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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2020-000669
Case No. 2016-CP-23-5905

Renewable Water Resources,.. Respondent,

v.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ... iii

Statement of Issues on Appeal ... 1

Statement of the Case ... 3

Statement of Facts ... 5

Standard of Review ... 10

Arguments ... 11

I. The trial court erred in finding coverage and making an award for a covered loss under the Building and Personal Property Policy issued by the Insurance Reserve Fund ... 11

A. South Carolina Rules of Construction of Insurance Policies ... 11

B. Burden of Proof ... 12

C. Insuring Agreement ... 13

D. Direct Physical Loss or Damage ... 13

E. Reliance on *Ocean Winds* Opinion was Misplaced ... 19

F. Protection of Property Clause ... 20

G. Covered Property ... 25

H. Ordinance or Law Exclusion ... 26

II. The trial court committed errors of law in its interpretation and application of DHEC regulations governing land application of biosolids and the National Pollutant Discharge Elimination System (NPDES) permits issued to ReWa under the Clean Water Act, and those errors resulted in the trial court awarding substantial damages for the costs of remediation at two facilities and the costs of processing and disposal of biosolids in landfills, all of which were not legally required or necessary ... 30

A. DHEC Regulations ... 31

B. National Pollutant Discharge Elimination System Permits 36

III. The trial court erred in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP, and that failed to address many key factual issues raised by the evidence and the parties 38

IV. The trial court erred in admitting into evidence summary exhibits which do not meet the requirements under Rule 1001, SCRE, and in relying on the information in those exhibits to find that every cost item in the 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa's facilities. In so doing, the trial court improperly shifted the burden of proof to the insurer to disprove the claimed loss rather than correctly require the insured to prove its covered loss 41

V. The trial court failed to give any consideration to the undisputed fact that the Policy includes a $3,000 deductible per occurrence 44

VI. The trial court erred in denying the IRF's motion for new trial absolute in light of the procedural irregularities and absence of fundamental fairness in violation of due process 45

Conclusion 48

TABLE OF AUTHORITIES

Cases

Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.,
356 S.C. 156, 588 S.E.2d 112 (2003) 14

Biays v. Chesapeake Ins. Co.,
11 U.S. (7 Cranch) 425 (1813) 23

Braswell v. Faircloth,
300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989) 15

Campbell v. Northern Ins. Co. of New York,
337 F.Supp.2d 764 (D.S.C. 2004) 11, 14, 15, 16

Chapman v. Ourisman Chevrolet Co.,
2011 WL 2651867 (D. Md. 2011) (2002) 40

Diamond States Ins. Co. v. Homestead Industries Inc.,
318 S.C. 231, 456 S.E.2d 912 (1995) 11

Ecclesiastes Prod. Ministries v. Outparcel Assn., LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) 15

Ex Parte Builders Mut. Ins. Co.,
431 S.C. 483, 847 S.E.2d 87 (2020) 12

First Data Merchant Services Corp. v. Securitymetrics, Inc.,
2014 WL 687158 (D. Md. 2014) 40

Gamble v. Travelers Ins. Co.,
251 S.C. 98, 160 S.E.2d 523 (1968) 12

Georgetown Manufacturing & Warehouse Co. v. South Carolina Department of Agriculture,
301 S.C. 514, 392 S.E.2d 801 (Ct. App. 1990) 37

Haas v. Audubon Indemnity Co.,
722 So. 2d 1022 (La. App. 1998) 27, 28

Hutchinson v. Liberty Life Ins. Co.,
404 S.C. 20, 743 S.E.2d 827 (2013) 11

In the Matter of the Care and Treatment of Corley,
365 S.C. 252, 616 S.E.2d 441 (Ct. App. 2005).. 38

In the Matter of the Treatment and Care of Luckabaugh,
351 S.C. 122, 568 S.E.2d 338 (2002) 38

John S. Clark Co., Inc. v. United National Ins. Co.,
304 F.Supp.2d 758 (M.D.N.C. 2004) 23

Murphy v. Owens Corning,
393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011)... 10

Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.,
350 S.C. 268, 565 S.E.2d 306 (2002) 19, 20

Piney Run Preservation Association v. County Commissioners of Carroll County,
268 F.3d 255 (4th Cir. 2001) 37

Roof v. Kimbrough,
297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988).. 46

Southern California Edison Co. v. Harbor Ins. Co.,
83 Cal.App.3d 747, 148 Cal. Rptr. 106 (1978)... 24

South Carolina Farm Bureau Ins. Co. v. Durham,
380 S.C. 506, 671 S.E.2d 610 (2009) 26, 29, 30

Southern Glass & Plastics Co., Inc. v. Kemper,
399 S.C. 483, 732 S.E.2d 205 (Ct. App. 2012).. 11

State v. Warner,
430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020)... 42

Sunex International, Inc. v. Travelers Indem. Co.,
185 F.Supp.2d 614 (D.S.C. 2001).. 12

Swire Pacific Holdings, Inc. v. Zurich Ins. Co.,
139 F.Supp. 2d 1374 (S.D. Fla. 2001) 23

Townes Associates, Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 10, 38

Wyoming Sawmills, Inc. v. Transportation Ins. Co.,
282 Or. 401, 578 P.2d 1253 (1978) 14

Rules and Statutes

Rule 30(b)(6), SCRCP 22, 40

Rule 43(i), SCRCP........ 45, 46

Rule 52(a), SCRCP 2, 38

Rule 52(b), SCRCP........ 18, 26, 28, 36, 39, 45

Rule 1001, SCRE........ 2, 41, 43

Rule 1006, SCRE........ 41, 42, 43

S.C. Code Ann. § 1-23-130........ 8

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding coverage and making an award for a covered loss under the Building and Personal Property Policy issued by the Insurance Reserve Fund?

A. Did the trial court err in its interpretation and application of the language "direct physical loss or damage" and specifically in disregarding existing South Carolina authority applying that language?

B. Did the trial court err in awarding consequential and economic loss damages to ReWa as "direct physical loss or damage"?

C. Did the trial court err in disregarding the "loss payment" provision in the Building and Personal Property Policy?

D. Did the trial court misapply and misread the Supreme Court's decision in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Company* so as to impermissibly broaden the scope of the insuring agreement to cover preventative measures to protect from future claims?

E. Did the trial court err in applying the so-called "protection of property" provision which was never pled and on which no discovery was done?

F. Did the trial court err in its application of the so-called "protection of property" provision and in failing to make findings of fact supporting the recovery of any expenses under that provision?

G. Did the trial court err in requiring the Insurance Reserve Fund to pay the expenses associated with the dewatering and disposal of biosolids as "covered property," including biosolids that did not exceed the 50 mg/kg threshold under Toxic Substance Control Act?

H. Did the trial court err in awarding expenses for the remediation of certain collection lines located outside the premises of the three facilities at issue where those collection lines did not qualify as "covered property"?

I. Did the trial court err in finding the "Ordinance or Law Exclusion" did not apply and also in failing to consider or apply the anti-concurrent causation clause in its analysis?

II. Did the trial court commit errors of law in its interpretation and application of DHEC regulations governing land application of biosolids and the National Pollutant Discharge Elimination System (NPDES) permits issued to ReWa under the Clean Water Act, with those errors resulting in the trial court awarding substantial damages for the costs of

remediation at two facilities and the costs of processing and disposal of biosolids in landfills, all of which were not legally required or necessary?

III. Did the trial court err in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP, and in failing to address many key factual issues raised by the evidence and the parties?

IV. Did the trial court err in admitting into evidence summary exhibits which do not meet the requirements under Rule 1001, SCRE, and in relying on the information in those exhibits to find that every cost item in the 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa's facilities?

V. Did the trial court improperly shift the burden of proof to the insurer to disprove the claimed loss rather than correctly require the insured to prove its covered loss?

VI. Did the trial court err in failing to give any consideration to the undisputed fact that the Building and Personal Property Policy includes a $3,000 deductible per occurrence?

VII. Did the trial court err in denying the Insurance Reserve Fund's motion for new trial absolute in light of the procedural irregularities and absence of fundamental fairness in violation of due process?

STATEMENT OF THE CASE

This is an action brought by the Respondent Renewable Water Resources ("ReWa"), which is a special purpose district and hence a governmental entity, against the Defendant South Carolina Insurance Reserve Fund ("IRF"), which is a division of the State Fiscal Accountability Authority. (R. 951). The IRF issued a Building and Personal Property Insurance Policy to the named insured, Renewable Water Resources, bearing Policy Number F130230114, with the effective dates of April 2, 2013 through April 2, 2014. (R. 951). According to its Amended Complaint, ReWa has made a property and casualty claim for losses allegedly suffered at three of its wastewater treatment plants arising from the dumping of PCBs into ReWa' system by a third-party (Timothy Howard). The IRF also issued a Tort Liability Insurance Policy to ReWa. (R. 952). Just prior to the commencement of this litigation, ReWa also made a claim under that policy.

In its Amended Complaint, ReWa alleged causes of action for declaratory relief and breach of contract with respect to both policies. In addition, ReWa alleged that the IRF's handling of this claim was conducted in bad faith and sought unspecified consequential damages. (R. 55-72).

The parties consented to refer the case to the Greenville County Master-in-Equity. (R. 1-2). The case came to trial before Judge Charles B. Simmons, Jr. on January 28, 2020. Following three days of testimony, the trial court took the matter under advisement.

Thereafter, on March 18, 2020, the trial court issued an order entering judgment in favor of ReWa in the amount of $5,824,924.49 under the Building and Personal Property Insurance Policy only. (R. 16). In addition, the trial ruled in favor of the IRF on the claims seeking

coverage under the Tort Liability Insurance Policy. (R. 12-14). The trial court also ruled in favor of the IRF on the bad faith claim. (R. 14).

The IRF filed post-trial motions, including a Motion for Judgment as a Matter of Law and/or Involuntary Nonsuit, a Motion to Alter or Amend Judgment and/or Motion for Reconsideration, and a Motion for New Trial. (R. 147-177). By order filed April 6, 2020, the trial court summarily denied that motion including the requests that the court amend the order to set forth the findings of fact and conclusions of law with sufficient specificity and detail to allow for proper appellate review. (R. 19-21).

Thereafter, the IRF filed a timely notice of appeal.

STATEMENT OF FACTS

The IRF issued a Building and Personal Property Insurance Policy ("Policy") to ReWa, bearing Policy Number F130230114, with the effective dates of April 2, 2013 through April 2, 2014. (R. 991-997).

On some date during or prior to January 2013, Timothy Howard illegally introduced polychlorinated biphenyls ("PCBs") into the wastewater treatment system operated by ReWa. (R. 952). As conceded by the IRF, Timothy Howard's actions qualify as an act of "vandalism" as used in the Building and Personal Property Insurance Policy. (R. 952). The definition of "specified causes of loss" under the Building and Personal Property Insurance Policy includes "vandalism." (R. 952). Timothy Howard is not an "insured" under any policy of insurance issued by the IRF. (R. 952).

In January 2013, ReWa conducted routine sampling of the wastewater sludge (also referred to as "biosolids") at its Pelham facility. (R. 952). The sampling results reflected PCBs in the sludge in the only digester in operation at Pelham. (R. 575). Confirmation sampling was performed, and additional testing further found PCBs in ReWa's Mauldin Road facility and in the Lower Reedy facility. (R. 952). Prior to the PCB contamination, ReWa principally disposed of sludge generated by its wastewater treatment plants through land application. (R. 953). After the PCBs were discovered, the land application program was suspended by the ReWa Board.

On July 26, 2013, ReWa provided formal notice to representatives of the South Carolina Department of Health and Environmental Control ("DHEC") and the United States Environmental Protection Agency ("EPA") regarding the PCB contamination. (R. 953). Thereafter, on or about July 29, 2013, ReWa contacted AECOM and thereafter hired them to assist with the PCB contamination, including preparing a "Sludge Removal and Disposal Plan" for the Pelham facility.

The "Sludge Removal and Disposal Plan" prepared by AECOM for ReWa was submitted to DHEC on October 17, 2013. With certain conditions, the plan was approved by letter from DHEC dated October 22, 2013. (R. 953).

ReWa submitted a "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" to DHEC on April 15, 2014. (R. 1143). That document was prepared by ReWa personnel and not by AECOM. (R. 954). ReWa received no specific response from DHEC. There was no formal approval received for that plan. (R. 552-553). The Plan as submitted included the following:

> The Lower Reedy and Mauldin Road WRRFs have a combined total of approximately 11.3 million gallons of thickened digested solids in storage with low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Maudlin Road and from 1.3 ppm to 4.2 ppm at Lower Reedy). Of this total volume, Lower Reedy has approximately 9.5 million gallons in storage. ReWa does not currently intend to land apply this material, even though current regulations would allow land application. (R. 1143).

Despite acknowledging that current DHEC and EPA regulations in April 2014 allowed for the land application of the contaminated biosolids at the Mauldin Road and Lower Reedy facilities, ReWa did not land apply those biosolids. (R. 652-659). ReWa did not re-commence land application of the biosolids at Lower Reedy until December 2014, and at Mauldin until May 2015. (R. 647-648). Up through those dates, ReWa was processing both the contaminated biosolids at those facilities as well as ongoing flows and has claimed the increased costs for that processing in its claim made to the IRF. (R. 531-532). ReWa personnel never consulted with the IRF about its decision not to land apply the contaminated biosolids or the ongoing flows at those facilities. (R. 653-655, 872-875).

ReWa did not re-commence land application of the biosolids at Pelham until March 2016. (R. 648). Up through those dates, ReWa was processing both the contaminated biosolids at those

facilities as well as ongoing flows and has claimed the increased costs for that processing in its claim made to the IRF. ReWa personnel never consulted with the IRF about its decision not to land apply the ongoing flows after the clean-up of the contaminated PCBs at Pelham was completed. (R. 654-655, 872-875).

The remediation undertaken by ReWa was limited to three facilities -- Pelham, Mauldin Road, and Lower Reedy. The remediation at the Pelham facility began on November 14, 2013 and was completed on February 19, 2014. (R. 557-558). The remediation at Lower Reedy occurred next and was begun in approximately July 2014 and was completed in mid-November 2014. (R. 560). The remediation at Mauldin Road was started in approximately December 2014 and was completed in June 2015. (R. 560). By June 2015, the PCB remediation at the three facilities was complete. (R. 560).

At Pelham, the structures that contained biosolids that tested positive for PCBs were Digester 1, Biosolid Holding Tanks 3, 4, 5, and 6, Biosolids Overflow Tanks 1 and 2, two wet wells and the influent pump station. All of those structures were constructed of concrete. (R. 578). None of those structures required demolition and replacement. (R. 579). There was no equipment in those structures that required removal and replacement. (R. 579). The structures were cleaned by pressure washing. (R. 579).

At Lower Reedy, the structures that contained biosolids that tested positive for PCBs were Holding Tanks 4 and 5. The test results for Digester 1 was non-detect for PCBs. (R. 582). Holding Tanks 4 and 5 were constructed of concrete. (R. 584). None of those structures required demolition and replacement. (R. 584). There was no equipment in those structures that required removal and replacement. (R. 584). The structures were cleaned by pressure washing. (R. 584).

At Mauldin Road, the structures that contained biosolids that tested positive for PCBs were Digesters 2 and 3, Biosolid Holding Tanks 3, 4, 5, 6, 7, and 8, Biosolid Tanks 1 and 2 (old digesters). (R. 597-598). All of those structures were constructed of concrete. (R. 599). None of those structures required demolition and replacement. (R. 599). There was no equipment in those structures that required removal and replacement. The structures were cleaned by pressure washing. (R. 600).

ReWa was required by Federal law including EPA regulations to decontaminate its facilities which contained PCBs at a level greater than 50 mg/kg concentration and to dispose of Toxic Substance Control Act (TSCA) level material at an approved facility. (R. 441-442, 447). In addition, DHEC required that wastewater have a PCB concentration of less than 0.5 micrograms/liter. (R. 805).

On September 25, 2013, DHEC filed an Emergency Regulation in accordance with S.C. Code Ann. § 1-23-130 which is entitled "Emergency Regulation for Management of Wastewater System Sludge, including Land Application of Sludge, Impacted by Illicit Discharges of Polychlorinated Biphenyls (PCB)." (R. 1109-1112). The Emergency Regulation was effective on September 25, 2013, for a period of ninety days. On December 23, 2013, DHEC re-filed the same verbatim Emergency Regulation. (R. 954). The re-filed Emergency Regulation was effective on December 23, 2013, for a period of ninety days. The re-filed Emergency Regulation expired on March 23, 2014.

On June 27, 2014, DHEC promulgated pursuant to the Administrative Procedures Act amendments to Sections 503 (domestic sludge) and 504 (industrial sludge) of DHEC Regulation 61-9 entitled "Water Pollution Control Permits." (R. 1146-1151). The amendments were published in the South Carolina State Register on June 27, 2014 and were effective on that date.

Those amendments did not prohibit the land application of PCBs at a level less than 50 mg/kg concentration. (R. 1149).

After the expiration of the Emergency Regulation on March 23, 2014, ReWa was not prohibited by state or federal law from disposing of biosolids containing PCBs at a level less than 50 mg/kg concentration by land application. (R. 653-656). While the Emergency Regulation was in place, ReWa was required to dispose of biosolids containing PCBs at a level less than 50 mg/kg concentration in a local landfill.

STANDARD OF REVIEW

The standard of review for an action at law on appeal of a case tried without a jury requires the appellate court to not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

ARGUMENTS

I. The trial court erred in finding coverage and making an award for a covered loss under the Building and Personal Property Policy issued by the Insurance Reserve Fund.

A. South Carolina Rules of Construction of Insurance Policies

The purpose of all rules of construction is to ascertain the intention of the parties to the contract." *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012). "The construction and enforcement of an unambiguous contract is a question of law for the court." *Id*. Likewise, "[w]hether language is ambiguous is a question of law for the Court." *Hutchinson v. Liberty Life Ins. Co*., 404 S.C. 20, 743 S.E.2d 827, 829 (2013).

"Insurance policies are subject to general rules of contract construction. This Court must give policy language its plain, ordinary, and popular meaning. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Diamond States Ins. Co. v. Homestead Industries Inc.*, 318 S.C. 231, 456 S.E.2d 912, 915 (1995).

"The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764, 769 (D.S.C. 2004).

B. **Burden of Proof**

The trial court erred in its analysis and application of the burden of proof. The trial court only states that "the insurer bears the burden of establishing that any exclusions apply." (R. 7). The trial court never addressed which party has the burden of proof with respect to the various components of the insuring agreement. In *Ex Parte Builders Mut. Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020), the Supreme Court explained that "the Insureds and the Insurers have the collective burden to show which portions of the general verdict are covered under the CGL policies." 847 S.E.2d at 92. The Supreme Court cited to *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523 (1968) as "explaining the initial burden to prove that a loss is covered under an insurance policy is on the insured, and once the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage." *Id*. In short, the burden of proving that the loss falls within the insuring agreement is on the insured as well the burden of proving the amount of the loss. *See also*, *Sunex International, Inc. v. Travelers Indem. Co.*, 185 F.Supp.2d 614, 617 (D.S.C. 2001) (citing *Gamble* and holding "[t]he burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract").

In addition to failing to address the applicable burden of proof, the trial court misapplied the burden by improperly shifting the burden of proof to the IRF to disprove ReWa's claimed expenses. As discussed more in length below, this is evident because the only expenses claimed by ReWa that the trial court ultimately declined to award are those that the IRF specifically raised at trial. The trial court never otherwise held ReWa to its burden of proving the expenses that were awarded. The only burden of proof on the IRF was to show the applicability of the "Ordinance or Law Exclusion." In contrast, the burden fell to ReWa to show that its loss is covered by the Policy and the amount of any covered loss. As to be discussed, the burden of

proof was misapplied by the trial court thereby warranting reversal of the judgment.

C. Insuring Agreement

The insuring agreement for the Building and Personal Property Coverage Form states as follows: "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." (R. 991). Thus, the Building and Personal Property Coverage Form is read in conjunction with the form entitled "Causes of Loss – Special Form." In the "Special Form" the "Covered Causes of Loss" are "risks of direct physical loss" which are not limited to the "specified causes of loss" which is a defined term. (R. 998). Instead, if the loss is caused by or resulting from "risks of direct physical loss," then there is a covered loss unless otherwise excluded or limited. (R. 998). In this case, one of the causes of loss is vandalism, as conceded by the IRF, which is a covered cause of loss. (R. 952).

The insuring agreement may be broken into components. The insured has the burden of showing: (1) "direct physical loss of or damage," (2) to "Covered Property"; (3) the loss occurred at the premises; and (4) the loss was caused by or resulted from a Covered Cause of Loss. In addition, the form entitled "Causes of Loss – Special Form" includes limitations and exclusions.

D. Direct Physical Loss or Damage

In considering the various components of the insuring agreement, the trial court erred in its interpretation and application of the language "direct physical loss or damage." The court disregarded on point South Carolina case law and interpreted "direct physical loss or damage" to

erroneously allow for consequential and non-physical losses or damages, including strictly economic losses and loss of use. The trial court made no attempt to even distinguish the South Carolina authorities cited by the IRF.

Based on prevailing South Carolina law, "direct physical loss or damage" means a loss or damage that is immediate, material, tangible, and not consequential or economic in nature. In *Campbell v. Northern Ins. Co. of New York*, 337 F.Supp.2d 764 (D.S.C. 2004), the federal district court, applying South Carolina law, addressed "direct physical loss or damage" and explained that "[t]he use of the term 'physical' to define property damage negates the possibility that the policy intended to include consequential or intangible damages." 337 F.Supp.2d at 769. Moreover, "[t]he Court is unable to construe the plain meaning of the policy in such a way as to find that direct physical accidental loss or damage could mean a consequential or intangible damage *such as loss of use*." *Id*. (Emphasis added). The court in *Campbell* relied on the Supreme Court's decision in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003), where the Supreme Court held that economic damages do not constitute "physical injury" to property. 588 S.E.2d at 115.[1]

In sum, the trial court erred in failing to rule, as South Carolina law requires, that "direct physical loss or damage" includes only the immediate physical damage to the covered property and does not include any consequential, intangible, or economic damages, costs, or expenses. Accordingly, there are many categories of expenses claimed by ReWa which are consequential

[1] The Supreme Court cited favorably to the case of *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978), and explained that the "use of term 'physical' to define property damage negates possibility policy intended to include consequential or intangible damage." *Brazell*, 588 S.E.2d at 116.

or economic and are not covered, including testing or sampling expenses;[2] expert consultant fees incurred in responding to requirements of DHEC and EPA; expenses incurred in investigating the cause of the PCB contamination; and expenses incurred to continue the operation of the waste water facilities including the future protocols developed and implemented for the receipt of FOG (fats, oil, and grease) at the Mauldin Road facility.[3]

This reading is also consistent with the "loss payment" provision contained in the Policy, which limits the insured's recovery to "the cost of repairing or replacing the lost or damaged property," and does not include payment for consequential or economic damages such as loss of use. (R. 994).[4] This Court has held that "[i]t is fundamental that in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Ecclesiastes Prod. Ministries v. Outparcel Assn., LLC*, 374 S.C. 483, 649 S.E.2d 494, 502 (Ct. App. 2007). In *Campbell*, the court explained that "the valuation clause of the contract makes damages such as loss of use impossible. Under this clause, the policy will not pay more than the cost to reasonably restore or replace the covered property. There can be no dispute that

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[2] In *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), the South Carolina Court of Appeals ruled that "[s]ampling and the performance of chemical tests do not constitute 'physical injury to or destruction of tangible property.'" 387 S.E.2d at 710. The trial court disregarded this controlling decision from this Court and awarded all sampling expenses. Notably, the trial court did not acknowledge the *Braswell* case nor attempt to distinguish it.

[3] The trial court did reject the attorney's fees incurred by ReWa in responding to requirements of DHEC and EPA as well as one invoice from AECOM. But the trial court did not reject all of the consultant fees charged by AECOM. (R. 16).

[4] Based upon the "loss payment" provision, the IRF would only be required to "[p]ay the cost of repairing or replacing the lost or damaged property, subject to b. below" and subsection (b) provides: "The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property." (R. 994).

damages for loss of use exceed restoration and/or replacement costs." *Campbell*, 337 F.Supp.2d at 769. The trial court, however, entirely disregarded the "loss payment" provision contained in the Policy and made no attempt to read together the related provisions of the Policy.

Instead, the trial court specifically ruled that "the Covered Property was *unusable* in its contaminated state, which constitutes 'damage' under the ordinary meaning." (R. 10). (Emphasis added). However, by awarding damages for the structures being "unusable," the trial court clearly awarded "loss of use" damages which is directly contrary to South Carolina law as discussed above as well as inconsistent with the "loss payment" provision contained in the Policy, which the trial court chose to disregard with no explanation.

A correct reading of the insuring agreement consistent with South Carolina law demonstrates that the IRF covers only the expense related to the repair of "direct physical loss and damage" to the structures themselves. However, as conceded by ReWa witnesses, including Ted Clark, ReWa's expert witness, no testing of the structures was even performed until *after* the cleaning was completed. (R. 450-451, 453, 635-637, 800). As a result, ReWa did not sustain its burden of proving that the structures, including any digesters or holding tanks at the three facilities, were actually damaged.

Moreover, as the evidence indisputably shows, levels of PCB contamination in all but three holding tanks at Pelham did not exceed the 50 mg/kg threshold that required remediation under TSCA. (R. 448-449, 1143, 1236-1281). The IRF agreed that the costs of cleaning the three holding tanks at Pelham would be covered to the extent that ReWa provided a breakdown of those specific costs, which ReWa never did. At trial, ReWa likewise did not present evidence of the costs to clean the three contaminated tanks at Pelham.

The evidence also indisputably showed that none of the PCB levels at the Mauldin and Lower Reedy facilities even approached the 50 mg/kg threshold. (R. 1143). Based on the low levels of PCB contamination and the applicable law as addressed in more detail below, the cleaning that ReWa engaged in at the Mauldin Road and Lower Reedy facilities was not even legally required or necessary. Nonetheless, even if the cleaning of the tanks at those facilities constitutes "direct physical loss and damage," ReWa, who bore the burden of proof, did not present evidence at trial of the costs to clean those tanks. In short, ReWa failed to prove any "direct physical loss and damage" at the Mauldin Road and Lower Reedy facilities.

Nonetheless, the trial court found that the digesters or holding tanks at the three facilities were "damaged" only because after the digesters and tanks were emptied, there remained biosolids stuck in spots to the walls which resulted in the digesters and tanks being pressure washed. (R. 9). The trial court found that constituted sufficient "damage" under the policy although there was no evidence presented by ReWa that having some spots of biosolids attached to the wall rendered the digesters and tanks unusable or "damaged."[5] Certainly the digesters or tanks that did not contain biosolids testing above the 50 mg/kg threshold were not so "damaged," and that would include, as discussed above, all of the digesters and tanks at the Lower Reedy and Mauldin Road facilities as well as all but three of holding tanks at the Pelham facility (specifically Biosolid Holding Tanks 3, 4, and 5). Moreover, the trial court ruled that the

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[5] The trial court found that "ReWa's three facilities, and the equipment and machinery located there, were not able to be used for their normal operations." (R. 10). The trial court cites no evidence for that finding. That finding is unsupported in the record. There is no evidence that any of the three facilities were ever shut down or not used for normal operations. In fact, the evidence shows that ReWa took an exceedingly lengthy time period to clean the structures at the three facilities. The remediation at Lower Reedy did not begin until July 2014, and the remediation did not begin at Mauldin Road until December 2014. (R. 560). Those facilities were in operation throughout and processed the ongoing flows. (R. 646-647).

biosolids had to be removed from the digesters and tanks in order to pressure wash them and return them to operation. However, instead of limiting the award to the expenses incurred for the emptying of the digesters or tanks and pressure washing them, the trial court included all expenses for dewatering and disposing of all of the biosolids at all three facilities. Those expenses are clearly consequential or economic loss that does not qualify as "direct physical loss and damage" under South Carolina law.

The trial court appears to agree with the IRF that the biosolids themselves did not qualify as "covered property,"[6] but the court nonetheless required the IRF to pay for the dewatering and disposal of the biosolids -- even those that were not contaminated over the 50 mg/kg threshold. There is no evidence, however, that the digesters and tanks that contained biosolids of less than 50 mg/kg were damaged in any respect. Importantly, the disposal of the biosolids is part of ReWa's normal operations, which is a critical factor that the trial court failed to consider or address. (R. 953). The biosolids are a natural and ordinary byproduct of ReWa's wastewater process which, regardless of PCB contamination, must be disposed of either by land application or by placement in landfills. Accordingly, the costs of the dewatering and disposal of the biosolids cannot qualify as "direct physical loss or damage" to covered property.

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[6] By way of a Rule 52(b) motion, the trial court was requested to make the specific ruling that it does not find the biosolids that were contained in the digesters, tanks, and other structures to qualify as "covered property," but the court disregarded that request. (R. 19-21). As the IRF argued, "covered property" is a defined term in Section A.1 of the Policy and is divided into the buildings or structures (including fixtures and permanently installed machinery and equipment) and the business personal property that is also described in a list of items covered. It is undisputed, however, that the Policy provides no business personal property coverage for the Pelham, Mauldin Road, and Lower Reedy facilities. That coverage was available to but not purchased by ReWa. (R. 865-868). Thus, the contents of the physical structures, including the biosolids stored within the structures, are not covered under the policy.

E. <u>Reliance on *Ocean Winds* Opinion was Misplaced</u>

The trial court also erred in its reliance on the decision of the South Carolina Supreme Court in *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002). The trial court misread and misapplied the *Ocean Winds* case so as to impermissibly broaden the scope of the insuring agreement. That constitutes an error of law that merits reversal.

In *Ocean Winds*, the Supreme Court was called upon by way of a certified question from the federal district court to interpret an "additional coverage" provision for building collapses in a property insurance policy. The insuring agreement for the collapse coverage states: "We will pay for loss or damage caused by or resulting from risks of direct physical loss involving a collapse of a building or any part of the building." The Supreme Court addressed the meaning of the language "risks of direct physical loss involving collapse" and determined that it could be read three different ways: (1) requiring an actual collapse, (2) requiring collapse to be imminent, or (3) requiring substantial impairment of the building to trigger coverage. The Supreme Court found "a requirement of imminent collapse is the most reasonable construction of the policy clause covering 'risks of direct physical loss involving collapse.'" 565 S.E.2d at 308.

The *Ocean Winds* decision has no application to the present case for several reasons. First, the Supreme Court was construing an ambiguous provision in an insuring agreement specifically for building collapse coverage. The present case involves a different insuring agreement. There is no "collapse" language that is ambiguous. In fact, ReWa has made no argument that the insuring agreement in the IRF policy is ambiguous or is capable of multiple reasonable constructions. Likewise, the trial court made no specific finding that the insuring agreement is ambiguous. Second, in the present case, the parties stipulated and the trial court

found that the PCB contamination was caused by vandalism which is a Covered Cause of Loss. (R. 7). The vandalism had occurred. The PCB contamination had occurred. ReWa made one claim for the three facilities, not multiple claims alleging multiple occurrences of vandalism over time. Certainly, there was never any additional or later claim made to the IRF for an "imminent" threat of vandalism or an additional PCB contamination to justify the trial court's award of the expenses for sampling, the FOG program, or the remediation of collection lines. Quite simply, the policy does not cover an insured in taking measures to prevent a future loss. Moreover, if there was an additional PCB contamination, ReWa could have made a claim for that, but it did not. Any later claims of contamination, which were never made to the IRF, are not properly part of this lawsuit, nor are preventative measures undertaken to prevent a future loss. Third, in *Ocean Winds*, the Supreme Court held that if there is sufficient damage to the point that collapse is imminent, there is coverage, but "substantial impairment" was held to be insufficient to trigger coverage. Therefore, it is a misreading of *Ocean Winds* to suggest that the Supreme Court extended coverage to pay for preventative measures to protect from future claims or losses. As indicated, that is not the purpose of a property casualty policy. Finally, the insuring agreement in *Ocean Winds* covered "loss or damage" and *not* "direct physical loss or damage" which is the language in the insuring agreement in the IRF policy. Consequently, as discussed above, the IRF policy does not cover consequential and economic damages but only "direct physical loss or damage" to covered property which further distinguishes the *Ocean Winds* case.

F. <u>Protection of Property Clause</u>

In a single, conclusory sentence and without citing any authority, the trial court writes: "Further, ReWa was directed by the policy to take all reasonable steps to protect its Covered

Property from further damage." (R. 11). Then, in a footnote, the trial court refers to what it calls the "protection of property" provision and rules that "[e]xpenses incurred in testing and remediating lines which flow into the facilities are covered expenses … even though this testing and remediation did not occur on the Covered Property [sic]." (R. 11).[7] The trial court committed numerous errors with respect to its reliance on the "protection of property" provision, each of which warrants a reversal.

First, the provision to which the trial court refers states in pertinent part as follows: "Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim." (R. 994). The trial court engaged in no analysis of this provision nor discussed how it should be interpreted or applied. Moreover, the trial court cited no authority, from this jurisdiction or any other jurisdiction, addressing how that provision should be applied.

Second, and perhaps most importantly, the trial court erred in even considering the "protection of property" provision in its coverage analysis. The record clearly shows that that provision of the Policy was never pled nor previously raised as a basis of coverage by ReWa in this litigation. In the Amended Complaint, the allegations and bases for coverage under the Policy are pled in the first and second causes of action. ReWa printed verbatim the "most relevant" portions of the Policy, and the "protection of property" provision is not stated verbatim nor even mentioned in passing. *See*, Amended Complaint, ¶ 31. (R. 59-61). Likewise, ReWa's failure to plead the "protection of property" provision is further reflected in the Plaintiff's Responses to Defendant's First Set of Interrogatories, dated March 26, 2018, specifically

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[7] Presumably, the trial court meant "covered premises" since the insuring agreement requires the "direct physical loss or damage" to occur "at the premises described in the Declarations." (R. 991).

interrogatory numbers 7, 9, and 11, which for each of the three facilities, asked that ReWa provide an itemized list of losses being claimed and "[f]or each item, provide an explanation, including reference to the specific policy language, of the Plaintiff's basis in claiming the loss is covered." (R. 184-188). ReWa provided a detailed response that addressed various policy provisions; however, the so-called "protection of property" provision was never cited. (R. 184-187). Interrogatory numbers 7, 9, and 11 were never subsequently supplemented prior to trial. Even in ReWa's pre-trial brief submitted to the trial court on January 17, 2020, just ten days before trial, there is no mention of the "protection of property" provision as a basis of coverage or an issue that the trial court would need to adjudicate. (R. 94-107). The record also includes excerpts of the Rule 30(b)(6) deposition taken of ReWa, and there was no discovery taken on the "protection of property" provision because it had never been pled nor subsequently addressed as a basis for coverage. Finally, the record includes a number of pre-litigation letters between the parties' attorneys which include detailed discussions of the relevant coverage provisions; yet again, ReWa never mentioned or cited to the "protection of property" provision. (1404-1421). Clearly, the trial court erred in considering a policy provision and an issue that was never pled and on which no discovery was taken. In addition, the IRF had no notice the issue would be tried and was therefore unable to present a defense on that coverage provision, thereby depriving the IRF of fundamental fairness and due process.

Third, the so-called "protection of property" provision has its own very unique body of case law interpreting what it means and how it is to be applied. There is no controlling case law in South Carolina so it presents a novel issue of insurance law which the parties did not brief and on which the trial court was not provided any argument. The reason for that, as argued above, is that the provision was never pled or otherwise raised. Not even ReWa's counsel provided the

trial court with any analysis either in their pre-trial brief or in the proposed order that the trial court ultimately signed. Certainly, no such analysis appears in the trial court's final order.

The so-called "protection of property" provision is actually referred to as a "sue and labor clause" in insurance jurisprudence. The "sue and labor clause" cannot be used, as the trial court has done in this case, to extend or create coverage not otherwise provided by the insuring agreement or to override an applicable policy exclusion. The great weight of the authority from other jurisdictions holds that an insured's ability to recover expenses under a sue and labor cause is tied to the insurer's obligations under the general insuring provisions of the policy. In fact, in an early case dealing with recovery under a sue and labor clause, the United States Supreme Court explained as follows:

> If this clause be construed with reference to what is most evidently its subject-matter, that is *a loss within the policy,* and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable, that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy, to render them liable to contribute to such expenses.

Biays v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 425, 419 (1813). (Emphasis in original). Other federal and state cases have held the same. *See, e.g., John S. Clark Co., Inc. v. United National Ins. Co.*, 304 F.Supp.2d 758, 767 (M.D.N.C. 2004) ("a sue and labor clause does not extend or create coverage; the recovery ... is tied irrevocably to the obligations undertaken by the insurers in the basic insurance policy"); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 139 F.Supp. 2d 1374, 1383 (S.D. Fla. 2001) ("Whether sue and labor expenses are covered at all ... is

tied directly to the policy's insuring provisions."); *Southern California Edison Co. v. Harbor Ins. Co.*, 83 Cal.App.3d 747, 148 Cal. Rptr. 106 (1978) ("recovery under a sue and labor clause is tied irrevocably to the obligations undertaken by the insurer in the basic insurance policy").

Fourth, ReWa presented no evidence to the trial court differentiating between the expenses sought because they were covered under the insuring agreement and the expenses sought under the "protection of property" provision. The reason for that is clear. As indicated, ReWa never pled or asserted a claim under the "protection of property" provision and hence never differentiated the expenses claimed. Similarly, ReWa did not provide that information during discovery in the responses to the IRF's interrogatories. (R. 184-188). Therefore, the evidence of damages, as presented at trial, was insufficient to allow the trial court to even make that differentiation, and hence, ReWa did not meet its burden of proof.

Fifth, as a corollary to the previous point, the trial court made no findings of fact to allow for a recovery under the "protection of property" provision. Of course, no such testimony was elicited from the witnesses -- in support or in opposition -- because the claim was never pled. But the trial court never made any attempt to make appropriate findings of expenses incurred that would even be payable under the "protection of property" provision. The court simply awarded all of ReWa's expenses with the exception of a few line items. (R. 16).

On appeal, this Court should reverse the judgment. The trial court erred in relying on the "protection of property" provision to create and extend coverage for expenses that are not covered. That is particularly true given ReWa's failure to plead the provision as a basis for relief and the fact that the IRF was denied the opportunity to engage in discovery on the issue so as to properly defend the claim. Finally, the trial court's findings of fact are insufficient to support a recovery under that provision.

G. **Covered Property**

As discussed briefly above, "covered property" is a defined term in Section A.1 of the Policy and is divided into the buildings or structures (including fixtures and permanently installed machinery and equipment) and the business personal property that is also described in a list of items covered. It is undisputed, however, that the Policy provides no business personal property coverage for the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 865-868, 981-982). That coverage was available to but not purchased by ReWa. (R. 867). Thus, the contents of the physical structures, including the biosolids stored within the structures, are not covered under the Policy. As already discussed above, the trial court erred in requiring the IRF to pay for the dewatering and disposal of biosolids, including the biosolids that did not exceed the 50 mg/kg threshold, which is part of ReWa's normal operation. Certainly, the biosolids contained in the digesters and holding tanks do not qualify as "covered property" and are not properly part of any covered loss.

Additionally, the trial court awarded expenses for the remediation of certain collection lines that are outside the premises of the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 11). The court did so under the "protection of property" provision discussed above. The erroneous application of that provision notwithstanding, a review of the Policy shows that those collection lines are not "covered property" for several reasons. First, those lines are not identified in the declaration pages as a separately covered "segment" of property. (R. 981-988). Second, the Policy contains a list of "property not covered" which includes "[u]nderground pipes, flues or drains." (R. 991-992). The trial court, however, failed to even address either of these reasons for denying coverage for the remediation of the collection lines. The trial court

thus erred in finding that ReWa was entitled to recover expenses related to the remediation of collection lines beyond the premises of the three facilities.

H. Ordinance or Law Exclusion

The trial court also misapplied the "Ordinance or Law Exclusion" and failed to consider or address the existence of an anti-concurrent causation clause. The Causes of Loss – Special Form includes an "Ordinance or Law Exclusion" which provides no coverage for a loss 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 the debris." (R. 998). Importantly, this section of exclusions includes an anti-concurrent causation clause that reads: "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (R. 998). As the Supreme Court has explained in *South Carolina Farm Bureau Ins. Co. v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009), where a policy includes an anti-concurrent causation clause, neither the efficient proximate cause rule nor the concurrent cause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss that is covered. In its final order, the trial court ruled that the Ordinance or Law Exclusion did not apply, and in so ruling, the court made several errors of law.

First, the trial court wrote: "The Court notes that no evidence was presented to indicate the environmental regulations at issue fall within the categories of ordinance and law specified in the policy." (R. 11-12). It remains unclear what the trial court means with this statement. The trial court denied the IRF's request to clarify per Rule 52(b). (R. 19-21). The record, however, is replete with evidence that ReWa's remediation was governed, in part, by TSCA, federal

regulations promulgated pursuant to TSCA, and DHEC regulations including the Emergency Regulation (while it was in effect). The trial court did rule that ReWa's remediation was, in fact, required by those federal and state laws. (R. 5-6). The exclusion includes within its scope "any ordinance or law … regulating … repair of any property." (R. 998). To the extent the trial court found no evidence of "any ordinance or law … regulating … repair of any property," that is clearly erroneous and merits reversal.

Second, the trial court wrote that "ReWa's mere compliance with the applicable regulation does not trigger this exclusion." (R. 12). The trial court, however, is incorrect because the Ordinance or Law Exclusion applies regardless of whether the loss results, in part, from the insured's voluntary obedience to an applicable law or from a forced obedience to that law. It is the enforcement of that law that triggers the exclusion. In other words, the exclusion applies where the loss resulted, at least in part, from a law that requires the insured to take certain action. As authority, the trial court cites only to the Louisiana case of *Haas v. Audubon Indemnity Co.*, 722 So. 2d 1022 (La. App. 1998), which if read carefully, does not support that ruling and is otherwise distinguishable. The trial judge cites *Haas* for the quote, "compliance is not enforcement." However, a careful reading of the *Haas* opinion reflects that the appellate court has simply re-printed the trial court's opinion, which includes what appears to be a subheading that states, "Compliance is not enforcement," set out in bold print. It appears at the end of the citation to the trial court's opinion. 722 So. 2d at 1029. The portion of the trial court opinion that follows that subheading was not reprinted by the appellate court and thus was not adopted by the appellate court. The subheading appears to be included as a clerical error. What appears next in the appellate opinion does not address the question as to whether compliance is or is not enforcement. Instead, the appellate court writes: "As the trial court correctly found, it

was the vandalism that caused damage to Haas' building, not the enforcement of any ordinance or law." *Id*. That is the actual holding of the appellate court. It is notable, however, that the appellate court in *Haas* did not address the effect of the anti-concurrent causation clause in the policy, which is the very same error committed by the trial court in the case at bar, as discussed next.

Third, the trial court ruled that "vandalism, not the enforcement of an ordinance or law, created ReWa's resulting loss." (R. 12). The trial court further wrote: "Any actions by the EPA and SCDHEC which could be deemed to be 'enforcement' under this exclusion did not, either directly or indirectly, cause ReWa to suffer the damages claimed in this lawsuit." (R. 12). That ruling is unsupported by the evidence and, at any rate, does not negate the application of the anti-concurrent causation clause which the trial court refused to even consider or address despite being asked to do so per the Rule 52(b) motion. As indicated, the record is replete with evidence that the damages sustained by ReWa were in part caused by the enforcement of federal and state regulations governing the remediation process. ReWa itself has taken the position that the remediation at all three facilities was controlled by EPA and DHEC regulations and that ReWa was required to undertake those remediation efforts, and the trial court adopted that position. The remediation was undertaken pursuant to "plans" that were submitted to EPA (for Pelham) and to DHEC (for Lower Reedy and Mauldin Road). (R. 1113-1137, 1139-1143). ReWa cannot take the position that the remediation was required by federal and state environmental laws and then take the inconsistent position that those very regulations were not a cause for the damages that are being claimed. The trial court similarly cannot make those inconsistent findings. The trial court did, in fact, make the finding that ReWa needed and received "the approval of SCDHEC and the EPA." (R. 15). Thus, the record indisputably supports a finding that the EPA

and DHEC regulations were, at the very least, an indirect cause of the resulting damages, even if vandalism was the "efficient proximate cause" that set the chain of events in motion.

As indicated, the trial court committed reversible error in refusing to consider or address the effect of the anti-concurrent causation clause and the Supreme Court's decision in *Durham*. In that case, the anti-concurrent causation clause read as follows: "Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Thus, it is identical to the anti-concurrent causation clause in the IRF Policy. The Supreme Court explained the effect of the anti-concurrent causation clause as follows:

> The majority of jurisdictions follow the efficient proximate cause doctrine which provides that in circumstances with two or more identifiable causes, the court looks to the cause which is determined to have set the chain of events in motion. If this "efficient proximate cause" is covered under the terms of the policy, then the loss is covered. The minority rule is the concurrent cause rule, which asks whether one of the causes of a loss is covered. If so, then the loss is covered notwithstanding the fact that there is also an excluded cause in the chain of causation. In the instant case, neither doctrine applies since the policy contains an anti-concurrent causation clause. The exclusion provides that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Consequently, though the underground water pressure was not the sole cause of the loss or even the efficient proximate cause, it was a cause of the loss and so, the exclusion applies.

Durham, 671 S.E.2d at 613. (Citations omitted).

In sum, where the policy includes an anti-concurrent causation clause, the Supreme Court has held that neither the efficient proximate cause rule nor the concurrent clause rule applies. Instead, if the exclusion addresses a cause of the loss, it makes no difference that there is another cause of the loss, such as vandalism, that is covered. Here, one of the causes for the loss is the enforcement by the EPA and DHEC of its regulations governing the remediation of PCBs. Quite simply, it is immaterial that vandalism was the only "efficient proximate cause" or that there was

no other cause of the PCB contamination itself. The IRF recognizes, of course, that the governmental regulations did not "cause" the PCB contamination. Nonetheless, the anti-concurrent causation clause is not limited to "efficient" causes or "concurrent" causes but to *any* causes -- direct or indirect -- contributing "*in any sequence* to the loss." (R. 998). The trial court failed to consider the "in any sequence" language. Clearly, the enforcement of the government regulations occurred in the sequence of events that led to the loss claimed by ReWa and for which the trial court awarded in excess of $5.8 million in damages. In sum, based on a proper application of the anti-concurrent causation clause and the *Durham* decision, it is clear that ReWa's claim is barred by operation of the "Ordinance or Law Exclusion." On this additional basis, the judgment for ReWa should be reversed.

II. The trial court committed errors of law in its interpretation and application of DHEC regulations governing land application of biosolids and the National Pollutant Discharge Elimination System (NPDES) permits issued to ReWa under the Clean Water Act, and those errors resulted in the trial court awarding substantial damages for the costs of remediation at two facilities and the costs of processing and disposal of biosolids in landfills, all of which were not legally required or necessary.

In adjudicating the amount of ReWa's loss, the trial court made several errors of law that tremendously inflated the award to ReWa. Those errors of law resulted in the court finding that remediation was even required at the Mauldin Road and Lower Reedy facilities as well as in finding that existing biosolids and ongoing flows after March 23, 2014 could not be land applied but rather required disposal in a local landfill. Each of those errors of law requires a reversal of the judgment entered.

A. DHEC Regulations

In the initial section of the Conclusions of Law captioned "ReWa's Remediation and Repair Efforts were Reasonable, Necessary, and Required," the trial court made several legal rulings that are in error, including the period of time when state regulatory law prohibited land application of the biosolids. Prior to the PCB contamination, ReWa's mode of operation included the land application of all biosolids generated at the Pelham, Mauldin Road, and Lower Reedy facilities. (R. 953). The land application program for those facilities only was suspended after the PCB contamination, but ReWa did not re-commence that program after legally cleared to do so. ReWa, nonetheless, included as part of its claim the costs for the disposal of the existing stored biosolids and the *ongoing flows* incurred after the DHEC regulations allowed for the biosolids to again be land applied rather than disposed of in a local landfill at the higher expense.

The trial court did address the DHEC Emergency Regulation adopted on September 25, 2013, but in doing so, disregarded the time period that the Emergency Regulation was actually in effect. The Emergency Regulation only temporarily prohibited the land application of the biosolids while it was in effect. The record shows clearly that the Emergency Regulation was effective on September 25, 2013, for a period of ninety days. (R. 1109-1112). Thereafter, on December 23, 2013, DHEC re-filed the same verbatim Emergency Regulation. The re-filed Emergency Regulation was effective on December 23, 2013, for a period of ninety days. (R. 954). The re-filed Emergency Regulation thus expired on March 23, 2014, which is a critical point that the trial court overlooked. The trial court also overlooked that from March 23, 2014 until June 27, 2014, there were no regulations by DHEC in place. Then, on June 27, 2014, DHEC promulgated pursuant to the Administrative Procedures Act amendments to Sections 503

(domestic sludge) and 504 (industrial sludge) of DHEC Regulation 61-9 entitled "Water Pollution Control Permits." (R. 1146-1151). The amendments were published in the South Carolina State Register on June 27, 2014 and were effective on that date. (R. 954). Importantly, those amendments did not prohibit the land application of PCBs at a level less than 50 mg/kg concentration. (R. 1149).

The trial court also failed to recognize that ReWa itself admitted in its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities," as submitted to DHEC on April 15, 2014, that "ReWa does not currently intend to land apply this material, ***even though current regulations would allow land application***." (R. 1143). (Emphasis added). In sum, the trial court erred in failing to rule as a matter of law that after the expiration of the Emergency Regulation on March 23, 2014, ReWa was *not prohibited* by state or federal law from disposing of biosolids containing PCBs at a level less than 50 mg/kg by land application which was its normal mode of operation. Only while the Emergency Regulation was in effect was ReWa required to dispose of biosolids containing PCBs at a level less than 50 mg/kg in a local landfill. (R. 655-656).

In footnote number 3 of its final order, the trial court instead made the following ruling of law: "[S]ince the Emergency Reg. was enacted to address the PCB contamination, it ***likely*** applied to all contaminated materials in ReWa's possession at the time it was implemented." (R. 6). (Emphasis added).[8] The trial court, however, cited no law -- statutory or case law -- to support its premise that the Emergency Regulation "likely" remained in effect after its March 23,

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[8] It was not appropriate for the trial court to make a "likely" ruling of law. The applicability of the Emergency Regulation and when it was in effect is an issue of law -- either the Emergency Regulation was in effect or it was not. The trial court failed to decide an issue of law with certainty but rather offered its ruling as a possibility or probability.

2014 expiration. Clearly, there is *no law* to support that flawed premise. It is elementary that an emergency regulation, like any other law, does not remain in effect and binding after it expires. In sum, the Emergency Regulation was not in effect after it expired on March 23, 2014. The trial court erred in not making that definitive ruling.

Nonetheless, even if the Emergency Regulation applied to the stored biosolids on March 23, 2014, as the trial court found to be "likely," there is certainly no reasonable or cogent argument that can be made that the Emergency Regulation applied *to the ongoing flows after that date*. Yet, the trial court made no such distinction and applies the Emergency Regulation to all stored biosolids *and* all ongoing flows at all three facilities after March 23, 2014 *and all the way into 2016*. In fact, the trial court made no determination of the expenses incurred by ReWa for processing the ongoing flows after March 23, 2014, at which point the Emergency Regulation clearly expired. The trial court also made no mention of the permanent regulation adopted by DHEC on June 27, 2014, which allowed for the land application of PCBs at a level less than 50 mg/kg concentration, *which includes all biosolids processed at Pelham, Mauldin Road, and Lower Reedy on or after June 27, 2014*. In effect, the trial court failed to address whether that permanent regulation was applicable to the disposal of the existing biosolids and the ongoing flows after June 27, 2014 -- which of course, it was.

Thus, the trial court erred in failing to rule as a matter of law that the disposal of all stored biosolids and the ongoing flows at the Mauldin Road and Lower Reedy facilities were permitted by law to be land applied. Critically, absent from the trial court's findings of fact, the remediation at the Pelham facility began on November 14, 2013 and was completed on February 19, 2014. (R. 557-558). The remediation at Lower Reedy occurred next and was begun in approximately July 2014 and was completed in mid-November 2014. (R. 560). The remediation

at Mauldin Road was started in approximately December 2014 and was completed in June 2015. (R. 560). By June 2015, the PCB remediation at the three facilities was complete. (R. 560). The trial court also failed to make the appropriate findings of fact that -- using ReWa's own language and data in its "Summary Remediation Plan for Low-Level PCB Solids Stored at Lower Reedy and Mauldin Road Resource Recovery Facilities" provided to DHEC on April 15, 2014 -- there was "low-level PCB concentrations (ranging from 0.66 ppm to 5.8 ppm at Mauldin Road and from 1.3 ppm to 4.2 ppm at Lower Reedy)" in those two facilities. (R. 1143). Indisputably, there were no stored biosolids with PCBs even remotely approaching the 50 mg/kg threshold at either Lower Reedy or Mauldin Road. Thus, those biosolids did not need to be dewatered and disposed of in a landfill after March 23, 2014. Instead, consistent with its normal mode of operation, the stored biosolids at those facilities legally could have been land applied by the time the remediations began for both Lower Reedy and Mauldin Road in July 2014 and December 2014, respectively.

This is critical for several reasons. First, the applicable law, supported by the undisputed evidence, establishes that the biosolids and ongoing flows at those facilities did not require any remediation *as a matter of law* in order to be legally land applied, consistent with ReWa's normal mode of operation prior to the PCB contamination. (R. 953). Second, there is absolutely no legal basis for the trial court to have ruled that the IRF is legally responsible for paying for the processing of the ongoing flows at the Lower Reedy and Mauldin Road facilities. Clearly, there was no evidence of any "direct physical loss or damage" to the existing biosolids or the ongoing flows. These critical issues of law require a reversal of the judgment.

Additionally, in its very brief discussion of the Emergency Regulation, the trial court erroneously concludes that "[t]he Emergency Reg. imposed more stringent limits, prohibiting

land application of sludge with *any* quantifiable amount of PCBs. The Emergency Reg. also provided that the process facility impacted by the illicit dumping must be operated in a manner so that the returned wastewater, after processing, has *no* quantifiable amount of PCBs." (R. 6). The trial court never states what "no quantifiable amount of PCBs" even means, but the evidence from the experts, including ReWa's expert, Ted Clark, confirms that the PQL (practical quantifiable limit) was 0.5 micrograms/liter (ug/l). (R. 442-443). Thus, the trial court failed to recognize and rule that the Emergency Regulation did allow for a threshold amount of 0.5 micrograms/liter of PCBs to exist in the aqueous phase. That was not a change from the DHEC requirement that pre-dated the Emergency Regulation. Additionally, the trial court disregarded and made no finding consistent with the "Sludge Removal and Disposal Plan" prepared by AECOM for the Pelham facility which states:

> In bench scale testing of the filtrate after treatment as proposed by various contractors, PCB concentrations in the filtrate have been below 0.5 ug/l. Additionally, and during full scale dewatering of other sludges at the Pelham WRRF where PCB concentrations are less than 50 mg/kg, PCB concentrations in the filtrate have been below 0.5 ug/l *with no treatment of the filtrate*. The PCBs remain associated with any solids removed by the sludge dewatering process and are not detected in the filtrate.

(R. 1119). (Emphasis added). As Ted Clark testified, the dewatered filtrate from the biosolids that had a concentration of less than 50 mg/kg was less than the 0.5 ug/l threshold, i.e., the quantifiable limit under the Emergency Regulation. (R. 445-446). Consequently, the trial court's conclusion that the filtrate had to be further processed to comply with the Emergency Regulation was in error and contrary to the undisputed expert testimony in the case.

B. National Pollutant Discharge Elimination System Permits

The trial court further ruled that "the fact that ReWa's remediation at those facilities did not take place until after the Emergency Reg. was lifted is immaterial." (R. 6). In so ruling, the court relied on the National Pollutant Discharge Elimination System (NPDES) permits, but the court's interpretation and application of the permits were in error. Citing not a single specific provision of either of the multi-paged NPDES permits, the trial court states in a conclusory fashion on two separate occasions only that ReWa was prohibited by the permits "from introducing pollutants into its pretreatment process." (R. 6).[9] Notably, this is the *extent* of the trial court's discussion of the NPDES permits. To reiterate, there is not even one reference or cite to any specific provision in the permits nor any quoted language from the permits in the trial court's final order. In effect, despite the request for clarification per the Rule 52(b) motion which was denied, the IRF and this Court are left to guess what language in the permits that the trial court relied on in requiring the IRF to pay in excess of $5.8 million.

Moreover, the suggestion that the NPDES permits do not allow *any* level of pollutants into the pretreatment process is legally in error. The trial court itself already recognized that the Clean Water Act allows for PCB contamination in biosolids of less than the threshold of 50 mg/kg. In addition, ReWa's expert Ted Clark testified that the Clean Water Act allows for a threshold of 3.0 parts per billion (ppb) for PCBs in the filtrate and wash water. (R. 443-444). Thus, the NPDES permits, which are issued pursuant to the Clean Water Act and must be read with reference to the Act, allow some level of PCBs into the pretreatment process. The permit,

[9] The trial court also failed to address that ReWa only put in evidence the NPDES permit with respect to the Pelham facility. (R. 1065). The NPDES permits for the Lower Reedy and Mauldin Road facilities are not in evidence.

like a contract, cannot be interpreted with no consideration of the enabling law or to require a legal absurdity.[10] Yet, that is precisely what the trial court ruled.

Moreover, the NPDES permits are to be interpreted like contracts. *See*, *Piney Run Preservation Association v. County Commissioners of Carroll County*, 268 F.3d 255, 269 (4th Cir. 2001) (applying principles of contract interpretation to NPDES permit). While not considered by the trial court, the NPDES permits in the record provide that "the PCBs shall be less than 50 milligrams per kilogram (mg/kg) of total solids (dry weight basis)." (R. 1046).[11] The trial court disregarded that clear language from the permits themselves. Thus, the trial court's ruling which suggests that the NPDES permits do not allow any level of PCBs to enter or exit the treatment facilities is legally erroneous. The permits state otherwise in express, unambiguous terms.

Ted Clark also testified that under the normal TSCA and DHEC regulations that pre-existed the DHEC Emergency Regulation the biosolids with less than a 50 mg/kg concentration of PCBs could be land applied. That was consistent with the NPDES permits issued to ReWa. (R. 441-442). Moreover, TSCA allowed for 3.0 parts per billion (ppb) for PCBs in the aqueous phase. (R. 443). In short, the trial court erred in concluding that the NPDES permits prohibited

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[10] *See*, *Georgetown Manufacturing & Warehouse Co. v. South Carolina Department of Agriculture*, 301 S.C. 514, 392 S.E.2d 801, 804 (Ct. App. 1990) ("Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result").

[11] It is important to note that NPDES Permit No. SC0033804 includes the following critical language: "The Land Application of sludge program (see ReWa Land Application Permit, SC0048381) approval issued by SCDHEC Water Facilities Permitting Division, dated December 1, 2010 shall be incorporated into and become an enforceable part of this permit." (R. 1086). Thus, the reference to the allowed levels of PCBs is included in both NPDES permits.

the introduction of any PCBs at any concentration into the facility. That is a misreading of the Clean Water Act as well as the specific language of the permits themselves.

III. The trial court erred in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP, and that failed to address many key factual issues raised by the evidence and the parties.

The standard of review for an action at law on appeal of a case tried without a jury requires that an appellate court not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). As a result, it is critical that the trial court set forth its findings of fact and conclusions of law with sufficient specificity and detail to allow for proper appellate review. Rule 52(a), SCRCP, in fact, requires "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. This Court has recognized that "meaningful appellate review is more readily obtained when we are presented with a clear presentation of the basis for the circuit court's findings." *In the Matter of the Care and Treatment of Corley,* 365 S.C. 252, 616 S.E.2d 441, 443 (Ct. App. 2005). The Supreme Court has similarly explained the critical necessity for adequate findings and conclusions of law:

> Trial courts, sitting without juries in an action at law, write their findings specially and separately to allow a reviewing court to determine from the record whether the judgment -- and the legal conclusions which underlie it -- represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

In the Matter of the Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 343

(2002).

Inexplicably, the trial court provides less than three pages of largely conclusory "findings" to support a judgment in excess of $5.8 million in a complex insurance dispute. The findings of fact by the trial court were woefully inadequate. By way of example, despite being requested to do so per the Rule 52(b) motion, the trial court refused to make findings of fact to address a number of the expenses challenged by the IRF including the following: the expenditure for the lake tank that was never used at the Pelham facility and was not required or recommended by AECOM (R. 463-464); the additional cost for removing the biosolids from digester #1 at the Pelham facility where about 15,000 gallons of water had to be added to the digester because ReWa personnel had drained the water from that digester without removing the biosolids (R. 460-463); the expense for "Little John Portable Toilets" which Glen McManus was unable to explain (R. 631-632); the expense charged for the Greenville News which McManus was unable to explain (R. 632-633); the purchase of a carport at the Lower Reedy facility ; the Lower Reedy expenditure to Greer Roofing, LLC (R. 633-635); the discrepancies in the charges for chemicals as brought forth in the cross-examination of McManus including the fact that the costs for chemicals at Mauldin Road (almost $1.5 million) was ten times the amount spent at Lower Reedy and 15 times the amount spent at Pelham and the fact that McManus could not verify the chemical charges were accurate; and the expenditures for chemicals at Mauldin Road prior to the date that the remediation at that facility began. (R. 637-647). The trial court failed to make findings of fact regarding these issues and also failed to make deductions in the amount awarded for the various expenses that Glen McManus could not testify to, explain, or justify during both his direct examination and his cross-examination.

The trial court also failed to make any findings of fact regarding the lengthy delays by ReWa in beginning the remediations at the Mauldin Road and Lower Reedy facilities and whether those delays were reasonable and, if so, why they were reasonable delays. As discussed above, the trial court gave no consideration for the fact that ReWa was charging the IRF for the costs associated with processing the ongoing flows at the Mauldin Road and Lower Reedy facilities, when those facilities could have been remediated much sooner than they were. (R. 644-647). The trial court also failed to make findings of fact regarding why it was reasonable for ReWa to continue to charge the IRF for costs associated with processing ongoing flows after the Pelham facility was remediated. In fact, the trial court made no findings of fact to explain why it was reasonable for ReWa to charge the IRF for any costs associated for processing ongoing plant flows at all three facilities.

Moreover, the trial court made no findings of fact as to why it accepted the calculation of the "Regular Cost of Processing Solids for Land Application" set forth in Plaintiff's Exhibit 101 (R. 1388) rather than the calculation set forth in Defendant's Exhibit 16 (R. 1422), when the latter provided for a greater offset and was furnished by ReWa as part of its Rule 30(b)(6) deposition testimony which should be binding as an admission on ReWa. (R. 1901-1912, 1922).[12] The trial court thus erred in applying an offset that differed from that presented in the Rule 30(b)(6) testimony.

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[12] In *Chapman v. Ourisman Chevrolet Co.*, 2011 WL 2651867 (D. Md. 2011), the court explained that "Rule 30(b)(6) requires the corporation be bound to the answers that [the designee] gave during his deposition testimony." 2011 WL 2651867 at *5. The court also disallowed the corporate party from presenting other testimony "that materially varies from the information provided in [the designee's] deposition." *Id. See also*, *First Data Merchant Services Corp. v. Securitymetrics, Inc.*, 2014 WL 687158, *14 (D. Md. 2014) (defendant "will be bound by its Rule 30(b)(6) testimony").

In sum, the failure of the trial court to make findings of fact with respect to key issues in the case warrant the reversal of the judgment entered.

IV. The trial court erred in admitting into evidence summary exhibits which do not meet the requirements under Rule 1001, SCRE, and in relying on the information in those exhibits to find that every cost item in the 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa's facilities. In so doing, the trial court improperly shifted the burden of proof to the insurer to disprove the claimed loss rather than correctly require the insured to prove its covered loss.

In an attempt to prove its damages, specifically the amount of the covered loss, ReWa presented two summary exhibits. Plaintiff's Exhibit 99 is what ReWa referred to as a "pivot table" which provides the totals paid to identified vendors and contractors broken out in certain accounts as established by ReWa. (R. 1338-1343). Additionally, Plaintiff's Exhibit 100 is an Excel spreadsheet that provides a list of all amounts paid that ReWa is claiming from the IRF. (R. 1344-1387). The spreadsheet contains little useful information other than the name of the vendor or contractor and the amount paid. There is no information in that spreadsheet that conveys what product the vendor sold or what service the contractor provided. The useful information -- the invoices themselves -- were never presented to the trial court nor entered into evidence.

Over objection, the trial court admitted Plaintiff's Exhibits 99 and 100 as summaries under Rule 1006, SCRE, which provides in part that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence." Rule 1006, SCRE. Importantly, "[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 and non-argumentative; and (4) the originals or duplicates of the underlying documents have been made reasonably available to the other parties." *State v. Warner*, 430 S.C. 76, 842 S.E.2d 361, 370 (Ct. App. 2020). The third element is lacking in this record. ReWa did not show, and the trial court made no finding, that either Plaintiff's Exhibit 99 or Plaintiff's Exhibit 100 qualifies as a "faithful rendering of the underlying data."

ReWa presented Plaintiff's Exhibits 99 and 100 through the testimony of Glenn McManus, who is the Director of Operations for ReWa and was the primary damages witness. (R. 183-184, 544). Critically, McManus admitted that he had no role in the actual preparation of Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100; yet, he was the witness who purportedly provided the foundation for the trial court to admit those exhibits under Rule 1006. (R. 515-516, 561-570). McManus admitted to not knowing what most of the expenditures set out in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 were. He had not verified that each of the entries in those summary documents was accurate and reflected an expense that was actually incurred by ReWa for the remediation of the three facilities. (R. 561-570). McManus admitted that he spent only "half a day" in reviewing Plaintiff's Exhibit 100 and had not taken the necessary steps to review the underlying documentation, which was estimated at 20,000 pages, to verify that the summaries were accurate. (R. 561-562). McManus thus was unable to substantiate that Plaintiff's Exhibit 99 or Plaintiff's Exhibit 100 provides a "faithful rendering of the underlying data." Those exhibits were admitted in error under Rule 1006.

In addition, however, the "summary exhibits" are devoid of useful and necessary information for the trial court to have even made a proper determination of damages. McManus, in fact, admitted that the entries on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100 do not provide any detail or even a brief explanation of the work performed or the item purchased. (R. 571-572). McManus further agreed that if the court attempted to determine what a particular line item in Plaintiff's Exhibit 100 was for, *there is no evidence in the record to make that determination*. (R. 571-573). He admitted that the only way for the court to make that determination was to look at the underlying information *which was not in evidence*. (R. 573-574).

Notably, the summary exhibit, Plaintiff's Exhibit 100, does not at the very least include a Bates reference so that the underlying information could even be accessed from the documents produced in discovery. In effect, ReWa presented Plaintiff's Exhibit 100 in such a format where it was virtually unverifiable; yet, the trial court gave no consideration to the requirements for a proper summary exhibit and nonetheless admitted Plaintiff's Exhibit 100 into evidence under Rule 1006. Certainly, no findings were made on the record or in the final order to demonstrate that the trial court considered the required factors under Rule 1001 and actually exercised discretion in admitting the exhibits.

Yet, despite all of the admitted shortcomings, deficiencies, and inaccuracies in Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, which represent the sole evidence of ReWa's alleged covered loss under the Policy, the trial court nonetheless ruled that "such costs and expenses incurred by ReWa were ***reasonable and necessary to remediate and repair*** its facilities and prevent further harm." (R. 16). (Emphasis added). There was not, however, sufficient evidence in the record to allow the trial court to make a credible determination of necessity or

reasonableness. From the "summary exhibits" the court could not even ascertain what product was sold or what service was provided, let alone have the type of detail needed to determine by a preponderance of the evidence that the expense was necessary, reasonable, or related to remediation work at any of the three facilities. Clearly, the trial court, as factfinder, has engaged in impermissible speculation that each and every cost item in a 44-page summary exhibit (with the exception of a few items) was reasonable and necessary to remediate and repair ReWa's facilities. The judgment based on such speculation cannot be allowed to stand.

It also bears repeating that the trial court failed to hold ReWa to its burden of proof. Instead, the court improperly shifted the burden of proof to the IRF to disprove the expenses. This is most evident given that the trial court rejected only three items on Plaintiff's Exhibit 99 and Plaintiff's Exhibit 100, and those were all entries that the IRF challenged during the cross-examination of Glen McManus. In effect, the trial court accepted each and every expense on Plaintiff's Exhibit 100 unless the IRF presented evidence to refute it. Any items that were not challenged by the IRF in its cross-examination were accepted by the trial court as reliable, reasonable, and necessary. That is clearly an impermissible shifting of the burden of proof. It was ReWa's burden to prove its covered loss and not the IRF's burden to disprove it. For this additional reason, the judgment in excess of $5.8 million cannot be allowed to stand on this record.

V. The trial court failed to give any consideration to the undisputed fact that the Policy includes a $3,000 deductible per occurrence.

The trial court failed to give any consideration to the undisputed fact that the Policy includes a $3,000 deductible per occurrence. (R. 981). Given the trial court's order, it is unclear

whether the court found more than one occurrence of PCB contamination. The IRF believes there was a single occurrence, but the trial court's award perhaps suggests otherwise. Nonetheless, despite being requested per the Rule 52(b) motion, the trial court refused to clarify the number of occurrences found and to apply a $3,000 deductible for each occurrence that it found finds ReWa had proven. (R. 19-21).

VI. The trial court erred in denying the IRF's motion for new trial absolute in light of the procedural irregularities and absence of fundamental fairness in violation of due process.

As part of its post-trial motions, the IRF sought a new trial absolute because of procedural irregularities that prevented or otherwise impeded the IRF's rights to due process and fundamental fairness. Specifically, the IRF was denied the opportunity to provide closing arguments as required under Rule 43(i), SCRCP. At the close of the testimony, the parties addressed with the trial court the opportunity to present closing arguments either orally or by proposed orders. In response, the trial court directed only that the parties submit proposed orders, but the court limited the orders to liability issues only and placed a ten-page limitation on the proposed orders. To its clear detriment, the IRF's counsel complied with that directive and did not address any damages issues in their proposed order. ReWa's counsel nonetheless submitted a proposed order that addressed damages issues. (R. 1923-1932). The IRF's counsel subsequently made an additional request by email dated February 27, 2020 to the Court "to either make closing arguments or brief the damages issues based on the evidence presented at trial. … We would also ask for the ability to present arguments on the damages issues either in writing or at a hearing on the record before the Court makes its final rulings on the case." (R. 1957). The trial court responded by email on that same date with the following: "As for lack of closing

arguments or briefing the damages issues, you are certainly correct. I do not feel the need for closing arguments since I am familiar with the record. As for briefing damages, I did not request that since I believe the record is sufficient for those determinations." (R. 1956). Rule 43(i), SCRCP, provides for closing argument or summation in a civil trial and limits the duration of closing argument. Rule 43(i), however, does not give the trial judge the discretion to deny a request for closing arguments. In *Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988), this Court ruled that "the trial judge has discretion to limit oral argument to less than two hours in civil matters." 375 S.E.2d at 321. But this Court did not hold that a trial judge has the discretion to deny closing arguments, either orally or in writing, altogether.

Accordingly, after the close of the evidence, the IRF never had the opportunity to argue the damages issues based on the evidence presented at trial and has thus been denied due process as a result. In contrast, ReWa had the opportunity to argues the damages portion of the case by ignoring the trial court's directives, and it is quite telling that ReWa's discussion of damages issues was then incorporated verbatim in the court's final order. Clearly, out of fairness, the trial court should have held closing arguments in some form and allowed post-trial analysis of damages by the IRF, particularly in light of the substantial amount in controversy, the impact of the trial court's ruling on the public fisc, the sheer number, complexity, and novelty of the issues and defenses, and the substantial evidence, both testimonial and exhibits, that was presented by the parties. In addition, with full recognition that an appeal was likely, as the trial court acknowledged on numerous occasions during the trial itself, the opportunity for closing arguments also ensures the parties' ability to preserve issues and arguments for subsequent appellate review.

Additionally, the trial court indicated that it wanted to schedule a telephone hearing for

February 27, 2020, to address additional issues raised by his review of the case. The IRF's counsel requested for that hearing to be on the record. That request was made by an email dated February 27, 2020. The Court denied that request by return email of the same date. (R. 1956). Consequently, the IRF was denied the opportunity to ensure that the arguments of counsel made during the February 27, 2020 telephone hearing as well as the colloquy with the trial court were preserved for review by this appellate court.[13] In contrast, on ReWa's motion for costs, which was relatively inconsequential when compared to the magnitude of the issues raised by the IRF's post-trial motions, the trial court scheduled a virtual hearing held on the record on May 13, 2020.

In sum, the trial court's refusal to provide the IRF with a fair opportunity to present a closing argument particularly with respect to the damages issue, despite allowing ReWa to submit a damages analysis that he later adopted essentially verbatim in his final order, constitutes an abuse of discretion and a denial of fundamental fairness. In addition, the trial court's denial of a request to hold a post-trial hearing on the record likewise is an abuse of discretion because it improperly interferes with the IRF's ability to seek meaningful appellate review. These errors by the trial judge would be significant in any case but are magnified given the stakes in this case including a judgment of over $5.8 million dollars to be paid with taxpayer-generated funds.

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[13] It is also noted that the February 27, 2020 telephone hearing was held prior to the shutdown of the courts in response to the COVID-19 pandemic. At that time, neither the federal government nor the Governor had declared a state of emergency.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Insurance Reserve Fund respectfully requests that the Court reverse the judgment entered in favor of the Respondent ReWa, including the award of costs, and remand with direction that the trial court enter judgment in the IRF's favor. The IRF requests that the Court order entry of an involuntary nonsuit or judgment as a matter of law in favor of the IRF or alternatively grant a new trial absolute or otherwise reduce the amount of the judgment on the bases stated herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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