[Cite as *State v. Republic Environmental Sys., Inc.*, 2015-Ohio-4118.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26492
	:	
v.	:	Trial Court Case No. 1998-CV-3449
	:	
REPUBLIC ENVIRONMENTAL SYSTEMS (OHIO), INC., et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellants/Appellees	:	

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O P I N I O N

Rendered on the 30th day of September, 2015.

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HALL, J.

{¶ 1} Defendants McCabe Corporation, Edward McCabe, and McCabe Engineering Corporation (which we will refer to collectively as "McCabe") appeal the trial court's denial of their Civ.R. 60(B) motion for relief from two contempt orders. Finding no error, we affirm.

I. Background

{¶ 2} Republic Environmental Systems (Ohio), Inc. and BRAC, Inc. (which we will refer to collectively as "Republic") owned a hazardous waste facility located at 636 North Irwin Street in Dayton, Ohio. The facility sits in Dayton's well field protection zone near a drinking water aquifer. The Ohio Environmental Protection Agency wanted to close down the facility because it was a source of numerous complaints for its handling of hazardous materials.

{¶ 3} On December 17, 1997, McCabe agreed to buy the facility from Republic. McCabe's business and expertise includes hazardous waste remediation. The purchase agreement states that "the Premises will be transferred 'as is', and the Purchaser will accept the property in the current condition without any other warranty as to the condition (including environmental) of the Premises, any improvements, or personal property thereon." An addendum to the purchase agreement states: "Purchaser hereby assumes all of Seller's responsibilities and liabilities to complete closure and other remedial requirements of the Premises, all as detailed in Seller's closure plan for the facility and any consent agreements with governmental authorities." While the sale to McCabe was pending, Republic began working with the Ohio EPA to come up with an acceptable

closure and clean-up plan, and as part of the sale, Republic hired McCabe to close the facility and clean up the surrounding property. The sale was completed in June 1998, and McCabe took possession of the facility. But Republic continued to negotiate an agreement on the closure plan with the Ohio EPA, which was completed in September 1998. Neither Republic nor McCabe disclosed to the EPA that there was a transfer of ownership during completion of the closure plan, and the transfer of ownership occurred without the Ohio EPA's knowledge. Upon approval of the closure plan with Republic, the State of Ohio filed an action against Republic alleging violations of the state's hazardous-waste laws, to obtain the force and effect of a court order to enforce the closure plan. The following month, the trial court entered a consent order that required Republic—and its successors in interest—to take steps to address contamination concerns and ultimately close the facility in accordance with the closure plan.

{¶ 4} Later in 1998, McCabe, while preparing the facility for closure, discovered the presence of additional soil contamination that is not specifically addressed in the closure plan. In July 2007, the state filed a motion for contempt against both McCabe and Republic for failing to comply with the 1998 consent order. On February 13, 2009, the trial court found both McCabe and Republic in civil contempt. The court found that they had failed (1) to timely close the facility in accordance with the closure plan; (2) to monitor and remediate ground water contamination in accordance with the closure plan; (3) to maintain an up-to-date written estimate of closure costs and adequate financial assurance; (4) to apply for a permit modification to transfer ownership of the facility; (5) to submit initial or updated background disclosures to the Attorney General in accordance with the consent order; and (6) to secure the facility against unauthorized entry. The court

also found that McCabe and Republic had failed to file an acceptable revision to the amended closure plan to account for needed remediation of the newly discovered soil contamination.

{¶ 5} McCabe objected to the imposition of additional clean-up obligations and expense, arguing that the closure plan did not disclose the presence of additional contaminants. The court found that though the Ohio EPA had reversed its 1998 determination that subsoil remediation was "unnecessary"—determining instead that the remediation was "required"—there was "no credible evidence that OEPA intentionally made material misrepresentations to the McCabe Defendants, upon which they reasonably relied[ ] in purchasing the Facility."

{¶ 6} On October 9, 2009, the trial court entered a separate order imposing stipulated contempt penalties totaling $14,706,800 on McCabe and Republic, holding them jointly and severally liable. As part of that judgment, the trial court determined that it did not have authority to reduce the periodic stipulated penalties even though the court believed that the accumulation of penalties was disproportionate to the seriousness of the violations. We affirmed the contempt findings and penalties. *See State ex rel. Rogers v. Republic Environmental Sys., Inc.*, 2d Dist. Montgomery Nos. 23513, 23644, 23723, 2010-Ohio-5523. We noted that "no evidence exists which supports McCabe's affirmative defense that the State participated in any way with Republic to fraudulently induce McCabe to purchase the facility." *Republic* at ¶ 63. On March 2, 2012, the trial court entered a separate judgment against McCabe as to its earlier finding that McCabe had failed to submit an acceptable amended closure plan. The court imposed previously stipulated periodic penalties amounting to $523,800, plus $600 each day until McCabe

submits an amended closure plan that is acceptable to the Ohio EPA.

{¶ 7} On March 13, 2014, McCabe moved, under Civ.R. 60(B)(4) and (5), for relief from the February 2009 and March 2012 contempt orders—but not from the October 2009 contempt order. McCabe alleged that in 2011 it learned that before the 2009 contempt order was entered the Ohio EPA "possessed documents in its files relating to the extent of contamination at the Facility, and failed to disclose them." And in October 2013, McCabe alleged, the Ohio EPA made disclosures of additional contamination at the facility. McCabe also claimed that the Ohio EPA misled it and the trial court by presenting the wrong closure plan to the court at the contempt proceeding. The correct plan, says McCabe, is more stringent than the one presented. McCabe claimed that the Ohio EPA's failure to timely disclose all information makes it impossible to estimate the cost of necessary remediation work, renders its attempts to write an acceptable amended closure plan fruitless, and leaves the closure trust fund underfunded. McCabe asked the court for an evidentiary hearing on its motion.

{¶ 8} The trial court denied McCabe's request for a hearing. The court concluded that even if the operative facts alleged in McCabe's motion are true, relief under Civ.R. 60(B) would not be justified. The court then overruled the motion for relief.

{¶ 9} McCabe appealed.

II. Analysis

{¶ 10} McCabe assigns three errors to the trial court. The first challenges the court's ruling that McCabe had no right to rely on the Ohio EPA's closure plan. The second challenges the denial of relief under Civ.R. 60(B)(4) and the denial of a hearing. And the third assignment of error challenges the court's denial of relief under Civ.R. 60(B)(5)

without first holding a hearing.

A. Reliance on the closure plan

{¶ 11} The first assignment of error alleges that the trial court erred by ruling that McCabe had no right to rely on the closure plan approved by the Ohio EPA.

{¶ 12} In its decision, the trial court said that "[b]ecause 'OEPA did not know of the McCabe Defendants['] involvement with the Facility' when the Consent Order and accompanying Closure Plan were drafted, OEPA was under no duty to disclose information to those Defendants at that time." *Decision, Order and Entry Denying Defendants' Motion for Relief and Request for Hearing; and Denying State of Ohio's Request for Hearing*, 15 (Oct. 30, 2014), quoting *Decision, Order and Entry Holding Defendants Republic Environmental Systems Ohio, Inc., BRAC, Inc., McCabe Corp., McCabe Engineering Corp. and Edward McCabe Jointly and Severally Liable in Contempt*, 9 (Feb. 13, 2009). McCabe says that this is contrary to the regulations governing the closure of hazardous waste facilities and is bad public policy.

{¶ 13} "The owner or operator of a hazardous waste management facility must have a written closure plan," Ohio Adm.Code 3745-55-12(A)(1), and must have "a detailed written estimate * * * of the cost of closing the facility," Ohio Adm.Code 3745-55-42(A). The cost estimate "must be based on the costs to the owner or operator of hiring a third party to close the facility." *Id*. The closure cost estimate must be revised after a modification to the closure plan "if the change in the closure plan increases the cost of closure." Ohio Adm.Code 3745-55-42(C). The owner or operator of the facility "must establish financial assurance" that it can pay the cost of closure. Ohio Adm.Code 3745-

55-43(A). One way that this can be done is by establishing a "closure trust fund," Ohio Adm.Code 3745-55-43(A)(1), the value of which equals "the current closure cost estimate at the time the fund is established," Ohio Adm.Code 3745-55-43(A)(4).

{¶ 14} Citing these regulations, McCabe contends that the Ohio EPA is always under a general duty to disclose in an approved closure plan all of the contaminants known to it. Otherwise, the value of the closure trust fund will be insufficient to pay for the closure. A closure plan that does not specify all known contaminants, says McCabe, lets the owner or operator of the facility off the hook. McCabe also argues that the third-parties hired to clean up a contaminated facility must know about all of the contamination and must be assured that the closure trust fund has enough money in it to pay them for their work. According to McCabe, the trial court's determination that the Ohio EPA had no duty to disclose all known contamination "creates a public policy of permitting the OEPA to submit an incorrect and underfunded Closure Plan to a Court, to obtain contempt sanctions against businesses which are attempting to clean up pollution when the polluter failed to pay for it." *Merit Brief of Appellants*, 18.

{¶ 15} We determine that the law does not impose on the EPA the duty urged by McCabe. The regulations make it clear that the owner or operator is the one that writes the closure plan. Ohio Adm.Code 3745-55-12(A)(1). In the plan, the owner or operator "must identify steps necessary to perform partial and/or final closure of the facility at any point during its active life," including "[a]n estimate of the maximum inventory of hazardous wastes ever on-site over the active life of the facility." Ohio Adm.Code 3745-55-12(B)(3). The owner or operator must then submit the plan to the Ohio EPA for approval. Ohio Adm. Code 3745-55-12(A)(1). All the regulations say about the Ohio

EPA's approval is that "[t]he director's approval of the plan must ensure that the approved closure plan is consistent with" certain specified rules. Ohio Adm.Code 3745-55-12(A)(2). None of the rules specified mention disclosure of all contamination at a facility known or even suspected by the Ohio EPA. It is the owner or operator that is responsible for closing a facility. The Ohio EPA simply oversees the process, making sure that it is done properly.

{¶ 16} Furthermore we note that both Rev. 3 and Rev. 4 of the closure plan that was negotiated between Republic and the EPA required detailed soil testing to insure that all potential contamination was discovered and remediated. Each version of the plan also provided that if soil sampling revealed significant evidence of contamination, an amended closure plan to deal with that contamination would have to be submitted to the EPA for approval. (Rev. 3, pg. 31; Rev. 4, pg. 30).

{¶ 17} Also, McCabe's concern for third parties hired to clean up a facility is unfounded. The closure regulations provide that if the closure cost estimate increases, the owner or operator "must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this rule to cover the difference." Ohio Adm.Code 3745-55-43(A)(6). So if additional contamination is disclosed later, the closure plan is amended, triggering a revision to the closure cost estimate. This in turn triggers the owner or operator's duty to put more money in the closure trust fund to pay the third parties for cleaning up the additional contamination. Theoretically, the trust fund should never be underfunded. The responsibility for sufficiently funding the closure trust fund, as well as for closing the facility, lies with the facility's owner or operator. So it is the owner or operator that is liable if the trust fund is underfunded—not the third parties hired to clean

up the facility.

{¶ 18} McCabe's problem is that before the additional contamination was disclosed or discovered, McCabe became not only the third party doing the closure and clean up but also the owner of the facility. Consequently McCabe became responsible for closing the facility—which means paying for the closure. McCabe, skilled in waste remediation, knew and accepted the risk. The purchase agreement clearly states that McCabe was buying the property "as is" and McCabe undertook liability for the closure. Nevertheless, "[t]here is no evidence that McCabe conducted any independent environmental assessment of the property at or prior to the time of purchase, as one would think a reasonable prudent purchaser would do for an 'as is' purchase of an urban brownfield property." *Decision, Order and Entry Holding Defendants Republic Environmental Systems Ohio, Inc., BRAC, Inc., McCabe Corp., McCabe Engineering Corp. and Edward McCabe Jointly and Severally Liable in Contempt*, ¶ 12 (Feb. 13, 2009).

{¶ 19} The closure regulations do not impose a duty on the Ohio EPA to ensure that a closure plan discloses all known or potential contamination before approving the plan. The question before the trial court, and this court, is not whether EPA files contained historical information related to soil contamination. For this decision, we assume those files do contain such information. The question is whether the EPA had a duty to affirmatively reveal this information either in the negotiated closure plan with Republic or to McCabe, who was an undisclosed and unknown third party. Under the circumstances of this case, we decline to impose such a duty. Thus we agree with the trial court's assessment that no such duty exists.

{¶ 20} The first assignment of error is overruled.

B. Relief under Civ.R. 60(B)(4)

{¶ 21} The second assignment of error alleges that the trial court erred, as a matter of law, by ruling that "other means of review" existed for purposes of Civ.R. 60(B)(4) and that the court abused its discretion by denying McCabe's motion for relief without a hearing. A trial court's denial of Civ.R. 60(B) relief is reviewed for abuse of discretion. *Eubank v. Anderson*, 119 Ohio St. 3d 349, 2008-Ohio-4477, 894 N.E.2d 48, ¶ 4.

{¶ 22} Civ.R. 60(B)(4) provides that a court may relieve a party from an order if "it is no longer equitable that the judgment should have prospective application." This provision provides relief from a judgment that has become inequitable because of later events that were not foreseeable and not within the control of the parties. *Crouser v. Crouser*, 39 Ohio St.3d 177, 180, 529 N.E.2d 1251 (1988), citing *Wurzelbacher v. Kroeger*, 40 Ohio St.2d 90, 92, 320 N.E.2d 666 (1974). In addition, Civ.R. 60(B)(4) relief should be reserved for parties who have no substantive remedy available to them for reviewing the judgment. *Id*. at 181.

{¶ 23} McCabe claimed that because of the late discovery of the additional contamination the closure trust fund is underfunded, it will take longer to clean up the site, and McCabe's ability to draft an amended closure plan acceptable to the Ohio EPA has been frustrated. In part, the trial court concluded that other means of review exist for remedying these alleged inequities. If McCabe believes that the Ohio EPA has acted unfairly, said the court, McCabe should seek administrative review. But that other-means conclusion by the trial court was only an ancillary part of its analysis.

{¶ 24} Before addressing the possibility of administrative review, the trial court had

already concluded that Civ.R. 60(B)(4) relief can only be warranted by events that occur subsequent to the judgment. The trial court recited prior factual determinations that McCabe and Republic failed to disclose the sale to the EPA, that McCabe did not communicate with the EPA until after the purchase, and that "the McCabe Defendants failed to undertake a reasonable due diligence investigation before contracting to purchase the property." *Decision, etc.,* (Oct. 30, 2014) at 15. Accordingly, McCabe was not entitled to relief under Civ.R. 60(B)(4), because the allegation that the EPA had files containing information of additional soil contamination before approval of the 1998 closure is not a subsequent event and would "have no legal bearing on the obligations the McCabe Defendants voluntarily assumed through their 1997 agreement to purchase the subject facility in 'as is' condition." *Id*. at 14. We agree, and conclude that that reason alone was sufficient to deny a hearing or relief under Civ.R. 60(B)(4).

{¶ 25} In regard to the potential for alternative relief by an administrative appeal, McCabe says that it is challenging only the contempt orders that, it argues, were entered as a consequence of the Ohio EPA's failure to disclose the additional contamination sooner. A successful administrative appeal, says McCabe, would do nothing about the contempt orders and the accumulating fines.

{¶ 26} We agree in part with both the appellant and with the trial court. In the 2009 contempt order, McCabe was held in contempt for failing to comply with multiple aspects of the consent order closure plan. Because the stipulated periodic penalties had been accumulating for such a long period of time before the contempt finding, the gross amounts were almost $15 million. We agree that an administrative body cannot vacate a court's contempt order. On the other hand, the 2012 contempt order related to McCabe's

failure to obtain EPA approval of an Amended Closure Plan, which McCabe submitted on May 28, 2009. That proposed plan, and its subsequent revisions, have been rejected by the EPA for various reasons. The EPA's final action on that amended plan is subject to administrative appeal. If it is determined on administrative appeal that an earlier version of the amended plan was adequate and should have been accepted at an earlier time, that conclusion could then be presented to the court as a later event making prospective application of the 2012 contempt order inequitable. Nonetheless, regardless of the efficacy of administrative review, the trial court's conclusion that McCabe did not present new facts subsequent to the contempt findings that would entitle McCabe to relief under Civ.R. 60(B)(4) was not an abuse of discretion and was independently adequate to overrule the motion for relief.

{¶ 27} Nor did the trial court abuse its discretion by denying McCabe's request for an evidentiary hearing. "[T]he trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 665 N.E.2d 1102 (1996), citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103 and 105, 316 N.E.2d 469 (8th Dist.1974). In other words, "'[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.' "*Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983), quoting *Adomeit* at 105. We agree with the trial court that the operative facts alleged in McCabe's motion, even if true, do not justify vacating either contempt order under Civ.R. 60(B)(4).

{¶ 28} The second assignment of error is overruled.

C. Denial of relief under Civ.R. 60(B)(5) without a hearing

{¶ 29} The third assignment of error alleges that the trial court abused its discretion by denying McCabe relief under Civ.R. 60(B)(5) without holding a hearing.

{¶ 30} Civ.R. 60(B)(5) provides that a court may relieve a party from an order for "any other reason justifying relief from the judgment." Fraud on the court justifies relief under this provision. *Coulson* at 15. An attorney's false representations to the court on which the court relies in making a decision, which it would not have made had it known the truth, is fraud on the court. *See id*. At 17-18. McCabe argued that the state perpetrated a fraud on the trial court by presenting at the 2009 contempt proceedings the wrong amended closure plan and by withholding from the court the information about possible contamination at the site that was later disclosed. The state admitted that it presented the wrong version of the plan but characterizes the error as an innocent mistake that was harmless to McCabe. The state said that McCabe was violating the provisions of both versions of the closure plan and knew about the correct version.

{¶ 31} The trial court concluded that the operative facts alleged in McCabe's motion, even if true, would not justify vacating either contempt order. The court found that the delayed disclosures could not constitute a fraud on the court and do not warrant Civ.R. 60(B)(5) relief. The court noted that the correct amended closure plan imposes more stringent requirements than those imposed by the plan presented to the court and that McCabe did not dispute that it had failed to comply with the terms of the presented plan. The failure to comply with the presented plan's *less* stringent requirements, said the court,

means that McCabe also failed to comply with the *more* stringent requirements of the correct plan. The court also said that the issue of whether McCabe violated the closure plan had been rendered res judicata by our decision in *Republic*, 2010-Ohio-5523.

{¶ 32} The trial court is best able to determine whether a fraud has been perpetrated on it, so its determination of the issue is entitled to great weight. *Coulson*, 5 Ohio St.3d at 16, 448 N.E.2d 809. Here, the court said that it would have found McCabe in contempt even under the correct version of the closure plan. So the fact that the state presented the wrong version, apparently inadvertently, does not justify relief under Civ.R. 60(B)(5). We cannot say that the trial court abused its discretion by denying McCabe's request for a hearing.

{¶ 33} The third assignment of error is overruled.

III. Conclusion

{¶ 34} We have overruled the three assignments of error presented by McCabe. The trial court's judgment therefore is affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

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