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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Case No. 2016-CP-39-100
Appellate Case No. 2016-00672

MRR Pickens, LLC.,..Appellant

v.

County of Pickens and William Cato,
Weldon Clark, Robert Ballentine,
Jo Johnston, Dennis Reinert and
Bob Young, Individually and in
Their capacity as appointed members
of the Pickens County Planning Commission,......................................Respondents

[INITIAL] BRIEF OF RESPONDENTS

Amy M. Snyder (S. C. Bar No.: 7968)
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606
(864) 232-4400 Phone
(864) 235-4399 Fax
asnyder@clarksonwalsh.com email

Gary W. Poliakaff (S.C. Bar No. 4488)
Poliakaff & Associates, P.A.
P.O. Box 1571
Spartanburg, SC 29306
(864) 582-5472 Phone
atty@gpoliakaff.com email

ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE CASE

Appellant MRR Pickens, LLC ("MRR"), a waste disposal company, filed suit in this matter on February 1, 2016, and simultaneously filed a Motion for a Preliminary Injunction. The purpose of the suit and motion is to force Pickens County to accept coal combustion residual ("CCR") waste in a landfill created for construction and demolition debris. The Motion for a Preliminary Injunction was denied by the Hon. Robin Stilwell by Order entered February 24, 2016. MRR filed a motion pursuant to Rule 59(e) for reconsideration which was denied by order of the court on March 11, 2016. On March 28, 2016, MRR filed a Rule 60 motion for relief from judgment and submitted portions of the deposition of former DHEC employee, Kent Coleman, in support thereof. That motion was denied by order of Judge Stilwell on March 28, 2016. MRR filed its notice of appeal of all three orders on April 13, 2016.

STATEMENT OF FACTS

Appellant wants to force the Respondents to accept CCR, or coal ash, in a landfill originally developed for the purpose of disposing of construction, demolition and land clearing debris. CCR encompasses fly ash, bottom ash, and flue gas and desulfurization materials and represents one of the largest industrial waste streams in the United States. Studies show that CCR's are enriched in trace metals and metalloids, including arsenic, lead and mercury, which are highly toxic and carcinogenic. In addition to trace metals, CCR's are characterized by relatively high concentrations of Naturally Occurring Radioactive Materials ("NORM"), including uranium, radium, radon, lead and polonium radionuclides. CCR has been recognized as a Group I human carcinogen with associated risks of skin, lung and bladder cancer. Specifically, the arsenic and radium exposures in

humans are associated with increased risks of skin, lung, liver, leukemia, breast, bladder and bone cancers for exposure predominantly due to chronic ingestion or chronic inhalation. (Vengosh affidavit)

The purpose of MRR's preliminary injunction was to short circuit the legal process and enjoin the Respondents from protecting themselves from having their county turned into a toxic waste dump. Armed with nothing more than affidavits from a company representative and its engineer, MRR requested the trial court to declare victory for them in the suit they filed simultaneously with their motion.

The story starts in 2007. On March 8, 2007, Pickens County entered into a development agreement with MRR for the construction and operation by MRR of "a construction and demolition and land clearing debris landfill." (Complaint Exhibit C) Section 9 of the agreement provides that

> The development of the site will require review by the Pickens County Planning Commission as per Pickens County Code Chapter 14, Article V. The failure of this Agreement to address a particular permit, condition, term or restriction does not relieve the Developer of the necessity of complying with the law governing the permitting requirements, conditions, terms or restrictions.

The agreement anticipates that State and Federal law may change after enactment of the Development Agreement. Section 18 of the Development Agreement provides as follows:

> In the event state or federal laws or regulations, enacted after this Agreement has been entered into, prevent or preclude compliance with one or more provisions of this Agreement, the provisions of this Agreement must be modified or suspended as may be necessary to comply with the state or federal laws or regulations.

Exhibit C to the Development Agreement sets forth the permitted uses for the Development.

....

3. Construction and Operation of a Construction and Demolition and Land Clearing Debris Landfill in area depicted on **Exhibit D**.

4. Construction and Operation of a Solid Waste Processing and Recycling Facility to process and recycle Construction and Demolition and Land-Clearing Debris in area depicted on **Exhibit D.**

....

In conjunction with the Development Agreement the parties entered into a Host Agreement. (Complaint Exhibit C) This agreement acknowledges, in part, that the parties are entering into the Development Agreement because MRR wishes to construct and operate a Long-term Construction, Demolition and Land Clearing Debris Landfill, since the County's current Construction, Demolition and Land Clearing Debris Landfill had nearly exhausted its capacity. Pursuant to the agreement, MRR agreed to "construct and operate a long-term Construction, Demolition and Land-Clearing Debris Landfill." The agreement further provides that all reports required to be submitted to DHEC by MRR must be simultaneously submitted to the County Administrator.

MRR obtained permit LF2-00003 from DHEC on November 3, 2008, which limited types of wastes that could be disposed of in the landfill and prohibits other wastes.

> 2. This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.19. ***All other wastes, including animal carcasses, are prohibited from disposal.*** (*Emphasis added.*) (Complaint Exhibit D)

The special conditions to the DHEC permit issued November 3, 2008 prohibit wastes other than those listed in Appendix 1 to R. 61-107.19. Appendix I includes four categories of waste: construction and demolition, land clearing debris, brown goods (furniture, etc.) and animal carcasses, which were separately prohibited. (Robbins Affidavit p. 4)

Despite receiving a Permit in 2008, MRR did not begin construction on the landfill. Sometime in 2014, CEC, an engineering firm retained by MRR, developed an alternate design for the landfill, differing from the one approved by Pickens County and DHEC. (Brown Affidavit) This design included the inclusion of a synthetic liner, which is completely unnecessary for the disposal of the type of wastes permitted at the Pickens landfill. Pickens County was never informed of the development of an alternative design or its purpose. (Wilson Affidavit. Brink Affidavit)

Subsequent to investing in a redesign of the landfill, in January of 2015, MRR returned to the Pickens County Planning Commission requesting the land use approval to begin construction. The Planning Commission considered the request for a renewed permit at the January 12, 2015 meeting. Representatives of MRR, their consulting engineers and counsel Jessica King, were present at that meeting. In January 2015, MRR represented as follows:

> I know some of you or maybe most of you weren't with the planning commission at the time this project was conceived back in 2006 and 2007 and when it was initially approved by the planning commission in February of 2007. ***It's probably also important to note right up front that the land use details and development details for the project are just the same as they were when we got the initial approval on the site back in 2007.*** (*emphasis added*) (Meeting Tr. P. 6)

MRR describes the proposed landfill as "the same type of facility that the county is operating." (Meeting Tr., P. 8) MRR also represented that all their communications with DHEC were being submitted to the Planning Commission "in a matter of a day or so." (Meeting Tr., P. 11). At the meeting, the Planning Commission specifically asked about liners and was told by MRR that MRR did not have to provide a liner. (Meeting Tr.,

P. 14). At no time do they mention that they had created an alternate design to include a liner, nor any plan to dump CCR in the landfill.

Based on the representations made by MRR that the plans for the landfill were "just the same as they were" in 2007, the Planning Commission renewed MRR's permit for the Pickens County Landfill (Brink affidavit). Furthermore based upon these representations that the plans for the landfill were "just the same as they were" in 2007", Pickens County agreed to amend the Development Agreement to substitute the term "Class II Landfill" for all references to Construction, Demolition and Land Clearing Landfill in accordance with a redefinition of terms which had occurred in the 2008 governing DHEC regulations. (Brink affidavit)

Unbeknownst to Pickens County, in August 2015, MRR requested from DHEC a modification of the 2008 permit to add the newly designed liner to the landfill in anticipation of using the originally agreed upon construction and demolition landfill as a dumping ground for coal combustion residuals (CCR). (Wilson Affidavit) As stated, CCR is extremely toxic and poses serious health risks to people and to the environment, and adversely affects water quality and air quality. (Vengosh affidavit) DHEC, in conjunction with MRR, chose to classify the requested modification as "minor", despite the fact that the extent of the changes was beyond the scope of minor modifications as defined by regulation. Per Regulation 61-107.19, Part I, A. 48.:

> a. Minor modification means a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change; and
>
> b. Major modification means a change that substantially alters the facility or its operations, e.g., tonnage increase above 25%, any volumetric capacity increase, alternate designs that vary from the design prescribed in this regulation. R61-107, Part 1, A. 48.

DHEC's and MRR's decision to treat the design modification as a minor modification allowed DHEC and MRR to avoid the statutory requirement for public review and public comment, which are necessary for major modifications, per R. 61-107.19, Part IV. I. 2 (Ex. 16). This, however, would not have relieved MRR of their contractual obligations to give notice to Pickens County of the submissions to DHEC, which was not done. The changes which MRR proposed to the original 2008 Permit included:

- the addition of alternate liner design (no liner was referenced in the 2008 Permit);
- changes from Class Two to Class Three characteristics (CEC Reports, Exhibits 8, 9, 10);
- language changes eliminating the limiting language of "all other wastes . . . are prohibited";
- Language changes replacing the original language limiting waste streams to allow "any other waste approved by the Department for disposal in a Class Two Landfill . . .,"; and,
- Changes to provisions for final cover. (See 2008 Permit, Ex. 11, and 2015 Permit, Ex. 12).

Per any reasonable interpretation of these Regulations, these changes constituted a major modification, requiring public comment, public review and Notice to the County. No such Notice or public involvement occurred. The covertly and improperly obtained modified Permit was issued August 10, 2015. The modified permit was not sent to Pickens County. (See Ex. 2, Report of Shelley H. Robbins; Ex. 3, Affidavit of C. Wesley Hulsey; Ex. 4, Affidavit of Christopher Brink; and Ex. 5, Affidavit of Gerald G. Wilson).

To this date, neither DHEC nor MRR has provided formal Notice of the purported August 10, 2015 Permit. To the contrary, MRR continued to represent to Pickens County

that this landfill would accept only C&D and LCD waste. (See Ex. 3, Affidavit of C. Wesley Hulsey; Ex. 4, Affidavit of Christopher Brink; and Ex. 5, Affidavit of Gerald G. Wilson).

CEC, MRR's engineering firm, has repeatedly reported to DHEC, but not Pickens County, that it intends to change the design of this C&D Landfill to meet the requirements of a Class Three Landfill, which is prohibited in Pickens County per DHEC and per the Pickens County Solid Waste Management Plan ("SWMP"). As stated by MRR's consulting firm CEC to DHEC:

> "During recent meetings between MRR and DHEC, it was confirmed that the modification of the Class Two Permit to meet the requirements of Regulation R. 61-107.19 Part V Class Three Landfills would require a minor Permit modification.
>
> (See CEC's Work Plan for Site-Specific Hydrogeological Investigation, Aug./Sept. 2014; attached, Ex. 8).

On January 16, 2016 the Pickens Planning Commission, after hearing that MRR planned to use the proposed landfill for CCR, sent a letter to MRR requesting that they "cease and desist any and all activities at the proposed site ***until such time as you have presented sufficient information to the Commission of your intention to strictly comply with our 2007 and 2015 land use approval*** and receive a renewal of your permit from the Commission." (*Emphasis added.*) MRR has yet to request to appear in front of the Commission or provide them with the requested information.

In response to the January 11, 2016 letter, MRR filed suit in this matter on February 1, 2016. The suit purports to be an appeal to the Circuit Court, pursuant to South Carolina Code Ann. § 6-29-1150, of the Planning Commission's request for additional information, mischaracterized by MRR as a "Termination Notice". Additionally, MRR alleges that the

purported "termination" has caused it irreparable harm. MRR alleges it has a "preliminary agreement" with a third party to accept CCR waste that it plans to dispose of in the Pickens County landfill in contravention the limitations of its agreement, state and federal law and every representation it has made to Pickens County. MRR alleges that its "deadline" to submit necessary documentation to accept CCR that meets its Class Two Landfill Permit expires in late February 2016. MRR alleges the dollar amount of actual and future damages if it is not allowed to dump CCR in Pickens County. MRR makes the following allegations with regard to irreparable harm:

- MRR is being denied the ability to conduct any activities on the Subject Property or use it in any manner without being subject to criminal prosecution[1];
- Injury that "threats (sic) the very existence of MRR Pickens's business and will result in loss of goodwill and other losses that are incapable of fully calculating into pecuniary terms.

On the same day MRR filed its Complaint, it filed a Motion for an Emergency Preliminary Injunction. MRR requested "an Order granting a Preliminary Injunction that enjoins Pickens County from taking any further action to suspend, terminate, fail to permit, or refusing (sic) to allow MRR Pickens from developing and operating its permitted and approved Class Two Landfill on the Subject Property and allowing it to accept waste allowed by DHEC and the Solid Waste regulations for a Class Two Landfill." Additionally, MRR requested the Order "***must***" be entered on or before February 24, 2016. (*emphasis added.*)

[1] Counsel for Pickens County represented to the Court and the Court noted in its order that MRR was free to proceed with any activities allowed under the 2008 permit.

In support of its Motion, MRR filed the affidavit of Norbert Hector, a managing member of MRR, and Scott Brown, a professional engineer with CEC hired by MRR. In of his affidavit, MRR's Mr. Hector swears as follows:

> 18. At the Planning Commission public meeting, MRR never stated it was not lining the landfill or that it was planning to restrict its waste to Construction and Demolition/Land-Clearing Debris. (C&D/LCD) waste.

This is in direct contravention of the transcript of that meeting where MRR indicated that the landfill would be used for the same purposes requested in 2007 and would not be lined. (Tr. P. 14)

He further avers the following:

> 23. To my knowledge, no member of the Pickens County Planning Commission has requested information from MRR Pickens relating to the false allegations in the Land Use Suspension.

This completely ignores that the document he refers to as a "Land Use Suspension" is a request for additional information, which to date has not been provided.

Perhaps most importantly, Mr. Hector states that any agreement that MRR could have with a third party to dispose CCR would be "contingent upon DHEC approving the CCR after characterization determines it meets the requirements for disposal at a Class Two Landfill." (Hector ¶ 27) He then avers that "***MRR Pickens has not yet submitted a waste characterization plan for approval from DHEC to accept CCR at the Subject Property."*** (Hector ¶ 29, *Emphasis added*). MRR thus concedes they have not even gotten the approvals necessary to contract to accept the waste subject to this litigation.

Mr. Brown, MRR's consulting engineer, also misrepresents what was said at the January, 2015 planning commission regarding the landfill use and liner in his affidavit.

(Brown ¶ 9 and 10). He then gives his legal interpretation of the DHEC solid waste regulations averring the following:

> 16. The DHEC Solid Waste Regulations allow disposal of wastes other than those listed in Appendix I (which includes construction and demolition waste) in a Class Two Landfill, so long as the waste demonstrates similar properties to the Appendix I waste and are approved by DHEC, or any waste that tests less than ten (10) times the maximum contaminant level set by State Primary Drinking Water Regulations.)

Mr. Brown concedes that none of the DHEC approvals he references have been requested or granted. (Brown ¶ 18). Mr. Brown conveniently omits that the 2008 DHEC permit language is much more restrictive as to what can be accepted in Pickens landfill than the regulation he quotes.

Most interestingly Mr. Brown admits that MRR was developing the design to line the landfill in 2014, months before MRR appeared in front of the planning commission for its permit renewal and denied a liner or any plan to change the character of the landfill.

In opposition to the motion, the Defendants submitted the affidavits of several witnesses regarding the nature of CCR and the rules and regulations governing the landfill in question. Dr. Avner Vengosh, a Professor of Geo-Chemistry and Water Quality at Duke University, explained the health and environmental danger of CCR.

Pickens County submitted the affidavit of Chris Brink, the Director of the Pickens County Department of Community Development. As Planning Director, Mr. Brink works closely with the Pickens County Planning Commission and was present at the January 12, 2015 meeting where MRR misrepresented their plan for the landfill. Mr. Brink explains that CCR falls within the definition of "special waste" as defined by the Pickens County Solid Waste Management Plan ("SWMP") controlling use of the landfill. Mr. Brink testified

that special wastes are not accepted at any landfill facilities in Pickens County pursuant to the SWMP.

In further opposition to the injunction, Pickens County presented the affidavit of Gerald G. Wilson, the Public Works Director for Pickens County, who confirmed that Pickens had not received any notice regarding the 2015 permit modifications. He confirms that Pickens County never approved the modifications. Furthermore, he confirms the County never received any of the correspondence between DHEC and MRR and their engineers in 2014 and 2015 regarding the substantial proposed to the DHEC permit, such notifications being required by both the Development Agreement and the County's Solid Waste Management Plan and promised by MRR's representative at the January, 2015 meeting.

Pickens County submitted the affidavit of T. Wesley Hulsey, a licensed professional geologist who testified that CCR qualifies as special waste pursuant to S. C. Code Ann. §44-96-390, and must be deposited in a Class Three Landfill that holds a "special waste permit" from DHEC. This statement was also agreed to by Kent Coleman in his deposition.

Q. All right. First of all, would you agree that
4 special wastes are supposed to go into municipal solid
5 waste landfills, otherwise known as MSW, which is also
6 known as a Class Three landfill?
7 A. Yeah. That's -- the statutory definition of
8 special waste refers to MSW landfills.
9 Q. Okay. Which is Class Three?
10 A. Yes.

Coleman p. 167

Q. And all I'm asking you is if something does
4 legitimately meet the definition of special waste, it

5 belongs in a Class Three, not a Class Two. Would you
6 agree?
7 A. Generally, I would agree with that.

Coleman p. 170

Mr. Hulsey also avers that in addition to meeting the definition of "special waste" under the South Carolina Code, CCR meets the definition of "special waste" in the Pickens County Solid Waste Management Plan, which his firm prepared for Pickens County. The definition of "special waste" in the Pickens SWMP is as follows:

> "P. Special Waste.
> Special Waste is defined as commercial or non-residential solid waste, other than regulated hazardous waste, that would be difficult or dangerous to handle and would require unusual management at MSP landfills, including but not limited to pesticide waste, liquid waste, sludge, **industrial process waste**, **waste from pollution control processors**, residue or debris from chemical cleanups, contaminated soil from chemical cleanups, containers and drums and animal carcasses. **Special Waste is not accepted at any of the county facilities.** (*Emphasis added.*)

Mr. Hulsey avers that since CCR is an "industrial process waste" and is a "waste from pollution processes", it qualifies as "special waste" pursuant to the SWMP, which he drafted.

After the court denied the Plaintiff's request for a preliminary injunction by Order dated February 24, 2016, MRR filed a motion to reconsider the trial court's denial of their motion for a preliminary injunction. MRR argued that the trial court had, in effect, enjoined MRR from accepting coal ash into the Pickens County landfill and that the court had incorrectly concluded that MRR had not shown irreparable harm or no adequate remedy at law. MRR did not present any additional information to the court in support of this motion. Before Pickens County could respond, the court, on March 11, 2016, denied the

Plaintiff's motion to reconsider noting that its initial order was never a "*sua sponte* injunction against the Plaintiff".

On March 2, 2016 the governor signed into law new legislation governing the disposal of CCR. S.C. Code Ann. § 58-27-255 states as follows:

> (A) Coal combustion residuals that result from an electrical utility, an electric cooperative, a governmental entity, a corporation, or an individual producing electricity for sale or distribution by burning coal must be placed in a commercial Class 3 solid waste management landfill, unless the coal combustion residuals are:
>
> (1) located contiguous with the electric generating unit;
>
> (2) intended to be beneficially reused;
>
> (3) placed into beneficial reuse; or
>
> (4) placed in an appropriate landfill which meets the standards of the Department of Health and Environmental Control Regulation 61-107, and that is owned or operated by the entity that produced the electricity which resulted in the coal combustion residuals.
>
> (B) The "beneficial reuse" of coal combustion residuals, as used in this section, is subject to the applicable regulations as promulgated by the Department of Health and Environmental Control.
>
> S.C. Code Ann. § 58-27-255

This legislation would prohibit MRR from dumping CCR in the Pickens Class II landfill.

On March 8, 2016, MRR took the deposition of Kent Coleman, the former DHEC employee who signed the 2015 permit modification. Counsel for MRR asked Coleman to assume that S.C. Code Ann. § 58-27-255 had not been enacted. (Coleman deposition, p. 56-57) Counsel then questioned the witness regarding approval of a permit modification under law that is no longer applicable to these facts.

On March 14, 2016, the Plaintiff filed a motion pursuant to Rule 60 of the South Carolina Rules of Civil Procedure for relief from judgment based upon the deposition of Kent Coleman. Coleman's testimony was offered to support the MRR's contention that

CCR is an acceptable waste stream under MRR's initial Class II permit from 2008, and its modified Class II permit of 2015. The only portion of the Court's order addressed in the motion was the language in the initial order that MRR "shall operate under the constraints and allowances of the subject permit of November 3, 2008." Plaintiff never mentioned the enactment of S.C. Code Ann. § 58-27-255.

In opposition to this motion, the Defendants submitted the remainder of the Coleman deposition which establishes that the 2015 changes to the permit, by definition, constituted a major modification and despite that, notice of the modifications to the permit had never been given to Pickens County:

- Coleman admits that the Department must follow the language of relevant statutes and regulations. (Coleman deposition, 1, p. 98, l.14-25, p. 99 l. 1-5).
- Coleman admits that the definition of "major modification," in the relevant regulation, includes "alternate designs." (Coleman Depo p. 102, l. 17-25; p. 103, l. 106).
- Coleman admits that in the definition of "minor modifications," there is no inclusion of "alternate designs." (Coleman Depo p. 103, l. 7-22).
- Coleman admits that he previously, in a letter signed by him on August 10, 2015 accompanying the purported Permit Modification, characterized the modification as an "alternate liner design"[2] and as a "design change." (Coleman Depo p. 103, l. 23-55; p. 104, l. 1-24).

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[2] Exhibit 1 is a rough draft of the Kent Coleman deposition, and on page 97

- Coleman admits that the purported Permit Modification was a "design change." (Coleman Depo p. 104, l.1-25; p. 106, l. 1-16).
- Coleman admits that "design change" falls under the definition of "major modification," and is not included in the definition of "minor modification," per the relevant regulation. (Coleman Depo p. 105, l. 17-21).
- Coleman admits that a "major modification" requires notice to affected persons. (Coleman Depo p. 105, l. 22-25; p. 106, l. 22).
- Coleman admits that, per relevant statute, the term "affected persons" includes local governments and host local governments. (Coleman Depo p. 106, l. 18-19).
- Coleman admits that when the Department determines a proposed change that is determined to be a "major modification," that ". . . we would have followed our normal process, which would include [notice to] adjacent owners, concerned parties, local governments." (Coleman Depo p. 106, l. 17-22).
- Coleman admits that, for the 2015 Permit change, there was no Notice provided to Pickens County or to the public. (Coleman Depo p. 106, l. 23-25; p. 107, l. 1-3).

inaccurately states "alternate ladder design." See Exhibit 2, the letter of Kent Coleman, which states "alternate liner design." Also see the continuing testimony of Mr. Coleman, pp. 98-99.

- (K) Coleman admits that if there is a "major modification," the public is supposed to receive Notice. (Coleman Depo p. 107, l. 4-19).[3]

MRR did not give any reason that Coleman could not have been deposed prior to the hearing on the motion for temporary injunction was originally heard, nor did they call Mr. Coleman as a witness in that hearing.

The court issued an order denying this motion on March 28, 2016 on the basis that the motion denying the preliminary injunction was not a final judgment or order of the court and therefore, not subject to the view under Rule 60. MRR has appealed all three orders.

STANDARD OF REVIEW

The grant of an injunction is reviewed for abuse of discretion. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct.App.2005). Hook Point, LLC v. Branch Banking & Trust Co., 397 S.C. 507, 510–11, 725 S.E.2d 681, 683 (2012)

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the [court]." BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006).

Arguments

[3] "Affected persons" is defined in S.C. Code § 44-1-60(E).

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION

It is important to note that this appeal is from three separate orders. The record before the Court at each hearing was different. Appellant, in support of its Motion for a Preliminary Injunction, submitted only the affidavits of its employee Norbert Hector and its hired engineer Scott Brown, in addition to its Complaint and Exhibits.

"A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). Hook Point, LLC v. Branch Banking & Trust Co., 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012).

MRR has asked the court to completely change the status quo and allow CCR to be dumped in a landfill developed for Construction and Demolition debris. MRR argues it will "sustain irreparable harm as a result of the Termination Notice and the Court's refusal to allow MRR Pickens to accept waste that is approved by DHEC." (Appellant's brief p. 11). However, the only two affidavits MRR submits in support of its motion both clearly state that MRR Pickens has not yet submitted a waste characterization plan for approval from DHEC to accept CCR at the Subject Property. (Hector affidavit ¶29 and Brown affidavit ¶18). Throughout Hector's affidavit, he characterizes the "potential contract" which is the linchpin of MRR's irreparable harm argument as "tentative," "contingent on DHEC approval," and "contingent" on winning the bid for the contract to start with. There

is no contract. Hector's affidavit negates any idea that there is any certainty there would ever be a contract.

MRR correctly notes that irreparable harm can exist in circumstances where there is misappropriation or denial of the use of property or regulatory taking of one's property rights. It is clear from the affidavits submitted by MRR that they do not have a "right" to dump CCR in Pickens County. MRR argues that they have lost a "potential" contract for CCR disposal[4] because of the Respondent's January 11, 2016 letter; however, its affidavits clearly state that it does not have the necessary state regulatory approvals to accept the waste subject to this contract. Without those approvals, there is no "right" for Pickens County to take.

The use of the subject property as a coal ash dumping ground is not and has never been a permitted use of the subject property. S.C. Code Ann. § 44-96-290 controls what waste DHEC is allowed to permit. It states as follows:

> No permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department **unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any; the proposed facility or expansion is consistent with the local or regional solid waste management plan** and the state solid waste management plan; and the host jurisdiction and the jurisdiction generating solid waste destined for the proposed facility or expansion can demonstrate that they are actively involved in and have a strategy for meeting the statewide goal of waste reduction established in this chapter. (*Emphasis added.*)
>
> S.C. Code Ann. § 44-96-290(F)

[4] MRR fails to identify who the contract would be with, submits no affidavit from anyone with the mystery company, nor any documentation supporting an agreement, preliminary or otherwise.

The Pickens County Solid Waste Management Plan prohibits special waste in Pickens County. The only testimony before the court at the hearing was that CCR constitutes special waste prohibited by the Pickens County Solid Waste Management Plan. (Hulsey affidavit) By statute, DHEC cannot permit a waste prohibited by a regional Solid Waste Management Plan. MRR argues that based on DHEC representative Coleman's' testimony, DHEC has the sole authority to determine if CCR meets the regulatory criteria to be placed in a Class II landfill. Of course, Coleman's testimony was not before the court at the time this injunction was requested, and was submitted later in support of MRR's Rule 60 motion.[5] However, the regulatory criteria is not the only criteria, and what DHEC may permit is controlled by statute, not Mr. Coleman.

The term "special waste" is defined by statute.

> (A) For the purposes of this section, "special wastes" is defined as nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills, including, but not limited to:
>
> ...
>
> (4) industrial process wastes, defined as **wastes generated as a direct or indirect result of the manufacture of a product or the performance of a service**, including, but not limited to, spent pickling liquors, cutting oils, chemical catalysts, distillation bottoms, etching acids, equipment cleanings, point sludges, core sands, metallic dust sweepings, asbestos dust, and off-specification, contaminated, or recalled wholesale or retail products. Specifically excluded are uncontaminated packaging materials, uncontaminated machinery components, landscape waste, and construction or demolition debris;
> (5) **wastes from a pollution control process**;
>
> ....

[5] MRR fails to point out that that all questions by MRR were requested to be answered under the assumption that S.C. Code Ann. § 58-27-255 had not been enacted, and conveniently omits that DHEC does not have the authority to permit any use inconsistent with a County SWMP.

S.C. Code Ann. § 44-96-390

As stated in the affidavit of C. Wesley Hulsey, CCR is both an industrial process waste and a waste from a pollution control device. Any purported permit that would allow CCR in a Class II landfill would be invalid under state law.

MRR's brief and affidavits negate any argument that they lack an adequate remedy at law. Due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Hampton v. Haley, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). MRR in its Complaint alleges it has a contract with Pickens County that has been breached. It claims damages from that breach. It purports to appeal the Planning Commission letter, as well as requests a declaration of its rights under its agreements with Pickens County. All of these are legal remedies available to MRR upon proof of its case. Neither the affidavit of Norbert Hector nor the affidavit of Scott Brown set forth any potential loss that money damages cannot resolve. Although Appellant's ***attorneys*** argue that as a result of Pickens January 11, 2016 letter MRR has lost goodwill and that its very existence has been threatened, there is nothing in the record before the trial court that supports this argument.

MRR argues they have a vested right to operate a Class II landfill. However the 2008 permit for that landfill restricts the type of waste that may be placed into that landfill and those restrictions would include CCR. The Pickens County SWMP, which governs the Development Agreement and cannot be contravened by DHEC, prohibits CCR. MRR now tries to support its argument with the testimony of Kent Coleman and various newspaper articles, but none of that was before the court at the motion for the preliminary

injunction. MRR has no likelihood of success on the merits. The activity it asks the court to permit is prohibited by the Pickens County Solid Waste Management Plan, the 2008 DHEC permit, S.C. Code Ann. § 58-27-255 and the Development Agreement. The record before the court supports that it is the Respondents, not MRR who will likely succeed on the merits.

Additionally, MRR, throughout its Complaint and Appellate brief, mischaracterizes the January 11, 2016 letter. The letter is not a "Termination Notice." The letter requests that MRR ""cease and desist any and all activities at the proposed site ***until such time as you have presented sufficient information to the Commission of your intention to strictly comply with our 2007 and 2015 land use approval*** and receive a renewal of your permit from the Commission." MRR's only response to this letter has been the current suit. Based on its position in the current litigation, MRR obviously has no intention to "strictly comply" with the 2007 and 2015 land use approvals. MRR argues that, based on its secretly and improperly obtained 2015 permit modification from DHEC, it no longer has to apply with the land use approvals. This will be a matter for the court to decide in the course of this litigation, not to be decided preliminarily solely upon the affidavits of Norbert Hector and Scott Brown.

II. THE TRIAL COURT'S ORDER CORRECTLY MAINTAINS THE STATUS QUO FOR THE PENDANCY OF THE LITIGATION

MRR's Motion for a Preliminary Injunction is really a request for a green light from the court to dump coal ash in Pickens County during the pendency of the suit it filed. MRR's entire suit is based upon the premise that its "rights" to develop and use the Pickens County Landfill have been terminated by Pickens County and it has been

damaged by its inability to dump CCR in Pickens County. MRR now argues that the portion of the trial court's February 24, 2016 order clarifying that it may use the landfill for all purposes allowed in the 2008 permit, but may not dump CCR, constitutes a "sua sponte injunction."

MRR alleges to have brought suit because its "rights" to use the landfill for any purpose were "terminated" by Pickens County. Although Pickens County denies this, MRR in this suit attempts to establish an entitlement to dump coal ash in Pickens County. The order specifies that this issue remains exactly where MRR placed it ------ before the trial court for consideration. If MRR believed that subsequent to the January 11, 2016 it had the right to dump coal ash in Pickens County, it would have had no need to file this suit.

Judge Stilwell's order sets out the agreement clarified at the hearing that MRR's right to use the landfill as set forth in the 2008 DHEC permit was not "terminated." Judge Stilwell's order acknowledges that MRR's ability to dump coal ash in Pickens County is still in dispute. As noted by Judge Stilwell in his March 11, 2016 order denying MRR's motion for reconsideration:

> The proscription against the dumping of coal ash, complained of by the Plaintiff in its Motion to Reconsider, does not entertain or grant a Motion for Injunctive Relief from the Defendant nor is it a sua sponte injunction against the Plaintiff. The Plaintiff has mischaracterized the holding of the Court by taking the sentence of context with the remainder of the Order. By concession of each of the parties, this Court allowed MRR to continue to conduct business in accordance with prescribed permits. The proscription against coal ash was a clarification of that provision such that these parties, animated by distrust and hostility would have a clear understanding of the intent of the Court.

(March 11, 2016 Order)

At this point it is clear that the initial Order and the Order on Reconsideration clarifies that MRR is not prohibited from all activity as it alleges, but can proceed pursuant to the 2008 permit. As stated in the court in its Order on Reconsideration, the Court has "failed to be confused by the artful turn of a phase," and clarifies again that its initial order is an "absolute denial" of MRR's Motion for Injunctive Relief.

In arguing against the denial of its Rule 59(e) motion, MRR again cites to the testimony of Kent Coleman to support its position that it is perfectly okay to dump coal ash in a Class II landfill. Again, MRR fails to point out that Mr. Coleman's testimony was not before the court at the time the Rule 59(e) motion was filed. Even if it were, MRR's argument ignores that DHEC has no authority to permit a waste stream not allowed in a county's Solid Waste Management Plan. South Carolina Code Ann. §44-96-290(F). MRR ignores that in March, 2016, the legislature enacted legislation specifically prohibiting CCR in Class II landfills under these facts. It ignores that MRR, as stated in the affidavits it submitted to the court, has not obtained the necessary approvals from DHEC to dump coal ash in Pickens County. It ignores that the 2015 modified permit was issued without notice to Pickens County when Mr. Coleman himself admits that a design change constitutes a major modification requiring notice. (Coleman deposition, p. 104-105). MRR incorrectly attempts to support its argument that it is somehow entitled to dump coal ash in Pickens County with half a deposition that was never part of the record before the trial court.

III. THE TRIAL COURT CORRECTLY HELD THAT RULE 60(B) DOES NOT APPLY TO THE DENIAL OF A PRELIMINARY INJUNCTION

On March 14, 2016 Plaintiff filed a motion "Pursuant to Rule 60 of the South Carolina Rules of Civil Procedure" requesting a hearing "to alter, amend and /or reconsider the Order of the Honorable Robin B. Stilwell on February 22, 2016 ("Order") on Plaintiff's Motion for Preliminary Injunction based on the deposition testimony of Kent Coleman ("Coleman"), the Director of the Division of Mining and Solid Waste Management for South Carolina Department of Health and Environmental Control (SDDHEC)." (Rule 60 Motion).

SCRCP 60(b)[6] provides as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> Rule 60(b)

Since MRR is using the motion as a vehicle to introduce into the record for the first time the testimony of Kent Coleman, presumably they are invoking Rule 60(b)(2). In support of its Motion MRR filed the affidavit of their counsel Robert Goings stating

> 3. Despite our diligent attempts to obtain the compelled testimony from Mr. Coleman prior to this court's hearing on February 18, 2016 and after

[6] Although MRR does not specify Rule 60(b), they do not argue any type of clerical mistake subject to Rule 60(a).

> receipt of this Court's Order dated February 22, 2016, Mr. Coleman was unavailable of being deposed until March 7, 2016.
>
> Goings affidavit p. 1

Mr. Coleman is not the evidence. Mr. Coleman's testimony is the evidence. Appellant has failed to explain why this information could not be obtained from another source. The information introduced by MRR in support of their Rule 60(b) motion is primarily legal interpretations of regulations from a non-lawyer, none of which would be the exclusive purview of one person. Appellant never served Respondents with a subpoena for Mr. Coleman's testimony prior to the hearing on the Injunction. Appellant did not submit any affidavits from Mr. Coleman or anyone at DHEC in support of its motion. There is nothing in Mr. Coleman's deposition or Mr. Goings's affidavit explaining Mr. Coleman's "unavailability", or more importantly, why an affidavit could not have been obtained prior to the hearing.

Appellant is the Plaintiff and the moving party for the injunction. As such, they control the timing of the suit and the hearing for the injunction, yet there is nothing in the record supporting why Mr. Coleman could not have submitted an affidavit prior to the hearing. There is nothing in the record explaining what due diligence was made to obtain Coleman's testimony. Appellant never requested that the record remain open in the hearing on the Preliminary Injunction to allow for Coleman's testimony. Coleman was not subpoenaed to testify at the hearing on the injunction.

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct.App.2003). "The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." Bowman v.

Bowman, 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct.App.2004) (citing Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992)); see also Saro Invs. v. Ocean Holiday Pship., 314 S.C. 116, 441 S.E.2d 835 (Ct.App.1994) (noting that Rule 60(b) motions are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion). Lanier v. Lanier, 364 S.C. 211, 215–16, 612 S.E.2d 456, 458 (Ct. App. 2005) In Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654, (Ct.App.2004), this Court held that "South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." Id. at 152, 591 S.E.2d at 657. Lanier v. Lanier, 364 S.C. 211, 220, 612 S.E.2d 456, 461 (Ct. App. 2005).

In Lanier, infra the court stated that to receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." Id. at 217, 612 S.E.2d at 459. The five-part test recited in Lanier is yet another way of restating Rule 60(b)(2)'s requirements. See 12 Moore's Federal Practice § 60.42[2] (Matthew Bender 3d ed.) (discussing various element tests for Rule 60(b)(2)). See. Hous. Found. v. Smith, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008).

Appellant has not set forth any information supportive of these standards other than a conclusory averment that Kent Coleman could not be deposed prior the injunction hearing. The testimony he puts before the court is half of a deposition, much of which was retracted during cross examination, which states legal conclusions, but not facts. MRR's

submissions in support of Rule 60(b)(2) fail to establish any entitlement to a preliminary injunction.

It should be noted the trial court never addressed the merits of the motion since the Rule 60(b) motion was addressed, not to a final order, but to a temporary order. South Carolina Rule of Civil Procedure Rule 60(b) is virtually the same as Federal Rule of Civil Procedure Rule 60(b). While our state courts have not interpreted the plain language of the rule as it applies to interlocutory orders, the federal courts have unanimously held that Rule 60(b) only applies to final orders.

> In 7 Moore's Federal Practice, ¶ 60.20, p. 60–170, after stating that Rule 60(b) is applicable only to a final judgment, order or proceeding, it is plainly said:
>
> > Interlocutory orders and judgments are not within the provisions of Rule 60(b), but are left within the plenary power of the Court that rendered them to afford such relief from them as justice requires.
> >
> > Fayetteville Inv'rs v. Commercial Builders, Inc., 936 F.2d 1462, 1473 (4th Cir. 1991)

While the denial of an injunction is immediately appealable, that does not change it from an interlocutory to a final order.

WHEREFORE, the trial court's interlocutory denial of Plaintiff's unsupported request for an injunction is not subject to Rule 60(b).

CONCLUSION

For the reasons stated herein, the Respondents respectfully request this Court uphold the lower court's denial of MRR's request for injunctive relief.

Respectfully submitted,

Amy M. Snyder (S. C. Bar No.: 7968)
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606
(864) 232-4400 Phone
(864) 235-4399 Fax
asnyder@clarksonwalsh.com email

Gary W. Poliakaff (S.C. Bar No. 4488)
Poliakaff & Associates, P.A.
P.O. Box 1571
Spartanburg, SC 29306
(864) 582-5472 Phone
atty@gpoliakaff.com email

ATTORNEYS FOR RESPONDENTS

Greenville, SC

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