THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appellate Case No. 2016-001932

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S.C. SUPREME COURT

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 Petitioner,

And Coley Brown is a Respondent.

BRIEF OF PETITIONER
EAST RICHLAND COUNTY PUBLIC SERVICE DISTRICT

Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Telephone: 803-771-0555
Facsimile: 803-771-8010
Email: selliott@elliottlaw.us

Attorney for Petitioner

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STATEMENT OF THE ISSUES ON APPEAL

I. **Was the insurance policy exclusion relied upon by the Respondent Fund to deny coverage of the allegations of the underlying action void because it conflicts with the statutory coverage provisions of the South Carolina Tort Claims Act?**

II. **Did the policy exclusion relieve the Respondent Fund from the duty to defend and to indemnify the Petitioner in the underlying action?**

STATEMENT OF THE CASE

This action was brought by the South Carolina Insurance Reserve Fund ("Fund" or "Respondent Fund") to determine whether or not it owed a duty to defend or a duty to indemnify the Petitioner East Richland County Public Service District ("Petitioner") with respect to the underlying civil action captioned *Brown v. East Richland County Public Service District* CA No. 2010-CP-40-5616 ("2010 Action" or "underlying action").

The Circuit Court issued its order September 9, 2013 holding that the Respondent Fund did not owe a duty to defend or a duty to indemnify the Petitioner in the underlying action. The Circuit Court granted the Respondent Fund's Motion for Summary Judgment and denied the Petitioner's Motion for Summary Judgment and dismissed the Petitioner's Counterclaim with prejudice. By order dated March 4, 2014, the Circuit Court denied the Petitioner's post trial motion. On March 23, 2016 the Court of Appeals issued its opinion affirming the order of the Circuit Court. The Court of Appeals denied the Petition for Rehearing by order filed August 18, 2016.

STATEMENT OF FACTS

The Petitioner is a special purpose district organized under state law to provide sanitary sewer service to northeast Richland County. Petitioner collects, transports, and treats raw sewage through approximately 400 miles of sewer lines serving approximately 18,000 customers under the authority of an NPDES discharge permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). (R. p. 1; R. p. 79, ll. 20-25).

As a part of a 2000 construction project, the Petitioner constructed a force main running beneath Westshore Road in the vicinity of the Respondent Coley Brown's ("Brown") 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 pumping stations begin to pump the sewage through the lines, the air relief valve operates to relieve pressure in the sewer line and remains open until the pumps stop at which point the valve closes. The valve operates instantaneously once the pressure within the line has built to sufficient force and closes just as quickly once the pressure in the line has been relieved. The system is required to have air relief valves because the pressure must be released to prevent an explosion damaging the force main. (R. p. 2; R. p. 84, l. 23 – p. 85, l. 8). The force main was designed to meet industry standards and was approved by DHEC. The air released from the air relief valves may be odorous. Any odors from the system are released when the pumps first operate and the odors dissipate as the system continues to run. There is not a continuous odor while the pumps are operating. The release of the air and any resulting odor when the pumps begin is sudden. It is not possible to anticipate or predict when the valves will open or close. (R. p. 2; 2013 Order p. 2; R. p. 83, l. 11 – p. 84, l. 6; R. p. 85, ll. 21 – 24; Tr. p. 18, l. 11 – p. 19, l. 6; p. 20 ll. 21 – 24).

Sewage contains hydrogen sulfide which has a rotten egg smell. Methane gas is also found in sewage but it is generally odorless. Neither hydrogen sulfide, methane gas nor other component parts of the rotten egg odor are regulated by DHEC as part of the Petitioner's NPDES discharge permit. (R. p. 2; 2013 Order, p. 2; R. p. 91, l. 11 – p. 93, l. 6; R. p. 83, l. 14 – p. 95, l. 15; Tr. p. 26, l. 11 – p. 28, l. 6; p. 28, l. 14 – p. 30, l. 15). All of the components of the odors are

natural byproducts of raw sewage and are not harmful or toxic to the public when released into the atmosphere. (R. p. 44). The rotten egg odor from hydrogen sulfide can be emitted from air relief valves, manhole covers and faulty customer plumbing. (R. p. 2; 2013 Order, p. 2; R. p. 91, l. 24 – p. 92, l. 24; Tr. p. 26, l. 24 - p. 27, l. 24; R. p. 93, l. 14 – p. 95, l. 15; Tr. p. 28, l. 14 – p. 30, l. 15).

Petitioner's personnel who responded to the complaints of odor were not able to smell any odors when they arrived, except when standing directly over the manhole where it is expected to detect an odor of raw sewage. (R. pp. 2-3; 2013 Order, pp. 2-3; R. p. 86, ll. 8-25; Tr. p. 21, ll. 8-25).

To reduce the possibility of odors, the Petitioner injected chlorine into the force main from its Percival Road pump station which was met with success. The chlorine reduced the odors and the complaints stopped. However, chlorine is corrosive and was beginning to damage the Petitioner's equipment. (R. p. 88, ll. 1-16; Tr. p. 23, ll. 1-16). Subsequently, the Petitioner took steps to mask the odors by installing charcoal filters or other chemical media in the manholes containing the air relief valves. Again, the filters initially succeeded in eliminating the odors, but again, the filters did not completely eliminate the release of odors into the air. Subsequently, the Petitioner had one or two complaints of odor. (R. p. 88, ll. 14-22; Tr. p. 23, ll. 14-22;R. p. 88, l. 24 – p. 89, l. 10; Tr. p. 23, l. 24 –p. 24, l. 10).

In May 2010, the Petitioner modified the air relief valve in the vicinity of the property owned by the Respondent Brown 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 Petitioner expected that the odors would have ceased. (R. p. 3; 2013 Order, p. 3; R. p. 96, l. 25 – p. 97, l. 1; Tr. p. 31, l. 25 – p. 32, l. 1).

In 2010, Brown filed his action against the Petitioner alleging causes of action for negligence, trespass and inverse condemnation. The Complaint alleges that an air relief valve on the Petitioner's sewage force main installed under Westshore Road where Brown resides gave off offensive odors over a period of years and that the continuous or repeated exposure to offensive odors deprived Brown of the use and enjoyment of his property. (R. p. 1; 2013 Order, p. 1; R. pp. 22-23; Complaint at pp. 2-3). The underlying action is the only lawsuit ever brought alleging offensive odors emitted from the Petitioner's 400 miles of sewer lines. (R. p. 97, l. 25 – p. 98, l. 3; Tr. p. 32, l. 25 – p. 33, l. 3).

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

ARGUMENT I

THE INSURANCE POLICY EXCLUSION RELIED UPON BY THE RESPONDENT FUND TO DENY COVERAGE OF THE ALLEGATIONS OF THE UNDERLYING ACTION IS VOID BECAUSE IT CONFLICTS WITH THE COVERAGE PROVISIONS OF THE SOUTH CAROLINA TORT CLAIMS ACT.

The Supreme Court's decisions in Hogan v. Home Insurance Company, 260 S.C. 157, 194 S.E.2d 890 (1973) and its progeny hold that if a provision of an insurance policy conflicts with State statute, the statute controls. The exclusionary provision of the insurance policy issued to the Petitioner by the Respondent Fund upon which it relies to deny coverage of the tort allegations of the complaint in the underlying action conflicts with the requirements of the Tort Claims Act and is therefore void.

Harmless odors are given off by human waste. Knowing that the Petitioner's sanitary sewer operations were associated with the unpleasant odors, the Respondent Fund issued a policy to the Petitioner as required by the Tort Claims Act and has accepted its premium payments. The Respondent Fund has provided coverage for claims for sewage spills and the offensive odors associated with sewer spills. However, relying upon the policy pollution exclusion the Respondent Fund has reversed course and denied coverage here.[1]

South Carolina has waived the doctrine of sovereign immunity. The Petitioner, as any

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[1] The Circuit Court upheld the Respondent Fund's denial of coverage based on the "pollution exclusion" which reads:
(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;

other public entity, is required to obtain insurance to protect itself against liability for claims brought under the Tort Claims Act. S.C. Code Ann. Section 15-78-140(b). The mandate for coverage not only protects the political subdivision and the citizens it serves by providing a fund from which to pay tort liability claims, but also protects claimants by ensuring that the public entity has the financial ability to pay its obligations under the Act. Insurance may be purchased from the Budget and Control Board, from a private carrier, from a pooled self-insurance liability fund or the political subdivision may self-insure. Id.

The Budget and Control Board (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. S.C. Code Ann. Section 1-11-140(C) provides that the procurement of insurance as provided for in S.C. Code Ann. Section 1-11-140 "is the exclusive means for the procurement of this insurance." If the Petitioner procures its tort liability insurance, automobile liability insurance or its property and casualty insurance from the Budget and Control Board, it must procure all such coverage from the Budget and Control Board. S.C. Code Ann. Sections 1-11-140, 15-78-140. 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 Petitioner, the Budget and Control Board may not limit the protections available to the Petitioner under the Act by limiting coverage otherwise required by statute. Hogan v. Home Insurance Company, 260 S.C. 157, 194 S.E.2d 890 (1973). The Budget and Control Board must provide insurance as required by statute. The policy exclusion conflicts with the Tort Claims Act and is void.

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 policy set by the Tort Claims Act is to promote insurance coverage for tort actions against the State and its subdivisions 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.

The State has waived the doctrine of sovereign immunity for torts and has required the State and its political subdivisions to procure insurance to cover those risks for which immunity has been waived. The Respondent Fund has issued a liability policy to the Petitioner to insure against torts waived by the Tort Claims Act. The complaint in the underlying action alleges torts for which immunity has been waived. The exclusionary provision of the insurance policy issued to the Petitioner by the Respondent Fund upon which it relies to deny coverage of the tort allegations of the complaint in the underlying action conflicts with the requirements of the Tort Claims Act and is therefore void.

ARGUMENT II

THE POLICY EXCLUSION DOES NOT RELIEVE RESPONDENT FUND FROM THE DUTY TO DEFEND AND TO INDEMNIFY THE PETITIONER IN THE UNDERLYING ACTION.

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 Petitioner 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 Petitioner 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 odors that may be unpleasant or offensive. 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 or offensive. 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 justify 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 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 Petitioner at pp. 7-8).

Society may treat odors from human waste as unpleasant or offensive, but the record is devoid of any evidence justifying the exclusion of coverage of allegations arising from offensive

odors under the pollution exclusion provision of the Respondent Fund's policy. 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.

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 Respondent Fund has the obligation to defend the underlying action.

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 within the meaning of the exception to the pollution exclusion 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 offensive odors as pollution, the Supreme Court decision in Greenville County v. Insurance Reserve Fund is controlling.

The decision in Helena Chemical Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E. 2d 455 (2004) provides no support for the opinion of the Court of Appeals. The Court in Helena Chemical Co. v. Allianz Underwriters Ins. Co., 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 evidence, much of it undisputed, 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 affirming the Circuit Court holding that the pollution exclusion relieved the Respondent Fund from its duty to defend and to indemnify the Petitioner in the underlying action. Greenville County v. Insurance Reserve Fund.

CONCLUSION

For the foregoing reasons and those set out in the Briefs of Appellant before the Court of Appeals, the Petitioner East Richland Public Service District submits that the Court of Appeals erred in affirming the judgment of the Circuit Court in favor of the Respondent Fund. The Petitioner respectfully submits that the Court of Appeals be reversed and the Respondent Fund be ordered to defend and indemnify the Appellant in the action captioned Brown v. East Richland Public Service District, Civil Action No. 2010-CP-40-5616.

Respectfully submitted,

SCOTT ELLIOTT, SC Bar No. 1872
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Phone: 803-771-0555
E-Mail: selliott@elliottlaw.us

Attorney for Petitioner

Columbia, South Carolina
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PROOF OF SERVICE

I certify that I have served the Brief 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 October 16, 2017.

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

Linda B. Kitchens, Paralegal
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
803-771-0555

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