THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Charles B. Simmons, Jr., Master-in-Equity

Appellate Case No. 2020-000669
Civil Action 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.

INITIAL BRIEF OF RESPONDENT RENEWABLE WATER RESOURCES

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INTRODUCTION AND SUMMARY

Through acts of vandalism, polychlorinated biphenyls ("PCBs") were introduced into three wastewater treatment facilities owned and operated by Renewable Water Resources ("ReWa"). The PCBs physically adhered to certain structures in the facilities, which made these structures unusable and inoperable. ReWa spent millions of dollars to repair and remediate the impacted structures from the direct physical damage caused by the PCB contamination and to bring the structures back to the operational condition they were in prior to the vandalism. The impacted structures were undisputedly "Covered Property" under a policy issued by the South Carolina Insurance Reserve Fund (the "IRF") to ReWa; however, the IRF refused to provide coverage or provide a clear statement of why there was no coverage.

The IRF, in its brief, attempts to complicate and confuse the issues. However, the trial court reached the correct and just result. The trial court properly determined coverage existed under the policy, properly assessed the damages, thoroughly stated the basis for its decision, and appropriately conducted the trial of this case. The judgment in this matter should be affirmed.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly determine that coverage existed under the insurance policies at issue for the PCB contamination caused by third party vandalism and for the resulting damage and expenses incurred by ReWa?

2. Is there any evidence to support the trial court's determination of damages?

3. Is the trial court's fourteen-page findings of fact and conclusions of law a sufficiently detailed statement of its ruling?

4. Did the trial court commit any reversible error in the procedural handling of the trial?

COUNTER-STATEMENT OF THE CASE

This case arises from an act of vandalism by a third party which caused PCBs to be introduced into and cause damage to wastewater treatment facilities owned and operated by ReWa in 2013. ReWa was insured at the time by the IRF.

ReWa reported the PCB contamination and resulting damage to the IRF. *See* Pl.'s Exs. 47, 48 (R. ___, ___). The IRF repeatedly refused to provide a coverage determination to ReWa. More than a year after ReWa provided notice of the damage from the PCB contamination, the IRF finally sent a coverage position letter which addressed coverage under certain "additional coverage" provisions of one policy, a Building and Personal Property Insurance Policy, bearing Policy Number F13023114 ("Building Policy"). Pl.'s Ex. 77 (R.___). The letter did not address or deny coverage under the primary insuring provisions of the Building Policy and did not address or deny coverage under a Tort Liability Insurance Policy ("Tort Policy").

ReWa filed suit on October 17, 2016. *See* Compl. (R.___). ReWa filed an Amended Complaint on June 15, 2018. *See* Am. Compl. (R.___). ReWa asserted breach of contract and declaratory judgment claims under the Building Policy and the Tort Policy, and a bad faith claim for the IRF's improper handling of the matter. At no time prior to suit did the IRF deny coverage under the primary insuring provisions of the Building Policy or provide any coverage determination under the Tort Policy.

With consent of both parties, the matter was referred to the Greenville County Master-in-Equity to decide the case non-jury. Order of Reference (Sept. 14, 2018) (R.___). The trial of the case began on January 28, 2020 before the Honorable Charles B. Simmons, Jr. The parties submitted extensive written pretrial submissions of their positions on the facts and law in lieu of oral opening statements. IRF's Pretrial Brief and ReWa's Pretrial Brief (R.___ and ___). The

Court heard three days of live testimony including seven witnesses and approximately 130 exhibits. *See generally* Tr. 1 to 739 (R. ___ to ___). The Court was also provided additional deposition excerpts to review outside of the courtroom. In lieu of closing arguments, the parties were asked to provide written statements in the form of proposed findings of fact and conclusions of law. *See* IRF's Proposed Findings of Fact and Conclusions of Law (R. ___); ReWa's Proposed Findings of Fact and Conclusions of Law (R.___). After the close of the submission of evidence, the trial court and counsel engaged in an extended colloquy in which the court asked counsel questions and permitted them to summarize their positions on key issues in the case. *See* Tr. 708:16 to 737:11 (R.___ to ___). The trial court then took the matter under advisement.

On March 18, 2020, the trial court issued Findings of Fact and Conclusions of Law in which the court ruled that judgment be entered for ReWa in the amount of $5,824.924.49. Order (March 18, 2020) (R.___). On March 30, 2020, the IRF filed a post-trial motion purporting to assert arguments pursuant to Rules 41, 52, and 59 of the South Carolina Rules of Civil Procedure. On April 6, 2020, the trial court issued an Order which analyzed and denied the IRF's post-trial motion. Order (April 6, 2020) (R.___). The IRF filed its Notice of Appeal on April 23, 2020. Notice of Appeal (R.___). The IRF filed an amended notice of appeal on June 22, 2020. Am. Notice of Appeal (R.___).

COUNTER-STATEMENT OF THE FACTS

ReWa is a special purpose district that provides wastewater treatment services in the Upstate of South Carolina. In 2013, ReWa discovered the presence of PCBs at three of its facilities during routine testing. Joint Stip. of Facts ¶¶ 8–9 (R.___). Once testing confirmed the presence of PCBs at its facilities, ReWa promptly contacted the United States Environmental Protection

Agency ("EPA") and South Carolina Department of Health and Environmental Control ("SCDHEC") and put its emergency action plan into place.

ReWa ultimately determined that the PCBs were introduced into the ReWa facilities as a result of vandalism by a third party illegally dumping contaminants into ReWa's system. Joint Stip. of Facts ¶¶ 5–6 (R.___). Three of ReWa's facilities were impacted and suffered damage because of the vandalism: (1) the Pelham Road Plant, (2) the Lower Reedy Plant, and (3) the Mauldin Road Plant. ReWa engaged an engineering firm to develop a detailed plan for repairing and remediating the Pelham Road facility,[1] which necessarily included removing and disposing of the PCB-contaminated waste. PCBs physically adhered to the concrete, which is a porous surface, and had to be blasted off by pressure washers and cleaned with a special chemical solution. Pl.'s Exs. 27 and 94 (R.___ and ___); Tr. 262:11 to 263:3, 265:5–19, and 373:16–18 (R.___ to ___, ___, and ___). No witness disputed that the PCB contamination inhibited or prevented the use of the contaminated structures and equipment.

At all times relevant hereto, ReWa maintained a Building Policy and Tort Policy issued by the IRF. Joint Stip. of Facts ¶¶ 3–4 (R.___); Pl.'s Exs. 8, 9, and 10 (R.___, ___, and ___). The three facilities involved—*i.e.*, the Pelham Road Plant; the Lower Reedy Plant; and the Mauldin Road Plant—are each listed in the declaration page for the Building Policy as a "Covered Premises." Pl.'s Ex. 2 (R.___). For the Pelham Road Plant, the Building Policy provided a limit

[1] The Pelham Road facility was the first facility found to have been impacted and was the first one to be repaired and remediated. Tr. 34:13–17 (R.___). The same process for repair and remediation was then used at the Lower Reedy Plant and the Mauldin Road Plant. Tr. 280:25 to 281:8 (describing order and method of repair and remediation) (R.___ to ___); Tr. 265:20 to 266:4 (R.___ to ___); Tr. 383:15–19 (R.___); Tr. 245:12–19 and Pl.'s Ex. 94 (repairs completed at Pelham Road about February 2014) (R.___ and ___); Tr. 258:7–9 (repairs completed at Lower Reedy about November 2014) (R.___); Tr. 257:25 to 258:2 (repairs completed at Mauldin Road about June 2015) (R.___ to ___).

of insurance of $87,392,145. Pl.'s Ex. 2 (R.___). For the Lower Reedy Plant, the Building Policy provided a limit of insurance of $43,853,232. Pl.'s Ex. 2 (R.___). For the Mauldin Road Plant, the Building Policy provided a limit of insurance of $120,029,885. Pl.'s Ex. 2 (R.___). Thus, the total award in this case was only a small fraction of the limit of insurance under the policy.[2] Additionally, during the time at issue, ReWa paid over $134,000 annually in premiums, related to these three facilities alone, for the coverage of the Building Policy. Pl.'s Ex. 2 (R.___).

On September 24, 2013, ReWa notified the IRF of the damage by email and asked for guidance in making a claim under any and all possible policies which would have coverage for the damage caused by the dumping of the PCBs. Pl.'s Ex. 47 (R.___). The IRF did not initially respond, so ReWa reached out again sixteen days later. Pl.'s Ex. 48 (R.___). The IRF indicated that a claim had been opened and that an adjuster would contact ReWa about the loss. Pl.'s Ex. 48 (R.___). The IRF, not ReWa, limited the claim to the Building Policy. Before the IRF ever told ReWa that the claim had been opened or that an adjuster had been assigned, internal communications at the IRF indicated that the IRF planned to deny coverage. Pl.'s Ex. 48 (R.___). This coverage position was because of an assessment that there was "no direct physical damage." *Id*. This coverage assessment was never conveyed to ReWa. Tr. 466:14 to 467:11 (R.___ to ___).

In response to the vandalism, ReWa incurred millions of dollars in expenses to repair and restore its facilities, machinery, and equipment to usable condition. In order to do so, ReWa had to remove and dispose of the resulting contaminated material so that it could gain access to the structures and machinery. Holding tanks, digesters, machinery, equipment, and structures at each of these three facilities were impacted by the PCB contamination. Pl.'s Ex. 94 (R.___); Tr. 265:20

[2] The IRF's witness acknowledged that any one of these facilities has far more insurance coverage than the total value of the claim. Tr. 697:2–4 (R.____).

to 266:4 (R.___ to ___); Tr. 364:1–7 (R.___); Tr. 371:1–4 (R.___); Tr. 386:16 to 387:12 (R.___ to ___); Young depo. 27:1-10 (R.___). Each witness who addressed this issue agreed that the repair and decontamination of the structures at the three facilities could not occur unless and until contaminated sludge was first removed from the structures and equipment. Tr. 220:12–17 (R.___); Tr. 601:9–15 (R.___). This removal was a necessary first step in any repair efforts. ReWa kept the IRF apprised of its ongoing efforts and expenses related to the remediation and repair by sending updated monthly expense reports. Pl.'s Exs. 52, 53, 62, 65, 67, 69, 71, 72, 73, 78, and 83 (R.___, ___, ___, ___, ___, ___, ___, ___, ___, ___, and ___); Tr. 472:9–24 and 479: 19–21 (R.____); Young depo 25:13-16 and 35:24-36:6 (R.___ and ___); Byers depo 37:3-9 and 38:14-22 (R.___ and ___).

To save costs and limit the impact on resources, ReWa did the repair and remediation work at its facilities one at a time. Tr. 295:7 to 296:19 (R.___ to ___). The work at the Pelham Plant was done first, then the Lower Reedy Plant, and finally the Mauldin Road Plant. Tr. 280:25 to 281:8 (describing order and method of repair and remediation) (R.___ to ___).

Throughout the time in which the repair work was being done, ReWa provided the IRF adjuster with a spreadsheet on a monthly basis which identified the costs being incurred because of the loss and damage from the PCBs. Pl.'s Exs. 52, 53, 62, 65, 67, 69, 71, 72, 73, 78, and 83 (R.___, ___, ___, ___, ___, ___, ___, ___, ___, ___, and ___); Tr. 479:19–21 (R.___). 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 the policies at issue. Tr. 479:1–21 (R. ___). ReWa also provided any information that was requested by the IRF. *See, e.g.*, Pl.'s Exs. 60 and 73 (R.___ and ___); Tr. 477:24 to 478:1 (R.___ to ___); Young depo. 35:24-36:6 (R.___); Byers depo. 38:14-22 (R.___).

ReWa repeatedly requested a coverage decision during the year after the notice of the damage was reported to the IRF. *See, e.g.*, Pl.'s Exs. 54 and 65 (R.___ and ___); Tr. 481:7–15 (R.___). However, the IRF did not provide any type of coverage letter or determination to ReWa until October 30, 2014, more than a year after the claim was accepted by the IRF, and after ReWa had incurred millions of dollars in repair expenses. Pl.'s Ex. 77 (R.___). In this "Coverage Position Letter," the IRF admits that the dumping of PCBs was vandalism and that vandalism is a "Coverage Cause of Loss" for primary coverage under the Building Policy. Pl.'s Ex. 77 (R.___). The "Coverage Position Letter," however, neither addresses nor denies coverage under the primary coverage of the Building Policy. It only discusses an "additional" coverage in the policy. At no time prior to suit did the IRF deny coverage under the primary insuring provisions of the Building Policy or provide any coverage determination under the Tort Policy.

STANDARD OF REVIEW

This appeal concerns a determination of coverage under an insurance policy, and thus the action is one at law. *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without any evidence which reasonably supports the judge's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976), abrogated on other grounds by *Matter of Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018). The judge's findings are equivalent to a jury's findings in an action at law. *Id.* The findings cannot be disturbed unless a review of the record discloses no evidence which reasonably supports the findings. *Graham v. Whitaker*, 282 S.C. 393, 396, 321 S.E.2d 40, 42 (1984). A trial court's findings of fact will be upheld if there is *any* evidence that reasonably supports them, and, conversely, will not be disturbed unless there is *no* evidence to support them.

Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011) ("In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed if there is any evidence which reasonably supports the judge's findings."); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co*., 395 S.C. 40, 46–47, 717 S.E.2d 589, 592 (2011) (stating findings of fact will not be reversed unless there is "no evidence" to support them); *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (same).

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing a party. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000) (citing *State v. Patterson*, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999)). The trial court has wide discretion in determining the relevancy of evidence, and its decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion. *Moore v. Moore*, 360 S.C. 241, 257-58, 599 S.E.2d 467, 476 (Ct. App. 2004) (citing *Hoeffner v. The Citadel*, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); *Davis v. Traylor*, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000); *Hawkins v. Pathology Assocs. of Greenville, P.A*., 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998)).

The basic principles and rules for interpreting insurance policies require that 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, then it is deemed ambiguous. *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 254, 531 S.E.2d 305, 307 (Ct. App. 2000). If the Court finds that the operative language is ambiguous, then 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. App. 2015) (stating

that "this court must construe ambiguities or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer."). 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.*

ARGUMENTS

I. The trial court properly determined coverage existed for the damage caused by the PCB contamination.

The trial court correctly found that coverage existed under the Building Policy for the damages ReWa sustained as a result of the PCB contamination. The Building Policy states that the IRF "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." Pl.'s Ex. 8 at ¶ A (R.___). Thus, to establish coverage under the Building Policy, the following factors must exist: (1) direct physical loss of or damage to property; (2) the 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. *See* Order (March 18, 2020) (R.___); *see also* IRF's Brief at 13. [3] For the reasons set forth below, the trial court properly determined that ReWa met each of these factors, and that no exclusion impinges on that coverage. *See* Order (March 18, 2020) (R.___).

[3] The second and third factors for coverage were not primarily at issue. For the second factor, the IRF's witness acknowledged "[t]he tanks, the digesters, the pumps, the structures at the wastewater treatment plants are covered property." Tr. 695:16–20 (R.___). The IRF witness also acknowledged that the three facilities at issue are properly identified on the policy declaration page. Tr. 695:21 to 696:11 (R.___ to ___). For the third factor, the parties stipulated that the dumping of PCBs was vandalism, which is a Covered Cause of Loss. *See* Joint Stip. of Facts ¶ 6 (R.___).

A. The trial court's finding that ReWa suffered "direct physical loss or damage" to structures and equipment at three of its facilities is supported by the Record.

The IRF's primary assertion of error with respect to the trial court's determination of coverage under the Building Policy is that the court misinterpreted and misapplied the phrase "direct physical loss or damage." IRF's Brief at 13. The IRF contends that the phrase "direct physical loss or damage" means immediate structural damage to the Covered Property. *Id*. at 14. This definition, however, is not contained in the Building Policy and the IRF cites no case law or testimony to support this interpretation.[4] As set forth below, the trial court relied on relevant case law from South Carolina and other jurisdictions to find that the PCB contamination at ReWa's three facilities caused damage that was both direct and physical in nature. *See* Order (March 18, 2020) (R.___).

Pursuant to the evidence presented at trial, PCBs physically adhere to concrete, and therefore had to be blasted off ReWa's structures and machinery by pressure washers and cleaned with a special chemical solution in order to extract them from the concrete. *See* Pl.'s Ex. 93 (R.___); Tr. 222:7–16, 261:17 to 263:3, 265:5–19, and 373:16–18 (R.___, ___ to ___, ___, and ___). The IRF's own expert admitted that the PCB contamination was physically adhered to the walls after the tanks were emptied. Tr. 600:6–25 (R.___). Multiple witnesses, including IRF witnesses, testified that the impacted structures and equipment were unusable or inoperable when filled with PCB-contaminated materials. *See, e.g.*, Tr. 267:3–14 (structures "unusable" when full

[4] "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* ____ S.C. ____ (Ct. App. Op. 577, October 21, 2020) (*quoting State v. Howard,* 384 S.C. 212, 217, 682 S.E.2d 42,45 (Ct. App. 2009)). Additionally, any attempt by the IRF to provide authority in its Reply brief does not change the abandonment. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

of PCB contaminated materials) (R.___); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R.__); Young depo. 28:10-19 (could not be used in contaminated state) (R.___); Beyers depo. 75:2-5 (R.___). Therefore, through the testimony and evidence presented at trial, ReWa carried its burden of proving that the structures at its three facilities suffered direct physical damage.

The trial court considered analogous case law from jurisdictions across the country in reaching its finding that "direct physical loss of or damage to" property includes the contamination of such property even in absence of structural damage. *See* Order (March 18, 2020) (R.___). For example, the trial court cited *Western Fire Insurance Company v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), which was one of the first cases to address the issue of what constitutes "direct physical loss." In that case, the insured church had to close its building because of the infiltration of gasoline in the soil under and around the building, which caused vapors to infiltrate and contaminate the foundation, halls, and rooms of the church, making it uninhabitable and rendering use of the building dangerous. *Id*. at 54. The central issue in the case involved whether the insured suffered "direct physical loss." The court noted that while loss of use of the church premises, standing alone, did not in and of itself constitute a "direct physical loss," this particular loss of use was the result of the accumulation of gasoline in and around the building. *Id*. at 55. Although there had been no structural damage to the building, the premises became so infiltrated and saturated with gasoline that they were uninhabitable. *Id*. All such harm, the court held, "equates to direct physical loss within the meaning of that phrase" as used in the policy. *Id*.

Here, the trial court correctly found that "ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations." *See* Order (March 18, 2020) (R. __). The IRF incorrectly asserts that this finding is unsupported by the record. *See*,

e.g., Tr. 267:3–14 (structures "unusable" when full of PCB contaminated materials) (R.___); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R.___); Young depo. 28:10-19 (could not be used in contaminated state) (R.___). The trial court correctly relied upon applicable case law in determining that the inoperable structures and equipment, as well as ReWa's inability to use its three facilities for normal operation in their contaminated state constituted damage which was direct and physical. *See* Order (March 18, 2020) at 8 (R.___).

The IRF ignores the testimony and the law in asserting that there was no direct physical damage or loss. PCBs physically adhered to the structures at each of the three facilities and had to be blasted off by pressure washers and cleaned with a special chemical solution. Pl.'s Exs. 27 and 94 (R.___ and ___); Tr. 265:5–19, 373:16–18, and 600:8–20 (R.___, ___, and ___). No witness disputed that the PCB contamination inhibited or prevented the use of the contaminated structures and equipment. The issue to be decided was whether this event constituted "damage" to the property and, if so, was that damage "direct" and "physical." The term "damage" is not defined in the policy. Tr. 679:13–16 (R.___). Thus, the law applies a plain and ordinary definition of the word. *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013).

The dictionary defines "damage" as something that reduces the value, usefulness, or normal function of property. *See* Damage, Dictionary.com (defining "damage" as "injury or harm that reduces value or usefulness"), *available at* https://www.dictionary.com/browse/damage (last visited Nov. 16, 2020); Damage, Oxford English Dictionary (defining "damage" as "Physical harm caused to something in such a way as to impair its value, usefulness, or normal function"), *available at* https://www.lexico.com/en/definition/damage (last visited Nov. 16, 2020), also at

Pl.'s Exs. 86 and 87 (R.___ and ___).[5] The IRF gave no alternative definition at trial.[6] In this situation, the vandalism that introduced PCBs into ReWa's facilities meets the elements of the ordinary meaning of "damage." Further, the usefulness and ordinary function of the impacted structures was also impaired. *See, e.g.*, Tr. 267:3–14 (structures "unusable" when full of PCB contaminated materials) (R.___); Tr. 228:4–16 (impacted portions of facilities "inoperable") (R.___); Young depo. 28:10-19 (could not be used in contaminated state) (R.___). This damage was also direct and physical. The PCBs directly and physically adhered to the surfaces of the structures. Pl.'s Exs. 27 and 94 (R.___ and ___); Tr. 265:5–19, 373:16–18, and Tr. 600:8–20 (R.___, ___, and ___).

The IRF's witness agreed that if a vandal spray paints on the wall of a covered building, it constitutes damage to the building because the paint physically adheres to the wall such that it alters or defaces the building, and therefore would need to be removed. Tr. 697:5–13 (R.___). The PCBs that physically adhered to the walls of ReWa's structures were equally or more damaging than spray paint, and the money spent to remove the PCBs therefore constitutes covered damages.

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[5] The IRF witness was presented with these plain, ordinary dictionary definitions of "damage," but refused to agree that any definition of "damage" was proper. Tr. 683:9 to 687:7 (R.___ to ___); Pl.'s Exs. 86 and 87 (R.___ and ___). The trial court took judicial notice of these pursuant to South Carolina Rule of Evidence 201. Tr. 686:23 to 687:7 (R.___ to ___). During discovery deposition, the adjusters in the claim gave definitions which focused on the usability or operability of the property. Beyers depo. 28:25-29:6 and 34:6-9 (R.___ and ___); Young depo. 27:22-28:4 (R.___).

[6] Even though the IRF would not agree to any definition of "damage" ate trial, during the claims process, its adjuster added modifiers to the term which are not in the Policy. Pl.'s Ex. 85 (adding "permanent" as a modifier of "damage") (R.___); Tr. 688:14–15 (IRF witness admits "permanent" is not part of the policy language) (R.___).

The trial court further relied upon the factually similar case of *Azalea, Ltd. v. American States Insurance Company*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995), in which the plaintiff operated a mobile home park that had its own sewage treatment facility on site. *Id*. at 600. The plaintiff maintained a commercial property and liability insurance policy for the mobile home park, which stated: "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." *Id*. During the policy period, an unknown substance was dumped into the sewage treatment facility servicing the mobile home park. *Id*. at 601. The plaintiff immediately took steps necessary to prevent discharge of the unknown pollutant into the river. *Id*. The court noted that "the chemical residue from the dumped substance adhered to the interior and caused the destruction of a bacteria colony which was part of the sewage treatment process." *Id*. As a result, the plaintiff was required to completely drain the system, steam clean the entire interior of the sewage treatment plant, and remove the chemical residue via hand chiseling. *Id*. The insurer denied coverage on the ground that there was no direct physical loss to the sewage treatment facility. *Id*. The court found that coverage did in fact exist because there was direct damage to the sewage treatment structure, as "the residue from the dumped substance actually covered and adhered to the interior of the structure causing destruction of the bacteria colony which was an integral part of the covered facility." *Id*. at 602.

The record in this case confirms that the PCB contamination adhered to ReWa's structures and machinery at the Pelham, Mauldin Road, and Lower Reedy facilities. *See, e.g.*, Tr. 365:1–9 and 424:13–19 (R.___ and ___). The trial court's finding that ReWa suffered "direct physical loss or damage" is supported by jurisdictions across the country which have interpreted similar policy language to include coverage for contamination of covered property even in the absence of

structural alteration. *See* Order (March 18, 2020) (R.___). Thus, the trial court's determination that the PCB contamination at ReWa's facilities constituted "direct physical loss or damage" was not clearly erroneous.

B. The trial court correctly found that coverage under the Building Policy includes "risks of direct physical loss."

As additional grounds for finding that ReWa's damages were covered under the Building Policy, the trial court found that coverage extended even to "risks of direct physical loss." *See* Order (March 18, 2020) at 8–9 (R.___). The Causes of Loss-Special Form states that "Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS." Pl.'s Ex. 9 (R.___). In interpreting this language, the IRF argues the trial court misapplied the South Carolina Supreme Court's decision in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Insurance Company*, 350 S.C. 268, 565 S.E.2d 306 (2002), so as to impermissibly broaden the scope of the insuring agreement. IRF's Brief at 18–19. The trial court, however, appropriately applied the Court's pertinent holding in *Ocean Winds* to its interpretation of the Building Policy in this case.

In *Ocean Winds*, the South Carolina Supreme Court was asked to answer a certified question to interpret a property insurance policy providing coverage for "risks of direct physical loss" involving a collapse of a building or any part of a building. 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).

Applying such interpretation to this case, the trial court determined that the Building Policy covers not only the 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. *See* Order (March 18, 2020) at 8–9 (R.___). The IRF asserts four argument disputing the trial court's ruling. Each is erroneous, and each is addressed in turn below.

First, the IRF asserts that *Ocean Winds* has no application to this case because *Ocean Winds* involved building collapse coverage in which the policy language was ambiguous. IRF's Brief at 19. The IRF incorrectly states that ReWa never made an argument that the Building Policy is ambiguous. *Id*. However, South Carolina case law is clear that if a provision is susceptible to more than one interpretation, it is deemed ambiguous. *Padgett v. S.C. Ins. Reserve Fund*, 340 S.C. 250, 254, 531 S.E.2d 305, 307 (Ct. App. 2000). Here, ReWa and the IRF have presented two different interpretations of the phrases "direct physical loss or damage" and "risks of direct physical loss." Like the Supreme Court in *Ocean Winds*, the trial court in this case was faced with differing interpretations of the policy language, and therefore was required to construe the phrase "risks of direct physical loss." The analysis in *Ocean Winds*, then, is analogous to this proceeding.

Furthermore, the Building Policy does not include a definition of the word "damage," and the record reflects that the IRF's representatives refused to provide a definition of the term. Tr. 683:9 to 687:7 (R.___ to ___). The trial court properly noted that 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* Order (March 18, 2020) at 7 (citing *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013)) (R.___). The IRF's assertion that the *Ocean Winds* decision has no application to the present case is therefore without merit.

The IRF's second and third arguments are likewise flawed. Specifically, the IRF attempts to distinguish *Ocean Winds* from the instant proceeding by arguing incorrectly that *Ocean Winds* involved the risk of *future* damages, whereas the instant proceeding (according to the IRF) involved only *past* damages. *See* IRF's Brief at 19–20 (arguing that *Ocean Winds* should not be applied here because the PCB contamination had already occurred and ReWa never filed additional coverage claims). The IRF's supposed distinction rests on an incorrect premise regarding the nature and timing of the damages ReWa sought to prevent. In *Ocean Winds*, the Supreme Court interpreted policy language in circumstances in which there was a threat of building collapse. Here, the trial court was asked to interpret the Building Policy under similar circumstances. The nature of ReWa's operations and the continued receipt of wastewater at ReWa's affected facilities posed a threat that *further* contamination (*i.e.*, additional, future contamination) could occur. During ReWa's cleanup efforts, there were ongoing investigations by SCDHEC and the EPA into the source of the vandalism and the number of instances in which PCBs were introduced into the system. Tr. 40:21 to 42:1 (R.___ to ___). In other words, while ReWa's facilities had already experienced damage, ReWa also had to take necessary actions related to the risks of continued and additional PCB contamination. The South Carolina Supreme Court's interpretation of the policy language in *Ocean Winds* is therefore directly applicable in this case.

Lastly, the IRF contends that the Building Policy does not cover an insured party taking measures to prevent a future loss. IRF's Brief at 20. However, the IRF confuses ReWa's mitigation of future damages with the implementation of preventative measures. The record reflects that once ReWa became aware of the PCB contamination, it undertook to lessen the threat of further contamination at its facilities. Tr. 456:18–25 and 457:16–21 (R.___ and ___). Stated differently, ReWa was not acting to prevent PCB contamination—the contamination had already

occurred. ReWa was acting to avoid further damage to its facilities. As the Court in *Ocean Winds* stated, failure to provide coverage in these circumstances would "encourage[] an insured to neglect repairs . . . , which is economically unsound and contrary to the insured's duty to mitigate damages." *Ocean Winds*, 350 S.C. at 271, 565 S.E.2d at 208. The trial court was therefore correct in finding that coverage exists under the Building Policy for ReWa's actions taken to address the risks of PCBs infiltrating deeper into ReWa's system. *See* Order (March 18, 2020) at 8–9 (R. __).

C. The trial court correctly ruled that certain of ReWa's expenses were compensable under the Protection of Property provision.

The IRF argues the trial court erred by ruling that ReWa's expenses incurred in preventing the inflow of further contaminants—efforts ReWa was *required* to undertake by the Policy—were Covered Expenses. *See* IRF's Brief at 20–24. As explained more fully below, however, the IRF's arguments are internally contradictory, reverse the parties' burdens, overlook evidence that supports the trial court's ruling, ignore ReWa's contractual and common law duty to mitigate damages, and rely on cases that are easily distinguishable.

The provision at issue appears in the Building Policy and requires the insured (ReWa) to "Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expense necessary to protect the Covered Property, for consideration in the settlement of the claim." Pl.'s Ex. 8 at 4 (R.___). This provision does not itself provide coverage, and the IRF admits as much. *See* IRF's Brief at 23 (R.___) (arguing at length that the clause cannot itself provide coverage). Nevertheless, the IRF repeatedly complains that ReWa never identified this provision as one of the bases for coverage. *See id*. at 21–22 (R.___). The IRF's argument defeats itself. The fact that ReWa did not list this provision as a basis for coverage is unremarkable *because this provision does not provide coverage*. ReWa's alleged "failure" is irrelevant to the coverage analysis. Further, to the extent the IRF now tries to employ this clause to exclude certain expenses

from coverage, it was the IRF's burden, not ReWa's, to raise and prove its application. *See Jericho State Capital Corp. of Florida v. Chicago Title Ins. Co.*, __ S.C. __, __, 848 S.E.2d 572, __ (Ct. App. 2020) ("In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies.") (citing *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005)).

The IRF's next argument, namely that the trial court could not (or should not) have ruled on this issue because it was a "novel" issue, likewise falls flat. The interpretation and application of a contractual provision's plain meaning is squarely within the province of a court, and such interpretative work is a particularly uncontroversial undertaking when (as here) the plain meaning of that provision is entirely consistent with an insured's common law duty to mitigate damages. *See Ocean Winds*, 350 S.C. at 271, 565 S.E.2d at 308 (noting the "insured's duty to mitigate damages") (citations omitted). Further, the IRF is simply incorrect when it asserts the issue was not raised to the trial court or that the trial court lacked sufficient information to consider this provision. At trial, counsel asked extensive questions about ReWa's efforts to prevent further damage to the covered property—efforts that did, in fact, on multiple occasions intercept additional, incoming PCBs and prevented them from reaching ReWa's facilities and causing further damage—and discussed the fact that ReWa was seeking reimbursement under the Policy for these efforts. *See, e.g.*, Tr. 184:17 to 186:15 (R.___ to ___); *id*. at 189:12 to 190:25 (R.___ to ___); *see also id*. at 721:1–9 (R.___). The trial court had ample basis to conclude those costs were reimbursable under the provision. ReWa properly undertook efforts to reduce the scope of the

damages to the Covered Property. Now, the IRF improperly seeks to punish ReWa for acting prudently and in accordance with the Policy.[7]

The cases cited by the IRF do not demonstrate any error in the trial court's ruling. *See* IRF's Brief at 23–24. Those cases stand merely for the proposition that a Protection of Property Clause (a/k/a "sue and labor" clause) cannot *itself* create coverage where none exists. But that is not what the trial court did here. Rather, the trial court correctly found coverage based on the insuring agreement in the Building Policy, not the Protection of Property Clause. *See* Order (March 18, 2020) at 5–8 (R.___). Once coverage was properly established (and, as already explained herein, it was), the trial court's award of expenses incurred by ReWa to prevent or reduce further damages to the Covered Property because of the Protection of Property Clause regarding expenses was entirely correct. Order (March 18, 2020) at 9 (R.___).

D. The removal and disposal of biosolids at ReWa's three impacted facilities was necessary in order to remediate and repair ReWa's Covered Property.

The IRF's "Covered Property" argument is an attempt to distract from the real issues and improperly distort and mischaracterize the actual finding of the trial court. *See* Section I.G. of IRF's Brief at 25–26. The IRF cites no authority to support this section, so its argument should be deemed abandoned.[8]

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[7] There is no language in the Protection of Property Clause which requires that the actions ReWa takes to protect the Covered Property must occur on the Covered Property. Pl.'s Ex. 8 at 4 (R.___). The only limitation in the language of the Protection of Property Clause is that it "will not increase the Limit of Insurance." Pl.'s Ex. 8 at 4 (R.___). The Limit of Insurance is the amount shown on the declaration page. Pl.'s Ex. 8 at 3 (R.___). There is no assertion that the expenses incurred for the protection of the property cause the claim to exceed the Limit of Insurance. Pl.'s Ex. 2 (for the Pelham Road Plant the limit of insurance was $87,392,145; for the Lower Reedy Plant, it was $43,853,232; and for the Mauldin Road Plant, it was $120,029,885) (R.___).

[8] "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* ____ S.C. ____ (Ct. App. Op. 577, October 21, 2020) (*quoting State v. Howard,* 384 S.C. 212, 217, 682 S.E.2d 42,45 (Ct. App. 2009)). Additionally, any attempt by the IRF to provide authority in its Reply brief does not change the

Even if the "Covered Property" argument is considered, it is without merit. The IRF argues that the trial court committed error in finding that the biosolids or sludge in ReWa's physical structures constitute "Covered Property" under the Building Policy. IRF's Brief at 25. However, this assertion merely knocks down a straw man, for it argues against a "finding" that was never made. Contrary to the IRF's assertion, the trial court did *not* find that the biosolids themselves constitute "Covered Property." *See* Order (March 18, 2020) at 5–6 (R.___). Instead, the trial court found that in order to repair its Covered Property (*i.e.*, the tanks, digesters, machinery, and equipment), ReWa had to remove and properly dispose of the biosolids held in those contaminated structures before it could clean them. *Id.*; *see also* Order (March 18, 2020) at 2–3 ("[T]he 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.") (R.___). In fact, the IRF's own expert testified that the sludge had to be removed from the tanks, structures, and equipment before they could be cleaned and made usable again. Tr. 601:9–12 (R.___). Also, the IRF's witness admitted that "[t]he tanks, the digesters, the pumps, the structures at the wastewater treatment plants are covered property." Tr. 695:16–20 (R.___). The IRF witness further acknowledged that the three facilities at issue are properly identified on the policy declaration page. Tr. 695:21 to 696:11 (R.___ to ___).[9] The trial court properly found that the costs of removal of the biosolid sludge was a part of the repair costs

abandonment. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

[9] There is evidence to support the trial court's finding, and therefore the findings should not be disturbed on appeal. *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011) (a trial court's findings of fact will be upheld if there is *any* evidence that reasonably supports them, and, conversely, will not be disturbed unless there is *no* evidence to support them).

for the structures at the three facilities. Therefore, the award for repairs to the ReWa's three facilities is proper.[10]

E. The trial court did not commit error in finding that the Ordinance or Law Exclusion does not apply.

The IRF conceded that the PCB contamination was caused by acts of vandalism, which is a Covered Cause of Loss under the Building Policy. *See* IRF's Brief at 13; Pl.'s Ex. 9; Joint Stip. of Facts ¶ 6 (R.___ and ___). The IRF now asserts, however, that ReWa's loss is excluded or limited by the Ordinance or Law Exclusion. *See* IRF's Brief at 13. This exclusion provides that 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 (R.__).[11] The IRF argues that in interpreting the Ordinance or Law Exclusion, the trial court failed to consider or address the existence of an anti-concurrent causation clause, which provides that a "loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id*. The IRF argues that because ReWa's remediation efforts were governed by federal and state regulations, coverage is excluded under the Ordinance or Law Exclusion. IRF's Brief at 26–27.

As an initial matter, if the IRF's interpretation of the Ordinance or Law Exclusion were to apply, then in any imaginable circumstance, ReWa would have no coverage under the Building Policy. As a wastewater treatment facility, ReWa's daily operations are subject to SCDHEC, EPA, and other federal and state regulations. *See, e.g.*, Pl.'s Exs. 14 and 15 (R.___ and ___); Tr. 38:15

[10]The remaining issue in this section is redundant of the issues discussed in Section I.F. of the IRF's Brief. *See* IRF's Brief at 20–24. It is fully addressed in Section I.C., *supra*.

[11] The environmental regulations at issue in this matter relate to the operation of a wastewater treatment plant, not "construction, use, or repair" of property.

to 39:13, 70:22 to 71:4, and 111:1 to 113:21 (R.___ to ___, ___ to ___, and ___ to ___). In effect, the exclusion would so engulf the coverage provisions of the policy, that coverage would never exist. This is not (and should not be) the effect of the exclusion, because such an interpretation would be absurd.

The trial court correctly found that the Ordinance or Law Exclusion does not apply because it was vandalism, not the enforcement of an ordinance or law, that created ReWa's resulting loss. *See* Order (March 18, 2020) at 10 (R.___); Joint Stip. of Facts ¶ 6 (R.___). Stated differently, PCB contamination and the resulting damages that ReWa suffered were not, either directly or indirectly, caused by the enforcement of any ordinance or law. The trial court's finding was based, in part, upon a determination that mere compliance with applicable regulations does not trigger the Ordinance or Law Exclusion. Order (March 18, 2020) at 10 (R.___). While the IRF conceded that neither DHEC nor the EPA ever filed an enforcement action against ReWa, the IRF contends that the trial court erred in relying upon *Haas v. Audubon Indemnity Company*, 722 So.2d 1022 (La. App. 1998) as standing for the proposition that mere compliance is not enforcement. As set forth below, the trial court's interpretation and application of *Haas* was proper.

In *Haas*, unknown persons broke into a large vacant building and caused damage to its interior. *Id*. at 1023–24. The intruders removed pipes from the building, which caused flooding. *Id*. After the flood, the floors had to be removed and replaced. *Id*. The flooring contained asbestos, which had previously been contained and was safe prior to the flooding event. *Id*. However, because the flooring was loosened by the water, the floor had to be treated as asbestos-containing materials. *Id*. Haas' policy included an ordinance or law exclusion that contains the same language included in ReWa's Building Policy. *See id*. at 1028. The insurer claimed that the ordinance or law exclusion applied, and therefore it was not liable for the increased costs of abatement of

asbestos in the flooring which was required by EPA regulations concerning asbestos. *Id*. The Louisiana Court of Appeals found that "it was the vandalism that caused damage to the Haas' building, not the enforcement of any ordinance or law." *Id*. at 1029. Therefore, "[t]he costs of asbestos abatement were necessary because of the flooding which arose out of the vandalism to the building." *Id*.

Here, like in *Haas*, the Ordinance or Law Exclusion does not apply because any compliance with an ordinance or regulation merely served as confirmation of the circumstances surrounding the actual cause of loss—vandalism that resulted in the presence of PCBs at ReWa's treatment facilities. In other words, any actions by the EPA and SCDHEC did not cause, either directly or indirectly, ReWa to suffer the damages claimed in this lawsuit.

The trial court also properly relied upon *Throgs Neck Bagels, Inc. v. GA Insurance Company of New York*, 241 A.D.2d 66 (N.Y. App. Div. 1998) in determining whether the exclusion applies. In *Throgs*, the plaintiff owned and operated a bagel store in a leased premises. *Id*. at 67. An accident between an automobile and a gas truck occurred at the intersection where the building was located, resulting in 1,500 gallons of gasoline being spilled into the street and ignited. *Id*. This catastrophe resulted in five deaths and destroyed three stores located nearby. *Id*. While the bagel shop was damaged by smoke and water, it was not consumed in the blaze. *Id*. However, the Department of Buildings immediately issued a Peremptory Vacate Order directing that all persons occupying the building vacate until it was declared safe. *Id*. The plaintiff filed a claim under a business owners' policy which provided for coverage for losses resulting from fire or explosion. *Id*. at 67–68. The policy contained an ordinance or law exclusion with the same language as ReWa's Building Policy. *Id*. The insurer denied coverage based on this exclusion. *Id*. at 68–69. The insurer argued that "it does not matter whether the fire was, in the first instance,

the efficient cause of the losses, since the policy excludes coverage for losses caused, either directly or indirectly, by ordinance or law." *Id*. at 71. The court found, however, that the Vacate Order from the Department of Buildings "served merely as a confirmation of the circumstances regarding the actual cause of loss, *i.e.*, the fact that the premises had been rendered structurally unsound and unfit for continued use as a result of the fire." *Id*. "[W]hen the order was served, the need to vacate the premises and all the immediate and consequential losses stemming from the fire and explosion, both direct and indirect, had already been 'caused.'" *Id*. at 71–72. The court noted that "[t]o hold that the law or ordinance exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy." *Id*. at 72.

Based upon this case law, the trial court properly found that the Ordinance or Law Exclusion does not apply because it was vandalism, not the enforcement of an ordinance or law, that caused the damage to ReWa's three treatment facilities. Contrary to the IRF's assertion, the South Carolina Supreme Court's decision in *South Carolina Farm Bureau Insurance Company v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009) does not change this analysis. In *Durham*, the Court found that where a policy includes an anti-concurrent causation clause, neither the efficient proximate cause rule nor the concurrent clause rule applies. *Id*. at 511–12, 671 S.E.2d at 613. Stated differently, if something is "a cause of the loss," then "the exclusion applies." *Id*. Without directly citing any evidence, the IRF asserts that one cause of ReWa's loss was the enforcement of an ordinance or law. But, as previously stated, the trial court found that vandalism was the only cause here. The fact that ordinances or regulations applied to ReWa's remediation efforts *after* the damage occurred, does not mean that such ordinances and regulations were a direct or indirect

cause of ReWa's losses. Therefore, the trial court correctly determined that the Ordinance or Law Exclusion does not apply.

II. The trial court's assessment of damages is supported by the evidence.

A. The trial court properly awarded ReWa's costs resulting from the "direct physical loss or damage" caused by the PCB contamination.

The IRF argues the trial court erred in awarding certain categories of ReWa's damages. The IRF contends that "direct physical loss or damage" should be interpreted to cover damages that are "immediate, material, tangible, and not consequential or economic in nature." IRF's Brief at 14. Thus, the IRF asserts the trial court erred in awarding certain categories of damages claimed by ReWa, including testing or sampling expenses, consultant fees incurred in responding to the contamination, and costs incurred to continue the operation of the facilities during the cleanup process. *Id*. at 14–15.

In so arguing, the IRF primarily relies on *Campbell v. Northern Insurance Company of New York*, 337 F. Supp. 2d 764 (D.S.C. 2004). *See* IRF's Brief at 14. In *Campbell*, the District Court interpreted a Commercial General Liability Insurance Policy. The incident giving rise to the dispute occurred when the insured's truck was involved in an accident while hauling a crane owned by a third party, which fell from the truck and was damaged. *Campbell*, 337 F. Supp. 2d at 766. The third party made a claim for both the physical damage to the crane as well as the costs of leasing a substitute crane while the repairs were ongoing. *Id*. The insurer paid for the costs of the repairs to the crane, but denied the claim for rental charges. *Id*. The District Court found that the insurer correctly denied coverage for loss of use charges. *Id*. at 769. The General Liability Policy specifically stated that coverage could not exceed (1) the cost to reasonably restore the property to its condition immediately before the loss or damage; or (2) the cost of replacing that property with substantially identical property. *Id*. On the basis that the valuation clause of the

contract made damages such as loss of use impossible, the District Court found that the policy was not intended to include consequential damages such as loss of use. *Id*.

The IRF asserts that pursuant to the loss payment provision contained in the Building Policy, the same reasoning that was applied in *Campbell* should likewise apply in this case. *See* IRF's Brief at 15. However, the loss payment provision in *Campbell* is different than the provision in the Building Policy. The provision in the Building Policy states that the IRF "will either: (1) pay the value of lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property . . . ; (3) take all or any part of the property at an agreed or appraised value; or (4) repair, rebuild or replace the property of like kind and quality . . . ." Pl.'s Ex. 8 (R.__). Therefore, the damages claimed by ReWa for repairing its contaminated property are not made "impossible" by the loss payment provision. *See Campbell*, 337 F. Supp. 2d at 769. Unlike the limitations of the provision in *Campbell*, which the District Court found made the claimed damages "impossible," the costs claimed by ReWa for repairing its contaminated property fall within the scope of the damages contemplated in the loss payment provision of the Building Policy.

Furthermore, in *Campbell*, the court found that "damages for loss of use exceed restoration and/or replacement costs." *Campbell*, 337 F. Supp. 2d at 769. The exact opposite is true in this case. In the case at hand, the damages awarded to ReWa for repairing its contaminated structures and equipment did not exceed the amount of damages contemplated under the Building Policy. *See* Pl.'s Ex. 8 (R.__). The trial court awarded ReWa $5,824,924.49 in total damages. If, however, ReWa had not cleaned the contaminated structures and had left the PCBs in its system, so that the structures and equipment would have eventually needed to be completely replaced, the amount at issue would have been significantly higher. The aggregate amount of coverage under

the Building Policy for ReWa's three affected facilities exceeds $250,000,000.[12] Thus, the costs of replacing the contaminated structures would have far exceeded the amount of damages that ReWa was awarded by the trial court for cleaning and repairing its equipment and machinery. The trial court properly awarded damages which were necessarily incurred in order to clean and repair ReWa's contaminated structures.

While the IRF casts ReWa's claimed damages as "loss of use" expenses, ReWa actually did not present any element of damage which was for loss of use. *See* Pl.'s Exs. 99 and 100 (R.___ and ___). ReWa's claimed damages consist of costs that were necessarily incurred in order to return its three facilities to the operational condition in which they were before the PCB contamination. Tr. 228:4–16 (R.___). The IRF's assertion that the trial court awarded loss of use damages is not accurate. *See* Order (March 18, 2020) at 14 (finding that "such costs and expenses incurred by ReWa were reasonable and necessary to remediate and repair its facilities and prevent further harm") (R.__).

The IRF also relies upon *Auto-Owners Insurance Company v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003) in arguing that economic damages do not constitute "physical injury" to property. A proper reading of this decision, however, actually *supports* the trial court's award of damages to ReWa. In *Auto-Owners*, the South Carolina Supreme Court answered the following certified question regarding a commercial general liability policy: does the policy obligate the insurer to indemnify the insured for the claims of third parties which are solely economic in nature? *Id*. at 162, 588 S.E.2d at 115. In the policy, "property damage" was defined

[12] For the Pelham Road Plant, the Building Policy provided a limit of insurance of $87,392,145. Pl.'s Ex. 2 (R.___). For the Lower Reedy Plant, the Building Policy provided a limit of insurance of $43,853,232. *Id*. For the Mauldin Road Plant, the Building Policy provided a limit of insurance of $120,029,885. *Id*.

as "physical injury to tangible property, including all resulting loss of use of that property." *Id*. at 163, 588 S.E.2d at 115. The Court found that because the third parties alleged *solely* economic damages, and not any physical injury to their property, coverage did not apply. *Id*. at 163–64, 588 S.E.2d at 115–116. (emphasis added).

Here, ReWa's damages are not solely economic damages. Instead, the evidence showed, and the trial court found, that ReWa's three facilities suffered damage that was both direct and physical. The damages awarded by the trial court were costs that ReWa necessarily incurred in order to clean and repair its contaminated equipment and machinery. Thus, the Court's decision in *Auto-Owners* supports the trial court's interpretation of the Building Policy and award of ReWa's damages resulting from the PCB contamination.

The IRF specifically claims that the trial court should have only awarded expenses incurred for emptying and pressure washing the digesters and tanks, as opposed to an award that included all expenses for disposing of all the biosolids at the three facilities. IRF's Brief at 17–18. The IRF cites no evidence or law to support this argument that costs necessarily incurred in remediating damaged property are not covered under the Building Policy. *Id*. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* ____ S.C. ____ (Ct. App. Op. 577, October 21, 2020) (*quoting State v. Howard,* 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)).[13]

It is imperative to note that the trial court's award of damages did not make ReWa whole. While the IRF paints the picture of ReWa receiving a windfall award, that is not the case. As the

[13] Additionally, any attempt by the IRF to provide authority in its Reply brief does not change the abandonment. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

record reflects, ReWa's total costs in responding to the PCB contamination totaled $8,751,949.60. Pl.'s Ex. 99 (R.__). The trial court then subtracted ReWa's regular costs of processing biosolids at its three facilities—$2,516,054.27—from this total amount of costs. Pl.'s Ex. 101 (R.__); Order (March 18, 2020) at 14 (R.___).[14] The trial court declined to award ReWa all of its costs, as well as ReWa's attorneys' fees incurred in engaging environmental and coverage counsel—subtracting an additional $410,970.84. Order (March 18, 2020) at 14 (R.___). Thus, the trial court's final award of $5,824,924.49 did not make ReWa whole.[15]

The IRF's assertion that the trial court improperly awarded consequential damages is incorrect. ReWa's necessary and reasonable costs incurred in remediating and repairing its Covered Property that suffered "direct physical loss or damage" are covered under the Building Policy.

B. The trial court properly applied the burden of proof in assessing ReWa's damages.

The IRF asserts the trial court misapplied the burden of proof by shifting the burden to the IRF to disprove ReWa's claimed expenses. *See* IRF's Brief at 12, 41. The IRF specifically assigns error to the trial court's admittance of Plaintiff's Exhibits 99 and 100 into evidence as summaries under Rule 1006, SCRE. Under Rule 1006,

> [t]he party seeking to admit a summary must demonstrate (1) the contents of the documents upon which the summary is based are so voluminous it would be inconvenient to examine them in court; (2) the underlying documents are admissible in evidence; (3) the summary is a faithful rendering of the underlying data, and any inferences it contains are supported by the contents and are neutral

[14] The IRF asserts that the trial court failed to consider or address the fact that the disposal of biosolids is part of ReWa's normal operation. *See* IRF's Brief at 18. That is simply not true, as the trial court made a specific finding that ReWa's regular costs of processing biosolids should be subtracted from ReWa's total expenses incurred in responding to the PCB contamination.

[15] ReWa's claimed damages were both necessary and reasonable in order to repair its contaminated property. Tr. 228:4–16 (R.___).

> and non-argumentative; and (4) the originals or duplicates of the underlying data have been made reasonably available to the other parties.

State v. Warner, 430 S.C. 76, 95, 842 S.E.2d 361, 370 (Ct. App. 2020). The record in this case reveals that ReWa met each of these requirements in introducing Plaintiff's Exhibits 99 and 100, and therefore the trial court did not abuse its discretion in admitting them into evidence.

Through the testimony of Glen McManus and Patricia Dennis, ReWa established that the costs directly related to the PCB contamination were allocated as such by the department managers and coded with a special tracking code so that the costs could be segregated in ReWa's accounting system. Tr. 300:17 to 302:23 and 498:22 to 499:10 (R.___ to ___ and ___ to ___). The PCB costs were then pulled into a Microsoft Excel spreadsheet to create Plaintiff's Exhibits 99 and 100. Tr. 302:24 to 303:24 and 496:11 to 497:10 (R.___ to ___ and ___ to ___). Each of these entries on the summary exhibits are supported by invoices and checks in ReWa's accounting system, which are tracked during the requisition process. Tr. 498:25 to 499:21, 500:16–22, 501:10–17 (R.___ to ___, ___, and ___). These financial records were kept in the ordinary course of ReWa's business. Tr. 303:25 to 304:2 and 497:11–20 (R.___ to ___ and ___).

Based upon the foregoing testimony, ReWa sustained its burden of proving that the damages set forth in Plaintiff's Exhibits 99 and 100 were those incurred in repairing ReWa's contaminated equipment and machinery. ReWa introduced these summary exhibits for the court's convenience and in order to avoid the cumbersome task of introducing each and every page of documentation backing up these costs. ReWa specified on its exhibit list the voluminous Bates numbered documents (well over 20,000 pages) summarized in Plaintiff's Exhibits 99 and 100. Certainly, this instance is exactly the type of scenario that Rule 1006, SCRE, aims to address.

Once ReWa sustained its burden of proving the damages set forth in Plaintiff's Exhibits 99 and 100, the IRF presented no evidence to discredit or disprove ReWa's damages calculation.

Instead, the IRF merely challenged a few specific charges on ReWa's damages spreadsheet. *See generally* Tr. 392:4 to 448:5 (R.___ to ___). The IRF's assertion that the trial court improperly applied the burden of proof is unfounded. ReWa sustained its burden through the presentation of evidence and the testimony of its witnesses at trial.

C. The trial court correctly interpreted SCDHEC's Emergency Regulation and ReWa's NPDES permits in awarding ReWa's damages.

The IRF asserts throughout its brief that for any digesters or tanks that did not contain biosolids testing above the 50 mg/kg threshold that required remediation under the Federal Toxic Substance Control Act ("TSCA"), there was no "direct physical loss or damage," and therefore ReWa's costs for cleaning that equipment and machinery are not covered under the Building Policy. *See* IRF's Brief at 16–17. Specifically, the IRF contends that the levels of PCB contamination in all but three holding tanks at the Pelham Road facility did not exceed the 50 mg/kg threshold, and that none of the PCB levels at the Mauldin Road and Lower Reedy facilities approached the 50 mg/kg threshold. *Id*. As explained more fully below, however, the trial court's award of damages for ReWa's remediation and repair of its equipment and machinery containing any amount of PCB contamination was proper pursuant to the Emergency Regulation issued by SCDHEC on September 25, 2013, as well as ReWa's National Pollutant Discharge Elimination System ("NPDES") permits. *See* Order (March 18, 2020) at 3–4 (R.___).

As an initial matter, the SCDHEC Emergency Regulation must be interpreted in light of the fact that it was adopted to specifically address the illicit dumping of PCBs at issue in this case. Pl.'s Ex. 29 (R.__). While the TSCA regulates remediation after contamination of PCB levels equal to or greater than 50 parts per million, the Emergency Regulation imposed *stricter* limitations. *Id*. Pursuant to the Emergency Regulation, ReWa was prohibited from land applying sludge with *any* quantifiable amount of PCBs. *Id*. The Emergency Regulation also specified that

ReWa must process the sludge such that the returned wastewater had no quantifiable amount of PCBs. *Id*.

The trial court's award of damages is further confirmed by ReWa's NPDES permits, which do not allow any level of pollutants from being introduced into the pretreatment process. Pl.'s Exs. 14 and 15 (R.___ and ___); Tr. at 111:1–13 (R.___). In other words, ReWa could not pass any contaminated sludge or wastewater through its routine pretreatment process. This necessitated ReWa's disposal of the sludge in a qualified landfill. The NPDES permits required ReWa to "take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment." Pl.'s Ex. 15 at REWA AECOM_007844 (R.__). Notably, the NPDES permits for ReWa's three facilities at issue do not contain allowable amounts of PCBs that ReWa could discharge into streams. Pl.'s Ex. 15 (R.__); Tr. at 117:11 to 118:6 (R.___ to ___). When read in conjunction, the Emergency Regulation and NPDES permits prohibited ReWa from introducing PCBs into its pretreatment process, returning wastewater or effluent with any quantifiable amount of PCBs, or land apply sludge with any quantifiable amount of PCBs.

The IRF asserts that after the Emergency Regulation expired on March 23, 2014, ReWa should have started land applying sludge that contained less than 50 mg/kg. IRF's Brief at 31–32. The IRF cites no authority for its assertion that ReWa was mandated to start land applying once the Emergency Regulation expired. Contrary to this assertion, ReWa's permit does not mandate that solids with less than 50 mg/kg of PCBs be land applied. Pl.'s Ex. 14 (R.__). In an effort to ensure that there were no cumulative effects of land applying PCBs at levels less than 50 mg/kg, ReWa did not resume land application until March or April 2016. *See* Pl.'s Exs. 88 and 90 (R.___ and ___); Tr. 57:17–23, 194:7–11, and 438:3–9 (R.___, ___, and ___). Additionally, the handling

of the material had to be the same whether the PCB levels were above or below 50 mg/kg because ReWa could not knowingly introduce PCBs into the headwaters of the facilities under its permits. Tr. 147:23 to 148:9 (R.___ to ___).

The trial court was correct in determining that ReWa's remediation and repair process was reasonable in light of the Emergency Regulation and ReWa's NPDES permits. The IRF presented no evidence, by testimony or otherwise, that ReWa's processes were excessive or unwarranted. The trial court's findings are supported by the evidence and should not be disturbed. *Moseley v. All Things Possible, Inc*., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011)

D. There was no error regarding the application of the deductible.

The IRF asserts the court did not consider the deductible in its ruling. IRF's Brief at 44 (Section V). This argument is abandoned and should not be considered by the Court because the IRF cites no authority in this section of its brief. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Miller v. Dillon,* ____ S.C. ____ (Ct. App. Op. 577, October 21, 2020) (*quoting State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42,45 (Ct. App. 2009)).[16]

Even if the IRF's deductible argument is not abandoned, the trial court committed no error. Undisputedly, the amount ReWa spent to repair the structures and equipment impacted by the PCBs and return them to operational status exceeded the amount awarded by the trial court. *See* Pl.'s Exs. 99 and 100 (R.___ and ___). The trial court stated that it reasonably considered all of the evidence in reaching the amount of the award. Order (April 6, 2020) (R.___). The IRF has

[16] Additionally, any attempt by the IRF to provide authority in its Reply brief does not change the abandonment. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding that argument that was not fully addressed with authority until the reply brief was not properly presented to the court for consideration).

failed to identify any evidence to support its contention that the trial court did not properly consider this issue in reaching its awarded amount. The fact that the court does not list every element of damages or every amount considered in reaching the award does not render its general award improper. "The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict." *Gold Kist, Inc. v. Citizens & S. Nat'l Bank of South Carolina*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985).

III. The trial court articulated findings of fact and conclusions of law sufficient to support its ruling and to satisfy the requirements of Rule 52(a).

The trial court's Findings of Fact and Conclusions of Law span fourteen pages, three of which articulate the court's factual findings and the remainder of which set out the court's legal conclusions. *See* Order (March 18, 2020) (R.___). The IRF, however, argues these findings and conclusions are inadequate and that this supposed inadequacy warrants reversal of the trial court's judgment. *See* IRF's Brief at 38–41.[17] This argument is without merit. As explained more fully below, the trial court's Order accurately and adequately articulates findings of fact and conclusions of law that explain the court's ruling and support its judgment. The IRF's erroneous argument to the contrary seeks to impose an artificial, heightened requirement that is not found in the Rules or case law.

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[17] The IRF's third outline heading asserts the trial court failed to make "specific findings of fact *and* conclusions of law." IRF's Brief at 38 (heading III) (emphasis added). The IRF's actual arguments, however, focus only on the court's findings of fact and do not identify any conclusions of law the IRF believes are missing or are insufficiently specific. Further, the IRF does not cite any authority discussing the required specificity of a court's conclusions of law. *See id*. at 38–40. Accordingly, the IRF has abandoned its argument that the trial court's conclusions of law lacked sufficient specificity. *See DiMarco v. DiMarco*, 399 S.C. 295, 301, 731 S.E.2d 617, 620 (Ct. App. 2012) (stating an issue is deemed abandoned and will not be considered on appeal if the appellant fails to support it with any authority).

Although the IRF has effectively abandoned its argument regarding the trial court's conclusions of law, ReWa's argument in response will address both the factual findings *and* legal conclusions, though with greater emphasis on the former since that is the sole focus of the IRF's argument.

A trial court's obligation to make findings of fact and conclusions of law after a bench trial stems from Rule 52(a), which requires the court to "find the facts specially" and to state them separately from its conclusions of law. *See* Rule 52(a), SCRCP. In the instant proceeding, the lower court did exactly what Rule 52(a), SCRCP, requires. *See* Order (March 18, 2020) at 1–3 (making express findings of fact) (R. ___); *id*. at 3–14 (R. ___) (making express conclusions of law). The IRF does not assert that any of the court's findings lack evidentiary support, nor has the IRF argued that the court's articulation of its legal conclusions is insufficient. *See* IRF's Brief at 38–41; *see also* n.17, *supra* (explaining the IRF has abandoned any argument about the adequacy of the conclusions of law). Rather, the IRF argues only that the findings of fact are (in the IRF's view) insufficiently detailed. *See* IRF's Brief at 39–40. This argument finds no support in Rule 52 or in South Carolina precedent, neither of which require the trial court's findings of fact to be exhaustive or comprehensively detailed. Rather, South Carolina precedent—including the case on which the IRF relies—reaches the *opposite* conclusion, namely that Rule 52(a) does "*not* require a lower court to set out findings on *all* the myriad factual questions arising in a particular case." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) (citing *Golf City, Inc. v. Wilson Sporting Goods, Co., Inc*., 555 F.2d 426 (5th Cir. 1977)) (emphasis added); *see also id*. at 131, 568 S.E.2d at 342 (noting that as long as the trial court "'states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.'") (quoting *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)); *see also Church v. McGee*, 391 S.C. 334, 346, 705 S.E.2d 481, 487 (Ct. App. 2011) (same).

Further, a review of the cases cited by the IRF reveals a notable contrast between those cases and this one—a contrast that further indicates the sufficiency of the trial court's findings

here. In *Luckabaugh*, for example, the lower court's Order provided no findings of fact whatsoever. *See Luckabaugh*, 351 S.C. at 131, 568 S.E.2d at 342 ("The order did not find *any* facts to support its legal conclusion . . . ."") (emphasis added); *id*. at 134, 568 S.E.2d at 343 ("The order below provides *no* findings of fact to support its ultimate legal conclusion.") (emphasis added). Not surprisingly, then, the *Luckabaugh* court held that nonexistent findings were insufficient to support the lower court's ruling. So too in *Corley*, the lower court's Order was merely "a form order" that, in the absence of findings of fact and conclusions of law, was not adequate or sufficient to explain the trial court's ruling. *In re Care & Treatment of Corley*, 365 S.C. 252, 255, 616 S.E.2d 441, 442–43 (Ct. App. 2005).[18] In contrast, the trial court's Order in the instant action *did* contain findings of fact and conclusions of law explaining and supporting its ruling. *See* Order (March 18, 2020) (R.___). The requirements of Rule 52(a) are, therefore, satisfied here.

Further, even assuming *arguendo* that the trial court's findings of fact and conclusions of law were insufficiently detailed (an assumption that, as explained above, finds no support in Rule 52(a), the case law, or the Record), the proper result on appeal is not reversal, but, rather, an examination of the Record to determine if there is any evidence that supports the trial court's findings, conclusions, and judgment. *See Corley*, 365 S.C. at 257, 616 S.E.2d at 443 ("We do not find, however, that the deficient order requires reversal. . . . [A] review of this record clearly documents a factual basis for concluding that probable cause was lacking."); *Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 776 ("We have therefore reviewed the evidence, not to determine the

[18] This context likewise illumines *Corley*'s statement that at least *some* degree of detail is needed to find probable cause to continue the involuntary commitment of a sexually violent predator, though such detail may not be required in other instances. *See Corley*, 365 S.C. at 255–56, 616 S.E.2d at 443 ("The first question before us, which we answer in the affirmative, is whether the circuit court must make detailed findings in connection with a probable cause determination in an annual review under the Act. . . . There are, to be sure, innumerable instances where the strictures of Rule 52(a) do not apply.").

preponderance thereof but to determine whether there is any evidence which reasonably supports the factual findings of the judge.").

In the instant proceeding, the trial court's findings cite Record evidence, and a review of the Record reveals the evidentiary basis for each of the disputed findings. The IRF argues, for example, that the trial court's Order failed to make specific findings regarding particular components of the remediation and repair work undertaken by ReWa. *See* IRF's Brief at 39 (R.___). The lower court expressly found and concluded, however, that ReWa's repair and remediation efforts were necessary, and the court cited witness testimony and specific exhibits that established the necessity and costs of those efforts. *See* Order (March 18, 2020) at 2–3 (R.___); *see also id*. at 13–14 (R.___).[19] A review of the cited exhibits and the trial testimony reveals the evidentiary basis of the trial court's findings and conclusions, including each of the specific items the IRF disputes on appeal. *See, e.g*., Pl.'s Ex. 99 (R.___); Pl.'s Ex. 100 (R.___); Pl.'s Ex. 101 (R.___); Tr. 300:5 to 303:24 (R.___ to ___);[20] Tr. 277:22 to 279:6 (R.___ to ___);[21] *id*. at 366:2–

[19] These passages also indicate the trial court performed a thorough and detailed analysis of the evidence as demonstrated by the fact that the Order specifically identified certain items of claimed damages the court was excluding from ReWa's recovery due to lack of proof. *Id*. at 14 (R.___).

[20] Testimony explaining that expenses listed on Plaintiff's Exhibits 99 and 100 were costs incurred in responding to the PCB contamination.

[21] Testimony explaining why it was necessary and reasonable to rent a "lake tank" as part of the remediation and repair efforts.

24 (R.___);[22] *id*. at 422:6–20 (R.___);[23] *id*. at 422:24 to 423:9 (R.___ to ___);[24] *id*. at 426:13 to 4:27:12 (R.___ to ___);[25] *id*. at 432:2 to 435:9 (R.___ to ___).[26]

The IRF further argues that the trial court failed to make specific findings of fact regarding the reasonableness of ReWa's supposed delay in beginning remediation efforts at two of its facilities. *See* IRF's Brief at 39–40. Contrary to the IRF's argument, however, the lower court's findings of fact expressly discuss ReWa's remediation plan, noting it was prepared by an expert engineering firm, was approved by government regulators, and involved sequential remediation efforts at the three affected facilities. *See* Order (March 18, 2020) at 2 (R.___). On that basis, the court concluded the plan was reasonable. *See id*. at 3–4 (concluding ReWa's remediation and repair efforts were reasonable). The trial transcript reveals the specific testimony on which those findings, and the resulting conclusion, rest, *see, e.g.*, Tr. 297:15 to 198:1 (R.___ to ___);[27] 447:1–9

[22] Testimony explaining why ReWa removed and reused the water from digester number 1 before removing the biosolids from that digester, and explaining that this decision was "the most economical method" for handling the material.

[23] Testimony explaining why it was necessary to purchase and erect a carport large enough to cover the dump trucks being loaded with PCB-contaminated materials to ensure rainfall did not cause the material being loaded to leak out and cause a spill.

[24] Testimony explaining the need for roofing membranes used to form a spill containment area.

[25] Testimony explaining that the cost difference for the remediation chemicals at each of the three affected facilities was due to the "sheer amount of volume difference" between the facilities.

[26] Testimony explaining that chemical expenses at the Mauldin facility were necessitated by the PCB contamination and were relevant to the remediation effort, which was underway prior to the removal of biosolids from the holding tanks.

[27] Testimony explaining that during the time the Pelham facility was being remediated, ReWa was unable simultaneously to begin remediation at the Lower Reedy and Mauldin Road facilities because things "were still up in the air in terms of what DHEC was going to do" and what disposal options were available.

(R.___),[28] and thus support the ruling, *see Corley*, 365 S.C. at 257, 616 S.E.2d at 443; *Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 776.

Lastly, the IRF argues the trial court failed to make findings of fact as to *why* it accepted an expense calculation found in one exhibit (Plaintiff's Exhibit 101) rather than the calculation found in another exhibit (Defendant's Exhibit 16). *See* IRF's Brief at 40. As an initial matter, this argument is, at minimum, a misdirection, because a trial court need not make a finding of fact to explain how it weighed the evidence or why it found one piece of evidence more persuasive than another. *See generally Church*, 391 S.C. at 346, 705 S.E.2d at 487 ("We do not believe that the circuit court was required to make an explicit finding of fact concerning its assessment of Ted's credibility.") (citation omitted). Rather, Rule 52, SCRCP, requires only that a court state its factual findings and separately state its conclusions of law, and so long as there is "any evidence" to support the findings, they will not be disturbed. *Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 776. Here, the trial court satisfied that obligation by expressly finding ReWa had incurred the expenses shown in Plaintiffs' Exhibit 101. *See* Order (March 18, 2020) at 3 (R.___); *see also id*. at 14 (R.___). The fact that the IRF wishes the trial court had relied on the calculation found in a different exhibit is no basis for reversal, particularly when the Record provides ample evidence to support the trial court's decision to rely on Plaintiff's Exhibit 101 rather than Defendant's Exhibit 16. Both exhibits were discussed extensively, and the individual who prepared both of them testified that "I feel more confident with the numbers in Exhibit 101 than I do in Exhibit 16." Tr. 451:8–9 (R.___); *see also id*. at 321:4 to 323:17 (R.___ to ___); *id*. at 327:1–15 (R.___); *id*. at 448:10 to 452:9 (R.___ to ___).

[28] Testimony explaining why remediation of the Mauldin facility could not have begun sooner.

In sum, the lower court's Order articulates findings and conclusions that are sufficient to explain and support its ruling and to eliminate the need for any speculation regarding the court's analysis. These findings and conclusions cite to and are supported by the evidence, and neither Rule 52(a) nor South Carolina precedent impose an obligation on a trial court to make an express finding of fact regarding *every* line item in an exhibit or *every* statement made by the witnesses. Accordingly, the findings and conclusions satisfy the Rule's requirement and should not be reversed.

IV. The supposed "procedural irregularities" did not deprive the IRF of due process or fundamental fairness.

The IRF argues that several "procedural irregularities" infringed on its right to due process and fundamental fairness, and, on this basis, argues the trial court erred by denying the IRF's motion for new trial. *See* IRF's Brief at 45–47. Specifically, the IRF contends its rights were impeded by (1) the IRF's inability to present closing arguments at the conclusion of trial; (2) the fact that ReWa discussed damages in its proposed order, while the IRF did not; and (3) the absence of a court reporter during a telephone call between the parties' counsel and the trial court judge. *Id*. As explained more fully below, the IRF's arguments are not preserved for appellate review and, even if they were, they are meritless.

A. The supposed denial of closing arguments is not preserved for appellate review and, even if it were, South Carolina's courts have never held there is an absolute right to present closing arguments in a civil suit.

The IRF argues that "[a]t the close of the testimony, the parties addressed with the trial court the opportunity to present closing arguments either orally or by proposed orders," but the IRF "was denied the opportunity to provide closing arguments as required under Rule 43(i), SCRCP." *See* IRF's Brief at 45. The IRF cites no Record evidence in support of the foregoing assertions, and a review of the Record reveals no evidence demonstrating that the IRF asked to

present closing arguments, was denied the ability to do so, and contemporaneously objected to that ruling. Rather, the Record indicates only that at the close of evidence, the court and counsel engaged in an extended colloquy in which the court asked counsel questions and permitted them to summarize their positions on key issues in the case. *See* Tr. 708:16 to 737:11 (R.___ to ___). Notably absent from that discussion, however, was any request for closing argument or any objection to the absence of the same.[29] Because the issue was not raised to and ruled on by the court, it is not preserved for appeal. *See Watson v. Chapman*, 343 S.C. 471, 481, 540 S.E.2d 484, 489 (Ct. App. 2000) (declining to address issue relating to closing argument because "no objection was raised at trial so as to preserve this issue for appeal"); *Hassell v. City of Columbia*, 430 S.C. 620, 637, 846 S.E.2d 373, 382 (Ct. App. 2000) (same); *State v. Hudgins*, 319 S.C. 233, 236, 460 S.E.2d 388, 390 (1995), *rev'd in part on other grounds by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1988) (holding defendant could not appeal a ruling that he had waived his closing argument because the issue was not preserved).

Even if the IRF's argument regarding the alleged deprivation of a closing argument were preserved (and, as noted above, it is not), it is without merit. Neither the South Carolina Constitution nor Rule 43(i), SCRCP, bestow on civil litigants an absolute right to present closing arguments at trial. Although a criminal defendant has a State and federal constitutional right to a

[29] The only Record evidence even mentioning closing arguments are two emails sent on February 27, 2020—nearly a month *after* the trial concluded; *after* the Proposed Orders had been submitted; *after* the trial judge had informed the parties of his ruling; and *after* the trial judge had directed specific changes be made to the Proposed Order to conform it to the precise contours of his ruling. *See* Email from IRF's Counsel to Judge Simmons (Feb. 27, 2020) (R.___); Email from Judge Simmons to IRF's Counsel (Feb. 27, 2020) (R.___). This "objection" was too little, too late. *See In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238–39 (2001) (holding an issue relating to closing arguments is not preserved for review absent a contemporaneous objection); *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating that a contemporaneous objection is necessary to preserve an issue for appeal).

full hearing, including a closing argument,[30] no South Carolina court has ever held a civil litigant has an absolute right to present closing arguments. If anything, the contrary is true. *See Foreman v. Foreman*, 280 S.C. 461, 466, 313 S.E.2d 312, 315 (Ct. App. 1984) (holding the trial judge did not err in declining to permit closing arguments following a bench trial); *see also* 6 Am. Jur. Trials 771 § 5 ("Contrary to common belief, the 'right' to argue a case to the court after the close of the evidence in a civil case is in fact only a privilege. In a majority of the jurisdictions in which courts have decided this issue, it has been held not prejudicial error to deny such privilege to counsel in civil nonjury trials.") (citations omitted).[31] The fact that civil litigants are not guaranteed a closing argument is further demonstrated this Court's precedent holding that a trial court may direct the parties to submit proposed orders in lieu of closing arguments. *See, e.g., Nelson v. Nelson*, 428 S.C. 152, 178, 833 S.E.2d 432, 446 (Ct. App. 2019) (affirming ruling in a suit in which a "proposed final order [was] submitted in lieu of closing arguments).[32] That, of course, is what the trial court did in the instant proceeding, and the IRF has not (and cannot) establish that the trial court erred by so doing.

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[30] *See* S.C. Const Art. I, § 14 (stating a person "*charged with an offense* shall enjoy the right . . . to be fully heard in his defense") (emphasis added); *Herring v. New York*, 422 U.S. 853, 858-59 (1975) (holding the complete denial of a criminal defendant's opportunity for closing argument infringed on his constitutional right to make his defense).

[31] The sole case cited by the IRF—*Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988)—does not establish otherwise. Rather, *Roof* stands merely for the undisputed proposition that a trial court has the discretion to limit the length of closing arguments if it sees fit. But the *Roof* appeal did not raise, much less decide, the question of whether civil litigants have an absolute right to present closing arguments.

[32] This Court has also affirmed a circuit court's rulings in an unpublished opinion noting the circuit court had allowed each party to submit their closing arguments in the form of proposed orders. Because the case is unpublished, ReWa mentions it without citation, *see* Rule 268(d)(2), SCACR, merely to illustrate that the practice of submitting proposed orders in lieu of closing arguments is permissible in a variety of contexts.

B. The IRF's alleged inability to discuss damages in its proposed order is not preserved for appellate review and, even if it were, a trial court may limit the scope of arguments at the close of trial.

The IRF argues that the trial court directed the parties to submit proposed briefs in lieu of closing arguments, but "limited the orders to liability issues only," meaning "the IRF never had the opportunity to argue the damages issue based on the evidence presented at trial and has thus been denied due process." *See* IRF's Brief at 45–46. The Record, however, contains no evidence indicating the trial judge ever instructed the parties that their proposed orders could *only* address liability issues or, conversely, that they could *not* address damages.[33] Rather, the sole Record "evidence" of the trial court's supposed instruction is in an email sent by the IRF's counsel to the trial judge nearly a month after trial and after the parties submitted their proposed orders, in which counsel summarized his understanding of the judge's request. *See* Email from IRF's Counsel to Judge Simmons (Feb. 27, 2020) (R.___) ("When you asked for proposed orders, you instructed the parties to only address liability issues, which is what we did."). In a reply email, however, the judge framed his prior statement differently, noting, "As for briefing damages, I did not *request* that since I believe the record is sufficient for those determinations." Email from Judge Simmons to IRF's Counsel (Feb. 27, 2020) (R.___) (emphasis added).

In the absence of any evidence of an order from the judge prohibiting the parties from addressing damages in their proposed orders, the IRF cannot now complain that the judge erred by supposedly making such an order or giving such an instruction. The issue is unpreserved. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the

[33] Further, ReWa's counsels' recollection of the judge's request for proposed orders differs from the account in the IRF's Brief. The understanding and memory of ReWa's counsel is that the judge requested the parties' proposed orders be limited to 10 pages and "focus on" liability issues, but he did not limit the parties *solely* to that topic nor did he prohibit them from discussing damages.

Record on Appeal."); *Bauckman v. McLeod*, 429 S.C. 229, 251 n.13, 838 S.E.2d 208, 219 n.13 (Ct. App. 2019) (holding that where the lower court's order ruling on the disputed issue was not included in the Record, the disputed issue was not preserved for appellate review).

Further, even assuming the issue were preserved for appellate review, and even assuming the trial court did, in fact, prohibit the parties from addressing damages in their proposed orders that were submitted in lieu of closing arguments, such a limitation is not erroneous or reversible. A trial court may, in its discretion, limit the scope of closing arguments and the topics to be addressed therein, and the trial court's exercise of this broad discretion will ordinarily be upheld. *See State v. Reddick*, 348 S.C. 631, 641, 560 S.E.2d 441, 445 (Ct. App. 2002) ("The trial judge is vested with broad discretion in dealing with the range and propriety of closing argument. [] An appellate court will not disturb the trial court's ruling regarding closing argument where there is no abuse of discretion.") (citations omitted); *State v. Condrey*, 349 S.C. 184, 195–96, 562 S.E.2d 320, 325–26 (Ct. App. 2002) (holding the trial judge "properly limited the scope" of closing arguments, and noting that a "trial judge is allowed broad discretion in dealing with the range and propriety of closing argument to the jury," and "[o]rdinarily, the judge's rulings on such matters will not be disturbed.") (citations omitted); *McGee v. Bruce Hosp. Sys*., 344 S.C. 466, 469, 545 S.E.2d 286, 287 (2001) (noting "the trial court bifurcated the closing arguments for liability and damages"); *Wall v. Keels*, 331 S.C. 310, 321, 501 S.E.2d 754, 759 (Ct. App. 1998) (noting that the "conduct of closing arguments are matters left to the sound discretion of the trial court") (citations omitted).

A judge's discretion to limit the parties' closing arguments (or, in this case, proposed orders) is at its apex in the context of a bench trial, where the judge is presumed to know the law, presumed to disregard inadmissible evidence, and is given broad discretion and presumed to be

competent to evaluate, weigh, and assess the evidence and testimony. *See generally Madren v. Bradford*, 378 S.C. 187, 191, 661 S.E.2d 390, 393 (Ct. App. 2008) (citations omitted); *see also State v. Inman*, 395 S.C. 539, 570, 720 S.E.2d 31, 48 (2011) (Pleicones, J., concurring) ("A judge is presumed to weigh evidence properly.") (citation omitted); *Orders Distrib. Co., Inc. v. Newsome Carpets & Wallcovering*, 308 S.C. 429, 431, 418 S.E.2d 550, 551 (1992) (affirming trial court's judgment in a case in which the jury determined liability but the trial judge assessed and awarded damages himself). So too, here, the trial court judge was capable of assessing and weighing the evidence and testimony relating to damages without requiring post-trial briefing or arguments on that topic from counsel.

In sum, the IRF's argument that it was denied due process and fundamental fairness by being "denied" the ability to discuss damages in its proposed order is not preserved for review and, even if it were, the trial court did not err by declining to request post-trial submissions on a topic that had already been the subject of extensive testimony and discussion by the lawyers during the trial.

C. The absence of a court reporter from a post-trial telephone call between the parties' counsel and the court is not an issue preserved for appellate review and, in any event, the IRF has not identified any resulting harm or prejudice.

The IRF argues the trial court erred by conducting a post-trial telephone call with counsel without a court reporter. *See* IRF's Brief at 46–47. The argument fails for at least two independent reasons.[34]

[34] As an initial matter, it appears this issue is unpreserved for review since the IRF expressly told the trial court it "was not objecting" to the call. Specifically, prior to the call at issue, the IRF's counsel emailed Judge Simmons to request the presence of a court reporter. *See* Email from IRF's Counsel to Judge Simmons (Feb. 27, 2020 at 8:45 a.m.) (R.___). Judge Simmons responded, stating there would be no reporter present, but that he was willing to cancel the call if there was an objection to proceeding as he had planned. *See* Email from Judge Simmons to Counsel (Feb. 27, 2020 at 8:58 a.m.) (R.___). The IRF's counsel replied, stating, "*I was not objecting* to the conference call or asking that the call be cancelled," and noting that "we welcome the opportunity to discuss any issues with the Court." *See* Email from IRF's Counsel to Judge Simmons (Feb. 27,

First, the IRF has not asserted any harm, injury, or prejudice caused by the absence of a court reporter. Rather, the IRF's argument is purely a technical and hypothetical assertion that *if* the judge had made a ruling during that call and *if* the IRF wanted to appeal it, then the lack of a transcript could hinder the IRF's ability to appeal. But the IRF has not actually alleged that the judge made any erroneous ruling during the call or did anything during the call that the IRF wishes to appeal. Accordingly, even assuming the absence of a court reporter was an error (an assumption that, as explained in the following paragraph, has no support in the law), it was a harmless error that made no difference and thus provides no basis for a reversal. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."); *JKT, Co. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("An error not shown to be prejudicial does not constitute grounds for reversal.") (citations omitted); 5A C.J.S. Appeal & Error § 1676, at 678 (1958) ("[H]armless error, that is, error as such, unaccompanied by prejudice or injury, is not ground for reversal.").

Second, the IRF's argument regarding the absence of a court reporter fails because the IRF has not cited any authority (because there is none) that prohibits a court from communicating with lawyers off the record.[35] Rather, the contrary is true. A judge undoubtedly may confer with counsel off-the-record in bench conferences, chambers discussions, telephone calls, and emails. *See, e.g.*, *State v. Washington*, __ S.C.__, __ n.4, __ S.E.2d __, __ n.4, 2020 WL 5225096, at *5 n.4 (Sept. 2, 2020). During such conversations, counsel may make arguments and the court may rule on

2020 at 9:17 a.m.) (R.___) (emphasis added). The IRF voluntarily chose to proceed without a court reporter, and cannot now fault the trial court for that decision.

[35] Further, the IRF's failure to cite any authority in support of this argument means it has abandoned this issue. *See DiMarco v. DiMarco*, 399 S.C. 295, 301, 731 S.E.2d 617, 620 (Ct. App. 2012) (stating an issue is deemed abandoned and will not be considered on appeal if the appellant fails to support it with any authority).

issues. If counsel wishes to preserve a record of any such arguments and rulings, it is counsel's obligation subsequently to memorialize them on the record. *See id*. (noting the permissibility of off-the-record conversations, but reminding counsel to "place[] on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers"). Accordingly, Judge Simmons did not err by conferring with counsel on an un-transcribed telephone call. If the IRF wished to create a record of any arguments it made and any comments made by the court, it could have done so. But it cannot complain that communications with the court in the absence of a court reporter are *per se* impermissible or erroneous.

CONCLUSION

The trial court reached the correct and just result in awarding a judgment to ReWa. The trial court further properly determined coverage existed under the policy for expenditures to repair the direct physical damage to the ReWa structures caused by the third-party vandalism and PCBs and to restore the structures to the operational condition in which they were prior to the vandalism. The trial court's assessment of the damages awarded is supported by the evidence at trial, and the Findings of Fact and Conclusions of Law thoroughly stated the basis for the decision. Finally, the trial court appropriately conducted the trial of this case and no prejudice resulted from the conduct of the trial. Therefore, the judgment in this matter should be affirmed.

[*SIGNATURE PAGE ATTACHED*]

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