ordinary operations, it was not unusual or atypical for
9 these odors to escape into the environment and that that
10 had happened for a period of time from 2002 to 2010.

11 What also I think is very significant is that
12 Mr. Brazell has testified that the use of the air relief
13 valves is an integral part of their operation. In fact,
14 without the air release valves a force main would not
15 operate and it would potentially fail.

16 And that it was expected and an ordinary part of the
17 operations of the Public Service District for these air
18 relief valves whenever the pumps went on at the pump
19 station to operate in such a manner that air would be
20 released from the sewage lines into the environment. And
21 that it was anticipated and expected that that air would
22 include hydrogen sulfide which, as the cases I've handed
23 up to Your Honor indicate, qualifies as a pollutant within
24 the course and scope of an absolute pollution exclusion.

25 So what I believe that the evidence clearly reflects

1 to the Court is that while the Public Service District may
2 have made attempts to limit the odors actually going into
3 the air, into the environment, what they haven't limited
4 is the emission of the hydrogen sulfide. That's actually
5 part of their ordinary course of business.

6 But in addition to that, it was not unexpected for the
7 odors to have occurred. In fact, in his deposition
8 testimony that we put in in our case in chief, Mr. Brazell
9 testified that there were a lot of complaints over the
10 years. Of course, we don't have a number, but a lot
11 certainly suggests quite a few.

12 And so this was not a one-time event. This was not a
13 one time or infrequent problem on this particular line.
14 Over the course of eight years there were numerous
15 complaints. In fact, I found it interesting. I didn't
16 realize that none of those complaints were from
17 Mr. Brown. And when Mr. Brown's complaint, underlying
18 complaint says that he had made these -- raised these
19 issues with the Public Service District but the bottom
20 line is they received complaints from numerous home owners
21 in the area.

22 And so this could not possibly be unexpected. And it
23 couldn't possibly be accidental. So just as the release
24 of the pesticides may not have been intended in the Helena
25 Chemical case, that didn't stop the Supreme Court as well

000124

1 as Judge Gregory in trial level to conclude that because
2 the release of the pesticides was part of the ordinary
3 course of business that that did not create an unexpected
4 and accidental release. It requires an unexpected and
5 accidental release in order for that pollution exclusion
6 not to apply.

7 And that of course that distinguishes too, to the
8 extent the Court considers the evidence in this case about
9 sewage backups -- and I would take suggest that this is
10 something totally different than sewage backups. But a
11 sewage backup, Your Honor, is not something that occurs on
12 a frequent basis. It's not something that's part of the
13 ordinary course of operating a sewage line.

14 It's not something that happens frequently every time
15 a pump station, the pumps in the pump station turn on. So
16 there's a great discrepancy between the release of the air
17 from an air release valve versus a sewage backup where
18 something occurs suddenly. It's unexpected. And it's
19 certainly accidental. And someone's house fills up with
20 raw sewage.

21 So to the extent that the Court even entertains the
22 evidence that sewage backups have been covered over the
23 years, that would certainly distinguish it. In addition
24 to which, if you look at the declaration page, the
25 declaration page shows that there's sewage backup coverage

000125

1 for this particular entity.

2 The last point I'd like to make because I anticipate
3 it from the arguments that were made in the memorandum
4 filed by the Public Service District. There's the
5 argument that the Insurance Reserve Fund has the
6 responsibility to cover any type of claims for which
7 sovereign immunity was waived back when McCall V Batson
8 was issued by the South Carolina Supreme Court back in
9 1986. And, that's a common misconception and one that I
10 believe that the authorities that we've cited clearly show
11 is not correct.

12 When the Tort Claims Act was first enacted, it
13 included a Section 15-78-140(a). And that particular
14 section said as follows. And I get this language from the
15 case of Town of Duncan versus State Budget and Control
16 Board, 1997 Supreme Court case. 15-78-140(a) originally
17 stated: It is the duty of the Budget and Control Board to
18 cover risks which immunity has been waived under the
19 provisions of this chapter by the purchase of insurance as
20 authorized by Section 15-78-150.

21 Then came the Town of Duncan case. In the Town of
22 Duncan case, the Insurance Reserve Fund took the position
23 that there was no coverage under -- for a Whistle Blower
24 Act claim.

25 The Supreme Court disagreed. They relied in a part on

000126

1 15-78-140(a). And as a reaction to that Town of Duncan
2 decision, the South Carolina General Assembly in 1997, and
3 that's the Act I handed up, as part of 1997 Act Number 155
4 Part Two Section 55, which I think was part of the
5 appropriations bill that year, specifically deleted
6 15-78-140(a). So since 1997, 15-78-140(a) no longer is
7 part of our code.

8 And obviously there was an intent to make a
9 legislative change. It was clearly in reaction to the
10 Town of Duncan decision but in addition to that in the
11 actual language of the Act or of Section 55, and that's
12 what I handed up to the Court, they specifically stated --
13 I can read this. It says: And to amend Section 15-78-140
14 as amended relating to the duties of the State Budget and
15 Control Board to cover liability risks for which immunity
16 has been waived, the requirement for the political
17 subdivision to procure insurance, the liability risks for
18 which immunity has been waived, and the exclusivity of
19 remedies for claims filed pursuant to the South Carolina
20 Tort Claims Act -- and here's the key language -- so as to
21 delete the duty of the Board to purchase insurance to
22 cover risks for which immunity has been waived.

23 So this argument that there's a requirement that the
24 Insurance Reserve Fund cover any and all risks for which
25 sovereign immunity has been waived clearly does not apply

000127

1 because that duty has been removed by the general
2 assembly.

3 Second of all, Your Honor, even if the Plaintiff's
4 argument was correct, and I think we've clearly shown from
5 this legislation that it's not, it certainly wouldn't
6 apply to the inverse condemnation claim because the
7 inverse condemnation is not even a tort. And we've cited
8 case law in our memorandum that says inverse condemnation
9 is not a tort. It's based upon a provision of the South
10 Carolina Constitution and it pre-existed sovereign
11 immunity.

12 I mean, if there was an inverse -- inverse
13 condemnations were in existence and were litigated long
14 before 1986 when sovereign immunity was overturned. So
15 clearly that argument, even if it had merit, does not
16 apply to an inverse condemnation claim.

17 But we contend it doesn't apply to the tort claims as
18 well, that the Insurance Reserve Fund has the right to
19 exclude coverage for certain acts and the pollution
20 exclusion certainly is valid and enforceable and has been,
21 has been applied by the courts. In fact, that was one of
22 the issues that was in the 1974 Supreme Court case
23 involving Greenville County which was that very pollution
24 exclusion.

25 I think that summarizes our arguments.

000128

1 Obviously if Mr. Elliott makes some additional
2 argument, I would appreciate the ability in rebuttal to
3 address it.

4 But our contention is, for the numerous grounds that
5 we've raised, that there is no coverage for the underlying
6 action and the evidence that Your Honor has heard today,
7 both through deposition affidavit and live testimony from
8 Mr. Brazell, fully supports that position.

9 Thank you, Your Honor.

10 THE COURT: Thank you. Mr. Elliott.

11 MR. ELLIOTT: If it please the Court.

12 The Court has heard the testimony of Mr. Brazell and
13 the testimony is that the District constructed this line
14 as approved by the Department of Health and Environmental
15 Control. It is -- it has been constructed in a manner
16 that meets not only DHEC specifications but in a manner
17 consistent with the practices of constructing such lines.

18 And that in spite of meeting all the standards
19 expected of it, the Plaintiff in this case, Coley Brown,
20 filed the lawsuit alleging that he has suffered from
21 the -- from odors, unpleasant odors coming from one of the
22 air release valves located on the street in front of his
23 house, and that he has suffered the loss of use of his
24 property and that he has brought a cause of action
25 alleging, as Mr. Lindemann set out, sounding in tort and

1 negligence, trespass and inverse condemnation.

2 We would submit that all of these causes of action are
3 covered or should be covered under the Act.

4 THE COURT: Under the Act or under the policy?

5 MR. ELLIOTT: Under the Tort Claims Act and ultimately
6 under the policy.

7 First, I think that you do have to consider the fact
8 that this insurance is issued pursuant to the Tort Claims
9 Act.

10 Under state law the Budget and Control Board through
11 the Office of Insurance Services is authorized to provide
12 insurance for the state, its agencies, including East
13 Richland, so as to protect the state against tort
14 liability and protect its personnel against tort liability
15 arising in the course of their employment.

16 So the Budget and Control Board is authorized to write
17 the insurance. Under Section B of 1-11-140. Any
18 political subdivision may procure the insurance through
19 the Budget and Control Board. That's significant in this
20 case. And (c) under 1-11-140, the procurement of tort
21 liability insurance in the manner provided is the
22 exclusive means for procurement of this insurance.

23 Now to dispose quickly of the Insurance Reserve Fund's
24 allegation that the IRF is not required to cover at least
25 the allegations raised in this complaint, we look at this

000130

1 Section 55 that he handed up to you. And you will see the
2 effect of this amendment, notwithstanding the -- not
3 withstanding the title is to delete Section 15-78-140(a).
4 It's just deleted. It does not exist. It says, you open
5 your book it will say reserved. What did that code
6 section say?

7 Well, it said that the Budget and Control Board had a
8 duty. It is the duty of the Budget and Control Board to
9 cover risks for which immunity has been waived under the
10 provisions of this chapter by the purchase of insurance as
11 authorized in Section 15-78-150.

12 The effect of that legislation is not as the IRF would
13 submit but rather is to simply make it a -- preparatory on
14 the Budget and Control Board to purchase insurance as
15 opposed to making it mandatory. It's no longer a duty
16 that they have to buy insurance but under Section 1-11-140
17 they have, they are authorized to sell the insurance, to
18 write the insurance.

19 Having accepted that authority then they must write
20 insurance that would cover the District in this case so as
21 to protect them against tort liability and to protect the
22 personnel of the District against tort liability arising
23 in the course of their employment.

24 Now, if we accept Mr. Lindemann's characterization of
25 the important material facts in this case, the District is

000131

1 being sued in tort for simply operating a sewer district.

2 There's no allegation -- while there's an allegation
3 of negligence in this matter, the fact of the matter is
4 that Mr. Lindemann says that the IRF pollution exclusion
5 says it doesn't matter whether there was negligence or
6 not. They operate a sewer district. By virtue of
7 operating a sewer district they have raw sewage that at
8 points on the line are open to the air, that at those
9 points where the lines are open to the air odor is
10 released. Odor is caused by hydrogen sulfide, therefore
11 it is a pollutant and therefore we don't have to cover
12 them for a tort arising out of that set of facts.

13 Well, that's totally inconsistent with Section
14 1-11-140 that provides that if they're going to be in this
15 business, and they are in a big way, that they have got to
16 comply with the terms of Tort Claims Act so as to protect
17 the state against tort liability.

18 Now under the Tort Claims Act the District in this
19 case may be liable for an occurrence. And the term
20 occurrence means an unfolding sequence of events which
21 proximately flow from a single act of negligence.
22 Occurrence means an unfolding sequence of events which
23 proximately flow from a single act of negligence.

24 We got the complaint in this matter. The complaint is
25 capable of the inference that it is alleged that when we

000132

1 constructed the system and the, what he calls the burp
2 station we did so negligently and so the act of negligence
3 is in the construction of the system which unfolded over a
4 period of eight years on this record, which proximately --
5 which gave rise to these odor complaints. But they all
6 proximately flow back to this single act of negligence.
7 So that any policy, I would submit, Your Honor, issued by
8 the IRF must protect East Richland or anybody else from
9 claims involving an occurrence as defined by the act.

10 Now, when you look at the policy, I'm going to come
11 back to that in a little bit, but when you look at the
12 policy issued by the IRF in this case they did a pretty
13 good job of defining occurrence in a way consistent with
14 the statutory definition which frankly I would submit must
15 be read into their policy, whether it is a literal
16 provision in their policy or not.

17 So our first -- my first point is that under the Tort
18 Claims Act and under the statutory authorization for the
19 Budget and Control Board to issue insurance, these -- the
20 allegations of this complaint are covered. And to the
21 extent that the pollution exception is even authorized,
22 and I would submit that I find no authorization in the act
23 for the pollution exception, frankly, to the extent that
24 it is inconsistent with the IRF's duty to provide coverage
25 for an occurrence as defined under the Tort Claims Act it

000133

1 is void.

2 If you look at the allegations of the complaint with
3 respect to property loss, the underlying complaint alleges
4 in Paragraph 15 that Mr. Brown has suffered from the loss
5 of use of his property, and that the specific allegations
6 of the complaint apply that loss-of-use allegation to all
7 three causes of action; negligence, trespass and the
8 inverse condemnation.

9 Now if you look at the property damage, as the Court
10 pointed out earlier in a question to Mr. Lindemann, when
11 you look at the property damages, that definition in the
12 IRF policy, loss of use is clearly there. There's just no
13 other way to read it. Loss of -- property damage, number
14 two, loss of use of tangible property. And so when you
15 examine the complaint in this matter you see that loss of
16 use is alleged.

17 And I need to address something I think at this point
18 before I go further. Mr. Lindemann, I believe, correctly
19 stated the law in this case that when they make these
20 decisions with respect to coverage they look at the
21 allegations of the complaint principally although they may
22 consider other matters known to them at the time of the
23 filing.

24 Now, what Mr. Lindemann has attempted to do in his
25 arguments is to suggest that, well, if you litigate this

000134

1 matter down the road you will find that loss of use is not
2 a component part of -- the loss of use alleged is not a
3 component part of -- that we cover under -- is not a
4 component part of inverse condemnation and therefore we
5 don't have to cover it.

6 I think that he is stuck with the allegations of the
7 complaint. The allegation of the complaint says loss of
8 use. The loss of use is covered. There can be no
9 question about the negligence and the trespass and I'll
10 address the inverse condemnation in a moment. So I think
11 that surely there are allegations in this complaint
12 alleging property damage that are covered by this policy
13 which is consistent with the Tort Claims Act.

14 Now let's talk about the pollution exclusion. If you
15 look at the complaint, the complaint alleges odors. When
16 you look at the pollution exclusion you find the word
17 odors nowhere in the exclusion. Now, again, what
18 Mr. Lindemann on behalf of the IRF would have the Court do
19 is to delve into the matters beyond the scope of the
20 complaint and -- four corners of the complaint, and
21 through the litigation in this matter ascertain that odors
22 may be caused by hydrogen sulfide. But he goes beyond --
23 in denying coverage they go beyond the scope of their
24 authority to look at a matter litigated well beyond the
25 four corners of the complaint.

000135

1 But it's his policy, excuse me. It's an IRF policy.
2 They wrote it. They don't have odors in here. The
3 allegation is odors and therefore the exclusion does not
4 apply for that reason.

5 Second of all, there's nothing in this record, there's
6 nothing in this record to suggest that hydrogen sulfide
7 giving off rotten egg odors is a pollutant.

8 It's their language. They do not define -- we're
9 stuck with the language here. They don't define any of
10 these terms. But the evidence in the record, the evidence
11 of record is that hydrogen sulfide when emitted into the
12 air is not a pollutant.

13 When you look at hydrogen sulfide, when you concern
14 yourself, if you're a sewer worker and crawling down in a
15 manhole, you want to make sure that there's plenty of
16 oxygen there. And the record here states that the oxygen
17 can be crowded out by hydrogen sulfide, methane emission
18 and any number of other gases. So therefore, what you do
19 is you blow air into the manhole so you force all of that
20 hydrogen sulfide out into the atmosphere where it's
21 harmless. And that's the record in this case.

22 I would point out and I haven't had a chance to read
23 it, and I have no objection in that regard but I would
24 point out just quickly looking at these cases that
25 Mr. Lindemann handed up, they are clearly

000136

1 distinguishable. United States Fidelity and Guaranty
2 Company versus Stanley, the -- it has to do with personnel
3 from Stanley dealing with hydrogen sulfide at Stanley's
4 facility. Stanley was supposed to, according to its
5 regulator, vent its storage tanks in a certain way and the
6 Bureau of Pollution Control advised Stanley that an
7 investigation of a complaint verified pollution odors
8 exist and at times could be very strong since hydrogen
9 sulfide is present. Stanley failed to take any
10 corrective measures.

11 My point is as I glanced at this, in this case
12 involving Stanley and United States Fidelity and Guaranty
13 Company the regulator is saying this stuff is dangerous
14 and then I think they're going into storage tanks and I
15 think it's like a manhole situation, this stuff's
16 dangerous and you're doing it wrong and you better correct
17 it. But they failed to correct it and so they were sued
18 for it.

19 Here the record is clear. The hydrogen sulfide as
20 given off in the normal course of East Richland's business
21 is not regulated by DHEC. That's all the evidence in the
22 record.

23 With respect to United National insurance Company
24 versus Hydro Tank, three Hydro Tank workers injured in
25 July while removing a petroleum by-product sludge from a

000137

1 mixing tank owned and operated by the appellant. Shortly
2 after entering the tank, two of the workers fell face
3 first into the sludge.

4 There's no allegation in the complaint by Mr. Brown
5 that he was injured by these fumes. That -- the evidence
6 is very much consistent with this case that when these
7 sewer workers crawl down into one of these manholes they
8 need to make sure that they vent the gases out so that
9 there's enough oxygen to breathe.

10 Oxygen by the way is a gas. Carbon dioxide is a gas.
11 I wouldn't -- I suspect we wouldn't be here arguing that
12 that was a gas, they were gases covered but it's just so
13 wrong to be meaningless and certainly doesn't apply in
14 this case.

15 When you look at Rock Hill versus Coyote, there is
16 evidence of record that the gas was hazardous and harmful
17 but there's no such finding here.

18 So just on the plain language of the IRF policy which
19 they wrote which is construed in our favor, it's not
20 actionable.

21 There is -- and all this assumes that the pollution
22 exception is even lawful under state law. There is an
23 exception to the exclusion. And that is that the District
24 can emit all of this, all of these matters, soot, fumes,
25 acids, alkalies and so forth -- again, not alleged here --

000138

1 but the exclusion does not apply if such discharge,
2 dispersal, release or escape is sudden and accidental.

3 Well, the exclusion, including the exception language,
4 is ambiguous. First of all, the word sudden is
5 ambiguous. It can mean abruptly. It can mean unintended,
6 unanticipated. The Supreme Court has held that term to be
7 ambiguous.

8 Here, there's no question but that when this line and
9 these facilities were built by the District they did not
10 anticipate the odors which are alleged in the complaint.
11 They just didn't anticipate that the odors would be of a
12 nature that would give rise to the complaints that they
13 allege and give rise to the underlying complaint.

14 Secondly what is -- what has got to be clear is that
15 the release in every instance was sudden. And the timing
16 of the release was unanticipated. And so, frankly, when
17 you take their policy language and you read it and you
18 construe it against them, because they wrote it, and in
19 our favor, I would submit that each such release of odor
20 was sudden, was abrupt or unanticipated.

21 Moreover, the escape must be sudden and accidental.
22 And accidental. Now the policy does not define, that I
23 can tell, the word accident or accidental. And so if we
24 look to Supreme Court authority, we find that the term
25 accident can be construed as occurrence.

000139

1 Under the authority of Auto Owners versus Rose, which
2 was not cited, Auto Owners Insurance Company versus Rose,
3 385 South Carolina 83, 682 Southeast Second 857, Court of
4 Appeals 2009. The Court of Appeals concluded that where
5 the policy did not define the term accident it would be
6 given its meaning occurrence.

7 Well, what is an occurrence? Well if you look at the
8 policy, occurrence means an accident including continuous
9 or repeated exposure to conditions which result in
10 personal injury or property damage neither expected nor
11 intended from the standpoint of the insured.

12 So if you substitute the policy language for
13 occurrence for the word accidental you have language --
14 you have the import of which is to provide that the
15 exception to the exclusion is sudden and -- I apologize,
16 continuous or repeated. It's ambiguous.

17 So if you assume that the pollution exception is
18 authorized under state law and you assume that odors are
19 part of that long litany of pollutants mentioned in the
20 exception and you get to the exception from the exclusion
21 you get this ambiguous language which sends you back to
22 the policy definition of occurrence which sends you back
23 to the tort claims act definition of occurrence which
24 requires the IRF to insure this.

25 THE COURT: Mr. Elliott, the tort claims definition of

000140

1 occurrence, where did -- what statute did you get that
2 from?

3 MR. ELLIOTT: Yes, ma'am. It is Section 15-78-30(g).

4 THE COURT: Thank you.

5 MR. ELLIOTT: So in sum, with respect to this policy,
6 this pollution exception, we -- when you read the policy
7 in light of the tort claims act and you read the policy in
8 light of the facts as alleged, coverage is provided.

9 Well, a question may arise about the meaning of
10 accidental or occurrence in this policy and I would submit
11 to you that, again, where it is not defined otherwise an
12 accident will be read as unintended from the standpoint of
13 the victim. Unintended from the standpoint of the victim,
14 not the insured, the victim. And my authority for that is
15 State Farm Mutual Auto Insurance Company versus Moorner.
16 330 South Carolina 46, 496 Southeastern Second 875, a 1998
17 Court of Appeals decision.

18 Clearly a reading of the complaint leaves the reader
19 to the inescapable inference that Mr. Brown did not expect
20 these odors when the sewer line was laid on his street.

21 So, taking the policy language, reading against the
22 statute, reading it against its own terms, it is
23 ambiguous. It must be read favorably for coverage because
24 as we -- as I think I made patently clear, if the IRF is
25 going to write policies and they don't have to, they must

000141

1 -- the coverage must be so as to protect East Richland.

2 So therefore, the policy exception does not apply.

3 Inverse condemnation. I would submit to you that it's
4 not clear from this record when the IRF asserted this
5 language into its policies. I cannot find any authority
6 for it to do so in the tort claims act against which I
7 believe its policies must be read.

8 But the -- when you read the complaint, the four
9 corners of the complaint, the allegations of inverse
10 condemnation are inextricably intertwined with the
11 allegations of negligence and nuisance as to make them
12 inseparable. And the complaint alleges with respect to
13 the inverse condemnation, the complaint alleges a loss of
14 use with respect to the inverse condemnation cause of
15 action so the nature of the damages is covered.

16 The damages are caused by the same odors as complained
17 of in the negligence and the trespass allegations. And I
18 would submit that as a consequence these, the inverse
19 condemnation allegations are covered by the policy.

20 And assuming arguendo that they're not so inextricably
21 intertwined so as to be unseparated, they got -- the duty
22 to defend is there and they got to defend the entire
23 action by virtue of the allegations of the complaint.
24 It's alleged. Clearly covered matters.

25 (Conferring with co-counsel.)

000142

1 The -- counsel cites Helena Chemical Company versus
2 Alliance Underwriters Insurance Company, 2004 case. First
3 of all, it involves a private insurance. It doesn't
4 involve state tort claims act. It doesn't involve
5 coverage authorized or controlled by the state tort claims
6 act.

7 It's distinguishable further however because it was
8 undisputed in Helena Chemical that the contaminants
9 released were pollutants as defined by the pollution
10 exclusion in the policy. Here the only inference is that
11 the odors are not pollutants as defined by the policy.

12 Second there was no evidence of record at least to the
13 Court in Helena that the contamination was sudden and
14 accidental. Again I would submit to you that in this case
15 the, each release of an offensive odor was sudden and that
16 it was abrupt. It was not intended, certainly, by the
17 District. The line was not designed in a way so as to
18 give rise to these complaints. Quite the contrary. And
19 the District has a clean record with respect to the
20 release of odors otherwise. Certainly it was not
21 expected from the standpoint of Mr. Coley Brown, as is
22 readily apparent from the four corners of his complaint.
23 So Helena is distinguished from our case there.

24 And last, from the record there's no conflict apparent
25 in Helena of language in the definitional (verbatim)

000143

1 section and in the exception section. Now what -- and I
2 think I should address this and I'm coming to a close.
3 What Mr. Lindemann argues is that an exception is exactly
4 that. And so that you might expect an exception to pose
5 some conflict with the definition.

6 Again, here there's a direct ambiguity between the
7 definition and the exception itself. That language,
8 sudden and accidental, is ambiguous when read in light of
9 the definition of occurrence.

10 And so this is not, as suggested by the Insurance
11 Reserve Fund, a case where you would expect, you would
12 expect a conflict. The ambiguity is actually between the
13 two provisions of the policy itself. So, I think it's
14 Owners Insurance Company but my desk is so -- such a mess
15 I can't find it, but it's cited by him in this case and
16 I'm sure he'd be happy in about two seconds to stand up
17 and remind us of what the cite is.

18 So, Your Honor, in sum -- actually that's not it.
19 It's very similar. Thanks for that.

20 In sum, we would submit on behalf of the District,
21 first of all, that under the terms of the tort claims act
22 the existing law we must be insured for an occurrence as
23 defined by the statute and as defined by the policy and
24 there's no authority for that pollution exception.

25 Secondly we would submit that the pollution exception

000144

1 is contrary to -- even if permitted, if properly drawn,
2 the way it's drawn in this policy it is in conflict with
3 the statute. It is designed -- we are left unprotected
4 from torts for conduct that we are authorized to do by
5 statute and regulated by DHEC to do.

6 Third, if the -- if the policy, the pollution
7 exception is valid, it doesn't apply to the odors which
8 are alleged in the complaint. Moreover, there's no
9 evidence in the record that the hydrogen sulfide and
10 methane as it's released by the District in its day-to-day
11 operations would be of a nature as would be covered under
12 the Act. If that was the case then oxygen would be
13 covered as well.

14 Third -- last. If the exception -- if we get this far
15 we are within the exception to the pollution exclusion.
16 Property damage, loss of use, it's covered. It's
17 applicable under the four corners of the complaint, all
18 three causes of action. So that argument is -- fails.

19 And, last, under the inverse condemnation the
20 allegations are so closely intertwined as to be
21 inseparable and they must cover for that reason.

22 Thank you.

23 MR. LINDEMANN: Your Honor, may I respond to certain
24 of those points?

25 THE COURT: Yes, sir.

000145

1 MR. LINDEMANN: I'll try to do it as succinctly as I
2 can. There are a number of points I wanted to at least
3 touch on briefly.

4 To start back at the beginning. Mr. Elliott made
5 arguments regarding the authority of the Insurance Reserve
6 Fund to write insurance coverage. He cited Section
7 1-11-140 which is the enabling legislation that authorizes
8 the State Budget and Control Board to form the Insurance
9 Reserve Fund and authorizes the selling of insurance
10 products. What is very important to recognize is 1-11-140
11 first of all does not give the Insurance Reserve Fund the
12 exclusive business in this particular area.

13 The Public Service District such as what we have in
14 this particular case has other sources to be able to
15 purchase coverage from. I know from personal experience
16 and we represent a number of different private insurers
17 that provide coverage to governmental entities, there are
18 funds that are formed, funded by municipal association, by
19 county association, that provide insurance coverage for
20 governmental entities.

21 So this is not an exclusive situation. But more
22 importantly, 1-11-140 is very important to recognize it
23 authorizes the selling of insurance but it does not
24 specify what is required as far as an insuring agreement,
25 what has to be insured. It doesn't provide any directive

000146

1 to the Insurance Reserve Fund as to what they have to
2 cover or what they don't have to cover. It simply
3 authorizes them to essentially be in the insurance
4 business.

5 The tort claims act does the exact same thing. It
6 does not specifically dictate what has to be covered or
7 what can be excluded. And the Insurance Reserve Fund
8 operates just like any other insurance company. And South
9 Carolina case law, appellate case law is very clear on
10 that. In fact, the Insurance Reserve Fund can be sued for
11 bad faith. They operate as an insurance company. They
12 write an insurance policy.

13 That's what at issue here. And it's a contractual
14 provision. And after the loss, it's simply not
15 appropriate for the insured to come in and contend that
16 you should have written broader coverage or you should
17 have provided me broader coverage than what you did. And
18 that's essentially what we have in this particular
19 instance.

20 So to the extent that there was any question as to
21 whether the Insurance Reserve Fund was required to write
22 coverage to cover any potential claim that could fall
23 under the tort claims act, that was clarified in response
24 to the Town of Duncan case with the repeal of one dash --
25 blanking out on the statute --

000147

1 THE COURT: 15-78-140.

2 MR. LINDEMANN: Yeah, 15-78-140. Thank you, Your
3 Honor.

4 And obviously the Court has to recognize that the
5 general assembly was intending to enact or to make a
6 change in the law. And clearly they did because it
7 happened right after the Town of Duncan decision and it
8 was in response to the Town of Duncan decision.

9 So to suggest that the Insurance Reserve Fund can't
10 act like another insurance company and can't put
11 exclusions on its policy is absolutely incorrect, Your
12 Honor.

13 Second of all, dealing with the pollution exclusion
14 itself. We cited, we handed up the federal case law for
15 the simple proposition to show the Court that hydrogen
16 sulfide, which is the gas at issue in this case, has been
17 found by several courts -- and honestly, Your Honor, there
18 are more -- to fall within the scope of the absolute
19 pollution exclusion that is applicable in this particular
20 case.

21 The facts of those cases are somewhat different but
22 the bottom line is what those cases show is hydrogen
23 sulfide qualifies as a subject matter of a pollution
24 exclusion and other courts have so held.

25 Now Mr. Elliott made the argument that because the

000148

1 word odors is not in the pollution exclusion, that
2 somehow -- and because Mr. Brown pled it using the word
3 odors rather than fumes or irritants or contaminants or
4 some other operative word, that somehow odors are not part
5 of the pollution exclusion.

6 And quite frankly, Your Honor, that's putting form
7 over substance. Clearly the pollution exclusion is
8 broadly written. It includes vapors. It includes fumes.
9 It includes waste materials. It includes irritants. I
10 mean, if the components of the waste that flows through a
11 sewage line isn't included in vapors, fumes, gases and
12 waste materials or other irritants, I don't know what is.
13 And in fact, if you apply the common dictionary definition
14 of the word fumes, it includes -- this is the Marion
15 Webster Dictionary definition, smoke, vapor or gas
16 especially when irritating or offensive.

17 So I would submit that the common, plain and ordinary
18 meaning of the word fumes certainly in and of itself
19 includes the offensive odors that are being asserted by
20 Mr. Brown as the subject of his lawsuit.

21 A couple of other points. Mr. Elliott made the
22 argument that somehow the exception to the pollution
23 exclusion is ambiguous because of the use of the word
24 accidental and then he tries to tie it back to the
25 definition of occurrence and the policy.

000149

1 And, quite frankly, I don't see how there's an
2 ambiguity when occurrence talks about things that are
3 unexpected. The South Carolina Supreme Court has defined
4 the word sudden in the context of the pollution exclusion
5 and they use the word unexpected. I don't think there's
6 any type of ambiguity here but I would remind the Court
7 the case that Mr. Elliott was forgetting the name of, it's
8 called Owners Insurance Company V Clayton. It's a 2005
9 case from the South Carolina Supreme Court. And it's
10 cited in our memorandum of law.

11 And the Supreme Court does a good job in this
12 particular case of explaining where ambiguities are
13 pertinent and relevant. There was the suggestion in this
14 particular case because an exclusion was inconsistent with
15 the insuring agreement that that created an ambiguity.
16 And what the Supreme Court explained was, it is absolutely
17 expected that there be inconsistencies between the
18 insuring agreement and the exclusions because the insuring
19 agreement provides for a broad statement of coverage and
20 then the exclusions are read to eliminate portions of that
21 broad statement of coverage.

22 And that is absolutely appropriate and that's not an
23 ambiguity that gives rise to essentially the judicial
24 rewriting of the policy. In this particular case -- and
25 in fact they distinguished the case, the Atly

000150

1 (phonetically) Prince case from years ago where the
2 Supreme Court found that there was an inconsistency
3 between a definition and an exclusion.

4 And in this particular case, Your Honor, there is no
5 ambiguity between any type of definition and an
6 exclusion. And to the extent that the Public Service
7 District is trying to suggest that, it simply isn't there
8 and we believe that the Owners Insurance Company case
9 speaks to that.

10 Mr. Elliott also made the argument that you look at
11 whether it's an intentional act from the standpoint of the
12 victim. And I'll have to look at the case that he cited
13 for that. I don't have a copy of that case with me, but I
14 don't believe that that is a fair and accurate way you
15 look at the exception to the pollution exclusion because,
16 quite frankly, if you look at the Helena Chemical Company
17 case again, the Supreme Court in this particular case
18 found that the ordinary operations of the business which
19 resulted in pesticide being released into the environment
20 was not unexpected or accidental. Again, they used the
21 word unexpected in place of the word sudden based upon
22 their decision in the Greenville County versus Insurance
23 Reserve Fund case. And we're applying the exact same
24 definition they did in that case.

25 But they obviously didn't look at it in terms of

000151

1 whether it was unexpected or accidental from the viewpoint
2 of the victims, the Plaintiffs who were suing in the
3 underlying action, which is what Mr. Elliott is suggesting
4 in this particular case.

5 You look at whether or not it's intentional or
6 unexpected from the viewpoint of the insured and takes
7 that a step further. What is so pertinent about the
8 Helena case is the Supreme Court focused on whether or not
9 the emission of the pesticides, the emission of the
10 pollutant was part of the ordinary business or, as they
11 put it in the decision, the routine business operations of
12 the chemical company. That is what you look at in
13 determining whether or not the exception to the exclusion
14 applies.

15 You don't -- I mean, obviously anybody who's been the
16 victim of pollution is going to say I didn't expect to be
17 the victim of pollution. I mean, it would essentially
18 make the pollution exclusion absolutely meaningless if you
19 looked at it from the terms of whether or not the intended
20 harm was something that was expected by the victim. And
21 that's not the intent of the language and I would suggest
22 to the Court clearly the Supreme Court in the Helena
23 Chemical Company case makes that clear.

24 And, again, the attempts to distinguish the Helena
25 Chemical Company case I would suggest are simply not

000152

1 particularly persuasive. You know, number one, the
2 suggestion that the pollutant was accepted as being within
3 the pollution exclusion in this particular case. I
4 recognize that they aren't accepting that in this
5 particular case, but I think we made a pretty strong case
6 to show that this dispersement (verbatim) of hydrogen
7 sulfide does fall within the pollution exclusion.

8 We've cited a number of federal cases that have held
9 that. And the suggestion that because the word odor was
10 not used in the exclusion somehow means that the hydrogen
11 sulfide would not be included, I would suggest to the
12 Court it's simply not meritorious.

13 The other ways that he attempted to suggest that the
14 Helena Chemical Company case is not persuasive also I
15 would suggest to the Court should be rejected,
16 specifically the suggestion that simply because it
17 involved private insurance instead of Insurance Reserve
18 Fund policy, again, it's the same word-for-word policy
19 exclusion.

20 The exclusion is written in the policy exactly what's
21 being applied and when you look at it, it's word for word,
22 the exact same exclusion we have here. The Insurance
23 Reserve Fund shouldn't be treated differently than any
24 other insurance company. And the case law doesn't treat
25 it any differently than other case -- any other insurance

1 company. The fact that it's a government-operated
2 insurance makes absolutely no difference.

3 And lastly, let me make the last point. The tort
4 claims act doesn't govern insurance matters. It doesn't
5 determine what can be covered or what can be excluded.
6 The Insurance Reserve Fund is authorized to write
7 insurance coverage by the general assembly. The general
8 assembly has never stated specifically what coverage has
9 to be provided or whether exclusions for certain things is
10 appropriate or not. The Insurance Reserve Fund is allowed
11 to issue the policies as they see fit and that's what
12 they've done for over 20-some years.

13 The Court's indulgence.

14 (Pause.)

15 And one last point. Just to reiterate on the inverse
16 condemnation claim. Again, there's clearly an exclusion
17 directly on point. So any reliance on prior case law is
18 not meritorious and even the reliance on Mr. Elliott's
19 argument that somehow everything is -- every tort claims
20 act claim should be covered by the Insurance Reserve Fund,
21 that argument doesn't even help him with that because in
22 the first condemnation as we argued earlier and we cited
23 cases in our memo, it's not a tort. It's not something
24 that is litigated under the tort claims act. It's not
25 something for which there is a \$300,000 cap, for instance.

000154

1 It is a constitutional claim that is not litigated
2 under the tort claims act so therefore to the extent the
3 Court even adopts his argument that somehow Insurance
4 Reserve Fund must cover everything that the tort claims
5 act provides a claim for or allows a claim for, that
6 doesn't help him with inverse condemnation.

7 And, quite frankly, it just make sense that an insurer
8 shouldn't have to pay for every taking that a governmental
9 entity makes. You would run into a situation where all
10 the government has to do is take some property for its own
11 public use and then turn to its insurer and say, hey. And
12 that's clearly not what the purpose of insurance is for.

13 Obviously there was a question as to that issue
14 because of the way the policy used to be written and given
15 the Court of Appeals' decision in 2001, that has been
16 rectified. And as the Court of Appeals instructed in that
17 particular case, there is now an express exclusion and
18 that express exclusion certainly bars inverse condemnation
19 in this case.

20 Thank you, Judge.

21 THE COURT: Counsel, I will take a look at the case
22 law. And in light of your arguments, I think I'm familiar
23 with the arguments and I think your pretrial briefs and
24 your memorandum set forth clearly your arguments.

25 One of two things will happen. Either I'll send the

000155

1 e-mail asking someone to prepare the appropriate order
2 based upon the decision or, and/or I'll ask for your
3 briefs in electronic format. And I think some of them,
4 most of them have been sent in electronic format.
5 Mr. Elliott, I'm not sure if yours was. I think yours
6 might have been filed with the clerk's office.

7 MR. ELLIOTT: I think you got it, but it may not be in
8 Word form. It may be in a .pdf form.

9 THE COURT: I would need it in a Word form. I can't
10 make any changes to a .pdf.

11 MR. ELLIOTT: Yes, ma'am.

12 THE COURT: And so hopefully you will be hearing from
13 me within the next couple weeks.

14 MR. ELLIOTT: Thank you, ma'am.

15 MR. BERGER: Thank you, Your Honor.

16 END OF CASE: 12:09 P.M.

17 ***

18 CERTIFICATE OF REPORTER

19
20 STATE OF SOUTH CAROLINA)

21 COUNTY OF AIKEN)

22 I, Cheri L. Young, Registered Professional Reporter
23 and Official Court Reporter for the State of South
24 Carolina, Second Circuit-At Large, do hereby certify that
25 the foregoing proceedings were written stenographically by

000156

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
South Carolina Insurance Reserve Fund)
)
Plaintiff,)
)
v.)
)
East Richland County Public Service)
District and Coley Brown,)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-2096

NOTICE OF MOTION
AND MOTION

RICHLAND COUNTY
FILED
2013 SEP 25 AM 9:19
JEANETTE W. MCENRIDE
C.R.P. & G.S.

The Defendant East Richland County Public Service District respectfully moves for an order pursuant to S.C.R.P.C 59 for a new trial or in the alternative to alter or amend the Order and judgment entered in the above-captioned action. By Order dated September 10, 2013, the Court granted the Plaintiff's Motion for Summary Judgment, denied the Defendant's Motion for Summary Judgment and dismissed the Defendant's counterclaim with prejudice. For the reasons hereinafter set out, the Defendant East Richland County Public Service District ("District" or "Defendant") is entitled to a new trial or in the alternative to an order altering or amending this Court's Order of September 10, 2013 ordering the Plaintiff to defend the underlying action and indemnify the Defendant for any liability.

Procedural Background

The matter before the Court arises out of an action by the Plaintiff South Carolina Insurance Reserve Fund ("SCIRF" or "Plaintiff") seeking a declaratory judgment to determine whether it owed a duty to defend or indemnify the Defendant with respect to the underlying civil action captioned *Brown v. East Richland County Public Service District*, C.A. No. 2010-CP-40-4616 ("underlying action").

The matter was heard by the Court June 11, 2012. Both parties filed competing motions for summary judgment; however, the Court heard the matter as a non-jury trial in which testimony was presented by witnesses, deposition excerpts and affidavits. The Court declared that the SCIRF was not required to defend the underlying action and indemnify the Defendant for any liability arising from the underlying action.

Factual Background

In 2000, the District constructed two pumping stations and a force main in the vicinity of the residence of Coley Brown, the plaintiff in the underlying action. The operation of the District's pumps act to build pressure in the force main. The force main was equipped with air relief valves at intervals to control air pressure within the force main. The Court found that the valve operates instantaneously once the pressure in the line has built to sufficient force and closes just as quickly once the pressure in the line has been relieved. The Court found that the force main was designed to meet industry standards and was approved by DHEC. However, DHEC does not regulate the release of odors. The air releases from valves may be odorous and any resulting odor when the pumps begin is sudden in that it is not possible to anticipate when the valves will open or close. The Court further found that the District's customers within the vicinity of Westshore Road had complained about odors coming from the force main. However, of the over 400 miles of sewer lines operated by the District the only complaints originated from the line near the Brown's property. The complaints have not been constant or continuous but irregular. Because the odors are not regularly released through the air release valve, it cannot be anticipated or predicted when the offensive odors will be released. The District has acted to reduce the possibility of odors by injecting chlorine in the force main with some success. The District took steps to mask the odors by installing charcoal filters or other chemical media in the manholes containing the air release valves. The filters initially succeeded in eliminating

the odors, but the filters did not completely eliminate the release of odors. Finally, in May of 2010 the District modified the air release valve in the vicinity of the Brown's property which appears to have resolved any issue concerning the release of odors and the complaints of odors have stopped. Each effort to eliminate or mask the odors alleged, the District expected the odors would have ceased. The complaint in the underlying action alleges causes of action for inverse condemnation, negligence and trespass. However, the complaint alleges that the release of offensive odors was constant.

Property Damage Alleged by Complaint in Underlying Action Caused by Occurrence.

Rules of insurance policy construction require clauses of inclusion to be broadly construed and clauses of exclusion to be narrowly interpreted. Indeed, the terms of an insurance policy should be liberally construed in favor of the insured. *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). In the case at hand, the Plaintiff's policy required the Plaintiff to pay all sums which the District shall become legally obligated to pay because of property damage caused by an occurrence. The policy defines occurrence 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.

The Court concluded that the damages alleged in the underlying action constituted property damage under the policy. However, without deciding whether the complaint alleges an occurrence as defined by the policy, the Court concluded that "pollution exclusion" under the policy excluded coverage of the allegations of trespass and negligence of the complaint in the underlying action (relying on exclusion (p) in the SCIRF policy, the Court held the inverse condemnation cause of action was excluded from coverage; the Defendant relies upon its authority in its memorandum filed June 12, 2012, in support of including coverage of the inverse condemnation claim).

The Court erred in failing to find and conclude that the release of the odors as alleged and as set out by the Court in its Order constituted an occurrence as defined by the policy requiring the SCIRF to defend the underlying action and indemnify the Defendant. The conduct complained of constituted "an accident, including continuous or repeated exposure to conditions," which resulted in property damage which was neither expected nor intended from the standpoint of the District. The facts as found by the Court reflect that the release of odors was not intended by the Defendant. The force main was designed to meet industry standards and was approved by DHEC. No other area in the District's service territory experienced the release of odors. The Defendant took steps to eliminate or mask the odors and with each such step expected the odors to abate. Construing the policy provisions liberally in favor of the insured compels the conclusion that the complaint alleges property damage caused by an occurrence as contemplated by the parties' insurance policy giving rise to insurer's duty to defend and indemnify. In addition, the SCIRF policy must conform to the provisions of the Tort Claims act. The Tort Claims Act requires the SCIRF policy to insure claims arising out of a single occurrence. 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. S.C. Code Ann. Section 15-78-30(g). The complaint in the underlying action alleges that the District was negligent in the construction and operation of the force main built in 2000. The complaint alleges an unfolding sequence of events (the unintended and unexpected release of odors) which proximately flow from a single act of negligence. The SCIRF policy language must be read consistently with the definition of occurrence under the Tort Claims Act and for this reason the conduct alleged in the complaint in the underlying action is an occurrence insured by the SCIRF policy.

The Policy Exclusion Does Not Apply to the Allegations of the Underlying Action.

Nevertheless, the Court held that the offensive conduct before the Court was excluded by the following policy language:

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 terms “odor” and “offensive odor” are not set out as a “pollutant” under the policy exclusion. The order purports to define the language of the exclusion broadly so as to bring its terms within the exclusion. However, the exclusion must be read narrowly and in favor of the Defendant so as to operate to provide coverage. *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund, supra*. Accordingly, the exclusion language does not relieve the SCIRF from defending and indemnifying the underlying action.

Moreover, the language of the exclusion is ambiguous. The term “sudden” is inherently ambiguous. *Greenville County v. Insurance Reserve Fund*, 313 S.C. 456, 443 S.E.2d 552 (1994). The term “sudden” as set out in the exclusion can be construed to mean “unexpected” or “unintended”. As stated, the Defendant did not expect the air release valve to operate to emit an offensive odor as alleged in the complaint in the underlying action in and having taken steps to eliminate the release of any offensive odor, the District never intended the release of the offensive odor as alleged.

However, the Court declined to find and conclude the release of odors was sudden holding as follows:

Additionally, the District contends that the release of offensive odors from the air relief valve across the street from Brown's property is unexpected and accidental. However, that is certainly not consistent with Brown's pleadings where he alleges that the release of offensive odors occurs "multiple times per day" and has occurred since the air relief valve's installation. (Order at p. 8)

Citing *Helena Chemical Company v. Allianz Underwriters Insurance Company*, 357 S.C. 631, 594 S.E.2d 455 (2004) and relying on the allegations of the underlying complaint, the Court concluded that the release of odors at the air relief valve in front of the Brown's property is part of the District's ordinary business operations and therefore, falls within the "pollution exclusion" of the policy.

Instead of examining the question whether the release of odor was sudden, unintended or unanticipated, from the standpoint of the insured, the Court determined the question from the standpoint of the plaintiff in the underlying action. In so doing, the Court construed the policy exclusion broadly and in favor of excluding coverage. However, the operation of the terms of the policy exclusion must be construed narrowly operating to include coverage. Construing the policy exclusion narrowly, against the Plaintiff SCIRF compels the conclusion that the language of the exclusion does not exclude the allegations of the complaint in the underlying action from coverage under the SCIRF policy. Moreover, the decision in *Helena Chemical Company* is distinguishable from that before the Court. The Court held in *Helena Chemical Company* that there was no evidence that the offensive discharge was sudden or unexpected. Nor was there any dispute over whether the offensive discharge constituted pollution under the terms of the policy in effect.

Therefore, the Court erred in finding and concluding that the release of odors was excluded under the terms of the insurance policy exclusions.

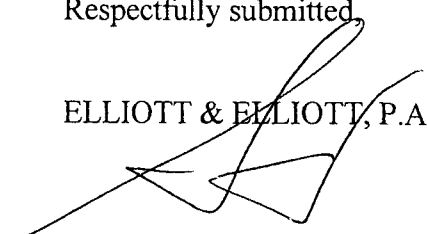
Conclusion

Based on the foregoing, as well as the pleadings and memoranda together with the evidence and argument at trial, the Defendant East Richland County Public Service District respectfully

requests that the Court grant a new trial, or alter or amend its Order to find and conclude that the Plaintiff South Carolina Insurance Reserve Fund owed a duty to defend the Defendant and indemnify it from liability arising out of the civil action captioned *Brown v. East Richland County Public Service District*, C.A. No. 2010-CP-40-5616 and further, that the Court deny the Plaintiff's Motion for Summary Judgment and grant the Defendant's Motion for Summary Judgment and issue its judgment in favor of the Defendant East Richland County Public Service District.

Respectfully submitted,

ELLIOTT & ELLIOTT, P.A.



Scott Elliott
1508 Lady Street
Columbia, SC 29201
803-771-0555 (P)
803-771-8010 (F)
Attorney for Defendant East Richland
County Public Service District

Columbia, South Carolina

September 23, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Coley Brown,

vs.

East Richland County Public Service)
District,)

Defendant(s))

(Please Print)

Submitted By: Neal M. Lourie

Address: P. O. Box 12089

Columbia, SC 29211

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010 CP-4005

RECEIVED

AUG 26 2010

SC Bar #: 7102

Telephone #: (803) 799-9806

Fax #: (803) 799-9806

Other:

E-mail: lgibson@lourielawfirm.com

NOTE The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint ☐ NON-JURY TRIAL demanded in complaint
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
- ☐ This case is exempt from ADR (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20____-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☒ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600) ☐ Pharmaceuticals (630)
☐ Automobile Arb (610) ☐ Unfair Trade Practices (640)
☐ Medical (620) ☐ Out-of-State Depositions (650)
☐ Other (699) ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (540) | | | |

Submitting Party Signature: _____

Date: 8/18/10

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S C Code Ann §15-36-10 et seq

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry,
Jasper, Lexington, Pickens (Family Court Only), Richland, Union and York

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE
DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT**

You are required to take the following action(s):

- 1 The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed
- 2 The initial ADR conference must be held within 300 days after the filing of the action
- 3 Pre-suit medical malpractice mediations required by S C Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs (Medical malpractice mediation is mandatory statewide)
- 4 Cases are exempt from ADR only upon the following grounds
 - a Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition,
 - b Requests for temporary relief,
 - c Appeals
 - d Post Conviction relief matters,
 - e Contempt of Court proceedings,
 - f Forfeiture proceedings brought by governmental entities,
 - g Mortgage foreclosures, and
 - h Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute
- 5 In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation
- 6 Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

RECEIVED

AUG 26 2010

000165 **INSURANCE RESERVE FUND**
CLAIMS DEPARTMENT

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

)

Coley Brown,

) C/A No

Plaintiff,

)

vs

)

East Richland County Public Service District,

)

Defendant

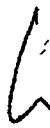
)

RICHLAND COUNTY
FILED
 2010 AUG 26 PM 3:36
 JEANETTE W. MCBRIDE
 CLERK & G.S.
 SUMMONS
 (Jury Trial Demanded)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your Answer to the said Complaint to said Plaintiff's attorneys Neal M. Lourie and Kenneth E. Berger, at their office located at 1224 Pickens Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

LOURIE LAW FIRM, LLC



Neal M. Lourie
 Kenneth E. Berger
 1224 Pickens Street
 P.O. Box 12089
 Columbia, South Carolina 29211
 Telephone (803) 799-9805
 Facsimile (803) 799-9571
 Attorneys for the Plaintiff

8/18, 2010
 Columbia, South Carolina

RECEIVED

AUG 26 2010

000166

NON-PAID RESERVE FUND
 CLERK'S DEPARTMENT

RECEIVED

AUG 26 2010

JUDGE RESERVE ROOM

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Coley Brown,) C/A No
Plaintiff,)
vs.)
East Richland County Public Service District,)
Defendant.)

COMPLAINT
(Jury Trial Demanded)

JEANETTE W. McBRIDE
2010 AUG 29 PM 3:26

FILED

Plaintiff Coley Brown (hereinafter styled "Mr Brown") brings this action against Defendant East Richland County Public Service District (hereinafter styled "Defendant ERCPSD") based upon the allegations set forth below.

PARTIES, JURISDICTION, VENUE

1. At all times relevant to this action, Mr Brown was a resident of South Carolina
2. Defendant ERCPSD is a governmental entity located in and established under the laws of the State of South Carolina
3. At all times relevant to this action, persons acting on behalf of Defendant ERCPSD were acting individually and as agents, servants, and/or employees, and within the scope of their agency and/or employment with Defendant
4. At all times relevant to this action, Defendant ERCPSD is liable for the acts and/or omissions of their agents, servants, and/or employees within the scope of their agency and/or employment with Defendant, under the doctrine of respondeat superior.
5. Plaintiff's First Cause of Action (*Inverse Condemnation*) is brought pursuant to Article I, Section Thirteen, of the Constitution of the State of South Carolina.

000167

6 Plaintiff's Second and Third Causes of Action (*Trespass, Negligence*) are brought pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et. Seq

7. Venue and jurisdiction are proper in this Court, as the most substantial act and/or omission giving rise to this action occurred in Richland County.

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

7 Mr. Brown owns and has owned a residential property located at 6436 Westshore Road in Richland County.

8. During the time Mr. Brown owned and possessed this property, a sewage force main was installed on Westshore Road.

9. The sewage force main was under the control of Defendant ERCPSD at all times relevant to this action

10. An air relief valve (i.e. "burp station") associated with the sewage force main, and located on Westshore Road, was also controlled by Defendant ERCPSD at all times relevant to this action

11 The air relief valve was located across the street from Mr. Brown's property

12 This burp station released offensive odors on a daily basis beginning shortly after its installation.

13 The offensive odors invaded Mr. Brown's property multiple times per day

14 The offensive odors which invaded Mr. Brown's property resulted in a severe diminution in the property's economic and non-economic value

15. The offensive odors which invaded Mr Brown's property prevented him from using and enjoying the land.

16 Mr Brown made repeated requests to ERCPSD that the stench be remedied, but the odors continued to invade his property

17 Several years ago, Mr Brown purchased a residential property in the Spring Valley subdivision, located near Columbia, South Carolina, as he could no longer endure the stench emanating from the burp station on Westshore Road

18 Several years ago, Mr. Brown placed the property located at 6436 Westshore Road on the real estate market, but the property was never sold.

18. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has suffered and in the future will suffer: economic damages, mental anguish; shock; embarrassment, humiliation, and loss of his enjoyment of life

FOR A FIRST CAUSE OF ACTION
(Inverse Condemnation)

19 The allegations of the foregoing paragraphs are incorporated as if repeated verbatim.

20. During the time Mr. Brown owned property located at 6436 Westshore Road, Defendant ERCPSD committed an affirmative, positive, aggressive act in the form of its installation and operation of a sewer main line and air relief valve along Westshore Road

21 ERCPSD's action resulted in a taking of Mr Brown's property

22. The taking was for a public use

23. The taking has some degree of permanence

000169

24. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has suffered and in the future will suffer. economic damages, mental anguish; shock, embarrassment, humiliation, and loss of his enjoyment of life.

25 As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr. Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, and such further relief as the Court may deem just and proper.

28. Mr. Brown is further entitled to damages based in part on the property's diminution in value, all costs incurred as a result of the Defendant's act and/or omissions, and attorney's fees

FOR A SECOND CAUSE OF ACTION
(Trespass)

25 The allegations of the foregoing paragraphs are incorporated as if repeated verbatim

26 During the time Mr Brown owned and possessed property located at 6436 Westshore Road, Defendant ERCPSD interfered with his right to exclusive, peaceable possession of said property

27. Mr. Brown had and still has legal possession of the property located at 6436 Westshore Road

28. Defendant ERCPSD voluntarily entered Mr. Brown's property by way of the offensive odors emanating from an air relief valve controlled by the Defendant.

29 By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr Brown has

suffered and in the future will suffer. economic damages, mental anguish, shock, embarrassment; humiliation, and loss of his enjoyment of life.

29. As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, all costs incurred as a result of the Defendant's act and/or omissions, attorney's fees, and such further relief as the Court may deem just and proper

FOR A SECOND CAUSE OF ACTION
(Negligence)

30. The allegations of the foregoing paragraphs are incorporated as if repeated verbatim

31. Defendant ERCPSD, acting through its agents, servants and/or employees failed to exercise the care necessary under the circumstances when it allowed offensive odors to emanate multiple times per day from an air relief valve it controlled on Westshore Road.

32. By reason and in consequence of the aforesaid acts and/or omissions of Defendant ERCPSD, through its agents, servants and/or employees, Mr. Brown has suffered and in the future will suffer: economic damages, mental anguish, shock; embarrassment; humiliation, and loss of his enjoyment of life.

33 As a result of the aforesaid acts and/or omissions of Defendant ERCPSD, Mr. Brown is informed and believes that he is entitled to judgment against Defendant for actual damages, both now and in the future, all costs incurred as a result of the Defendant's act and/or omissions, attorney's fees, and such further relief as the Court may deem just and proper.

RECEIVED

000171

AUG 26 2010

CLERK OF THE COURT
JAMES DEPARTMENT

WHEREFORE, the Plaintiff prays as follows. (a) that the Plaintiff recovers a judgment against the Defendant in an amount sufficient to compensate him for his damages as described above; (b) that the Plaintiff recovers all costs associated with this action; (c) that the Plaintiff recovers all attorney's fees; and (d) that the Plaintiff recovers such other relief as the court may deem just and proper

LOURIE LAW FIRM, LLC



Neal M. Lourie
Kenneth E. Berger
1224 Pickens Street
P O. Box 12089
Columbia, South Carolina 29211
Telephone (803) 799-9805
Facsimile (803) 799-9571
Attorneys for the Plaintiff

8/18, 2010
Columbia, South Carolina

RECEIVED

AUG 26 2010

**INSURANCE RESERVE FUND
CLAIMS DEPARTMENT**

POLICY NUMBER	POLICY PERIOD	TYPE OF INSURANCE	COVERAGE
T130400210	07/15/2009-07/15/2010	GENERAL TORT LIABILITY	1,000,000

NAMED INSURED AND ADDRESS	CURRENT DEC PAGE AND SCHEDULE	ACTIVITY
EAST RICHLAND COUNTY	AS OF: 03/30/2011	002

PUBLIC SERVICE DISTRICT
704 ROSS RD/PO BOX 23069
COLUMBIA, SC 29224-3069

ATTN: LARRY BRAZELL
(803) 788-1570

COVERAGE PROVIDED UNDER THIS POLICY IS SUBJECT TO THE FOLLOWING FORMS:
CD-01 CD-12 CD-37 CD-38

S C H E D U L E

NUMBER OF PERSONS	RATE PER PERSON	PREMIUM	PERSONNEL CLASSIFICATION
9			DIRECTORS, EXECUTIVES, MANAGERS
17			MAINTENANCE PERSONNEL
9			CLERICAL PERSONNEL
9			OTHER PERSONNEL
			- OPTIONAL PREPAID LEGAL
			- OPTIONAL SEWER BACKUP
			- TOTAL PREMIUM

COVERAGE IS AUTOMATICALLY PROVIDED FOR THE ENTITY

PREPAID LEGAL DEFENSE COSTS COVERAGE

BASIC	15,000.00
OPTIONAL	35,000.00
TOTAL	50,000.00

SEWER BACKUP COVERAGE

PLAN 2: \$5,000 MAXIMUM LIMIT FOR EACH OCCURRENCE WITH A \$250 DEDUCTIBLE
AND A 20% CO-PAYMENT FROM THE INSURED ON EACH OCCURRENCE



000173



SOUTH CAROLINA BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND
POST OFFICE BOX 11066
COLUMBIA, SOUTH CAROLINA 29211

Phone: (803) 737-0020

DLSCN 04/04/11

TORT LIABILITY INSURANCE POLICY POLICY PROVISIONS

SOUTH CAROLINA BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND
(HEREINAFTER CALLED THE FUND)

P. O. BOX 11066
1201 MAIN STREET, SUITE 500
COLUMBIA, S. C. 29211
803-737-0020

These policy provisions, with declarations, and endorsements, if any, issued to form a part thereof, complete your Tort Liability Insurance Policy. This policy is made and accepted subject to the following provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

The time of inception and the time of expiration of this policy and of any schedule or endorsement attached shall be 12:01 AM standard time at the location of property involved. To the extent that coverage in this policy replaces coverage in other policies terminating noon standard time on the inception date of this policy, coverage under this policy shall not become effective until other such coverage has terminated.

This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on back hereof, or attached hereon, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed herein or added hereto; and no officer, agent or other representative of said Board shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power to be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Insured unless so written or attached.

Assignment of this Policy shall not be valid except with the written consent of the Fund.

IN WITNESS THEREOF The State Budget and Control Board of the State of South Carolina, through the Office of Insurance Reserve Fund executed and attested these presents.

OFFICE OF INSURANCE RESERVE FUND

By

Office Director

CERTIFIED TRUE COPY

Athena S. Western 30 March 2011
ATHENA S. WESTEREN, CPCU DATE
UNDERWRITING DEPARTMENT
SC INSURANCE RESERVE FUND

000174

I.
COVERAGE A - PERSONAL INJURY LIABILITY
COVERAGE B - PROPERTY DAMAGE LIABILITY

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.

The Fund shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Fund shall not be obligated to pay any claim or judgement or to defend any suit after the applicable limit of the Fund's liability has been exhausted by payment of judgements or settlements.

II.
SUPPLEMENTARY PAYMENTS

The Fund will pay, in addition to the applicable limit of liability:

- (a) All expenses incurred by the Fund, all costs taxed against the insured in any suit defended by the Fund and all interest on the entire amount of any judgement therein which accrues after entry of the judgement and before the Fund has paid or tendered or deposited in court that part of the judgement which does not exceed the limit of the Fund's liability thereon.
- (b) Premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the Fund shall have no obligation to apply for or furnish any such bonds.
- (c) At the request of the insured, to or for each person who sustains bodily injury caused by an accident all reasonable medical expense incurred within one year from the date of the accident on account of such bodily injury, provided such bodily injury arises out of (a) a condition in the insured premises, or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under this policy, not to exceed \$1,000 per person, such payments shall be excess over any valid and collectible insurance, Medicare, or Medicaid. The applicable limit of the Fund's liability will be reduced by any medical expense payments.
- (d) Reasonable expenses incurred by the insured at the Fund's request in assisting the Fund in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$250 per day.
- (e) Defense costs, including legal fees, travel, expert witness fees, and court reporter fees, for all suits against an insured not covered by this policy, auto liability policies, aircraft liability policies, or medical professional liability policies, but only if the suit was served on or after January 1, 2001, subject to an annual aggregate limit of \$15,000 for defense costs for all suits covered under this paragraph.

III.
DEFINITIONS

When used in this policy:

"Automobile" means a licensed or unlicensed land motor vehicle, trailer or semi-trailer designed for use principally on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment.

"Bodily Injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

"Handicap" means physical disability.

"Insured" means any person, entity or organization qualifying as an insured in the "Persons Insured" provision. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the Fund's liability.

"Mobile Equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled;

- (1) not subject to motor vehicle registration,
- (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or
- (3) designed for use principally off public roads, or
- (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

"Named Insured" means the person or entity named in Item 1 of the declarations of this policy.

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

"Personal Injury" means:

- (1) bodily injury caused by an occurrence.
- (2) injury arising out of one or more of the following offenses committed during the policy period:
 - (a) false arrest, detention, imprisonment, malicious prosecution; or humiliation resulting from false arrest, detention, imprisonment or malicious prosecution.
 - (b) wrongful entry or eviction or other invasion of the right of private occupancy;
 - (c) a publication or utterance of a libel or slander or other defamatory or disparaging material;
 - (d) assault and battery not committed by or at the direction of the insured unless committed for the purpose of protecting persons or property;
 - (e) discrimination on the basis of race, sex, age, religion, or handicap;
 - (f) denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;

000175

"nuclear material" means source material, special nuclear material or byproduct material;

"source material," "special nuclear material," and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

- (a) any nuclear reactor,
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel or (3) handling, processing or packaging waste,
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations:

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property;

- (o) to any **personal injury** or **property damage** resulting from retaliation. This policy excludes coverage for any claim or suit that is based upon any statute which provides a remedy for retaliation or which prohibits retaliation including, but not limited to, whistleblower statutes and those statutory remedies prescribed for retaliation based upon the making of a complaint or upon participation in some proceeding or process. This exclusion applies to any statutory remedy for retaliation or to any retaliation prohibited by statute even where the retaliation relates to a covered personal injury or property damage.
- (p) to **bodily injury** or **property damage** arising out of or in any way connected with the operation of the principals of eminent domain, condemnation proceedings, inverse condemnation, or takings, by whatever name called, whether such liability accrues directly against the insured or by virtue of any agreement entered into by or on behalf of the insured.

VII. CONDITIONS

1. Premium.

All premiums for this policy shall be computed in accordance with the Fund's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

The **named insured** shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the Fund at the end of the policy period and at such times during the policy period as the Fund may direct.

2. Inspection and Audit.

The Fund shall be permitted but not obligated to inspect the **named insured's** property and operations at any time. Neither the Fund's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The Fund may examine and audit the **named insured's** books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. Financial Responsibility Laws.

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for **bodily injury** liability or for **property damage** liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to reimburse the Fund for any payment made by the Fund which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

- (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the Fund or any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the Fund every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the Fund and, upon the Fund's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

000176

5. Action Against Fund.

No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the claimant and the Fund.

Any person or organization or the legal representative thereof who has secured such judgement or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Fund as a party to any action against the insured to determine the insured's liability, nor shall the Fund be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Fund of any of its obligations hereunder.

6. Other Insurance.

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Fund's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Fund shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) Contribution by Equal Shares.

If all of such other valid and collectible insurance provides for contribution by equal shares, the Fund shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits.

If any of such other insurance does not provide for contribution by equal share, the Fund shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. Subrogation.

In the event of any payment under this policy, the Fund shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

8. Changes.

Notices to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Fund from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the Fund.

9. Assignment.

Assignment of interest under this policy shall not bind the Fund until its consent is endorsed hereon; if, however, the named insured shall die, such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

10. Cancellation and Non-Renewal.

- (a) This policy may be cancelled by the named insured by mailing to the Fund a 90 day written advance notice stating when thereafter the cancellation shall be effective. A political subdivision may cancel all policies with the Fund by mailing to the Fund a 90 day written advance notice as provided in §15-78-140 of the South Carolina Code of Laws.
- (b) The Fund may cancel this policy for non-payment of premium by mailing a notice of cancellation giving not less than 30 days notice of the cancellation as provided in §15-78-160 of the South Carolina Code of Laws.
- (c) If this policy is cancelled in accordance with (a) or (b) above, earned premium shall be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- (d) For the purposes of this policy, the term "non-renewal" shall mean "cancellation" if the insured is ceasing all coverages with the Fund and conditions as provided in sections (a), (b) and (c) above apply.

11. Declarations.

By acceptance of this policy, the **named insured** agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Fund or any of its agents relating to this insurance.

000177

- (g) violation of the following Amendments to the Constitution of the United States:
First Amendment
Fourth Amendment
Eighth Amendment

"Policy Territory" means:

- (1) the United States of America, its territories or possessions, or
- (2) international waters or air space, provided the personal injury or property damage does not occur in the course of travel to any other country or nation, or
- (3) anywhere in the world with respect to "bodily injury, property damage or personal injury" arising out of the activities of any "insured" permanently domiciled in the United States of America, though temporarily outside the United States of America, its territories and possessions or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions.

Such insurance as is afforded by paragraph (3) above shall not apply to Premises Medical Payments Coverage.

"Professional Services" means the rendering of medical or architectural services by individuals with training in the profession who are licensed or certified to practice the profession.

"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.

"Volunteer Employee" means:

- (1) any person or entity who, of his own free will, provides goods or services, without any financial gain, to any agency, instrumentality or political subdivision of the State; or
- (2) any person performing public service employment, either voluntarily or as directed by a court or other authority, in lieu of fines and/or incarceration.

IV. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (a) The entity designated in the declarations as **named insured** is an insured.
- (b) Any employee of the entity designated in the declarations as **named insured** is an insured, but only while the employee is acting in the scope of his or her official duties.
- (c) Any **volunteer employee** of the entity designated in the declarations as **named insured** is an insured, but only while the **volunteer employee** is acting in the scope of his or her official duties.
- (d) With respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law;
 - (i) an employee of the **named insured** while operating any such equipment in the scope of his or her official duties for the insured, and
 - (ii) any other person while operating with the permission of the **named insured** any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no

other valid and collectible insurance available, either on a primary or excess basis, to such person or organization; provided that no person or organization shall be an insured under this paragraph (d) with respect to:

- (1) **bodily injury** to any fellow employee of such person injured in the scope of his or her official duties for the insured, or
- (2) **property damage** to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (ii).

V. LIMIT OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **personal injury** or **property damage**, or (3) claims made or suits brought on account of **personal injury** or **property damage**, the Fund's liability is limited as follows:

The total liability of the Fund for all damages as the result of any **occurrence** including damages for care and loss of services, because of **personal injury** sustained by one or more persons, because of all **property damage** sustained by one or more persons or organizations, or by any combination of **personal injury** or **property damage** sustained by one or more persons or organizations, shall not exceed the limit of liability stated in the declarations as applicable to each **occurrence**. However, for any action or claim brought under the provisions of Chapter 78 of the South Carolina Code of Laws, cited as the "South Carolina Tort Claims Act", the liability of the Fund shall not exceed the following limits:

- (a) Occurrences arising prior to July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 250,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 500,000 dollars regardless of the number of agencies or political subdivisions involved.
- (b) Occurrences arising on or after July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 300,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 600,000 dollars regardless of the number of agencies or political subdivisions involved.

Liability limits in excess of those stated in (a) and (b) shall apply only in actions or claims to which Chapter 78 does not apply.

The property damage liability coverage applies only to the amount of damages in excess of a \$250 per claim deductible sustained by one person or organization as the result of any one **occurrence**. The Fund may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the Insured shall promptly reimburse the Fund for such part of the deductible amount as has been paid by the Fund.

For the purpose of determining the limit of the Fund's liability, all **personal injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.

000178

VI. EXCLUSIONS

This insurance does not apply:

- (a) to liability assumed by the insured under any contract or agreement;
- (b) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any automobile or aircraft owned or operated by or rented or loaned to any insured and/or
 - (2) any other automobile or aircraft operated by any person in the scope of his or her official duties for the insured; but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobiles are not owned by or rented or loaned to any insured, or
 - (3) any aircraft under the guidance of an air traffic controller employed by any insured;
- (c) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of any **mobile equipment** while being used in any prearranged or organized racing, speed, or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity;
- (d) to **personal injury or property damage** arising out of and in the course of the transportation of **mobile equipment** by an automobile owned or operated by or rented or loaned to any insured;
- (e) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any watercraft, in excess of twenty-six (26) feet in length, owned or operated by or rented or loaned to any insured, or
 - (2) any other watercraft, in excess of twenty-six (26) feet in length, operated by any person in the scope of his or her official duties for the insured; by any insured; but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;
- (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;
- (g) to **personal injury or property damage** due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the following, with respect to
 - (1) liability assumed by the insured under contract
 - (2) expenses for medical expense under the Supplementary Payments provision;
- (h) to any obligation for which the insured or any carrier as his insurer may be held liable under any workers' compensation; unemployment compensation or disability benefits law, or under any similar law;
- (i) to **bodily injury** to
 - (1) an employee of the insured arising out of and in the scope of his or her official duties for the insured; or
 - (2) the spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (1) whether the insured may be liable as an employer or in any other capacity; and
- (2) to any obligation to share damages with or repay someone else who must pay damages because of the injury.
- (j) to **property damage** to
 - (1) property owned or occupied by or rented to the insured,
 - (2) property used by the insured,
 - (3) property in the care, custody or control of the

insured or as to which the insured is for any purpose exercising physical control, or

- (4) **property** (including money) seized by the insured whether legally or illegally;
- (k) to **property damage** to premises alienated by the named insured arising out of such premises or any part thereof;
- (l) to loss of use of tangible property which has not been physically injured or destroyed resulting from a delay in or lack of performance by or on behalf of the insured or any contract or agreement;
- (m) to **personal injury or property damage** due to rendering of or failure to render any professional service;
- (n) **NUCLEAR ENERGY LIABILITY EXCLUSION (Broad Form)**

I. This policy does not apply:

A. Under any Liability Coverage, to personal injury or property damage

(1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments Coverage, to expenses incurred with respect to personal injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

C. Under any Liability Coverage, to personal injury or property damage resulting from the hazardous properties of nuclear material, if

(1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of an insured, or (b) has been discharged or dispersed therefrom;

(2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured, or

(3) the personal injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

II. As used herein:

"hazardous properties" include radioactive, toxic or explosive properties;

000179

POLICY NUMBER	POLICY PERIOD	TYPE OF INSURANCE	COVERAGE
T130400211	07/15/2010-07/15/2011	GENERAL TORT LIABILITY	1,000,000

NAMED INSURED AND ADDRESS	CURRENT DEC PAGE AND SCHEDULE	ACTIVITY
EAST RICHLAND COUNTY	AS OF: 03/30/2011	002

PUBLIC SERVICE DISTRICT
704 ROSS RD/PO BOX 23069
COLUMBIA, SC 29224-3069

ATTN: LARRY BRAZELL
(803) 788-1570

COVERAGE PROVIDED UNDER THIS POLICY IS SUBJECT TO THE FOLLOWING FORMS:
CD-01 CD-12 CD-37 CD-38

SCHEDULE

NUMBER OF PERSONS	RATE PER PERSON	PREMIUM	PERSONNEL CLASSIFICATION
9			DIRECTORS, EXECUTIVES, MANAGERS
17			MAINTENANCE PERSONNEL
9			CLERICAL PERSONNEL
9			OTHER PERSONNEL
			- OPTIONAL PREPAID LEGAL
			- OPTIONAL SEWER BACKUP
			- TOTAL PREMIUM

COVERAGE IS AUTOMATICALLY PROVIDED FOR THE ENTITY

PREPAID LEGAL DEFENSE COSTS COVERAGE

BASIC	15,000.00
OPTIONAL	35,000.00
TOTAL	50,000.00

SEWER BACKUP COVERAGE

PLAN 2: \$5,000 MAXIMUM LIMIT FOR EACH OCCURRENCE WITH A \$250 DEDUCTIBLE
AND A 20% CO-PAYMENT FROM THE INSURED ON EACH OCCURRENCE



000180



SOUTH CAROLINA BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND
POST OFFICE BOX 11066
COLUMBIA, SOUTH CAROLINA 29211

Phone: (803) 737-0020

DT.SCN 04/04/11

TORT LIABILITY INSURANCE POLICY

POLICY PROVISIONS

SOUTH CAROLINA BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND (HEREINAFTER CALLED THE FUND)

P. O. BOX 11066
1201 MAIN STREET, SUITE 500
COLUMBIA, S. C. 29211
803-737-0020

These policy provisions, with declarations, and endorsements, if any, issued to form a part thereof, complete your Tort Liability Insurance Policy. This policy is made and accepted subject to the following provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

The time of inception and the time of expiration of this policy and of any schedule or endorsement attached shall be 12:01 AM standard time at the location of property involved. To the extent that coverage in this policy replaces coverage in other policies terminating noon standard time on the inception date of this policy, coverage under this policy shall not become effective until other such coverage has terminated.

This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on back hereof, or attached hereon, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed herein or added hereto; and no officer, agent or other representative of said Board shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power to be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Insured unless so written or attached.

Assignment of this Policy shall not be valid except with the written consent of the Fund.

IN WITNESS THEREOF The State Budget and Control Board of the State of South Carolina, through the Office of Insurance Reserve Fund executed and attested these presents.

OFFICE OF INSURANCE RESERVE FUND

By

Office Director

CERTIFIED TRUE COPY

Athena S. Western 30 March 2011
ATHENA S. WESTEREN, CPCU DATE

UNDERWRITING DEPARTMENT
SC INSURANCE RESERVE FUND

000181

I.
COVERAGE A - PERSONAL INJURY LIABILITY
COVERAGE B - PROPERTY DAMAGE LIABILITY

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.

The Fund shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Fund shall not be obligated to pay any claim or judgement or to defend any suit after the applicable limit of the Fund's liability has been exhausted by payment of judgements or settlements.

II.
SUPPLEMENTARY PAYMENTS

The Fund will pay, in addition to the applicable limit of liability:

- (a) All expenses incurred by the Fund, all costs taxed against the insured in any suit defended by the Fund and all interest on the entire amount of any judgement therein which accrues after entry of the judgement and before the Fund has paid or tendered or deposited in court that part of the judgement which does not exceed the limit of the Fund's liability thereon.
- (b) Premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the Fund shall have no obligation to apply for or furnish any such bonds.
- (c) At the request of the insured, to or for each person who sustains bodily injury caused by an accident all reasonable medical expense incurred within one year from the date of the accident on account of such bodily injury, provided such bodily injury arises out of (a) a condition in the insured premises, or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under this policy, not to exceed \$1,000 per person, such payments shall be excess over any valid and collectible insurance, Medicare, or Medicaid. The applicable limit of the Fund's liability will be reduced by any medical expense payments.
- (d) Reasonable expenses incurred by the insured at the Fund's request in assisting the Fund in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$250 per day.
- (e) Defense costs, including legal fees, travel, expert witness fees, and court reporter fees, for all suits against an insured not covered by this policy, auto liability policies, aircraft liability policies, or medical professional liability policies, but only if the suit was served on or after January 1, 2001, subject to an annual aggregate limit of \$15,000 for defense costs for all suits covered under this paragraph.

III.
DEFINITIONS

When used in this policy:

"Automobile" means a licensed or unlicensed land motor vehicle, trailer or semi-trailer designed for use principally on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment.

"Bodily Injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

"Handicap" means physical disability.

"Insured" means any person, entity or organization qualifying as an insured in the "Persons Insured" provision. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the Fund's liability.

"Mobile Equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled;

- (1) not subject to motor vehicle registration,
- (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or
- (3) designed for use principally off public roads, or
- (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

"Named Insured" means the person or entity named in Item 1 of the declarations of this policy.

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

"Personal Injury" means:

- (1) bodily injury caused by an occurrence.
- (2) injury arising out of one or more of the following offenses committed during the policy period:
 - (a) false arrest, detention, imprisonment, malicious prosecution; or humiliation resulting from false arrest, detention, imprisonment or malicious prosecution.
 - (b) wrongful entry or eviction or other invasion of the right of private occupancy;
 - (c) a publication or utterance of a libel or slander or other defamatory or disparaging material;
 - (d) assault and battery not committed by or at the direction of the insured unless committed for the purpose of protecting persons or property;
 - (e) discrimination on the basis of race, sex, age, religion, or handicap;
 - (f) denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;

000182

- (g) violation of the following Amendments to the Constitution of the United States:

First Amendment
Fourth Amendment
Eighth Amendment

"Policy Territory" means:

- (1) the United States of America, its territories or possessions, or
- (2) international waters or air space, provided the personal injury or property damage does not occur in the course of travel to any other country or nation, or
- (3) anywhere in the world with respect to "bodily injury, property damage or personal injury" arising out of the activities of any "insured" permanently domiciled in the United States of America, though temporarily outside the United States of America, its territories and possessions or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions.

Such insurance as is afforded by paragraph (3) above shall not apply to Premises Medical Payments Coverage.

"Professional Services" means the rendering of medical services by individuals with training in the profession who are licensed or certified to practice the profession.

"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.

"Volunteer Employee" means:

- (1) any person or entity who, of his own free will, provides goods or services, without any financial gain, to any agency, instrumentality or political subdivision of the State; or
- (2) any person performing public service employment, either voluntarily or as directed by a court or other authority, in lieu of fines and/or incarceration.

IV. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (a) The entity designated in the declarations as **named insured** is an insured.
- (b) Any employee of the entity designated in the declarations as **named insured** is an insured, but only while the employee is acting in the scope of his or her official duties.
- (c) Any **volunteer employee** of the entity designated in the declarations as **named insured** is an insured, but only while the **volunteer employee** is acting in the scope of his or her official duties.
- (d) With respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law;
 - (i) an employee of the **named insured** while operating any such equipment in the scope of his or her official duties for the insured, and
 - (ii) any other person while operating with the permission of the **named insured** any such equipment registered in the name of the named insured and any person or organization legally responsible for such operation, but only if there is no

other valid and collectible insurance available, either on a primary or excess basis, to such person or organization; provided that no person or organization shall be an insured under this paragraph (d) with respect to:

- (1) **bodily injury** to any fellow employee of such person injured in the scope of his or her official duties for the insured, or
- (2) **property damage** to property owned by, rented to, in charge of or occupied by the named insured or the employer of any person described in subparagraph (ii).

V. LIMIT OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **personal injury** or **property damage**, or (3) claims made or suits brought on account of **personal injury** or **property damage**, the Fund's liability is limited as follows:

The total liability of the Fund for all damages as the result of any **occurrence** including damages for care and loss of services, because of **personal injury** sustained by one or more persons, because of all **property damage** sustained by one or more persons or organizations, or by any combination of **personal injury** or **property damage** sustained by one or more persons or organizations, shall not exceed the limit of liability stated in the declarations as applicable to each **occurrence**. However, for any action or claim brought under the provisions of Chapter 78 of the South Carolina Code of Laws, cited as the "South Carolina Tort Claims Act", the liability of the Fund shall not exceed the following limits:

- (a) Occurrences arising prior to July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 250,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 500,000 dollars regardless of the number of agencies or political subdivisions involved.
- (b) Occurrences arising on or after July 1, 1998:
 - (1) No person shall recover in any one action or claim a sum exceeding 300,000 dollars because of loss arising from a single **occurrence** regardless of the number of agencies or political subdivisions involved.
 - (2) The total sum recovered arising out of a single **occurrence** shall not exceed 600,000 dollars regardless of the number of agencies or political subdivisions involved.

Liability limits in excess of those stated in (a) and (b) shall apply only in actions or claims to which Chapter 78 does not apply.

The property damage liability coverage applies only to the amount of damages in excess of a \$250 per claim deductible sustained by one person or organization as the result of any one **occurrence**. The Fund may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the Insured shall promptly reimburse the Fund for such part of the deductible amount as has been paid by the Fund.

For the purpose of determining the limit of the Fund's liability, all **personal injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.

000183

VI. EXCLUSIONS

This insurance does not apply:

- (a) to liability assumed by the insured under any contract or agreement;
- (b) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any automobile or aircraft owned or operated by or rented or loaned to any insured and/or
 - (2) any other automobile or aircraft operated by any person in the scope of his or her official duties for the insured; but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobiles are not owned by or rented or loaned to any insured, or
 - (3) any aircraft under the guidance of an air traffic controller employed by any insured;
- (c) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of any **mobile equipment** while being used in any prearranged or organized racing, speed, or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity;
- (d) to **personal injury or property damage** arising out of and in the course of the transportation of **mobile equipment** by an automobile owned or operated by or rented or loaned to any insured;
- (e) to **personal injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any watercraft, in excess of twenty-six (26) feet in length, owned or operated by or rented or loaned to any insured, or
 - (2) any other watercraft, in excess of twenty-six (26) feet in length, operated by any person in the scope of his or her official duties for the insured; by any insured; but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;
- (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;
- (g) to **personal injury or property damage** due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the following, with respect to
 - (1) liability assumed by the insured under contract
 - (2) expenses for medical expense under the Supplementary Payments provision;
- (h) to any obligation for which the insured or any carrier as his insurer may be held liable under any workers' compensation; unemployment compensation or disability benefits law, or under any similar law;
- (i) to **bodily injury** to
 - (1) an employee of the insured arising out of and in the scope of his or her official duties for the insured; or
 - (2) the spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (1) whether the insured may be liable as an employer or in any other capacity; and
- (2) to any obligation to share damages with or repay someone else who must pay damages because of the injury.
- (j) to **property damage** to
 - (1) property owned or occupied by or rented to the insured,
 - (2) property used by the insured,
 - (3) property in the care, custody or control of the

insured or as to which the insured is for any purpose exercising physical control, or

- (4) property (including money) seized by the insured whether legally or illegally;
- (k) to **property damage** to premises alienated by the named insured arising out of such premises or any part thereof;
- (l) to loss of use of tangible property which has not been physically injured or destroyed resulting from a delay in or lack of performance by or on behalf of the insured or any contract or agreement;
- (m) to **personal injury or property damage** due to rendering of or failure to render any professional service;
- (n) **NUCLEAR ENERGY LIABILITY EXCLUSION (Broad Form)**

I. This policy does not apply:

A. Under any Liability Coverage, to personal injury or property damage

(1) with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments Coverage, to expenses incurred with respect to personal injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

C. Under any Liability Coverage, to personal injury or property damage resulting from the hazardous properties of nuclear material, if

(1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of an insured, or (b) has been discharged or dispersed therefrom;

(2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured, or

(3) the personal injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

II. As used herein:

"hazardous properties" include radioactive, toxic or explosive properties;

000184

"nuclear material" means source material, special nuclear material or byproduct material;

"source material," "special nuclear material," and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing byproduct material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

- (a) any nuclear reactor,
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel or (3) handling, processing or packaging waste,
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste, and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations:

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property;

- (o) to any **personal injury** or **property damage** resulting from retaliation. This policy excludes coverage for any claim or suit that is based upon any statute which provides a remedy for retaliation or which prohibits retaliation including, but not limited to, whistleblower statutes and those statutory remedies prescribed for retaliation based upon the making of a complaint or upon participation in some proceeding or process. This exclusion applies to any statutory remedy for retaliation or to any retaliation prohibited by statute even where the retaliation relates to a covered personal injury or property damage.
- (p) to **bodily injury** or **property damage** arising out of or in any way connected with the operation of the principals of eminent domain, condemnation proceedings, inverse condemnation, or takings, by whatever name called, whether such liability accrues directly against the insured or by virtue of any agreement entered into by or on behalf of the insured.

VII. CONDITIONS

1. Premium.

All premiums for this policy shall be computed in accordance with the Fund's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

The **named insured** shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the Fund at the end of the policy period and at such times during the policy period as the Fund may direct.

2. Inspection and Audit.

The Fund shall be permitted but not obligated to inspect the **named insured's** property and operations at any time. Neither the Fund's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The Fund may examine and audit the **named insured's** books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. Financial Responsibility Laws.

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for **bodily injury** liability or for **property damage** liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The insured agrees to reimburse the Fund for any payment made by the Fund which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

- (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the Fund or any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the Fund every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the Fund and, upon the Fund's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

000185

DLSCN 04/04/11

5. Action Against Fund.

No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the claimant and the Fund.

Any person or organization or the legal representative thereof who has secured such judgement or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Fund as a party to any action against the insured to determine the insured's liability, nor shall the Fund be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Fund of any of its obligations hereunder.

6. Other Insurance.

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Fund's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Fund shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) Contribution by Equal Shares.

If all of such other valid and collectible insurance provides for contribution by equal shares, the Fund shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits.

If any of such other insurance does not provide for contribution by equal share, the Fund shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. Subrogation.

In the event of any payment under this policy, the Fund shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

8. Changes.

Notices to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Fund from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the Fund.

9. Assignment.

Assignment of interest under this policy shall not bind the Fund until its consent is endorsed hereon; if, however, the named insured shall die, such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

10. Cancellation and Non-Renewal.

- (a) This policy may be cancelled by the named insured by mailing to the Fund a 90 day written advance notice stating when thereafter the cancellation shall be effective. A political subdivision may cancel all policies with the Fund by mailing to the Fund a 90 day written advance notice as provided in §15-78-140 of the South Carolina Code of Laws.
- (b) The Fund may cancel this policy for non-payment of premium by mailing a notice of cancellation giving not less than 30 days notice of the cancellation as provided in §15-78-160 of the South Carolina Code of Laws.
- (c) If this policy is cancelled in accordance with (a) or (b) above, earned premium shall be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- (d) For the purposes of this policy, the term "non-renewal" shall mean "cancellation" if the insured is ceasing all coverages with the Fund and conditions as provided in sections (a), (b) and (c) above apply.

11. Declarations.

By acceptance of this policy, the **named insured** agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Fund or any of its agents relating to this insurance.

000186

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Coley Brown,)
)
Plaintiff,)
)
vs.)
)
East Richland County Public)
Service District)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2010-CP-40-005616

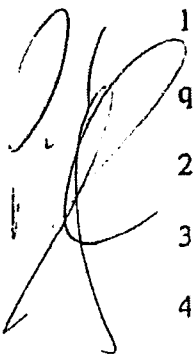
ANSWER

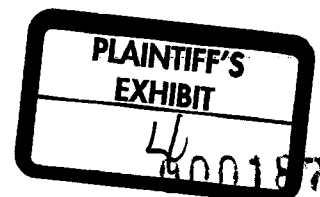
FILED
2010 OCT 25 AM 10:09
JENNIFER C. C. P. & G. S. SERVICE

TO: KENNETH E. BERGER, ESQUIRE, ATTORNEY FOR PLAINTIFF

The Defendant East Richland County Public Service District (hereinafter "ERCPSD" or "District"), answering the Complaint of Plaintiff herein alleges:

FOR A FIRST DEFENSE

- 
1. Each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained is expressly denied.
 2. The allegations of Paragraph 1 are admitted.
 3. The allegations of Paragraph 2 are admitted.
 4. The Defendant admits so much of the allegations of Paragraph 3 as allege that it acts through its employees and agents; the balance of the allegations of Paragraph 3 are denied.
 5. The allegations of Paragraph 4 are denied.
 6. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 5 and therefore denies same.



7. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 6 and therefore denies same.

8. The allegations of Paragraph 7 (first numbered Paragraph 7) are admitted on information and belief.

9. The allegations of Paragraph 7 (second numbered Paragraph 7) are admitted on information and belief.

10. The Defendant admits so much of the allegation of Paragraph 8 as allege that a force main was constructed on Westshore Road; the Defendant lacks sufficient information to form a belief as to the truth of the balance of the allegations of Paragraph 8 and therefore denies same.

11. The allegations of Paragraph 9 are admitted.

12. The Defendant admits so much of the allegations of Paragraph 10 as allege that there exists an air relief valve on the force main located on Westshore Road; in further answer to the allegations of Paragraph 10, the Defendant would allege that the term "burp station" is not a technical term associated with the air relief valve.

13. The Defendant admits so much of the allegations of Paragraph 11 as allege that an air relief valve is located in the vicinity of the Plaintiff's property on Westshore Road.

14. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 12 and therefore denies same.

15. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 13 and therefore denies same.

16. The allegations of Paragraph 14 are denied.

17. The allegations of Paragraph 15 are denied.

18. The allegations of Paragraph 16 are denied.

000188

19. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 17 and therefore denies same.

20. The Defendant admits so much of the allegations of Paragraph 18 (first numbered Paragraph 18) as allege that the Plaintiff's property is advertised for sale. The balance of the allegations of Paragraph 18 are denied.

21. The allegations of Paragraph 18 (second numbered Paragraph 18) are denied.

22. The Defendant realleges the allegations of Paragraph 1 through 21 above in response to the allegations of Paragraph 19.

23. The allegations of Paragraph 20 are denied.

24. The allegations of Paragraph 21 are denied.

25. The allegations of Paragraph 22 are denied.

26. The allegations of Paragraph 23 are denied.

27. The allegations of Paragraph 24 are denied.

28. The allegations of Paragraph 25 (first numbered Paragraph 25) are denied.

29. The allegations of Paragraph 28 (first numbered Paragraph 28) are denied.

30. The Defendant realleges the allegations of Paragraphs 1 through 29 above in response to the allegations of Paragraph 25 (second numbered Paragraph 25).

31. The allegations of Paragraph 26 are denied.

32. The Defendant lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 27 and therefore denies same.

33. The allegations of Paragraph 28 (second numbered Paragraph 28) are denied.

34. The allegations of Paragraph 29 (first numbered Paragraph 29) are denied.

35. The allegations of Paragraph 29 (second numbered Paragraph 29) are denied.



000189

36. The Defendant realleges the allegations of Paragraphs 1 through 35 above in response to the allegations of Paragraph 30.

37. The allegations of Paragraph 31 are denied.

38. The allegations of Paragraph 32 are denied.

39. The allegations of Paragraph 33 are denied.

FOR A SECOND DEFENSE

That the causes of action alleged in the Complaint fail to state facts sufficient to constitute a cause of action or claim against this Defendant, and the Defendant therefore moves to dismiss the Complaint.

FOR A THIRD DEFENSE

That the Defendant District, its agents, servants, employees, officials or representative at all times relevant hereto, during the performance or non-performance of the acts alleged in the Complaint, did not perform any acts or fail to perform any acts in bad faith, in a malicious manner, or with corrupt motives; and thus, the Defendant is, therefore, immune from suit.

FOR A FOURTH DEFENSE

That the Plaintiff's claims and causes of action are barred by the doctrine of sovereign immunity applicable to the Defendant.

FOR A FIFTH DEFENSE

That Plaintiff's claims and causes of action are barred under the doctrines of estoppel and waiver which are pled as and serve as affirmative defenses to the within action.

000190

FOR A SIXTH DEFENSE

That Plaintiff's claims and causes of action are barred under the applicable statute of limitations which are pled as and serve as an affirmative defense and bars to the within action.

FOR A SEVENTH DEFENSE

That Plaintiff's claims and causes of action are barred under the doctrine of laches which is pled as and serves as an affirmative defense and bar to the within action.

FOR A EIGHTH DEFENSE



That any injuries and/or damages sustained by the Plaintiff as set forth in the Complaint were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness, and/or comparative negligence of the Plaintiffs, which negligence exceeded any (potential) negligence of the Defendant, which is expressly denied, so as to be proximate cause of the set of injuries and damages and without the same would not have occurred; and, thus, the Defendant pleads the comparative negligence and comparative willfulness of the Plaintiff as a complete bar to the within action, or, in the alternative, as a partial bar or limitation to the recovery and relief sought by Plaintiffs.

FOR A NINTH DEFENSE

That the conduct of this Defendant, and its employees and agents, was not the proximate cause of the Plaintiff's alleged injuries.

FOR A TENTH DEFENSE

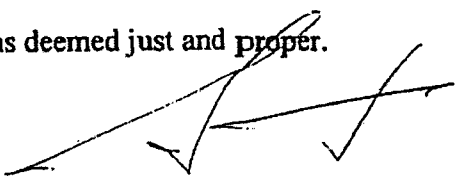
That Plaintiff has failed to mitigate any damages allegedly suffered.

000191

FOR A ELEVENTH DEFENSE

That the Defendant would respectfully show that this action is governed by the South Carolina Tort Claims Act and the Defendant asserts the applicable provisions, immunities and limitations on recovery set forth in the Act as affirmative defenses.

9.6
WHEREFORE, having fully answered the Complaint herein, the Defendant East Richland County Public Service District demands that the Complaint be dismissed with prejudice as to it, and that the Plaintiff be taxed with the Defendant's costs and attorney's fees and that the County award such other relief as deemed just and proper.



Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555
803-771-8010
Attorney for Defendant East Richland
County Public Service District

October 22, 2010

000192

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,)
)
Plaintiff,)

Civil Action No. 2011-CP-40-2096

v.)

**PLAINTIFF'S DEPOSITION
DESIGNATIONS**

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

The Plaintiff South Carolina Insurance Reserve Fund submits the following deposition designations which may be published at trial:

Larry Brazell

page 9, line 19 to page 10, line 1
page 10, lines 11-13
page 16, lines 17-23
page 21, lines 8-19
page 26, lines 5-15
page 27, lines 13-21
page 29, line 25 to page 30, line 7
page 32, line 17 to page 33, line 3
page 33, line 7-13
page 34, lines 3-23

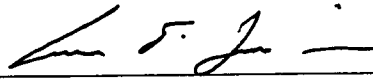
Donnie Way

page 10, lines 6-14
page 26, line 11 to page 28, line 1



000193

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Plaintiff South Carolina
Insurance Reserve Fund*

Columbia, South Carolina

June 11, 2012

000194

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

South Carolina Insurance Reserve Fund,
Plaintiff,

Civil Action No. 2011-CP-40-2096

v.

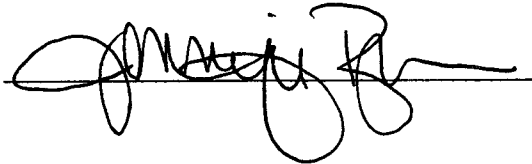
CERTIFICATE OF SERVICE

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

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Plaintiff, does hereby certify that service of the **Plaintiff's Deposition Designations** in the above-captioned matter was made upon all counsel of record by email and 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 June 2012:

Kenneth E. Berger, Esquire
Law Office of Kenneth E. Berger, LLC
5205 Forest Drive - Suite Two
Columbia, South Carolina 29206
Email: kberger@bergerlawsc.com

Scott Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, South Carolina 29201
Email: selliott@elliottlaw.us



000195

State of South Carolina	)	
	)	
County of Richland	)	
Coley Brown,	)	2010-CP-40-005616
	)	
Plaintiff,	)	
	)	
vs.	)	Deposition
	)	
East Richland County Public	)	of
Service District,	)	
	)	Larry Brazell
Defendant.	)	
	)	

Deposition of Larry Brazell, taken before Sandra Ayers
Reed, a notary public in and for the State of South Carolina,
commencing at the hour of 10:13 a.m., Tuesday, March 22, 2011,
at the office of the Lourie Law Firm, L.L.C., 1224 Pickens
Street, Columbia, South Carolina.

Reported by
Sandra Ayers Reed

1 A No.

2 Q I take it you're not age 25?

3 A By no means.

4 Q All right.

5 A But I never was charged, but I was arrested.

6 Q Understood.

7 A I did spend the night in jail.

8 Q That was when you were a student at Dentsville?

9 A Probably the best thing ever happened to me but,
10 yes, last year there.

11 Q Understood. Did you graduate Dentsville?

12 A Yes, sir.

13 Q Okay. Have you ever been suspended, terminated, or
14 put on leave from any job you've worked?

15 A No, sir.

16 Q No? Good. Ever been accused of any form of
17 misconduct on the job?

18 A No, sir.

19 Q Good. How long you been with East Richland?

20 A Thirty-one years.

21 Q Thirty-one years? Excellent.

22 Mr. Brazell, can you tell me some of the past
23 positions you've held with East Richland?

24 A I came there as the maintenance superintendent in
25 1980 and held that position until June of 2010 when

Page 10

1 I became the executive director.

2 Q Can you tell -- who was the executive director
3 from, say, January of 2000 until June of 2010?

4 A Bill Long.

5 Q Bill Long? His God-given name is William?

6 A William. Uh-huh.

7 Q William Long? But he went by Bill?

8 A Uh-huh.

9 Q And he was your immediate predecessor?

10 A Yes, sir.

11 Q Okay. And your current title is "Executive
12 Director"?

13 A Yes, sir.

14 Q Congratulations.

15 A I don't know. I may be. Thank -- thank you
16 anyway.

17 Q For a thankless job?

18 A Yeah.

19 Q Mr. Brazell, have you given a deposition before?

20 A Yes, sir.

21 Q Have all your depositions been given for East
22 Richland?

23 A Yes, sir.

24 Q How many depositions have you given?

25 A Four or five.

Page 16

1 previously provided me in a Freedom of Information
2 request. If you would, look over it; familiarize
3 yourself with it. Mr. Brazell, does that letter
4 appear to be dated March 17th, 2008, and be written
5 by your attorney, Mr. Scott Elliott?

6 A Yes, sir.

7 Q And that is Exhibit 1 in front of you, marked there
8 at the bottom?

9 A Uh-huh. Right.

10 Q Yes?

11 A Yes, sir.

12 Q That's a yes, sir. Okay.

13 Now, according to Mr. Elliott's letter dated
14 March 17th, 2008, the district -- this is the third
15 paragraph on the first page.

16 A Uh-huh.

17 Q "The district rebuilt it's Percival Road pump
18 station and built the sewer line along Westshore
19 Road in 2000," correct?

20 A That's right.

21 Q Okay. And the pump station was intended to force
22 sewage through the line?

23 A That's right.

24 Q All right. Do you know approximately how many
25 gallons per minute the pump was designed to force

1 Q Well, wouldn't sewage stand in the line if the
2 water wasn't --

3 A Yeah.

4 Q -- flowing?

5 A Yeah. Certainly it stops. Uh-huh.

6 Q Okay.

7 A How long? To the pump comes back on.

8 Q Okay. But if sewage stands in the line, my
9 understanding -- again, this is based on the March
10 18th letter that's marked Exhibit 1 -- is that
11 sewage stands in the line, it becomes septic,
12 correct?

13 A If it stays long enough, it gets septic; it
14 certainly will.

15 Q And as it becomes septic, it begins giving off
16 odors?

17 A Oh, yeah.

18 Q Okay.

19 A Yeah. Septic or not septic, it gives off an odor.

20 Q Now, with regard to the -- the 20-inch portion of
21 the force main that begins there at Eastshore --

22 A Uh-huh.

23 Q Based on -- on the March 18th letter -- excuse me,
24 the March 17th letter, East Richland had problems
25 with the flow through that 20-inch line. I believe

Page 26

1 A I can't answer if it would. But from experience,
2 it's no -- the hydrogen sulfide that comes out of a
3 air-release valve is no different if the sewer's
4 septic or if it's running full force.

5 Q Okay. But, again, for -- for purpose of the
6 record, "hydrogen sulfide" in -- in layman terms,
7 that's the odor that -- that's commonly associated
8 with sewage?

9 A With air-release valves and sewer, yeah.

10 Q With air-release valves. It stinks?

11 A Sure, it stinks.

12 Q It's offensive?

13 A If you're standing over the manhole. I've never
14 stuck my nose in a manhole that didn't smell --
15 smelt good and -- it doesn't smell like roses.

16 Q You wouldn't have to be standing over the manhole,
17 however, for the smell of hydrogen sulfide coming
18 from the air relief valve to offend you, correct?

19 A Well, it's -- you know, it's according to what
20 you're talking about. Now, if it's got filters in
21 and it's been sealed, yes, you would have to be
22 standing over the manhole.

23 Q Okay. All right.

24 A Or within 10 feet of the manhole.

25 Q All right. We'll come back to that. Mr. Brazell,

1 isn't it -- is the situation where the higher the
2 hydrogen sulfide levels, the worst it smells?

3 A Yeah.

4 Q Okay. And then the higher it gets, it gets to the
5 point where you can't even smell it anymore,
6 because the levels are so toxic, they'll kill you,
7 correct?

8 MR. ELLIOTT: I'm going to object to -- just
9 to the form of that question.

10 MR. BERGER: Sure. (To the deponent) You can
11 still answer.

12 A I don't have any idea.

13 Q Okay. All right. You'd -- you'd agree that
14 hydrogen sulfide is found in the force main line,
15 correct?

16 A Yes.

17 Q Okay. How does hydrogen sulfide escape from the
18 force main?

19 A Through the air-release valves --

20 Q And one --

21 A -- with air.

22 Q Yes, sir. And one of the air valves was, in
23 essence, across the street from Mr. Brown's
24 residence at 6436 Westshore Road?

25 A Up the street from his house, not across the

1 haven't marked this as an exhibit, but you can show
2 me right on here, if you'd like. I've got --

3 MR. BERGER: Scott, this just --

4 MR. ELLIOTT: Sure. I understand.

5 MR. BERGER: -- No. 69. I've got Mr. Brown's
6 house here, and then I've got the release
7 station here.

8 A Air-release station's here, and Mr. Brown's house
9 is down here.

10 THE DEPONENT: (To Mr. Brown) Aren't you --
11 you --

12 A He's the second house from the corner?

13 Q Okay.

14 MR. BROWN: (To the deponent) Third.

15 THE DEPONENT: Third? Okay.

16 Q So you think it's approximately 200 feet?

17 A Uh-huh. Would -- well, if I had my maps, I could
18 tell you exactly.

19 Q And we can revisit that question.

20 A Okay. But it's at least a couple hundred feet.

21 Q Okay. And it was an air-release manhole?

22 A Uh-huh.

23 Q All right.

24 A Yes, sir.

25 Q And the air valve was tied into the 20-inch force

Page 30

1 main we've been discussing?

2 A Yes, sir.

3 Q All right. And it was from this air valve that
4 hydrogen sulfide was released?

5 A Yeah. Yes, sir.

6 Q And you said earlier that hydrogen sulfide stinks?

7 A It's got a smell.

8 Q You said it was offensive?

9 A No, I didn't say it was offensive. I said it had a
10 smell.

11 Q You said it was offensive if you were standing over
12 it?

13 A Yeah. If you got your head in a manhole. If you
14 got your head in it, in a 4-foot manhole, it's
15 offensive, certainly. You can smell it.

16 Q And that's due to the hydrogen sulfide levels?

17 A Not only hydrogen sulfide but everything else
18 that's in that sewer line --

19 Q What else is in that sewage line?

20 A Oh, that could be anything from motor oil to
21 gasoline, plastics, you name it; it comes down that
22 line. Anything that's flushed and anything that
23 somebody don't want is in that sewer line.

24 Q And it could all have an odor?

25 A Sure. Every bit of it.

Page 32

1 couldn't tell you what's coming out of there. I
2 know hydrogen sulfide does build in a sewer line
3 and does relieve through a air-release valve with
4 air and other -- methane or whatever that's -- is
5 in that line.

6 Q And you said other things that could be in that
7 line include --

8 A Oh, it could be anything that's flushed down the
9 line. I mean it could be anything.

10 Q And all of them could have an odor?

11 A Sure.

12 Q And that odor would have the chance to increase and
13 become more septic if there was insufficient flow
14 in the line?

15 A I don't know. I'm not a chemical man. I couldn't
16 tell you that.

17 Q Okay. And you said earlier that the higher the
18 hydrogen sulfide levels is -- hydrogen sulfide
19 level is, the worse it would smell?

20 A Yeah. But you also said it got so high that you
21 couldn't smell it and it could kill you, so I --
22 you know, I'm not a chemist. I don't know. I -- I
23 know sometimes it'll smell different than other
24 times.

25 Q How would it smell?

1 A Like a rotten egg.

2 Q And other times?

3 A Like a half-rotten egg.

4 Q I like that answer.

5 A Yeah.

6 Q Okay. Thanks. All right. Okay.

7 Now, the odor emanating from the release valve
8 in question, the one closest to -- to Mr. Brown's
9 residence, it resulted in multiple complaints over
10 the years, correct?

11 A Yes, sir. Well, a lot of them, yeah.

12 Q Okay. Complaints from residents?

13 A From residents.

14 Q And complaints from Representative Joan Brady on
15 behalf of her constituents?

16 A Yes, sir.

17 Q From Senator Joel Lourie on behalf of his
18 constituents?

19 A Yes, sir.

20 Q And you know that Senator Joel Lourie has no direct
21 association with this firm, correct?

22 A I did not know that, no.

23 Q He's not employed by this firm.

24 A Okay. No, I don't --

25 Q I believe that there was a explanation that had to

Page 34

1 be written to DHEC on y'all's behalf.

2 A That's right.

3 Q Okay. So it was not Mr. Brown, alone, who was
4 upset by the odor?

5 A No.

6 Q This was not a -- a subjective problem. He wasn't
7 just being a troublemaker in the neighborhood;
8 you'd agree?

9 A Not to my knowledge.

10 Q All right. Now, the odor was described as "a
11 stench"; was it not?

12 A Bad odor.

13 Q Bad odor.

14 A That's what all our calls say: bad odor --

15 Q All right.

16 A -- or offensive odor.

17 Q All right. So you wouldn't agree with the
18 characterization of "a stench"?

19 A No.

20 Q No. You said earlier it smelled like a rotten egg?

21 A Uh-huh.

22 Q Does a rotten egg have a stench?

23 A It's got an odor.

24 Q Okay.

25 Plaintiff's Exhibit No. 3, Work orders,

State of South Carolina	)	
	)	
County of Richland	)	
Coley Brown,	)	2010-CP-40-005616
	)	
Plaintiff,	)	
	)	
vs.	)	Deposition
	)	
East Richland County Public	)	of
Service District,	)	
	)	Donnie Way
Defendant.	)	
	)	

Deposition of Donnie Way, taken before Sandra Ayers Reed, a notary public in and for the State of South Carolina, commencing at the hour of 11:38 a.m., Tuesday, March 22, 2011, at the office of Lourie Law Firm, L.L.C., 1224 Pickens Street, Columbia, South Carolina.

Reported by
Sandra Ayers Reed

000208

Page 10

1 put on leave from any job you've worked?

2 A Never.

3 Q Good. Ever been accused of any form of misconduct
4 on the job?

5 A Never.

6 Q Good. And you've been with East Richland, you
7 said, since May 1st of '06?

8 A That's correct.

9 Q What positions have you held with East Richland?

10 A I am the district engineer.

11 Q You've held the same position the entire time?

12 A That's correct.

13 Q Okay. That's your current title?

14 A Yes.

15 Q Okay. Mr. Way, have you given a deposition before?

16 A Yes.

17 Q Have you given any depositions for East Richland?

18 A Yes.

19 Q How many?

20 A One other than this one.

21 Q All right. What was the nature of that deposition
22 or nature of the case?

23 A A gravity sewer that was to be run acrossed --
24 across -- it was a -- what -- what's the word I'm
25 looking for? -- condemnation act where we were

000209

Southern Reporting, Inc.

<http://www.southernreporting.net>

803.749.8100

Page 26

- 1 A That is a very -- possibility. Yes.
- 2 Q It's more likely than not?
- 3 A Yes.
- 4 Q Well --
- 5 A I mean, it certainly could happen.
- 6 Q All right.
- 7 A Depends on what's in your sewage as to how septic
- 8 it becomes and how rapidly and so forth.
- 9 Q All right. And isn't --
- 10 A How long the pumps are off; all that.
- 11 Q Sure. And isn't it true that the hydrogen sulfide
- 12 levels would increase as sewage became more septic?
- 13 A Yes.
- 14 Q Okay. Now, just for our understanding and for the
- 15 record: Hydrogen sulfide is the odor commonly
- 16 associated with sewage?
- 17 A That and methane. It's probably more predominant -
- 18 - it's probably more of a noticeable odor than
- 19 methane, but it's the rotten-egg smell that -- that
- 20 people talk about from -- from septic -- force main
- 21 pump stations, anything that's gone septic where
- 22 sewage sits --
- 23 Q Okay.
- 24 A -- and becomes septic, non-aerated.
- 25 Q So there're two odors associated with sewage:

1 hydrogen sulfide and methane?

2 A Yes. And maybe more as far as that goes.

3 Q Okay.

4 A It's -- it's all kinds of things in sewage, so it's
5 not just -- I -- I don't -- I couldn't even tell
6 you all of them, and I've been doing this a long
7 time, but I --

8 Q Uh-huh.

9 A -- couldn't tell you all the different gases that
10 are associated with sewage. And it depends on the
11 sewage.

12 Q Uh-huh. But both of them stink: hydrogen sulfide
13 and methane?

14 A They have an odor.

15 Q They're offensive.

16 A To most people, yes.

17 Q Are they offensive to you?

18 A Well, I wouldn't want to -- to have to sit there
19 and smell it all day, I guess, if that's what
20 you're asking. No.

21 Q Okay. And to --

22 A It's the rotten-egg smell. I don't think anybody
23 likes to smell rotten eggs.

24 Q I agree. I agree. And the higher the hydrogen
25 sulfide level, the worse the smell, correct?

000211

Page 28

1 A I think that is true.

2 Q All right. But if hydrogen sulfide -- if the
3 hydrogen sulfide levels get high enough, it becomes
4 toxic and can kill you, right?

5 A I'm not sure it's the hydrogen sulfide, but if --
6 if the -- if the levels of the gases that occur in
7 sewage get high enough, it can kill you.

8 Q Okay.

9 A I don't know which gases that are -- or combination
10 of gases, but if it gets high enough, yes, it will.

11 Q All right.

12 A And that . . .

13 Q All right. Let's go back to -- to this second
14 exhibit where it shows the -- the force main where
15 it changes from 16 inches to 20 inches there in the
16 size of the pipe.

17 A Okay.

18 Q You'd agree, based on the elevation scale, the
19 force main changes from 16 to 20 inches at
20 approximately 205 feet of elevation, correct?

21 A That is correct, looking at this plan.

22 Q All right. It then traveled downward to
23 approximately 170 feet elevation?

24 A That looks right. Yes.

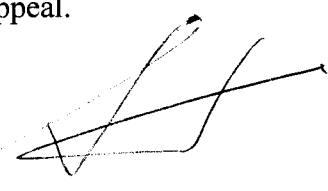
25 Q And that's a 35 change -- 35-foot change in

000212

CERTIFICATE OF COUNSEL

I, Scott Elliott, the undersigned attorney for the Appellant, do hereby certify that this Record on Appeal contains all material proposed to be included by any of the parties and does not contain any matter which is irrelevant to this appeal.

This the 19th day of February, 2015.



Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Tel.: 803-771-0555; Fax: 803-771-8010

Attorney for Appellant

RECEIVED

MAR 11 2015

SC Court of Appeals

000213

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Appellate Case No. 2014-000728

RECEIVED

FEB 19 2015

SC Court of Appeals

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.

PROOF OF SERVICE

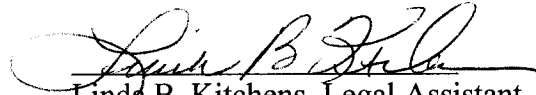
I certify that I have served the Record on Appeal of Appellant East Richland County Public Service District on the below-named parties, at the addresses given, via hand delivery or by depositing a copy of it in the United States Mail, postage prepaid, on February 19, 2015.

Via Hand Delivery

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

Via U.S. Postal Service

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

A handwritten signature in cursive script, appearing to read "Linda B. Kitchens", written over a horizontal line.

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

February 19, 2015