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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
In the Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Court of Appeals No. 2014-000728

South Carolina Insurance Reserve Fund,..Respondent,

v.

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

Of whom East Richland County Public Service District is the Appellant,

and Coley Brown is a Respondent.

PETITION FOR REHEARING

The Appellant requests rehearing of the decision in this appeal on the following grounds.

I. CONFLICT WITH THE TORT CLAIMS ACT.

The Appellant provides sanitary sewer service to its customers. Harmless odors are given off by human waste. Polite society associates the unpleasant odors from human waste as offensive. The Respondent Insurance Reserve Fund issued an insurance policy to the Appellant as required by the Tort Claims Act. Knowing that the Appellant's operations were associated with the unpleasant orders arising from human waste, the Respondent Fund issued a policy to the Appellant

and has accepted its premium payments. Historically, the Respondent Fund has provided coverage for claims for sewage spills and the offensive odors associated with sewer spills.

South Carolina has waived the doctrine of sovereign immunity to allow claimants injured by public employees to obtain compensation for their injuries while protecting the financial interests of the public by requiring insurance coverage for those claims for which sovereign immunity has been waived. The Budget and Control Board (now the State Fiscal Accountability Authority) is required to provide insurance "so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment." S.C. Code Ann. Section 1-11-140. Certainly, the Budget and Control Board must provide insurance as required by statute and any provision in the instant policy which conflicts with statute is void. The General Assembly has required that political subdivisions such as the Appellant, when procuring insurance from the Budget and Control Board, must procure insurance for all tort liability exposures from the Budget and Control Board. In those cases, the Budget and Control Board becomes its insureds' exclusive carrier for tort claims. S.C. Code Ann. Section 15-78-140(b)(2). Having the obligation for providing all liability coverage for tort liability claims made against the Appellant, the Budget and Control Board may not limit the protections available to the Appellant under the Act by limiting coverage otherwise required by statute. Hogan v. Home Insurance Company, 260 S.C. 157, 195 S.E.

Assuming for the sake of argument that the Respondent Fund is authorized to issue policies in certain instances which exclude coverage for pollution, the record fails to provide authority justifying the application of the pollution exclusion in the instant case. Citing Pennsylvania National Mutual Insurance Company, v. Parker, 282 S.C. 546, 320 S.E.2d 48 (Ct. App. 1984), the Court of Appeals held that insurers have the right to limit their liability provided the limitations are not in contravention

of some statutory inhibition or public policy. The statutory intent of the Tort Claims Act is to promote coverage and the pollution exclusion in the instant action violates statutory policy. Moreover, the pollution exclusion does not advance a legitimate statutory policy. The record is devoid of any statutory or public policy interest sufficient to justify construing the pollution exclusion to defeat coverage of the allegations of the complaint. The Respondent Fund's policy must be read to provide coverage for the allegations of the complaint for which sovereign immunity has been waived.

II. COVERAGE UNDER THE POLICY.

A. Applicability of the Pollution Exclusion

Citing City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 677 S.E. 2d 574 (2009), the Court of Appeals correctly reasoned that if the underlying complaint and those facts known to the carrier create a possibility of coverage, the insurer is obligated to provide coverage. The Respondent Fund does not argue that the complaint fails to allege an occurrence covered under the policy. Instead, the Respondent Fund argues, and the Court of Appeals so held, that the terms of the pollution exclusion relieve the Respondent Fund from the obligation to defend and indemnify the Appellant against the allegations. As held by the Court of Appeals, the carrier has the burden of demonstrating the applicability of the pollution exclusion. However, the Respondent Fund offered no evidence on the issue and the Court of Appeals, in effect, shifted the burden to the Appellant as insured to demonstrate that the odors in question were not in the nature of pollution as defined by the policy pollution exclusion.

The Tort Claims Act promotes coverage. Courts have uniformly held that where a clause in an insurance policy is one of inclusion, it should be broadly construed while clauses of exclusion are to be narrowly interpreted. McPherson v. Michigan Mutual Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993). Exclusionary clauses must be reasonable. Pennsylvania National Mutual

Insurance Company, v. Parker, *supra*. Instead of offering evidence to justify the application of the pollution exclusion to the allegations of the complaint, the Respondent Fund simply argues that the laundry list of pollutants in the pollution exception is broad enough to ensnare allegations of offensive odors. Neither public policy nor reason would justify an exclusionary clause defeating coverage of allegations of unpleasant odors. The pollution exclusion excludes coverage for "...discharge, dispersal, release or escape of ...fumes...gases...or **other irritant, contaminants or pollutants** into... the atmosphere...." [Emphasis added] The clear meaning of the highlighted language compels the conclusion that the release must be harmful, not simply unpleasant. The offensive odors alleged in the complaint may be caused by naturally occurring gases, but the record is clear that the odors are not harmful. The dictionary definitions of fumes and gases fail to explain any statutory or public policy served by excluding coverage of the allegations of the complaint. The pollution exclusion has the extraordinary impact of denying coverage for the allegations of the complaint which would otherwise be covered by the policy, subjecting the public and plaintiff to financial risk. The offensive odors alleged in the complaint were just that—odors. Accordingly, the pollution exclusion fails to relieve the Respondent Fund of its obligation to provide coverage of the allegations of harmless odors in the complaint.

Moreover, the Court of Appeals overlooked that all of the case law from other jurisdictions cited as support for its decision that odors are pollution, involved allegations that the odors were toxic and harmful. (See Reply Brief of Appellant at pp. 7-8).

Society may find odors from human waste unpleasant, but the record is devoid of any evidence justifying the exclusion of coverage of allegations arising from unpleasant odors. The statutory policy favors coverage and the language of the pollution exclusion must be narrowly interpreted. Accordingly, construing the policy in favor of coverage and the pollution exclusion

narrowly, the offensive odors alleged in the complaint did not constitute pollution as defined by the Respondent Fund policy and the Court of Appeals erred in holding that the odors alleged in the complaint were pollution within the meaning of the pollution exclusion of the Respondent Fund policy.

B. Applicability of the Exception to the Pollution Exclusion

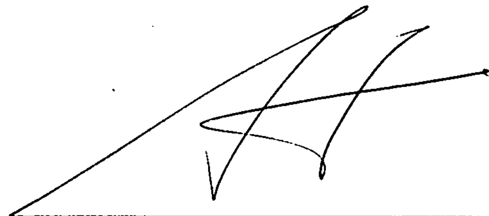
The Supreme Court decision in Greenville County v. Insurance Reserve Fund, 313 S.C. 546, 443 S.E. 2d. 552 (1994) compels the conclusion that the pollution exclusion failed to relieve the Respondent Fund of the obligation to defend. In Greenville County v. Insurance Reserve Fund, the Supreme Court characterized the complaints in that action to "allege contamination through dumping of hazardous waste and chemicals in the landfill" over a period from 1960 to 1972. Construing an exception to a pollution exclusion identical to that in the instant case, the Supreme Court in Greenville County v. Insurance Reserve Fund, held that the twelve year process of dumping of hazardous waste and chemicals into the landfill was sudden and accidental requiring the Respondent Fund to provide coverage for the lawsuits brought seeking damages for the pollution. Accepting for the sake of argument the Court of Appeals characterization of the unpleasant odors as pollution, the Supreme Court decision in Greenville County v. Insurance Reserve Fund is controlling.

Moreover, the decision in Helena Chemical Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E. 2d 455 (2004) expressly stated that the chemical company failed to offer any evidence that the release of the pollution was sudden and accidental. Helena Chemical Co. v. Allianz Underwriters Ins. Co., 594 S.E. 2d at 462. Here, the record is replete with the undisputed evidence that the release of odors was sudden and accidental within the meaning of the policy. Cf. Greenville County v. Insurance Reserve Fund.

The public policy advanced by the Tort Claims Act favors coverage. The allegations of the complaint, the evidence of record, and applicable case law compel the conclusion that the allegations of offensive odors was covered by the Respondent Fund policy. The Court of Appeals erred in holding that the allegations of offensive odors were not covered by the Respondent Fund policy. Greenville County v. Insurance Reserve Fund.

CONCLUSION

The Appellant, therefore, respectfully requests rehearing in this case on the grounds raised above.



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Columbia, South Carolina
April 7, 2016

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District and Coley Brown, Defendants

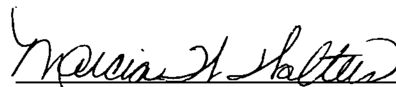
Of Whom East Richland County Public Service District is Appellant,

And Coley Brown is a Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Appellant East Richland County Public Service District on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on April 6, 2016.

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



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April 7, 2016

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

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

Dear Ms. Kitchings:

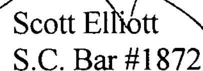
Enclosed please find the original and six copies of the Petition for Rehearing on behalf of East Richland County Public Service District, together with Proof of Service in the above-captioned matter. I have also enclosed an extra copy of this document, which I would ask you to date stamp and return to me via my courier. By copy of this letter, I am serving all other parties of record with the above-referenced document.

Elliott & Elliott, P.A. check number 8928 in the amount of $25.00 is enclosed for the filing fee.

If you have questions or require any further information, please do not hesitate to contact me. Thank you for your time and assistance.

Sincerely,

Elliott & Elliott, P.A.



Scott Elliott
S.C. Bar #1872

SE/mlw
Enclosures

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