EFiled: Jun 26 2019 02:45PM EDT
Filing ID 63485012
Case Number 139,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	
Plaintiff/Appellant,	)	**On Appeal from the Superior Court in and for Kent County**
v.	)	**No. 139, 2019**
McGINNIS AUTO & MOBILE HOME SALVAGE, LLC,	)	
Defendant/Respondents.	)	

REPLY BRIEF OF THE APPELLANT DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

/s/ Ralph K. Durstein, III
Ralph K. Durstein III (ID #0912)
Deputy Attorney General
Department of Justice
State of Delaware
102 W. Water St.
Dover, DE 19901
(302) 577-8510
Attorney for Appellant

Dated: June 26, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF FACTS

In its counterstatement of facts, McGinnis contests DNREC's Statement of Facts in the Opening Brief, and asserts that "[m]any of DNREC's factual assertions are entirely without record support."[1] This is incorrect, and misses the point. There is no hearing record, and thus no exhibits or transcript of testimony, because the Environmental Appeals Board ("EAB") effectively dismissed five of seven grounds for the Cease and Desist Order, prior to any hearing. McGinnis cannot force the Court to consider this appeal in a vacuum. Rather, the allegations set forth in the Secretary's Order must be accepted as true, for purposes of ruling on the dismissal.[2] The Secretary's Order[3] incorporates by reference DNREC's site investigations and enforcement actions, leading up to the Cease and Desist Order. This history provides valuable context for the Order. On a remand to the EAB, McGinnis would be free to contest the factual basis for the Order, as well as the relief ordered. But for purposes of the appeal, the Court is entitled to evaluate the Order in the context of the violations and enforcement history at the McGinnis site. The issue is whether, given this background, the Secretary had authority to issue a cease and desist order to obtain compliance with applicable regulations, before seeking injunctive relief in the Court of Chancery.

---

[1] AB-5.
[2] *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993).
[3] A-25.

I. DNREC PROPERLY EXERCISED THE CEASE AND DESIST POWER GRANTED TO THE SECRETARY, AND THERE IS NO BASIS FOR CURTAILING THAT STATUTORY POWER.

With respect to the standard of review, contrary to McGinnis' statement[4], this is not a case where substantial evidence is an issue. There was no hearing below, and no factual findings. Rather, as in the case of a Rule 12 dismissal, the facts alleged in the Order[5] should be accepted as true by this Court, for purposes of the appeal.[6] The sole question is whether the EAB, and the Superior Court, erred as a matter of law in curtailing the statutory authority of the DNREC Secretary to enforce environmental laws relating to resource recovery and permits. On this narrow legal question, the Court is free to substitute its judgment for that of the lower court and the administrative board, and is compelled to do so, where the applicable law has been misinterpreted and misapplied.

Whether or not the violations were admitted or contested or can be proved is irrelevant on appeal. The record includes the Cease and Desist Order, which states the factual basis for the relief ordered, as well as the series of investigative and enforcement actions that preceded it.[7] This Court must determine whether those investigative findings and observations were legally sufficient to support the relief

---

[4] AB-6.
[5] A-25.
[6] *Rales v. Blasband, supra.*
[7] OB 3-5.

ordered by the Secretary, in the context of the statutory cease and desist power. If the Board and the Superior Court are reversed, the matter would then be remanded to the Board for a hearing on the Order, under the proper application of the cease and desist statute. DNREC recognizes that McGinnis, at that point, could contest the allegations in the Order (and could argue that the relief was unnecessary or unsupported by the evidence). These are issues of fact to be determined by the EAB on remand, not issues of law to be foreclosed from review on appeal.

McGinnis repeatedly concedes – or at least pays "lip service" to – the broad power of the Secretary under Chapter 60 or Title 7.[8] However, McGinnis would curtail and constrict those powers, when it comes to the administrative tool set forth in the cease and desist statute, 7 *Del.C.* §6018. In other words, the McGinnis argument is that the Secretary can do a great many things when confronted with environmental harm; but mysteriously loses all such authority when the label "cease and desist" is applied. Under the McGinnis theory, the General Assembly intended that the cease and desist statute limit, rather than facilitate, the other statutory powers of the Secretary. There is nothing in the legislative history, past use, or judicial interpretation of the cease and desist power that would suggest it was intended as a check on enforcement authority.

[8] E.g., "the Secretary's authority is substantial", AB-7; "extraordinarily powerful remedy", AB-10; "[r]equiring a permit for a regulated activity falls within the Secretary's authority, and McGinnis never argued otherwise…". AB-16.

Quite to the contrary, this Court upheld the broad nature of the Secretary's enforcement power in *Formosa Plastics v. Wilson*, 504 A.2d 1083 (Del. 1986), a case that McGinnis tries but fails to distinguish. Contrary to McGinnis' false distinction[9], this Court in *Formosa* considered the nature of the remedy (revocation), as well as its severity, and implied the power to revoke from the power to award a permit. Here, finding the power to compel compliance within the cease and desist authority is considerably less of a stretch.[10]

According to McGinnis, DNREC cannot claim "concomitant authority" to enforce environmental laws under the teaching of *Formosa*, because the cease and desist process lacks "procedural safeguards and fairness".[11] This claim is false in the abstract and false as applied to McGinnis. It comes from a company that has not been prevented from continuing with its primary business, after having recognized that it could not continue to dismantle mobile homes without a resource recovery permit. McGinnis has avoided the removal of contaminated waste, documentation of proper disposal, an accounting of waste received *in the past*, and an explanation of procedures used *in the past* for demolition of mobile homes.

---

[9] AB-12.

[10] Compare *Breslin v. Richard*, 1994 WL 1892113 (Del.Super. July 24, 1994), a case with a multitude of issues and a "procedural quagmire", wherein a cease and desist order requiring a remedial plan was not challenged on that basis and not limited by the Court. The Court did observe that "the Secretary has considerable discretion in how he chooses to enforce the provisions of Chapter 60". *Id.* at 4.

[11] AB-20.

For three years, this case has wound through the EAB, the bankruptcy process, the Superior Court, and now this Court. The point is not to criticize McGinnis for its exercise of its rights. The point is that DNREC has afforded McGinnis the full panoply of procedural safeguards and essential fairness that are mandated by Delaware law, and that constitute due process of law. For McGinnis to characterize this as "rule by whim or caprice"[12] is to lose all credibility. The record reflects that McGinnis received prior notice and formal warnings of non-compliance[13], and the opportunity for a hearing prior to any enforcement. Beyond that, DNREC agreed to allow McGinnis to make its purely legal arguments in support of dismissal, prior to an evidentiary hearing. "No good deed goes unpunished." There has been no violation of procedural rights here, and speculation to the contrary is not supported by the record – in this case or any other. There is no evidence that environmental enforcement "drives businesses into penury".[14] It is a legal fallacy that a hearing on the merits is required before an order is issued.[15] No case so holds (and no authority is cited). This case exemplifies the procedural safeguards afforded to a violator by DNREC. McGinnis has been treated fairly.

---

[12] AB-21.
[13] OB 3-5.
[14] AB-23. There is no evidence that the McGinnis bankruptcy filing was brought about by the inability to receive abandoned mobile homes for dismantlement.
[15] AB-23.

McGinnis creates a false distinction between what it calls "affirmative relief" and the (purportedly narrow) authority of the Secretary.[16] It then finds (unwritten) restraints on the (admitted) power of the Secretary to compel compliance with (admittedly) applicable regulations. At various points McGinnis asserts [1] that the administrative authority of the Secretary is less than that of the Court of Chancery in issuing a preliminary injunction, or [2] that even that Court could not compel compliance with environmental laws.[17] Both arguments are false. Regardless of the procedural tool used, the Secretary has the authority to compel a regulated party to obtain a permit, to comply with regulations, to remediate a contaminated site, and to provide required documentation. Where a party has caused environmental harm and a potential risk to public health, the Secretary may shut down the offending operation pending full compliance. To the extent such measures would mirror those within the prerogative of the Court of Chancery, the administrative power is equivalent. This is not unusual, and does not violate the separation of powers or the Delaware Constitution.[18]

[16] AB-15.
[17] AB-17.
[18] The purported Constitutional argument was not raised below, in the EAB or the Superior Court, and the interests of justice do not require that this Court indulge McGinnis by entertaining it at this late juncture. Supr.Ct. Rule 8.

Just as the Secretary may alternatively seek penalties and recover costs in administrative actions or in the Superior Court[19], the Secretary may choose to compel compliance administratively, or through the Court of Chancery.[20] The cease and desist power is limited in duration; not in scope. After thirty days, or in the event of noncompliance, in the absence of an appeal, the Secretary may suspend the order by seeking the equivalent relief through an injunction. The statute confers authority on the Court of Chancery to grant that relief. None of these provisions make any distinction between past, present, and future conduct.[21]

This artificial distinction advocated by McGinnis ignores the meaning of the words "cease" and "desist". To "cease" is to stop illegal activity; whereas to "desist" is to refrain from resuming it in the future. Thus the underlying purpose of such an order is to warn the offender that, if they do not discontinue specified conduct, or take certain actions to comply with substantive law, by deadlines set forth, they may be subject to judicial action. The intent of the statute is to afford a precursor to litigation that provides notice of violations and proposes remedies, in order to compel compliance and facilitate enforcement, within a narrow window of time.

---

[19] 7 *Del.C.* §6005(b),(c).
[20] 7 *Del.C.* §6005(b)(2); §6018.
[21] As noted in the Opening Brief, at 7, 25, the Secretary's Order addressed the obligations of McGinnis under the applicable regulations, and required compliance – not novel or "affirmative" actions - within the thirty-day duration of the Order.

That is precisely how the statutory cease and desist power has been utilized by various DNREC Secretaries for decades, without challenge.[22] The Secretary was fully within his rights in mandating not only that McGinnis stop operating without a permit, but comply with the regulations governing resource recovery and the handling of asbestos and other toxic substances. A truncated provision that would enable the Secretary to compel a violator like McGinnis to "cease", but not "desist", would be virtually meaningless in most applications, in that it would leave DNREC powerless to deal with accumulated contamination and the immediate need for remediation to prevent environmental harm and risk to public health.

McGinnis is critical of two statements from the Opening Brief: [1] "[t]he legislature did not place any limits on the scope of a cease and desist order; only on its duration" and [2] "[n]othing in the statutory language prevents a cease and desist order from containing affirmative, as well as prohibitory, mandates."[23] Yet each statement is true, with reference to the statutory language. McGinnis

---

[22] Contrary to the novel shrunken view advocated by McGinnis, cease and desist authority has been broadly construed in comparable contexts. *In Re Estep*, 933 A.2d 763, 767 (Del. 2007) (attorney disciplinary proceeding); *State v. McFarland*, 1984 WL 553556 (Del.Super. Apr. 24, 1984) (consumer action); *Delaware Corr. Officers Ass'n. v. State*, 2003 WL 23021927 (Del.Ch. Dec. 18, 2003) at 7 (labor dispute); *First Federal Savings Bank v. State*, 1992 WL 187623 (Del.Ch. July 27, 1992) (bank examiner).

[23] AB-13.

complains of the lack of citation to authority (while citing no authority to the contrary), and there admittedly is none. The question then becomes, what is this Court to make of that absence[24]? McGinnis tries to put DNREC in the unfair position of proving a negative. But some things can be fairly deduced. For one, there is no evidence that any previous violator challenged the authority of the Secretary in this manner, successfully or otherwise. Neither party has cited an appeal or ruling questioning the scope of the cease and desist authority. Nor has the General Assembly revisited the statute to amend it so as to limit (or extend) the power of the Secretary in any way.[25] In this instance, the silence speaks volumes. The Court is entitled to conclude that the mischief suggested by McGinnis has not occurred elsewhere, just as there is no evidence of any prejudice to McGinnis (who does not contest the lack of permit or need to obtain one) in this case. This, then, is a case of first impression (as the Superior Court correctly noted), and the Court is called upon to construe the cease and desist statute in the context of the broad enforcement authority of the Secretary, as well as the statutory and regulatory authority granted over solid and hazardous waste and resource recovery.

---

[24] Other than to despair over the all-too-familiar lack of legal authority on a matter of state law in a small state with relatively few reported cases.

[25] The kinds of new limits on the Secretary's authority advocated by McGinnis would be a matter for the General Assembly to take up, by amending the statute to define the scope of that authority.

McGinnis argues that the Secretary must look elsewhere to enforce the law, citing injunctions and other available remedies.[26] This concept is flawed in two ways. First, if – as McGinnis concedes – the Secretary has broad statutory powers, the use of one procedural remedy does not make others simply vanish. If – as is recognized – the Secretary has broad statutory authority to mandate environmental remediation (including the removal of contaminated waste) and to order the abatement of public health risks and compliance with regulations, then the use of the cease and desist power to implement this authority is permissible. It is an available means to a required end. If the legislature had intended to limit the use of the cease and desist power as McGinnis contends, such limitations would have been manifest in the statute itself. They are not. Quite to the contrary, the General Assembly provided only that the cease and desist power expires, is withdrawn, or is suspended – or superseded – by injunction.

Second, the McGinnis theory would take away the Secretary's discretion to use the enforcement tools available to him, in the way he sees fit. The General Assembly has clearly given the Secretary options, and it is not for McGinnis, or the Board, or, with respect, this Court to dictate what tool can be used when confronted with environmental violations. The discretion to utilize the appropriate

[26] AB-10; Section 6005(b)(2) contemplates that "DNREC would be forced to pursue litigation to compel compliance". AB-17.

enforcement tool for the circumstances has been given to the Secretary, and there is no showing that this discretion has been abused, here or elsewhere. The sole consideration ought to be whether the procedure used to enforce the substantive law afforded the procedural safeguards implicit in due process of law to the violator. It is uncontested here that McGinnis was afforded notice and the right to a hearing, before any of the contested measures were implemented.[27]

Injunctive relief is not the answer in every case. Of course, the Secretary could instead seek an injunction in every case where a cease and desist order is contemplated. That is what McGinnis says should have happened here, and what should happen in any case where the Secretary seeks records, site remediation, and compliance with applicable regulations. If that were the sole path available to the Secretary, the Court of Chancery would then be burdened with dozens of new cases each year, whereas a prior administrative step, used in many prior cases with great success, would be eliminated. This would ignore the process articulated by the General Assembly. By its very statutory design, the cease and desist power is broad, but temporary, and, when ignored, may be "suspended by injunction". §6018(3). The statute contemplates remedial action in sequence. The distinction

[27] McGinnis appears to argue that it was entitled to a pre-revocation hearing. AB-13. Not surprisingly, there is no citation to authority for this proposition. As the record reflects, McGinnis was able to appeal to the EAB and raise its legal arguments, without having to comply with the Cease and Desist Order. This is the essence of due process of law.

between the remedies is in timing, not in scope. The administrative remedy logically precedes the equivalent judicial remedy, in the hope that the former would obviate the need for the latter. A cease and desist order essentially seeks voluntary compliance, or a fact hearing, rather than judicial intervention.

McGinnis argues that the reference to injunctive relief in §6018 renders the reference in §6005(b)(2) mere "surplusage".[28] This is flawed statutory analysis. The latter statute grants the Secretary the power to seek injunctive relief. Without it, the reference in the former statute would be all but meaningless. (A reference to suspension would not independently convey the power to seek an injunction). The statutes can easily be read together. Instead of seeking an injunction in the first instance, the Secretary may instead issue a cease and desist order, in an effort to gain compliance without going to court. If that administrative effort proves unsuccessful, the Secretary may then seek an injunction, invoking judicial authority to compel the relief sought. Reading the statutory provisions in harmony, it is easy to see the preference of the General Assembly for the use of the administrative remedy in the first instance, avoiding or at least delaying judicial involvement. The cease and desist statute provides an enforcement interval of thirty days, during which a violator like McGinnis can be administratively required to come into regulatory compliance.

[28] AB-11.

McGinnis seeks to disrupt what has been a pragmatic and effective administrative remedy, by forcing all such cases into litigation. This drastic departure would force a wholesale change in DNREC enforcement policy and practice. That would be a bad result for DNREC, and also for the regulatory violators forced to retain counsel and litigate in the Court of Chancery, without a first chance at compliance and resolution through the administrative process.[29]

The McGinnis site, far from "bad cases make bad law", is a case in point. If all that the Secretary could do would be to stop activity at a contaminated site, the interests he protects would not be served. If, as McGinnis contends, the Secretary could not order sampling, testing, and removal of asbestos and other harmful substances, public health would be at risk. If an order could not demand records of waste received, or documentation of dismantlement and removal, there would be no ability to track hazardous materials, in or out of the site. And, if the DNREC Secretary cannot mandate compliance with Departmental regulations regarding proper resource recovery or require a permit, the statute would become virtually meaningless. The Board ruling would effectively eliminate the cease and desist power, and, if sustained, the statutory tool would simply be abandoned as worthless.

[29] Such a drastic change would prove especially onerous to small business violators with limited resources for intensive litigation.

McGinnis based its argument below on vague and unsubstantiated allegations of abuse of discretion by the Secretary. Clearly there has been no such abuse or any prejudice sustained by McGinnis here. The site has remained dormant while the parties litigate this case. No cases are cited where a Delaware court has dealt with an alleged abuse of the cease and desist power by any DNREC Secretary. McGinnis relies on speculation, and not facts of record. Logic dictates that, if there were any truth to these allegations, there would be a record of abuse. But the record is silent. It is not DNREC's burden to prove a negative. The burden falls to McGinnis to prove it has been treated unfairly in the administrative enforcement process by an abuse of statutory authority, and this McGinnis has failed to do. Nor has McGinnis given this Court any basis to believe that the cease and desist power has been subject to systematic or chronic abuse. To the extent that the cease and desist authority has been used over many years, there is no indication from the public record of any problem. Rather, this administrative tool has been used to enforce environmental laws and to avoid the necessity of litigation. The cease and desist power has been used within the narrow time constraints provided, to prevent harm and to enforce compliance with applicable laws. The inescapable conclusion from this lack of record is that the cease and desist process is not broken and does not need a judicial fix. This is a solution in search of a problem.

CONCLUSION

The Secretary respectfully asks that this Court reverse the ruling of the EAB as affirmed by the Superior Court, thus reinstating the Cease and Desist Order, and remand this case to the EAB for a hearing on the merits.

/s/ Ralph K. Durstein, III
Ralph K. Durstein III (ID #0912)
Deputy Attorney General
Department of Justice
State of Delaware
102 W. Water St.
Dover, DE 19901
(302) 577-8510
Attorney for Appellant

Dated: June 26, 2019