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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

Case No. 2016-CP-23-5905

Renewable Water Resources,..... Respondent,

v.

Insurance Reserve Fund, a Division of the
State Fiscal Accountability Authority of South Carolina,..... Appellant.

AMENDED NOTICE OF APPEAL

The Appellant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina, amends its previously filed Notice of Appeal and hereby appeals the following Orders issued by the Honorable Charles B. Simmons, Jr.:

(1) Findings of Fact and Conclusions of Law filed March 18, 2020,

(2) Order filed April 6, 2020, and

(3) Order Granting in Part Motion for Costs, filed May 21, 2020.

The Appellant's counsel received written notice of entry of the Order filed May 21, 2020, on that same date.

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources, Plaintiff, vs. Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina, Defendant.	)	Civil Action No. 2016-CP-23-5905 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

Plaintiff Renewable Water Resources ("ReWa") is a special purpose district that provides wastewater treatment services in the Upstate of South Carolina. (Joint Stip. of Facts, Ct.'s Ex. 1 at ¶¶ 1, 5.) At all times relevant hereto, ReWa maintained a Building and Personal Property Insurance Policy ("Building Policy") and Tort Liability Insurance Policy ("Tort Policy") with the Insurance Reserve Fund ("IRF"). (*See id*. at ¶¶ 3-4; Pl.'s Exs. 8, 9, 10.)

This case arises out of a polychlorinated biphenyl ("PCB")[1] contamination that occurred in the Upstate of South Carolina beginning in 2013 as a result of vandalism by the illegal dumping of PCBs into ReWa's system. (Ct.'s Ex. 1 at ¶¶ 5-6.) ReWa discovered the presence of PCBs at three of its facilities—Pelham Road, Mauldin Road, and Lower Reedy—in routine periodic testing of the wastewater sludge (also referred to as "biosolids"). (*Id*. at ¶¶ 8-9.)

ReWa provided formal notice to the Environmental Protection Agency ("EPA") and South Carolina Department of Health and Environmental Control ("SCDHEC") of the PCBs in its treatment facilities on July 26, 2013. (*Id*. at ¶ 12; Pl.'s Ex. 17.) ReWa's Controller, Patricia Dennis, reported an insurance claim to the IRF on September 24, 2013, which was acknowledged by the IRF on October 11, 2013. (Ct.'s Ex. 1 at ¶¶ 13-14; Pl.'s Exs. 47, 49.)

[1] PCBs do not readily break down in the environment and cause a variety of significant adverse health effects, including cancer.

ReWa retained AECOM—an engineering firm with expertise in the remediation and removal of contaminants like PCBs—to develop and implement a plan for remediation and repair at the Pelham Road facility. (Ct.'s Ex. 1 at ¶ 15.) ReWa submitted a "Sludge Removal and Disposal Plan" to SCDHEC on October 17, 2013, which was approved by letter dated October 22, 2013. (*Id*. at ¶¶ 15-16; Pl.'s Exs. 32, 33.) The remediation and repair work, recommended by AECOM and approved with direction from SCDHEC, required ReWa first to remove the sludge contained in the contaminated equipment and fixtures, which process began in November 2013. (Pl.'s Exs. 27, 94.) The plan further required the cleaning of the contaminated facilities, equipment, and structures. PCBs had physically adhered to concrete, which is a porous surface, and had be blasted off by pressure washers and cleaned with a special chemical solution. (*Id*.) Prior to this cleaning, while in their PCB-contaminated state, ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations. The repairs and remediation at the Pelham Road facility were completed in late February and early March of 2014. (*Id*.)

Once the repairs at the Pelham Road facility were complete, ReWa began remediation and repair work at its Mauldin Road and Lower Reedy facilities in April 2014. The Mauldin Road and Lower Reedy facilities required the same types of remediation and repair as the Pelham facility, and ReWa incurred the same categories of damages in this process. On April 15, 2014, ReWa submitted a "Summary Remediation Plan" for Mauldin Road and Lower Reedy to SCDHEC, which followed the same process that was done at Pelham Road. (*See* Ct.'s Ex. 1 at ¶ 17; Pl.'s Ex. 38.) This EPA prescribed decontamination process was needed at all three facilities. (Rule 30(b)(6) Depo. of ReWa at 158:10-21.)

No witness disputed that the PCB contamination inhibited or prevented the use of the contaminated structures. Also, all witnesses who addressed the issue agreed that the repair and decontamination of the structures at the three facilities could not occur unless and until the

contaminated sludge was first removed from the structures. This removal was a necessary first step in any repair efforts. Because of the PCB contamination at its three facilities, ReWa incurred millions of dollars in expenses to repair and restore its facilities, machinery, and equipment to usable condition, including the removal and disposal of contaminated material to be able to access the facilities. (Pl.'s Exs. 99, 100, 101.) ReWa kept the IRF apprised of its ongoing expenses related to the PCB remediation and repair by sending updated monthly expense reports. (*See, e.g.*, Pl.'s Exs. 52, 53, 62, 63, 67, 69.) The IRF never notified ReWa that these expense reports should be submitted in a different form or that certain expenses were not covered or appropriate under ReWa's policies.

During the year after the claim was made, ReWa repeatedly requested a coverage decision. However, the IRF did not provide any determination until October 30, 2014, more than a year after the claim was submitted, and after ReWa had incurred millions of dollars in remediation costs. (*See* Pl.'s Exs. 54, 65, 77.) In this "Coverage Position Letter," the IRF acknowledged that vandalism was a covered cause of loss for primary coverage under the Building Policy, but did not provide any basis for its failure to provide primary coverage. (Pl.'s Ex. 77.) The IRF offered coverage of $30,000 under an additional coverage provision for pollutant cleanup and removal. (*Id.*) Before suit, the IRF never provided a written determination of coverage to ReWa for the Tort Policy.

This matter came before the Court for trial on January 28-30, 2020. Pursuant to the evidence and testimony presented at trial, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

I. ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required.

On September 25, 2013, SCDHEC issued an emergency regulation ("Emergency Reg.") which specifically addressed the illicit dumping of PCBs at issue in this case. (Pl.'s Ex. 29.) The federal Toxic Substance Control Act ("TSCA") regulates remediation after contamination of

PCB levels equal to or greater than 50 parts per million ("ppm"). The Emergency Reg. imposed more stringent limits, prohibiting land application of sludge with *any* quantifiable amount of PCBs. The Emergency Reg. also provided that the processing facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has *no* quantifiable amount of PCBs. In addition, ReWa was prohibited under its National Pollutant Discharge Elimination System ("NPDES") Permits from introducing pollutants into its pretreatment process.[2]

In light of the Emergency Reg. and ReWa's NPDES Permits, the Court concludes that the remediation and repair processes undertaken by ReWa at its three facilities were reasonable and necessary. The IRF argues that ReWa's costs and expenses at the Mauldin Road and Lower Reedy facilities were unwarranted because the PCB contamination levels at those facilities were below 50 ppm. However, the fact that ReWa's remediation at those facilities did not take place until after the Emergency Reg. was lifted is immaterial. ReWa's NPDES Permits prohibited the introduction of pollutants into its pretreatment process, and ReWa's normal operations could not continue during the PCB contamination.[3] The Court finds that PCB contamination necessitated action by ReWa to remediate and repair the three affected facilities.

II. Interpretation of Insurance Policies

Words in an insurance policy are to be given their "plain, ordinary and popular meaning." *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). If a provision is susceptible to more than one interpretation, the Court must adopt the interpretation that favors coverage. *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143-44, 781 S.E.2d 137, 142 (Ct.

[2] ReWa maintained NPDES Sludge Permits and Surface Water Discharge Permits for the three facilities at issue. (Pl.'s Exs. 14, 15; Testimony of Joel Jones.)

[3] In addition, since the Emergency Reg. was enacted to address the PCB contamination, it likely applied to all contaminated materials in ReWa's possession at the time it was implemented.

App. 2015). Moreover, the insurer bears the burden of establishing that any exclusions apply, and such policy exclusions are to be construed most strongly against the insurer. *Id*.

III. ReWa's Remediation and Repair Efforts are Covered, and Not Excluded, by the Building Policy.

The Building Policy states: "We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Building Policy ¶ A, Pl.'s Ex. 8.) Thus, to establish coverage under the Building Policy, the following factors must exist: (1) direct physical loss of or damage to property; (2) that property must be Covered Property at the premises described in the Declarations; and (3) the loss or damage must be caused by or resulting from a Covered Cause of Loss. The Court finds that each of these factors has been met,[4] and that no exclusion alters or impinges on that coverage.

A. Covered Property at Premises in Declarations

The Building Policy states that "Covered Property" includes ReWa's buildings, together with the fixtures and permanently installed machinery and equipment at such locations. (Pl.'s Ex. 8 at ¶ A.1.a.) To repair its tanks, digesters, machinery and equipment, ReWa first had to remove and properly dispose of the biosolids held in the contaminated tanks and digesters before it could clean them. The IRF does not dispute that these tanks, digesters, machinery, and equipment at the three facilities are Covered Property. The three facilities are also listed on the declaration pages.[5] (*See* Pl.'s Ex. 2.)

The IRF argues that ReWa's biosolids do not constitute "Covered Property," and therefore costs associated with removing and disposing of the contaminated biosolids are not

[4] The IRF conceded that the PCB contamination was caused by vandalism, which is a Covered Cause of Loss. (*See* Causes of Loss-Special Form ¶ F, Pl.'s Ex. 9; Ct.'s Ex. 1 at ¶¶ 5-6.)

[5] The amount of coverage provided in the declaration pages for each affected facility is greater than ReWa's total damages.

covered. The testimony, including from the IRF's expert, was that the tanks, structures, and equipment at the facilities could not be cleaned and made usable again until the contaminated sludge was removed. The Court concludes that removing and disposing of the sludge was necessary to remediate and repair the contaminated structures, machinery, and equipment at ReWa's three impacted facilities. The costs associated with remediating and repairing such Covered Property, including the removal and disposal of biosolids, are covered under the Building Policy.

B. "Direct Physical Loss of or Damage to"

The IRF contends that coverage does not apply under the Building Policy because "direct physical loss of or damage to" should be interpreted to mean only immediate structural changes to Covered Property.[6] However, the Court finds that "direct physical loss of or damage to" property includes the type of contamination involved herein of Covered Property even in the absence of structural alteration. This finding is supported by jurisdictions across the country which have found that "direct physical loss of or damage to" property includes the contamination of such property even in the absence of structural damage or alteration.[7]

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[6] The IRF also argues that the words "direct" and "physical" modify both "loss" and "damage." While the policy does not specifically limit coverage to "direct physical loss" or "*direct physical* damage," the Court finds this distinction irrelevant, as the contamination that occurred at ReWa's facilities is covered under the Building Policy regardless of whether or not the Court interprets the words "direct" and "physical" to modify both "loss" and "damage."

[7] *See Mellin v. N. Security Ins. Co., Inc.*, 115 A.3d 799, 803-4 (N.H. 2015) (cat urine odor emanating from another condominium unit caused "direct physical loss" to insured's unit); *Gregory Packaging, Inc. v. Travelers Property Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia discharge physically incapacitated insured's facility, and "property can sustain physical loss or damage without experiencing structural alteration"); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 708 (E.D. Va. 2010) (toxic gases released by drywall manufactured in China constituted "direct physical loss" to insured's property and noting that "[t]he majority of cases appear to support [the insured's] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825-27 (3d Cir. 2005) (bacteria contamination of well water constitutes direct physical loss to house if it

Furthermore, because the Building Policy does not include a definition of "damage," the Court must apply the "plain, ordinary and popular meaning" of the word. *See Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). Black's Law Dictionary defines "damage" as "loss or injury to person or property." *Black's Law Dictionary* (11th ed. 2019). In analyzing the meaning of "damages" under a general tort policy, the South Carolina Supreme Court found in *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004) that "[t]he plain, ordinary meaning of 'damages' is monies paid on an insured's loss, in this case, from property damage" and that "[a]n 'ordinary' meaning of the term is not a legalistic one…." *Id*. at 638, 594 S.E.2d at 458.

The evidence shows that ReWa suffered direct physical loss of or damage to its facilities as a result of the PCB contamination. PCBs physically adhered to concrete, and had to be blasted off by pressure washers and cleaned with a special chemical solution.[8] Further, in the

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rendered it unusable); *Yale Univ. v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 413 (D.Conn. 2002) (Yale suffered "physical loss of or damage to property" for the presence of asbestos or lead contamination in its buildings, and stating that the insurer "fail[ed] to even consider, let alone distinguish, the substantial body of case law in which a variety of contaminating conditions have been held to constitute 'physical loss of or damage to property'"); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 9 Mass.L.Rptr. 41 (Mass. 1998) (carbon monoxide contamination, or the *risk* of carbon monoxide contamination, in plaintiffs' apartment building constituted "direct physical loss of or damage to" the insured building); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (1998) (under the homeowner's insurance policy, "[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property"); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995) (there was direct damage to sewage treatment structure because residue from pollutant covered and adhered to the interior of the structure causing destruction of the bacteria colony which was an integral part of the covered facility); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335-6 (Or. Ct. App. 1993) (the odor from a methamphetamine lab constituted "physical" damage because it damaged the house and the cost of removing the odor was a direct physical loss); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (when insured church had to close its building because of the infiltration of vapors from gasoline in the soil under and around the building, "direct physical loss" occurred).

[8] The IRF's expert admitted that the PCB contamination was physically adhered to the walls after the tanks were emptied.

contaminated state, ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations.[9] In other words, the Covered Property was unusable in its contaminated state, which constitutes "damage" under the ordinary meaning. The damage from the PCBs was direct and physical. Thus, the Court concludes that the PCB contamination that occurred at ReWa's facilities caused "direct physical loss of or damage to" ReWa's Covered Property.

Additionally, coverage under the Building Policy extends to even "risks of" direct physical loss. The Causes of Loss-Special Form states that "Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS." (Pl.'s Ex. 9 at ¶ A.) Notably, this language has been directly addressed by the South Carolina Supreme Court. In *Ocean Winds Council of Co-owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002), the Supreme Court explained the significance of the word "risks" as it relates to the scope of coverage provided. The Court reasoned:

> In our view, to construe the phrase "*risks* of direct physical loss *involving* collapse" as requiring actual collapse is too narrow an interpretation. This phrase is more expansive than the word "collapse" and appears to cover even the threat of loss from collapse. Further, as noted by courts rejecting the actual collapse standard, such an interpretation encourages an insured to neglect repairs and allow a building to fall, which is economically unsound and contrary to the insured's duty to mitigate damages.

Id. at 271, 565 S.E.2d at 208 (emphasis in original) (internal citations omitted).

Applying such interpretation to this case, the Court concludes the Building Policy covers not only direct physical loss of or damage to ReWa's Covered Property, but also the costs incurred by ReWa in addressing the risks of PCBs infiltrating deeper into its facilities, equipment, and machines, such as expenses related to sampling and prevention of contaminated hauled storage being introduced into ReWa's facilities and remediation of ReWa's collection

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[9] ReWa was processing thirty million gallons a day coming into its system.

lines that led into its facilities. Further, ReWa was directed by the policy to take all reasonable steps to protect its Covered Property from further damage. (*See* Pl.'s Ex. 8 at ¶ E.2.a.(4).)[10] ReWa is therefore entitled to its reasonable costs and expenses incurred as a result of the PCB contamination, less ReWa's regular ongoing costs of processing biosolids.

C. ReWa's Remediation and Repair Efforts are Not Limited or Excluded Under the Building Policy.

The IRF argues that ReWa's coverage is limited or excluded by various provisions of the Building Policy. For example, the IRF contends that the "debris removal" and "pollutant cleanup and removal" provisions limit ReWa's coverage. (See Pl.'s Ex. 8 at ¶ A.4.) These provisions, however, are additional coverages under the Building Policy, and are not intended to limit the primary coverage provisions. The Court finds that ReWa's remediation and repair efforts are not limited or excluded by any additional coverage or exclusion provisions under the Building Policy.

The primary exclusion claimed by the IRF was the Ordinance or Law Exclusion. The IRF contends that the Building Policy does not cover ReWa's damages resulting from the PCB contamination because ReWa's remediation and repair process was governed by EPA and SCDHEC regulations, and therefore the Ordinance or Law Exclusion applies. That Exclusion states the IRF "will not pay for loss or damage caused directly or indirectly by … The enforcement of any ordinance or law: (1) Regulating construction, use or repair of any property; or (2) Requiring the tearing down of any property, including the cost of removing its debris." (Pl.'s Ex. 9 at ¶ B.1.a.) The Court notes that no evidence was presented to indicate the environmental regulations at issue fall within the categories of ordinance and law specified in the

[10] Expenses incurred in testing and remediating lines which flow into the facilities are covered expenses under this "protection of property" provision, even though this testing and remediation did not occur on the Covered Property.

policy.[11] The Court concludes that vandalism, not the enforcement of an ordinance or law, created ReWa's resulting loss. Any actions by the EPA and SCDHEC which could be deemed to be "enforcement" under this exclusion did not, either directly or indirectly, cause ReWa to suffer the damages claimed in this lawsuit. *See Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1st Dep't 1998) ("So long as extraneous forces cause physical damage to property, this type of exclusion does not defeat recovery when, as a result, a governmental body enforces an ordinance against the property."). Further, ReWa's mere compliance with the applicable regulations does not trigger this exclusion. *See, e.g., Haas v. Audubon Indem. Co.*, 722 So.2d 1022 (La. App. 1998) ("Compliance is not enforcement" and "it was the vandalism that caused damage to the [insured's] building, not the enforcement of any ordinance or law").

IV. ReWa's Remediation and Repair Efforts are Not Covered by the Tort Policy.

ReWa also made a claim under the Tort Policy. That policy states the IRF "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of … Property Damage to which this applies caused by an occurrence." (Tort Policy ¶ I.B., Pl.'s Ex. 10.) An "occurrence" is defined as "an accident, including continuous related exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." (*Id.* at ¶ III.)

With respect to liability insurance, the South Carolina Supreme Court has ruled:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play, there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. *There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained*.

[11] The Court further notes that, in its Pre-Trial Brief, the IRF conceded that "Neither DHEC nor the EPA ever filed a complaint or an enforcement action," and that ReWa "was never even threatened with an enforcement action." *See* IRF Pre-Trial Brief at 8.

Howard v. Allen, 254 S.C. 455, 176 S.E.2d 127, 129 (1970) (emphasis added). ReWa has not identified any suit or claim as defined by the Tort Policy filed by a third party against ReWa that was tendered to the IRF for a defense and indemnity. There was never even an enforcement action – nor the threat of one – from DHEC or the EPA. No consent order was issued, nor was one requested by DHEC or EPA. The EPA never advised ReWa that it was treating it as a "potentially responsible party" ("PRP") under CERCLA. At no time did ReWa take the position that it was a PRP under CERCLA or had any responsibility for causing the PCB contamination. Without the institution of a suit, as *Howard* instructs, there is no duty to defend nor a duty to indemnify under the Tort Policy.[12]

Furthermore, the Tort Policy issued by the IRF includes an "Owned Property Exclusion" which provides as follows: "This insurance does not apply to property damage to property owned or occupied by or rented to the insured." This Court concludes that ReWa is seeking to be indemnified for alleged property damage to its own property. That claim falls squarely within the scope of the Owned Property Exclusion. *See City of Abbeville v. South Carolina Ins. Reserve Fund*, 323 S.C. 60, 448 S.E.2d 579 (Ct. App. 1994).

Finally, Section VII.5 of the Tort Policy states: "No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgement against the insured after actual trial or by written agreement of the insured, the complaint and the Fund." With respect to ReWa's claim, ReWa's "obligation to pay" has not been established by a judgment after an actual trial or by a settlement agreement. As the record conclusively shows, there has not been a settlement agreement with a third-party, and certainly not a settlement to which the IRF agreed.

[12] ReWa's witnesses conceded that no request for legal counsel was ever made to the IRF.

Based on these principles, the Court concludes ReWa was not legally obligated to pay for the damages caused by the PCB contamination, which resulted from intentional acts of vandalism by a third party. Thus, coverage is not triggered under the Tort Policy. On these bases, the Court finds in favor of the IRF on the causes of action alleging coverage under the Tort Policy.

V. Bad Faith

ReWa has also asserted a bad faith claim against the IRF based upon allegations that the IRF unreasonably delayed in making a coverage determination and failed to pay the amounts due under the policies. The covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed. *See Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002). The Supreme Court has recognized that a bad faith claim could be asserted against the IRF, and that such claim is a tort governed by the Tort Claims Act. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993).

The Court is troubled by the length of time the IRF took to deny the claim (thirteen months). However, the Court concludes that the unique facts presented in this matter do not rise to the level of bad faith, particularly in light of the significant delay by ReWa in initially notifying the IRF of its claim. The Court therefore finds in the IRF's favor on the bad faith claim. It is not necessary for the Court to address the other defenses raised by the IRF to the bad faith claim.

VI. Attorneys' Fees

On the issue of attorney's fees, the IRF argued that (1) the prayer for attorney's fees in the Amended Complaint was pled only as part of the bad faith causes of action, (2) ReWa cited only to Section 38-59-40 as a basis for attorney's fees and that requires a showing of unreasonableness or bad faith, and (3) that the IRF is not an "insurer" under the definitions

applicable to Title 38, so Section 38-59-40 cannot be used against the IRF. *See Davis v. State of S.C. Budget & Control Bd.*, 298 S.C. 135, 378 S.E.2d 604 (Ct. App. 1989). Furthermore, counsel for ReWa has conceded that if ReWa did not prevail on the bad faith claim, it could not obtain the attorneys' fees identified in its damages exhibits and a motion for attorneys' fees for the litigation under Section 38-59-40 could not be supported under any of the other claims.

VII. Damages

ReWa's response to the PCB contamination was both reasonable and necessary. ReWa was faced with the urgency of preventing the discharge of contaminated materials into public rivers or the land application of contaminated biosolids onto land owned by local farmers. Testimony was presented at trial by Joel Jones, ReWa's Chief Technical Officer, that ReWa processes approximately thirty million gallons of wastewater a day. The Court finds that under these unique circumstances, ReWa properly notified SCDHEC and the EPA and acted with the necessary sense of urgency to prevent the PCB contamination from further impacting its facilities or affecting the public-at-large.

ReWa retained AECOM, a firm experienced in remediation and removal of contaminants, to help it develop the best course of action. ReWa also used a competitive bid process in determining which vendor to use for solid waste removal. With the approval of SCDHEC and the EPA, ReWa developed a plan of action to safely dispose of over fifteen million gallons of wastewater impacted by the PCB contamination, some of which had to be transported to specially approved receiving facilities in Emelle, Alabama. During the remediation and repair process, ReWa provided monthly reports to the IRF setting out what had been done and the expenses related thereto. As ReWa's Controller, Patricia Dennis, testified at trial, ReWa established a two-step accounting system in order to monitor and track expenses related to the PCB remediation and repair efforts. The IRF never raised any concerns or

questions about ReWa's process of tracking these costs, nor stated any objection to ReWa's inclusion of any particular costs in its expense spreadsheets.

Pursuant to the above findings, the Court finds that the testimony of ReWa's witnesses and the evidence presented at trial establish that ReWa incurred $8,751,949.60 in total expenses for the PCB remediation and repair. (*See* Pl.'s Exs. 99, 100.) After subtracting ReWa's regular costs of processing biosolids ($2,516,054.27), ReWa's total damages are $6,235,895.33. (Pl.'s Ex. 101.) The Court declines to award the following costs: $249,572.00 to Greenville County Solid Waste due to lack of sufficient proof for outside technical support; $4,246.25 to AECOM for lack of sufficient proof; $1,320.00 which appears to be a double charge for pressure washing (*see* Def.'s Ex. 19); and $155,832.59 in attorneys' fees and costs relating to environmental and coverage counsel.

The Court finds that all of ReWa's other costs and expenses are reasonable and recoverable under the Building Policy. Therefore, the Court finds that ReWa is entitled to an award of damages in the amount of $5,824,924.49 against the IRF.

RULING

For these reasons, the Court concludes ReWa's damages resulting from the cleanup, repair, and remediation of its facilities, machinery, and equipment due to PCB contamination at its Pelham Road, Mauldin Road, and Lower Reedy facilities are covered under the Building Policy, and such costs and expenses incurred by ReWa were reasonable and necessary to remediate and repair its facilities and prevent further harm.

Pursuant to the testimony and evidence presented at trial, judgment is hereby entered, consistent with the findings herein, awarding ReWa the amount of $5,824,924.49 under the Building Policy only.

AND IT IS SO ORDERED.

Judge's Electronic Signature to Follow

Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant, et al

Case Number: 2016CP2305905

Type: Master/Master's Filing

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Renewable Water Resources, Plaintiff, vs. Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina, Defendant.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C/A #: 2016-CP-23-05905 **ORDER**

The matter is before the Court pursuant to motions filed by Defendant on March 30, 2020. Based upon the Court's familiarity with the record, I find that a hearing is not necessary. See, *Pollard v. County of Florence*, 444 S.E.2d 534 (S.C. App. 1994). As will be more fully explained below, the motions are denied.

As set forth in the motion under Findings of Fact, items 1., 2. and 3. argue, in substance, that Plaintiff did not consult with Defendant on certain aspects of the remediation. However, the record is clear that Defendant was noticed of the PCBs contamination, provided monthly reports/expenses summaries, and never availed themselves of opportunities to consult with Plaintiff, approve or deny the plan or expenses, or take any other active role for some thirteen (13) months. Under the facts herein, it is too late to now argue Plaintiff acted improperly or without an offer of consultation with Defendant.

As to 5., the Court finds that Plaintiff submitted sufficient evidence to support its claims and the same is amply supported by the evidence. Again, and as noted above, the Defendant was

on actual notice of the ongoing remediation and ongoing and increasing expenses and took no action or participation therein.

The other issues and items raised under Findings of Fact have been sufficiently addressed in the Order filed March 18, 2020.

Under Conclusions of Law, while the Court appreciates the arguments raised by Defendant, the preponderance of the evidence established that Plaintiff acted in a reasonable and appropriate manner in its remediation and that the amounts awarded are reasonable.

Upon a review of the record, the Order of March 18, 2020 and Defendant's motions filed March 30, 2020, the Court is of the opinion that the Order of March 18, 2020 is appropriately and reasonably based upon the facts presented at trial and the applicable law.

As such, Defendant's motions are denied.

JUDGE'S SIGNATURE PAGE TO FOLLOW

Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant, et al

Case Number: 2016CP2305905

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Renewable Water Resources, Plaintiff, vs. Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina, Defendant.	)	Civil Action No. 2016-CP-23-5905 **ORDER GRANTING IN PART MOTION FOR COSTS**

Plaintiff Renewable Water Resources' ("ReWa") Motion for Costs came before the Court for hearing, by consent done via Zoom, on May 13, 2020. William S. Brown appeared on behalf of ReWa. Andrew F. Lindemann and John R. Devlin, Jr. appeared on behalf of Defendant Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina ("IRF"). Having heard the arguments and reviewed the submissions of the parties, ReWa's Motion for Costs is hereby granted in part for the reasons set forth below.

Rule 54(d) of the South Carolina Rules of Civil Procedure provides that "[e]xcept when express provision thereof is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its offices, and agencies shall be imposed only to the extent permitted by law." The South Carolina Supreme Court and Court of Appeals have held that costs may be assessed against the State as with any other Defendant. *See Dunn v. Dunn*, 298 S.C. 365, 369, 380 S.E.2d 836, 838 (1989); *Varn v. South Carolina Dept. of Highways & Public Transp.*, 311 S.C. 349, 354, 428 S.E.2d 895, 898 (Ct. App. 1993).

Rule 54(e), SCRCP, states that taxable costs include: (1) costs authorized by statute; (2) all filing and recording fees charged by the clerk of court in which the action is pending; (3) fees of the sheriff for service of the summons and complaint or subpoenas for trial; (4) fees incurred

in service of process, which include the fees incurred to subpoena the witness who testified at trial or for the production of documents and materials actually used at trial; (5) witness fees and mileage actually traveled and paid to persons who testified at trial; and (6) fees for exemplification and copies of papers necessarily obtained for trial.

ReWa submitted the Affidavit of William S. Brown in support of its Motion for Costs and also submitted invoice backup for these items in advance of the hearing. The Affidavit includes an itemization of costs that ReWa seeks to recover totaling Thirty-Two Thousand Five Hundred Twenty-Seven Dollars and Six Cents ($32,527.06), which is further broken down by category and specific amount for each entry. ReWa seeks an award of the following costs pursuant to Rule 54, SCRCP and South Carolina statute:

(1) Interest pursuant to S.C. Code Ann. § 15-37-30 in the amount of Twenty-Nine Thousand Three Hundred Twenty-Four Dollars and Nineteen Cents ($29,324.19);

(2) Filing and recording fees in the amount of Two Hundred Twenty-Five Dollars ($225.00);

(3) Fees incurred in service of process of the Complaint in the amount of Fifty Dollars ($50.00); and

(4) Costs of exemplifications and copies of papers necessarily obtained for trial, including foam board exhibits, trial exhibits, and original depositions in the amount of Two Thousand Nine Hundred Twenty-Seven Dollars and Eighty-Seven Cents ($2,927.87).[1]

[1] This original amount sought by ReWa included the deposition costs of Four Hundred Twenty-Eight Dollars and Seventy-Eight Cents ($428.78) relating to Jerry Anderson. ReWa later conceded that this amount could be removed from ReWa's total claimed costs because Mr. Anderson did not testify as a live witness and, although portions of his deposition were originally designated, his deposition was not used or published to the Court during trial.

RULING

As an initial matter, the Court finds that ReWa's Motion for Costs is properly before the Court pursuant to Rule 54(d), SCRCP, and is a matter which should be decided by the Court with the awarded costs entered by the clerk. Furthermore, the Court concludes that, in the interest of judicial economy, the taxation of costs should not be delayed until the IRF's appeal is completed. Ruling at this time in no way prejudices any rights of the IRF.

The Court finds that ReWa is "the prevailing party" under Rule 54. The IRF did not contest that issue in its submission on the motion. Therefore, ReWa is entitled to an award of costs. The issue before the Court is determination of the amount of that award of costs.

1. Interest under S.C. Code Ann. § 15-37-30

ReWa asserts that pursuant to Rule 54(e)(1), SCRCP, it is entitled to recover costs allowed by statute. The statute at issue regarding interest is S.C. Code Ann. § 15-37-30, which states that "[w]hen the judgment is for the recovery of money, interest from the time of the verdict or report until judgment may be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto."

In this case, the Court entered Findings of Fact and Conclusions of Law on March 18, 2020 which set forth the Court's finding and set the amount of the judgment to be entered in favor of ReWa. The judgment was entered by the clerk on April 8, 2020. Therefore, what is at issue is interest which accrued for the twenty-one (21) days between the Court's determination and the entry of judgment.

The IRF makes two principal arguments in opposition to the award of interest under S.C. Code Ann. § 15-37-30 as a cost. First, the IRF asserts that S.C. Code Ann. § 15-37-30 was

repealed by implication with the adoption of Rule 54(e). Second, the IRF contends that Rule 54(e) states the exclusive list of allowable costs. Because interest is not identified in Rule 54(e), the IRF contends that it cannot be awarded as a cost.

The Court does not believe that S.C. Code Ann. § 15-37-30 was repealed. When the Rules of Civil Procedure were adopted by 1985 S.C. Act 100, the General Assembly provided a long list of statutes which were repealed because they were replaced by the Rules. S.C. Code Ann. § 15-37-30 was not listed as repealed by the General Assembly in 1985 S.C. Act 100 or any subsequent Act. "In general, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 135, 694 S.E.2d 213, 216 (2010). "The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." *Spectre, LLC v. South Carolina Dep't of Health & Envtl. Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). The Court finds that Rule 54(e) and S.C. Code Ann. § 15-37-30 can be applied without conflict, so that the IRF has failed to show that they are "incapable of any reasonable reconcilement." The express language of Rule 54(e), SCRCP, permits recovery of "Costs Authorized by Statute" allowing for the award of costs authorized "in favor of the prevailing party under ***any statute*** or Rule of Civil Procedure." Rule 54(e)(1), SCRCP (emphasis added); *see also* 7 S.C. JUR. COSTS § 42 (March 2020 Update). As such, the Court finds that S.C. Code Ann. § 15-37-30 has not been repealed and remains valid law.

The Court finds that ReWa is entitled to interest from the time this Court's Findings of Fact and Conclusions of Law were entered on March 18, 2020 until such time as the judgment was entered by the clerk on April 8, 2020 under S.C. Code Ann. § 15-37-30. The interest for that twenty-one (21) day period has accrued at the post-judgment interest rate. S*ee* 7 S.C. JUR. COSTS

§ 42 (March 2020 Update). However, such interest is not a taxable cost under Rule 54(e), SCRCP. This amount should be treated with other interest on the award/judgment and be recoverable at the time of any collection on the judgment. Therefore, the Court denies ReWa's request for an award of Twenty-Nine Thousand Three Hundred Twenty-Four Dollars and Nineteen Cents ($29,324.19)[2] as a taxable cost pursuant to Rule 54(e), SCRCP, and finds that this amount should be included as part of the post-judgment interest calculation.

2. Filing Fees and Service of Process

ReWa seeks filing and recording fees, as shown in the public record, for the filing of the Complaint and several motions in the amount of Two Hundred Twenty-Five Dollars ($225.00). Rewa also seeks costs incurred in service of process of the Complaint in the amount of Fifty Dollars ($50.00). The IRF did not oppose the award of these costs. The Court finds that these are proper under Rule 54(e), SCRCP.

3. Costs of Copies Obtained for Trial and Depositions

ReWa also seeks the costs of certain copies and depositions. Costs for exemplifications and copies of papers necessarily obtained for trial are recoverable under Rule 54(e)(6), SCRCP. ReWa incurred the expense of copying exhibits for trial. It seeks an award of costs for one full set of Plaintiff's trial exhibits submitted for the Court's use during trial in the amount of Six Hundred Forty-Seven Dollars and Thirty-Five Cents ($647.35). During the trial, ReWa used a foam board blow-up of Plaintiff's Exhibit 107, which reflects ReWa's total damages calculation and seeks costs for this of Ninety Dollars and Ten Cents ($90.10). These costs relate to copies of

[2] The parties also raise an issue regarding the proper daily accrual of interest. ReWa calculated the accrual on a standard 365-day year. The IRF contends that the calculation should use 366 days, to account for the fact that 2020 is a leap year. Neither party submitted authority for its position. Because the Court is delaying the award of this interest, it need not reach this issue.

papers and exemplifications that were necessarily obtained for the trial of this matter, and the Court finds that they are therefore recoverable under Rule 54(e)(6), SCRCP.

ReWa also seeks the costs of certain depositions which were used during trial. The IRF opposes the award of the deposition costs and asserts that deposition costs are not properly recoverable as a cost under Rule 54. The Court finds that ReWa's costs in obtaining original depositions for use at trial are recoverable as taxable costs. The South Carolina Supreme Court upheld the award of deposition costs in *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 401-402, 618 S.E.2d 903, 908 (2005). Noting that the "trial judge has broad discretion to award costs to the prevailing party," the Supreme Court upheld the trial court's award of deposition costs pursuant to Rule 54(d), SCRCP. *See also Register v. Duke*, 302 S.C. 195, 394 S.E.2d 718 (Ct. App. 1990); 7 S.C. JUR. COSTS § 31 (March 2020 Update). Therefore, the Court finds that deposition costs of Two Thousand One Hundred Ninety Dollars and Forty-Two Cents ($2,190.42) should be awarded as costs.

For these reasons, the Court grants in part ReWa's Motion for Costs. The Court finds that ReWa is entitled to interest pursuant to S.C. Code Ann. § 15-37-30, but declines to award this interest as a taxable cost under Rule 54, SCRCP. The Court grants ReWa's Motion for Costs as to the remaining items, and therefore awards ReWa taxable costs in the amount of Three Thousand Two Hundred and Two Dollars and Eighty-Seven Cents ($3,202.87), which shall be added to and included as a part of the judgment.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE ON NEXT PAGE

Greenville Common Pleas

Case Caption: Renewable Water Resources vs. Insurance Reserve Fund , defendant, et al

Case Number: 2016CP2305905

Type: Order/Costs

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of the **Amended Notice of Appeal** was made upon all counsel of record by email only this the 22nd day of June 2020:

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s/ Andrew F. Lindeman

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June 22, 2020

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Renewable Water Resources v. Insurance Reserve Fund, a Division of the State Fiscal Accountability Authority of South Carolina
Appellate Case Number: 2020-000669
Civil Action Number: 2016-CP-23-5905
Claim Number: A4190
Our File Number: 104.10068

Dear Ms. Kitchings:

Please find enclosed for filing the **Amended Notice of Appeal** in the above referenced matter. I am not providing a filing fee since the Appellant is an agency of the State of South Carolina. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (g)(3) of the Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency Appellate Case No. 2020-000447 (As Amended May 29, 2020).

Thank you for your assistance in this matter. Please advise if you have any questions.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

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cc: (w/ Enclosure)

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