

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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Elizabeth A. Brown
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Case No. 83027
District Court Case No. A-20-
818624-J

APPEAL

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

APPELLANT'S OPENING BRIEF

LAW OFFICES OF BYRON THOMAS
BYRON THOMAS, ESQ.
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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 Appellant ABC Recycling Industries, LLC in the case and is expected to appear in this Court.

Dated this 15th day of December 2021

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JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court pursuant to NRAP 3A(b)(1). The decision rendered by the district court disposed of all claims of all parties, and thus it was a final appealable order. The notice of entry of the order of the district court's decision is dated April 30, 2021. The appealed filed on June 1, 2021.

ROUTING STATEMENT

The Supreme Court should retain jurisdiction of this matter because it involves an Administrative agency case involving water, or public utilities commission determinations. NRAP 17(a)(8).

ISSUES PRESENTED

1. Did the District Court Err When it Affirmed Commission's erroneous ruling that it could not consider the behavior of NDEP?
2. Did the District Court Err When it Affirmed the Commission's error of law that it could not find that NDEP had acted arbitrarily and capriciously?
3. Did District Court Err When it Affirmed the Commission's failure to consider Appellant's request for additional time constitute reversible error?
4. Did the District Court Err When it Affirmed the Commission's Summary Judgment Finding?

STATE MENT OF THE CASE

The Nevada Department of Environmental Protection (hereinafter the “State” or “NDEP”) revoked ABC’s water permit. ABC appealed to the Nevada State Environmental Commission (the “Commission”). NDEP then filed a motion for summary judgment (hereinafter the “Motion”). NDEP contended that it was entitled to summary judgment because ABC Recycling Industries, LLC (hereinafter “ABC”) had not paid the annual fee for mining. ABC filed an opposition and requested additional time as to compile evidence so as to be able to defend against the Motion for Summary Judgment. The Nevada State Environmental Commission (the “Commission”) granted the Motion for Summary Judgment and did not consider the motion for additional time. ABC appealed the case to the district court and the district court affirmed the decision of the Commission.

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 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 wrong doing 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.

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.

SUMMARY OF ARGUMENT

The district court erred when it affirmed the decision of the Commission and rejected the arbitrary and capricious argument of ABC. The district court erred when it found that substantial evidence supported decision of the Commission to grant summary judgment. The district court erred when it denied ABC's request for additional discovery, which affirmed the decision of the Commission.

ARGUMENT

Standard of Review

This Court should reviews appeals of decisions of administrative bodies as follows:

On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court. We review the factual determinations of administrative agencies for clear error "in view of the reliable, probative and

substantial evidence on the whole record” or for an “abuse of discretion.” NRS 233B.135(3)(e), (f). Thus, factual findings will only be overturned if they are not supported by substantial evidence, which, we have explained, is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions. . “A de novo standard of review is applied when this court addresses a question of law, ‘including the administrative construction of statutes.’ We will decide purely legal issues without deference to the agency's conclusions of law. *Id.*

Nassiri v. Chiropractic Physicians' Bd., 130 Nev. 245, 248, 327 P.3d 487, 489 (2014)(citations omitted).

This Court reviews 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. 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. The District Court Misinterpreted the Law When it Disregarded ABC’s Arbitrary and Capricious Argument.

A ruling is arbitrary or capricious when:

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).

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. Mr. Ford was testified that he was given conflicting information by subsequent officials, and that he tried to comply. NDEP 135-38. He also testified about NDEP acting in bad faith because this matter was really about the dispute over the reclamation fees. *Id.*

That coupled with the fact that we are talking about \$4,000 when tens of thousands of dollars have been spent and tens of thousands more will have to be spent. Yet, the state did not even provide written responses to the request before pulling the permit. This type of conduct would certainly fall under the type of actions identified in State v. Dist. Ct., 267 P.3d at 780 (2011).

Thus, this evidence was material and should have viewed in the light most favorable to ABC instead the board did not give any credence to the evidence at all, and thus the district court erred when it affirmed the Commission decision to grant summary judgment in favor of NDEP.

B. The District Court Erred When it Affirmed the Refusal to Give ABC

Additional Time to Challenge The Motion for Summary Judgment.

NRCP 56(d), formerly NRCP56(f) allows a party more time to gather evidence to oppose a summary judgment motion if the party needs additional time to gather evidence to challenge the motion for summary judgment.

The Nevada Supreme Court has interpreted Rule 56(f) as follows:

NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of its opposition. A district court's decision to refuse such a continuance is reviewed for abuse of discretion. Furthermore, a motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact. In Halimi v. Blacketer, this court concluded that a district court had abused its discretion when it denied an NRCP 56(f) motion for a continuance and granted summary judgment in a case where the complaint had been filed only a year before summary judgment was granted. This court noted that summary judgment is improper when a party seeks additional time to conduct discovery to compile facts to oppose the motion. Furthermore, this court held that when no dilatory motive was shown, it was an abuse of discretion to refuse a request for further discovery at such an early stage in the proceedings.

Aviation Ventures, Inc. v. Joan Morris, Inc., 121 Nev. 113, 117–18, 110 P.3d 59, 62 (2005).

In the instant case the parties were early in the litigation. NAC 445B.8913 provides as follows:

1. The Commission may, upon its own motion or a motion made by a party, conduct a prehearing conference to:

- (a) Formulate, simplify or limit the issues involved in a hearing;
- (b) Obtain admissions of fact or any stipulation of the parties which will avoid unnecessary proof;
- (c) Arrange for the exchange of proposed exhibits or prepared expert testimony;
- (d) Identify the witnesses and the subject matter of their expected testimony and, if necessary, limit the number of witnesses or the scope of their testimony;
- (e) Rule on any pending prehearing motions or matters;
- (f) Establish a schedule for the filing of motions or the submission of briefs; or
- (g) Consider any other action or procedure which may expedite the orderly conduct and disposition of the proceedings or a settlement of the matter.

The Commission decided to conduct the prehearing conference. It could have allowed ABC time to gather more evidence to present its case. In addition, ABC explained how the delay would allow it to defeat NDEP's summary judgment motion. The need for more time was made clear during 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 0161:3-162-7. In addition, the Commission seemed to indicate that they were amenable to the argument if plans were actually submitted and there was a dispute as to whether the Plans had been submitted:

THOMAS: The letter from Stephen Gibbs is a part of Exhibit B, but [inaudible] we didn't have the other document.

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.

Vol I APP 0163:8- 0164-7 However NDEP does not even address the request for additional time. Id. at APP 0192-194. Therefore, the district court erred in denying the petition for judicial review.

Dated this 15th day of December 2021.

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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 3716 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 15th day of December 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Nevada by using the Court's electronic service system on December 15, 2021. A copy of the foregoing shall be electronically transmitted from the Court to the email addresses on file for each of the following:

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Dated this 15th day of December 2021.

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