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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Opinion No. 5393
(S.C. Ct. App. filed March 23, 2016)

South Carolina Insurance Reserve Fund, Respondent,

v.

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

of Whom, East Richland County Public Service District, is Petitioner,

and Coley Brown, is Respondent.

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STATEMENT OF THE CASE

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

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

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

By Order filed September 30, 2013, Judge Lee ruled that the IRF "does not owe a duty to defend or a duty to indemnify to the Defendant East Richland County Public Service District in the civil action captioned *Brown v. East Richland County Public Service District*, Civil Action Number 2010-CP-40-5616." (R. 9). The District filed a Rule 59(e) motion which was subsequently denied by an Order filed March 6, 2014. (R. 11).

The District then filed an appeal to the South Carolina Court of Appeals which issued a published opinion on March 23, 2016, affirming the order of Judge Lee. A subsequent petition for rehearing was denied.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Respondent IRF submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The trial court, as affirmed by the Court of Appeals, correctly ruled that the pollution exclusion contained in the IRF's Tort Liability Policy is not in conflict with the South Carolina Tort Claims Act.

As its first issue for the issuance of a writ of certiorari, the District argues that the pollution exclusion contained in the IRF's Tort Liability Policy is void

because it conflicts with the provisions of the South Carolina Tort Claims Act. However, there is no requirement, as correctly determined by the Court of Appeals and the trial court, for the IRF to provide insurance coverage for all claims that may be brought against a governmental entity under the Tort Claims Act.¹ Instead, it is entirely permissible for the Tort Liability Policy to include exclusions of coverage, including the pollution exclusion on which Judge Lee relied in concluding that the IRF owed no coverage to the District for the claims brought by Coley Brown.

The District cites to Section 1-11-140(a), which is the enabling act authorizing the State Fiscal Accountability Authority² (and hence the IRF) "to provide insurance for the State, its departments, agencies, institutions, commissions, boards, and the personnel employed by the State in its departments, agencies, institutions, commissions, and boards so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment." *See*, S.C. Code Ann. § 1-11-140(a). The District also cites to Section 1-11-140(c), which states: "The procurement of tort liability insurance in the manner provided is the exclusive means for the procurement of this insurance."

¹ In its petition for writ of certiorari, the District states several times that the Tort Claims Act "promotes" insurance coverage. There is no such provision in the Act itself nor in the case law.

² Prior to the South Carolina Restructuring Act of 2014, the Insurance Reserve Fund was a Division of the South Carolina Budget and Control Board. Effective July 1, 2015, the South Carolina Budget and Control Board was abolished, and the Insurance Reserve Fund was transferred to the State Fiscal Accountability Authority.

See, S.C. Code Ann. § 1-11-140(c). However, Section 1-11-140(c) refers only to the procurement of tort liability insurance by the State and its agencies. In actuality, Section 15-78-140(b), which is part of the Tort Claims Act, provides greater options and authorizes political subdivisions to procure coverage in one of four ways: "(1) the purchase of liability insurance pursuant to § 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement." *See*, S.C. Code Ann. § 15-78-140(b).³ Thus, the District has options and can procure coverage from other sources including private insurance if it wishes to have broader coverage than available under the IRF Tort Liability Policy. Moreover, the District also has the ability to procure specialty coverages from other sources through the IRF.

As the Court of Appeals and Judge Lee both recognized, there is no statute that precludes the IRF from implementing policy exclusions such as the pollution exclusion at issue. When the Tort Claims Act was initially enacted in 1986, it included Section 15-78-140(a), which read as follows: "It is the duty of the Budget and Control Board to cover risks for which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in Section 15-

³ If Section 1-11-140(c) were construed to apply to political subdivisions, then the provision would obviously be in conflict with Section 15-78-140(b), which gives political subdivisions four separate options for procuring tort liability insurance, as discussed above. In that case, Section 15-78-140(b) would control as it is well settled that "later legislation takes precedence over earlier legislation." *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242, 243 (1993). Section 1-11-140(c) pre-dated the 1986 enactment of the Tort Claims Act.

78-150." *See*, S.C. Code Ann. § 15-78-140(a) (repealed). However, in 1997, the General Assembly repealed that statute. *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. In short, the General Assembly, by repealing Section 15-78-140(a), stated its intent that the IRF does not have a duty to cover every risk for which sovereign immunity has been waived. Quite simply, with the repeal of Section 15-78-140(a), there is no "mandate for coverage" as the District claims. The IRF may include exclusions in its policies, including the pollution exclusion at issue in this case.

As further support for that conclusion, the Court of Appeals cited Regulation 19-415, which was adopted to "fill up the details" of Section 1-11-140. Regulation 19-415.1 states that the Tort Liability Policy was "codified" in the regulations "to provide the public with information regarding the nature, terms, and scope of the insurance which it provides under § 1-11-140 of the 1976 Code." S.C. Code Ann. Regs. 19-415.1. The Tort Liability Policy, as codified in the regulations, includes a number of policy exclusions including a pollution exclusion that is nearly identical to the one at issue here. This demonstrates the intent of the General Assembly that policies issued pursuant to Section 1-11-140 by the IRF could include policy exclusions. Thus, with specific reference to this case and as

determined by the Court of Appeals, "this inclusion of such a pollution exclusion is strong evidence that the legislature did not intend to preclude the use of such exclusions, even in policies issued pursuant to the Act." (App. 9). Consequently, the Court of Appeals was correct in ruling that the pollution exclusion at issue is valid.

In sum, the Court of Appeals correctly concluded that the pollution exclusion at issue is not contrary to any provision of law, including the Tort Claims Act. The District has not presented any authority or argument to contradict the Court of Appeals' decision in this regard, and as a result, there is no basis for issuance of a writ of certiorari on this issue.

III. The trial court, as affirmed by the Court of Appeals, correctly ruled that the pollution exclusion was applicable to bar coverage for Coley Brown's claims.

As its second issue for the issuance of a writ of certiorari, the District contends that the Court of Appeals erred in concluding that the pollution exclusion bars coverage for the underlying claims made by Coley Brown.

The Complaint filed by Coley Brown in Civil Action Number 2010-CP-40-5616 asserts the following causes of action: (1) inverse condemnation, (2) trespass, and (3) negligence. Brown alleges that the District installed an air relief valve or "burp station" across the street from his property and that the air relief

valve releases offensive odors "on a daily basis." *See* Complaint, ¶ 12. (R. 22). Brown alleges that the "offensive odors invaded Mr. Brown's property multiple times per day." *See*, Complaint, ¶ 13. (R. 22).

The IRF policy includes an insuring agreement providing as follows: "The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. Personal Injury or B. Property Damage to which this applies caused by an occurrence." (R. 182). The policy also includes two exclusions that are applicable to the claims brought by Coley Brown, specifically Exclusion (P) which is the inverse condemnation exclusion, and Exclusion (F) which is the pollution exclusion.⁴

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

[T]he insurance does not apply to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant[s], contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

⁴ It is unnecessary for this Court to even address coverage for the inverse condemnation claim. The District has not appealed the bar of coverage pursuant to the inverse condemnation exclusion.

(R. 184).

The District contends that the Court of Appeals erred in finding that the pollution exclusion applies to the factual scenario presented by the underlying litigation commenced by Coley Brown. The District suggests that the offensive odors from raw sewage do not fall within the scope of a pollution exclusion. The District seems to claim that the "fumes" or "gases" must be "harmful" rather than merely "offensive." Neither the policy language nor applicable case law draws such a distinction, which is truly a matter of semantics.

The pollution exclusion broadly includes "fumes," "gases," "waste materials" and "irritants" within its scope. (R. 184). The word "fumes," in fact, has a dictionary definition of "smoke, vapor or gas especially when irritating or offensive." *See*, Merriam-Webster Dictionary. After noting the dictionary definitions for such terms, Judge Lee concluded that "the odor created by the hydrogen sulfide and other byproducts are gases or fumes that create an irritating atmosphere and are offensive to the neighbors on Westshore Drive." (R. 8). This is an action at law, tried without a jury, and as a result, "the trial court's findings of fact will not be disturbed unless there is no evidence that reasonably supports the court's findings." *Middleton v. Eubank*, 388 S.C. 8, 694 S.E.2d 31, 34 (Ct. App. 2010). The trial court's finding is amply supported by the following testimony of Larry Brazzell, who is the executive director for the District:

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

A. Yes, sir.

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

A. That's right.

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

A. Yes, sir.

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

A. Yes, sir.

(R. 102).

In addition, there are cases from other jurisdictions finding similar offensive odors as included within the scope of a pollution exclusion. *See e.g., Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154 (Minn. App. 2007) (offensive odor from pig manure is covered by pollution exclusion); *City of Spokane v. United National Ins. Co.*, 190 F.Supp.2d 1209 (E.D. Wash. 2002) (holding odors from a composting facility were pollutants triggering pollution exclusion); *Kruger Commodities, Inc. v. United States Fidelity & Guaranty*, 923 F.Supp. 1474 (M.D. Ala. 1996) (holding “offensive odors” emitted from plant that rendered animal

carcasses were pollutants triggering pollution exclusion, even absent evidence the odors contained a toxic chemical or the plant was in violation of environmental laws); *City of Bremerton v. Harbor Ins. Co.*, 92 Wash. App. 17, 963 P.2d 194 (1998) (holding "foul and obnoxious odors and toxic gases" emitted from sewage treatment plant were pollutants triggering the pollution exclusion).

In short, there is no real question that the hydrogen sulfide at issue falls within the scope of the pollution exclusion, and the trial court, as affirmed by the Court of Appeals, was correct in so ruling. There is no basis for the issuance of a writ of certiorari on that ground.

Lastly, the District insists that the "sudden and accidental" exception to the pollution exclusion applies and was proven. In an entirely conclusory manner, the District insists that "the record is replete with evidence, much of it undisputed, that the release of odors was sudden and accidental within the meaning of the policy." *See*, Petition for Writ of Certiorari, p. 11. That is not the case. The evidence outlined in the decisions below fully supports the finding that the release of the odors at the air relief valve in question was part of the District's ordinary business operations and was expected to occur.

The "sudden and accidental" exception to the pollution exclusion has been subject to interpretation in the case of *Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994), in which this Court held that the term

"sudden" should be interpreted as "unexpected." Therefore, to assess the applicability of the pollution exclusion, it is necessary to determine whether the discharge or release of the offensive odors was unexpected and accidental. In *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004), this 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.

Despite the District's statement to the contrary, the *Helena Chemical* case is not only instructive but controlling. 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. This Court agreed that "the contamination at the various sites was caused by Helena's routine business operations." *Id.* This Court further explained that "routine discharge of pollutants occurred at the various Helena facilities during ordinary operations." 594 S.E.2d at 461. This Court held that "the pollution releases were not unexpected and accidental." 594 S.E.2d at 462. As a result, this Court ruled 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 offensive 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 this Court in *Helena Chemical*. Thus, the allegations of the Complaint and the other information available to the IRF lead to one conclusion – which is the very conclusion reached by Judge Lee in the non-jury trial – "that the discharge of the offensive odors from the air relief valve is part of the ordinary operations of the District." (R. 8).

This evidentiary ruling is supported by the testimony from Larry Brazzell, who explained that the District received numerous odor complaints from residents. (R. 100-101). Brazzell also confirmed that the emission of hydrogen sulfide (which has the odor of rotten eggs) from the air relief valve is "not unusual or unexpected" and occurs "many times a day." (R. 102-103). Brazzell further testified as follows:

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

A. That's very possible.

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

A. Yes, sir.

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

A. Yes, sir. It better happen.

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

A. Right.

Q. It could create a vacuum?

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

Q. Okay.

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

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

A. Yes, sir.

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

A. Yes, sir.

(R. 103-104).

Thus, the allegations and information available to the IRF, coupled with the trial testimony of Larry Brazzell, fully support the conclusion that the release of the odors at the air relief valve in question is part of the District's ordinary business operations and is expected to occur. As discussed above, in *Helena Chemical*, this Court, while applying an identical pollution exclusion, explained that "property damage caused by pollution arising from ordinary business operations is not covered." 594 S.E.2d at 460. Consequently, the Court of Appeals and the trial court were correct to conclude that the District has not shown that the exception to the pollution exclusion applies. In sum, there is no valid basis for the issuance of a writ of certiorari to review the Court of Appeals' decision.⁵


⁵ The Court of Appeals did not find it necessary to reach the additional sustaining ground that the damages sought by Coley Brown in the underlying action do not qualify as "property damage" under the policy. (App. 13). In the event this Court is inclined to grant a writ of certiorari, the Court is respectfully asked to consider and address that additional ground that was not initially reached. That ground is fully briefed in the Court of Appeals briefs that are part of the record.

CONCLUSION

Based on the foregoing discussion, the Respondent South Carolina Insurance Reserve Fund respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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BY:  _____

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CERTIFICATE OF SERVICE

S.C. SUPREME COURT

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent South Carolina Insurance Reserve Fund, does hereby certify that service of the **Return to Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 8th day of November 2016:

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