THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Alison Renee Lee, Presiding Judge

Appellate Case No. 2014-000728

SC Supreme Court Case No. 2016-001932

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 Petitioner,

And Coley Brown is a Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the South Carolina Supreme Court Decision in 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) compel the conclusion that the allegations in the underlying Complaint were covered by the Respondent Fund Policy.

ARGUMENT

The South Carolina Supreme Court Decision in 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) compels the conclusion that the allegations in the underlying Complaint were covered by the Respondent Fund Policy.

The South Carolina Supreme Court decision in 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) is dispositive of the issues in this appeal. Accordingly, the Respondent South Carolina Insurance Reserve Fund ("Respondent Fund") should be required to provide coverage for the complaint in the underlying action.

The Court of Appeals below relied upon the pollution exclusion of the policy to conclude that the allegations in the complaint in the underlying action were not covered by the Respondent Fund policy.

The pollution exclusion in the instant appeal reads as follows:

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. (R. p. 000179).

The Supreme Court has construed the identical language to provide coverage of materially similar allegations. In Greenville County v. Insurance Reserve Fund, where it was alleged that a Greeneville County landfill had been polluting neighboring properties for 12 years, the Court construed the following pollution exclusion:

> This 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, 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*;... (Italics in original)

Greenville County v. Insurance Reserve Fund, 443 S.E. 2d 553, FN 1. The pollution exclusions in the instant appeal and in Greenville County v. Insurance Reserve Fund, are identical.

The Supreme Court has held that term "sudden" found in the language of the exception to this pollution exclusion in this action is inherently ambiguous. Greenville County v. Insurance Reserve Fund involved lawsuits by landowners who alleged that dumping hazardous waste and chemicals into Greenville County's landfill over a 12 year period contaminated neighboring properties. The Supreme Court held that the term "sudden" as set out in the pollution exclusion was ambiguous in that it could be construed to mean "unexpected" or "unintended" or construed to require an abrupt or precipitous event. Because the words of the exception to the pollution exclusion were capable of two reasonable interpretations, the exception to the pollution exclusion would be construed in a manner most favorable to the insured. Consequently, the Supreme Court held that the word "sudden" meant unexpected and required the Insurance Reserve Fund to defend the action.

Here, the Appellant did not expect the force main to release odors as alleged. The Appellant operates over 400 miles of sewer lines and has never had a similar allegation of odors. The Appellant could not expect to know when odors would be released and by making repeated efforts to eliminate the odors, never intended to allow the release of offensive odors into the atmosphere. The release of odors was unexpected and unintended by the Appellant, not routine. Thus, the release was sudden and unexpected from the standpoint of the Petitioner.

In addition, odors are not released every time an air release valve is opened. The release of the odors is instantaneous. Thus, it is impossible to predict when the odors would be released. The discharge of offensive odors was precipitous and sudden.

The Supreme Court's construction of the pollution exclusion in Greenville County v. Insurance Reserve Fund, is controlling, and the Court of Appeals should be reversed.

The Respondent Fund sidesteps this Court's decision in Greenville County v. Insurance Reserve Fund arguing instead that Helena Chemical Company v. Allianz Underwriters Insurance Company, 357 S.C. 631, 594 S.E. 2d 455 (2004) is controlling. The facts in Helena Chemical Company and in the instant appeal could not be more dissimilar. First, in Helena Chemical Company, it was undisputed that the contaminants released were pollutants as defined by the pollutant exclusion in the policy. According to the Merriam-Webster's Learner's Dictionary, a pesticide is a chemical that is used to kill animals or insects that damage plants or crops. In other words, the pesticides were poisonous. Helena Chemical Company had entered into an agreement with the EPA and DHEC to clean up pesticide contamination at its manufacturing site. The Supreme Court concluded that Helena Chemical Company failed to introduce any evidence that the contamination was sudden and accidental. The only evidence was that the pollution was discharged routinely.

In the instant appeal, the offensive odors were not harmful and consequently, were not regulated by DHEC. The Respondent Fund offered no evidence that the offensive odors are a pollutant as intended by the parties' insurance policy. The release of odor was sudden and unexpected, and the odors were not routinely released from the air release valve. There is neither evidentiary support nor legal authority to suggest a factual equivalence between poison and unpleasant odor as a pollutant under the Respondent Fund policy.

The language of the exception to the pollution exclusion is ambiguous. Based on the evidence of record, construing the exclusion favorably to the Petitioner as insured, the allegations of the complaint in the underlying action fall within the exception to the pollution exclusion. The Respondent Fund has agreed to insure the Appellant for "an accident, including continuous or repeated exposure to conditions, which result in personal injury or property damage neither expected nor intended from the standpoint of the insured." The Petitioner's alleged conduct was covered by the policy provisions. Greenville County v. Insurance Reserve Fund.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari and the briefs in the Court of Appeals, the Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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November 18, 2016

STATE OF SOUTH CAROLINA
IIN THE COURT OF APPEALS

Appeal from Richland County
In the Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Reserve Fund, Respondent,

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PROOF OF SERVICE

I certify that I have served the Reply to Return to Petition for Writ of Certiorari of Petitioner 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 November 18, 2016.

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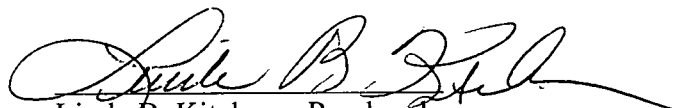

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