THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-001932
Lower Court Case No. 2011-CP-40-2096

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S.C. SUPREME COURT

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.

BRIEF OF RESPONDENT SOUTH CAROLINA INSURANCE RESERVE FUND

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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. A petition for writ of certiorari was later granted by this Court.

ARGUMENTS

I. 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 on appeal to this Court, 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, such as the pollution exclusion on which Circuit Court Judge Alison R. 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 Authority[2] (and hence the IRF) "to provide insurance

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[1] In its opening brief, 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.

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." *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

[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. In addition, and perhaps more importantly, Section 1-11-140(b) provides that a political subdivision may procure tort liability insurance "in the same manner provided for the procurement of this insurance for the State, its entities, and its employees, or in a manner provided by Section 15-78-140." *See*, S.C. Code Ann. § 1-11-140(b). Thus, that is an explicit recognition in Section 1-11-140 that political subdivisions have options and are not required to procure insurance from the IRF.

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, which is something that the District has not elected to do.

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 15-78-150." *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 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. With the repeal of Section 15-78-140(a), there is clearly 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.[4] There is no statute that bars the IRF from excluding coverage for pollution.

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 of Regulations R. 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,

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[4] Policy exclusions contained in the IRF Tort Liability Policy, including the pollution exclusion itself, have been addressed and even found applicable by this State's appellate courts. The courts indeed have never found that the IRF lacked the authority to include exclusions in its policy. *See e.g.*, *Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (1994) (pollution exclusion); *City of Abbeville v. South Carolina Insurance Reserve Fund*, 323 S.C. 60, 448 S.E.2d 779 (Ct. App. 1994) (care, custody and control exclusion); *McPherson v. Michigan Mutual Ins. Co.*, 356 S.C. 156, 588 S.E.2d 112 (2003) (automobile exclusion).

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. Quite simply, there is no statutory requirement for the IRF to provide tort liability coverage for all torts for which sovereign immunity has been waived under the Tort Claims Act. Likewise, the IRF is not statutorily precluded from excluding coverage for such risks as pollution or inverse condemnation.[5]

II. 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.

The District also contends that the Court of Appeals erred in concluding that the pollution exclusion bars coverage for the underlying claims made by Coley Brown.

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[5] The District has not appealed the trial court's ruling that Exclusion (P) bars coverage for the inverse condemnation claim. However, to the extent that is incorrect, the IRF would note that inverse condemnation is not a tort that falls within the scope of the Tort Claims Act. As the Court of Appeals has previously 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). Therefore, even if the Tort Claims Act mandates insurance coverage, as the District seems to argue, that would still provide no basis for requiring the IRF to cover inverse condemnation claims.

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.[6]

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,

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[6] As indicated above, the District has not appealed the bar of coverage pursuant to the inverse condemnation exclusion.

> 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.

(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.

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*, Petitioner's Brief, p. 12. 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.

III. As an additional sustaining ground, the alleged damages sought by Coley Brown in the underlying action do not qualify as "property damage" as defined by the Tort Liability Policy.

As an additional sustaining ground and coverage defense,[7] the IRF submits that the alleged damages sought by Coley Brown in Civil Action Number 2010-

[7] In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon

CP-40-5616 do not qualify as "property damage."[8] 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." (R. 183). 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. This Court in *Auto-Owners* did not reach the issue raised with respect to a pollution exclusion. Instead, applying the policy definition of "property damage," this Court explained that "[c]laimants 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 sale of homes located on property containing hazardous materials." 588 S.E.2d at 115. This 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, this 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

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any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

[8] While this additional sustaining ground was raised below, the Court of Appeals did not find it necessary to reach the issue. (App. 13).

property value damages. While Judge Lee and the Court of Appeals did not find it necessary to reach this issue, it remains nonetheless an additional coverage defense that supports Judge Lee's finding of no coverage under the IRF Tort Liability Policy.

CONCLUSION

Based on the foregoing discussion, the Respondent South Carolina Insurance Reserve Fund respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent South Carolina Insurance Reserve Fund, does hereby certify that service of the **Brief of Respondent South Carolina Insurance Reserve Fund** 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 15th day of November 2017:

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