

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ABC RECYCLING INDUSTRIES, LLC

Petitioner

vs.

STATE ENVIRONMENTAL  
COMMISSION, a political subdivision of  
the State of Nevada; NEVADA  
DIVISION OF ENVIRONMENTAL  
PROTECTION, a political subdivision of  
the State of Nevada, and DOES I through  
X and ROE CORPORATIONS XX  
through XXX

Respondents/Cross-Petitioner

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**Supreme Court Case No. 83027**

**Dist. Ct. Case No. A-20-818624-J**

**APPEAL**

**From the Eighth Judicial District Court  
Department I  
Clark County Nevada  
HONORABLE BITA YEAGER**

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**PETITIONER'S REPLY BRIEF**

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*ABC RECYCLING INDUSTRIES, LLC*

### **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

ABC Recycling Industries, LLC

The Law Offices of Byron Thomas has appeared for Petitioner ABC Recycling Industries, LLC in the case and is expected to appear in this Court.

Dated this 7th day of March 2022

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## STATEMENT OF FACTS

On or about February 6, 2020, NDEP revoked Lathrop Mill Reclamation Permit #0711 (the “Permit”). Vol I APP0024. NDEP claimed that it was revoking the Permit for non-payment of fees, but in reality NDEP revoked the license in bad faith. Id. NDEP is using the fee issue as a smokescreen to hide the unreasonable withholding of the approval of ABC’s reclamation plan. Vol I APP0095-96. The State originally set the reclamation bond at \$1,260,000, Id. However the actual reclamation costs is more than triple the bond. Id. It is believed that Hillcrest spent approximately \$3,400,000 attempting to reclaim the property. Id. ABC Recycling has spent approximately \$1,000,00,000 not counting costs such as attorney fees and the costs of other professionals. Id.

In addition, there may be the need for even more expenditures on cleanup. Id. There is also a settling pond of approximately 200 acres located on the property. Id. We believe that this settling pond contains contaminants. Id.

We also cannot forget that American Borate is the cause of all these problems. Id. However, American Borate is not being required to take responsibility for its actions. Id. Instead NDEP is pursuing actions against ABC. The only party that is currently trying to remedy the problem. Id.

ABC has presented a plan to reclaim the land. Id. The plan reasonably proposes to use green waste to reclaim the property, but NDEP unreasonably withheld approval and then acting in bad faith and ill will it revoked the Permit. Id.

ABC appealed to the State Environmental Commission (the “Commission”) and NDEP moved for summary judgment only on the fee issue. Vol 1 APP 0022-54; Vol 1 APP 0055-87. ABC opposed on the bases that it needed more time to solicit evidence of NDEP’s wrongdoing and because of the nefarious purposes of NDEP the ruling was arbitrary and capricious. Vol I App 0090-107

At the hearing it became clear that ABC was correct. The Representative for ABC testified that ABC was trying to comply but they were given a series of conflicting directives by successive representatives of NDEP. Vol I App 156-159. In addition, it became clear that more time was needed. The following testimony was provided at the hearing:

THOMAS: And just to follow up, as we – our issue is that this is a much broader issue than what NDEP is saying it is, that it’s simply a pretext and it is also arbitrary and capricious, and that’s also why I put in the 56F motion requesting more time to gather more documents to show that this is really just a pretext and that it’s really arbitrary.

GANS: Okay. I thank you both. I understand what you’re saying. I’m assuming my mic is on. I understand what you’re saying, and I have a few questions, but I’d like to get Kacey first with anything that she wants to ask you.

KC: Could you point me to the letter where you’re saying that it said – what were you saying, that it was -- that it didn’t matter or what – I

read all the letters that were attached here, and I didn't see [inaudible]?

THOMAS: And that was my issue. That's why I wanted more time to gather the evidence to oppose this as required by law by 56F. We were just able to get ahold of this information. We were just able to get ahold of this information and again, this would be a part of the additional evidence that we can produce if 56F was approved theory that if a party needs more time to gather additional evidence [audio cut].

KC: Yeah, I saw that in your letter, your motion, but the letter that you guys are speaking to isn't in our packets here, so that's what you were saying you wanted more time to produce?

THOMAS: Yes, and that and other documents, yes.

Vol I APP 161:3-162-7.

At the hearing testimony was provided as follows:

PORTA: And for the Division, was this plan approved? I saw in my packet a letter back to ABC stating that the – ABC had to get local approvals first before NDEP could move on approval of the plan. Did that ever happen?

THOMAS: Yes, that – was that question directed to Mr. Ford or NDEP?

PORTA: I guess it – well that would be more appropriate for NDEP.

NUBEL: Okay, and I don't know the status of any local approvals that ABC had to obtain, but what I do know is that no plan was ever submitted to the Division in writing as was stated under the rule.

PORTA: Okay, that's what I'm trying to get at. I mean, Mr. Thomas, if you're trying to make the argument that, you know, the Division is holding up the plan and you're not NDEP going to pay the fee because of that, but if you haven't even submitted a plan, I'm failing to see the connection here.

THOMAS: Well the connection is that we've been negotiating to try to resolve these issues, like Mr. Ford was told at one point, there wasn't a need to modify the plan. Now all of a sudden there is. So, we were just trying to figure out exactly what was going on.

NDEP 142:8-143-7. Vol I APP0161:8-162-7. ABC filed a petition for judicial review to the district court. Vol I App 0001-12. The parties briefed the issues on appeal. Vol II APP0207-APP0227; APP0228-APP0245; APP0260-APP0272. On April 15, a hearing was held and the district court affirmed the decision of the Commission. Vol II APP0279-APP0281.

## **ARGUMENT**

### **Standard of Review**

This Court should review the orders granting summary judgment de novo to determine whether the evidence properly before the district court “demonstrate[s] that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law. Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). If a reasonable jury could find for the non-moving party, summary judgment is inappropriate.<sup>4</sup> Furthermore, a district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment. Borgerson v. Scanlon, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001).

A. ABC Raised Material Issues of Fact, and Therefore the Commission Should not Have Granted Summary Judgment.

ABC contended that NDEP was acting improperly and the Commission had the authority to determine that NDEP had acted with prejudice bias or ill will, and it could thus, overturn the decision of NDEP regardless of whether the fees were paid. Commission and NDEP's (collectively referred to as "Respondents") almost completely ignore this argument, and claims that NDEP's reason for revoking the permit was clear and uncontroverted on the record. This is simply not the case as pointed out in the Opening Brief, several board members raised questions about prior dealings of NDEP and ABC. Mr. Ford testified that promises were made to him by the old regime, and then broken. So, there is evidence in the record of NDEP acting in bad faith.

The issue of whether NDEP acted arbitrarily is certainly material:

[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Wood v. Safeway, Inc., 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005). The substantive law regarding arbitrary and capricious behavior is as follows:

An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason," Black's Law Dictionary 119 (9th ed. 2009) (defining "arbitrary"), or "contrary to the evidence or established rules of law," (omitted) (concluding that



“[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so”). A manifest abuse of discretion is “[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” (omitted) “is one exercised improvidently or thoughtlessly and without due consideration”); (omitted) ( “[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.”).

State v. Dist. Ct. (Armstrong), 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011).

So, a clearly erroneous misinterpretation of the law or rule is material. In the instant case it appears that the Commission misperceived its authority. The Commission seemed to believe that it did not have the authority to determine that the decision of NDEP was arbitrary and capricious. This was a clearly erroneous interpretation of the law. A decision is also arbitrary and capricious if the judgment is manifestly unreasonable or the result of partiality, prejudice, bias or ill will. Thus, evidence concerning prejudice bias or ill will is certainly material.

Contrary to the Respondents’ position the evidence was material and should have been viewed in the light most favorable to ABC, instead the Commission did not give any credence to the material evidence, and thus the Commission’s decision violated the summary judgment standard.

B. ABC was Entitled to Additional Time to Challenge The Motion for Summary Judgment.

Respondents' argument against the additional discovery is without merit. Respondents argue that whether fees were paid was the only issue the district court could consider. However, ABC has demonstrated that the decision of NDEP could be overturned if NDEP was acting with malice ill will or bad intent. ABC also showed by affidavit that discovery regarding whether NDEP was acting with malice, ill will or bad intent would lead to the evidence that would defeat NDEP's summary judgment motion. ABC needed additional discovery to identify and produce these material facts. Moreover, if the Court were to adopt Respondents' argument, no party could ever challenge a decision of NDEP on the basis of arbitrariness or capricious. Every order issued with malice or ill will would be beyond consideration.

Dated this 7<sup>th</sup> day of March 2022.

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## **CERTIFICATE OF COMPLIANCE**

The below-signed hereby certifies that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2243 words. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

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I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7<sup>th</sup> day of March 2022

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Eighth Judicial District Clark County Nevada by using the Court's electronic service system on March 7, 2022. A copy of the foregoing shall be electronically transmitted from the Court to the email addresses on file for each of the following:

### **Attorneys for Respondents**

Dated this 7th day of March 2022.

*/s/ Byron Thomas*

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