[Cite as *State ex rel. Yost v. Baumann's Recycling Ctr., L.L.C.*, 2020-Ohio-1504.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, EX REL., DAVE YOST, OHIO ATTORNEY GENERAL, ET AL.,	:	
Plaintiffs-Appellees,	:	No. 108706
v.	:	
BAUMANN'S RECYCLING CENTER, LLC, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 16, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-910310

Appearances:

Dave Yost, Ohio Attorney General, Sarah Bloom Anderson, Lauren N. Chisner, and Amber Wootton Hertlein, Assistant Attorneys General, *for appellees*.

Dinsmore & Shohl, LLP, Leslie G. Wolfe, David A. Zulandt, and Timothy D. Hoffman, *for appellants*.

Weyls Peters & Chuparkoff, LLC, Timothy J. Weyls, Jr., *for appellants*.

PATRICIA ANN BLACKMON, J.:

{¶ 1} This matter concerns various entities owned by William Baumann. Defendant Baumann's Recycling Center, LLC ("BRC"), operates a construction and demolition debris ("C&DD") recycling facility on Chaincraft Road in Garfield Heights, Ohio. Defendant Baumann Properties, Ltd. ("BPL") is the owner of the Chaincraft property. Prior to starting this operation, Baumann's main operation was defendant Baumann Enterprises, Inc. ("BEI"), a company that engages in the demolition of residential and commercial buildings. BEI also operates out of the Chaincraft Road property. BRC, BPL, and BEI all appeal from the order of the trial court that granted the Ohio Attorney General a preliminary injunction and ordered compliance with R.C. Chapters 3714, 3734, and 3737, and rules promulgated thereunder, as well as various fire prevention and abatement procedures. BRC, BPL, and BEI challenge the trial court's determination that: BRC and BEI operated or maintained an unlicensed C&DD disposal facility at the Chaincraft Road site; defendants "illegally disposed or allowed the illegal disposal of [C&DD] at the Site"; defendants "conducted, permitted and/or allowed open dumping of solid waste at the Site"; and defendants' "illegal disposal of [C&DD] * * * created a significant fire hazard to the local community [and] created a condition that constitutes a common law public nuisance." Defendants assign the following error for our review:

> The trial court erred in issuing the entry and order granting [the Attorney General's] motion for preliminary injunction.

{¶ 2} Having reviewed the record and the controlling statutes and caselaw, we affirm.

{¶ 3} On January 3, 2019, following a fire at the Chaincraft Road recycling facility, the Garfield Heights Fire Department issued a stop-work order. The following week, the Ohio Environmental Protection Agency ("EPA") conducted a site visit. The EPA director ("Director") later issued Final Findings and Orders that provided in relevant part, as follows:

> 6. The Facility is neither licensed nor permitted as a construction and demolition debris C&DD disposal facility or solid waste disposal facility. * * *
>
> 15. On January 9, 2019, Ohio EPA conducted site visit at the Facility. At the time of the visit, Ohio EPA observed the illegal disposal of C&DD and the open dumping of solid waste, including scrap tires, at the Facility in violation of [R.C.] Section 3734.03 and [Ohio Adm. Code] 3745-27-05(C) and 3745-400-04(B).

{¶ 4} The Director's orders required defendants to, inter alia, monitor temperature, air, and organic compounds for fire hazards, establish water source and fire responder access, and abate solid waste and C&DD disposal. The Director also advised defendants that it reserved all enforcement rights available at law or in equity.

{¶ 5} Defendants filed an appeal before the Ohio Environmental Review Appeals Commission ("ERAC"), but on January 29, 2019, the Attorney General filed a complaint for injunctive relief and civil penalty against defendants, alleging that it was acting at the written request of the Director, the Cuyahoga County Board of Health, and the Garfield Heights Fire Safety Inspector, instructing it to initiate immediate civil proceedings pursuant to pursuant to R.C. Chapters 3714, 3734, and 3737, and the rules promulgated under those statutes. In relevant part, the eight-

claim complaint alleged that beyond simply "processing" C&DD, defendants were illegally "disposing" of a "massive amount" C&DD that is decomposing, thereby creating safety and imminent fire hazards; operating and maintaining an unlicensed C&DD facility; unlawfully engaging in the open dumping of solid waste, including scrap tires; failed to comply with the Director's orders; failed to maintain C&DD piles within height limitations; failed to maintain fire access roads; failed to maintain water supply access; and created a common law public nuisance.

{¶ 6} The matter proceeded to trial on May 21, 2019. Lt. Joseph Warner ("Warner"), fire safety officer of the Fire Prevention Bureau of the Garfield Heights Fire Department testified that he conducted a site inspection in October 2018, after observing a large wood pile. He provided the facility's employees with the portions of the fire code that applied to the wood pile, but was unable to set up a time for a follow-up inspection. Several months later, on January 2, 2019, a "track hoe fire" occurred in the middle of the C&DD pile. The fire department experienced difficulties in reaching the fire, and accessing water. The fire was extinguished, and Warner admitted that the materials beneath the track hoe were not burning. However, after the fire Warner observed steam coming from different points within the C&DD pile, indicating that decomposition was occurring. Warner issued a stop-work order for the facility, the first such orders issued by the department in "years." Warner also emailed the EPA and requested a site visit.

{¶ 7} Warner returned to the site the following week. At that time, the temperature of the C&DD pile was 136 degrees Fahrenheit. He also measured

volatile organic compounds to determine decomposition and obtained a rate of 25 parts per million, out of an expected rate of zero parts per million. He then issued a second stop-work order that focused on spreading and removing the C&DD pile and addressing fire department access issues. Warner next referred the matter to the Ohio Attorney General's enforcement office. He has continued to take temperature and gas readings. The wood pile has since been "pulled back," but the C&DD pile "remains the same." A nearby hydrant is now accessible and repaired. However, there was no compliance with the portion of the fire department order pertaining to installation of a water pump at C&DD pile and did not undertake removal of the C&DD pile. Warner admitted that volatile organic compounds are no longer detectable, and thermal imaging did not detect heat signatures on the surface of the C&DD. However, he opined that C&DD pile remained a fire hazard because, although the surface of C&DD pile is cooling, decomposition and heating are still occurring within the pile.

{¶ 8} Aaron Shear ("Shear") from the C&DD Unit of the EPA's Material and Waste Division testified that he is the technical advisor of the C&DD processing facility rules team and state-registered sanitarian. He is also the lead author of guidance documents for compliance with C&DD regulations. Although C&DD processing facilities are required to complete a one-time registration, C&DD disposal facilities must be licensed each year.

{¶ 9} Shear stated that processors should remove disposal items "on a regular basis" to prevent accumulation, minimize fire risks, and ensure access for

emergency vehicles. Materials for processing may remain for a temporary period of time if they remain unchanged and readily retrievable. Items designated clean, hard fill, such as bricks, may remain for no longer than two years. Solid wastes must be brought to a landfill. C&DD for disposal must be brought to a proper facility. Certain materials may not be processed if extensive decomposition is occurring. Some facility operators have indicated that the smallest debris materials are "recovered screen material," ("RSM") but the EPA still designates it as C&DD.

{¶ 10} Shear further testified that there were significant issues at the facility due to the size of the piles, which increased even after the EPA raised concerns. Shear stated that the facility has complied with many of the requirements of the Director's orders, including environmental monitoring, removal of the wood pile, and removal of the tires. However, the parties remain in disagreement about removing the C&DD pile. More material had been added to the pile than was being processed.

{¶ 11} Vladimir Cica ("Cica"), chief of the EPA Division of Materials and Waste Management, testified that he met with the owner and toured the facility after the fire. Cica did not want to shut down the facility, and he instructed his staff to "stand down" for time. However, he stated that the materials were not coming off so "a reasonable person can conclude it's not being recycled, its being disposed."

{¶ 12} Cica also testified that there is a third pile, consisting of RSM that is mentioned in the Director's orders. The RSM is not included within the Attorney General's motion for preliminary injunction, but has created another issue between

the parties because BRC wants to sell it for reuse. Cica advised the facility that if materials could be pulled from the C&DD "debris," is safe, and has a legitimate market, it could be processed, but the EPA conducted tests upon the RSM and determined that it is contaminated due to elevated concentrations of arsenic, lead, and multiple polycyclic aromatic hydrocarbons, including Benzoapyrene. For that reason, the EPA determined that the RSM had to be disposed. Absent determinations from the Director that the RSM is safe and there is a legitimate market for it, reuse is illegal.

{¶ 13} Joshua Adams ("Adams"), a specialist with the EPA Materials and Waste Management and state-registered sanitarian, testified that after the fire, his group conducted temperature readings, volatile organic compounds readings, and carbon monoxide level determinations at the C&DD pile. The temperatures were taken in vents several inches to one foot deep. One vent had a temperature of 152 degrees Fahrenheit, while the high temperature for that day was 4 degrees Fahrenheit. By May, a temperature of 101 degrees Fahrenheit was detected. Overall, the temperature readings indicated that the waste was decomposing, but over the past few months, the temperatures at the C&DD pile have decreased. Volatile organic compounds and carbon monoxide were measurable after the fire but were not detected months later. Adams stated that levels had stabilized because no work was being performed at the C&DD pile, so it had time to "cool down," whereas processing on the pile would introduce oxygen that would in turn increase the rate of decomposition. Adams testified that the C&DD pile still presents a risk of harm

to the public from fire, and additional toxin exposure risks to first responders if a fire ignites.

{¶ 14} Bryon Marusek ("Marusek") manager of EPA's ambient air monitoring operations, testified that the facility installed air monitors at the C&DD pile as ordered by the Director following the fire. Measurements were required for seven days in order to obtain a "background" of upwind and downwind conditions. According to Marusek, this requirement was not completed. The facility was also required to conduct sampling as cleanup progressed in order to check community exposure levels. Only one such sampling was completed. Defendants submitted their own report showing "normal" level of pollutants, but according to Marusek, this report used "cherry picked data" and did not consider the fire risk issue.

{¶ 15} Barry Grisez ("Grisez"), supervisor of the Cuyahoga County Board of Health environmental public service area, testified that the facility is landlocked near neighborhoods. After the fire, the C&DD pile was 85 feet tall and had steam vents. He assisted the Director in determining sample locations for the C&DD pile. His general concerns are "vectors," such as rodents and mosquitoes, water quality, air monitoring, and fire risks to the residential area to the south of the facility. He was not aware of neighbor complaints, however. If no work is being done, there is a chance that the area can stabilize, but much monitoring must be undertaken while the facility works to reduce the C&DD pile to avoid fire risk.

{¶ 16} Civil and environmental engineer Ralph Hirshberg ("Hirshberg") of Civil & Environmental Consultants, a C&DD facilities fire prevention, training, and

environmental consultant, testified for the defense. According to Hirshberg, the primary fire issue for such facilities is the receipt of "hot loads," or combustibles. He reviewed the data obtained by the EPA in this matter and also visited the site and conducted thermal imaging. He opined that the EPA's data was insufficient to support the conclusion that the C&DD facility presented the imminent risk of a fire because there was not enough information about carbon monoxide and the precise type of type of detected volatile organic compounds found on the pile. To the contrary, according to Hirshberg, the C&DD pile does not present the imminent risk of fire, based upon the temperature data, emission data, aggregate volatile organic compounds, and the carbon monoxide data. He disputed the claim that steam was being emitted from the pile, and he claimed that this was simply the condensing of hot moist air into the cooler air.

{¶ 17} BRC's Office Manager Deanna Carriero ("Carriero"), testified that the facility is a properly state-registered C&DD processing facility that has certifications from the Recycling Certification Institute. Presently, the C&DD pile contains 50,000 cubic yards of material. She maintained that it has not grown "much" in the four years that she has worked at BRC. All material coming into and out of the facility is tracked in monthly reports. BRC does not accept loads containing less than 90 percent recyclable materials. According to Carriero, the amounts of materials coming out are reduced due to the EPA prohibition on reusing the RSM, which Carriero believed could be reused.

{¶ 18} Carriero further testified that the fire occurred after a piece of machinery on the C&DD pile ignited. BRC has complied with the stop-work orders. Carriero then followed up on the Director's orders and oversaw the compliance with the orders, but the EPA did not approve BRC's plan for removal of the C&DD pile. Carriero stated that compliance has been very costly, and BRC now has no income due to the stop-work orders.

{¶ 19} William Baumann, owner of the facility, testified that he disputed the EPA's application of the term "solid waste," and the materials then stockpiled after that time. He also disputed the EPA's regulation of the RSM materials that he believed could be reused. He opined that he has spent $500,000 in complying with EPA orders, and another $500,000 would be needed to remove the C&DD pile.

{¶ 20} On June 13, 2019, the trial court granted the Attorney General's motion for a preliminary injunction. The court determined that BRC and BEI operated or maintained an unlicensed C&DD facility, that defendants illegally disposed of or allowed the illegal disposal of C&DD on the property, and that defendants dumped or permitted the dumping of solid waste at the site. The court further concluded that defendants' illegal disposition of C&DD created "a significant fire hazard to the community" and "a condition that constitutes a public nuisance."

Injunctive Relief

{¶ 21} In the assigned error, defendants assert that the trial court erroneously awarded injunctive relief without jurisdiction to do so. Defendants further argue that BRC operates a "processing" facility that is exempt from C&DD

regulations, the EPA has no regulatory authority over the facility. Defendants also maintain that the Attorney General failed to produce clear and convincing evidence to demonstrate a public nuisance.

{¶ 22} We review a trial court's granting of an injunction for an abuse of discretion. *Pointe at Gateway Condo. Owner's Assn. v. Schmelzer*, 8th Dist. Cuyahoga Nos. 98761 and 99130, 2013-Ohio-3615, ¶ 72, citing *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956). *See also Corbett v. Ohio Bldg. Auth.*, 86 Ohio App.3d 44, 49, 619 N.E.2d 1145 (10th Dist.1993).

{¶ 23} In an action for a temporary or permanent injunction, the plaintiff must prove his or her case by clear and convincing evidence. *Pointe at Gateway Condo. Owner's Assn.* at ¶ 73, citing *Franklin Cty. Dist. Bd. of Health v. Paxon*, 152 Ohio App.3d 193, 2003-Ohio-1331, 787 N.E.2d 59, ¶ 25 (10th Dist.). Clear and convincing is that measure or degree of proof that will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. *Id.*, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). However, in *New Holland v. Murphy*, 4th Dist. Pickaway No. 18CA6, 2o19-Ohio-2423, the court held that a plaintiff may obtain an injunction under R.C. 3714.11 where it can show, by a preponderance of the evidence, that the statutory requirements are fulfilled. *Id.* at ¶ 26.

Trial Court's Jurisdiction

{¶ 24} Defendants maintain that the trial court was without jurisdiction to grant injunctive relief because R.C. 3745.04 provides the ERAC with exclusive jurisdiction to review actions taken by the Director.

{¶ 25} In *Rocky Ridge Development, LLC v. Winters*, 151 Ohio St.3d 39, 2017-Ohio-7678, 85 N.E.2d 717, the Ohio Supreme Court recognized that under R.C. 3745.04, "ERAC has exclusive jurisdiction to review an action of the OEPA director." *Id*. at ¶ 7. R.C. 3745.04 provides:

> (A) * * * As used in this section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.
>
> (B) Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

{¶ 26} R.C. 3745.04 has been applied to preclude the court of common pleas from hearing a constitutional challenge to the Director's regulation and matters pertaining to the issuance of a permit. *Rocky Ridge Develop., LLC.*

{¶ 27} However, the Ohio Supreme Court recognized that the Revised Code expressly preserves the traditional authority of the common pleas courts to hear nuisance suits; political subdivisions may seek injunctive relief against licensed waste facilities "in the narrow areas of nuisance and pollution prevention and

abatement." *Id.*, quoting *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill*, 67 Ohio St.3d 293, 296, 617 N.E.2d 1089 (1993).

{¶ 28} Further, R.C. 3714.11, pertaining to construction and demolition debris law, authorizes the Director to seek injunctive relief as it provides:

> (A) *The attorney general*, the prosecuting attorney of the county, or the city director of law where a violation has occurred, is occurring, or may occur, *upon the request of the respective board of health of the health district,* the legislative authority of the political subdivision in which a violation has occurred, is occurring, or may occur, *or the director of environmental protection, shall prosecute to termination or bring an action for injunction against any person who has violated, is violating, or is threatening to violate any section of this chapter, applicable rules adopted under it, or terms or conditions of a permit, license, or order issued under it. The court of common pleas in which an action for injunction is filed has the jurisdiction to and shall grant preliminary and permanent injunctive relief upon a showing that the person against whom the action is brought has violated, is violating, or is threatening to violate any section of this chapter, applicable rules adopted under it,* or terms or conditions of a permit, license, or order issued under it. The court shall give precedence to such an action over all other cases.
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> * * *
>
> (D) This chapter does not abridge rights of action or remedies in equity, under common law, or as provided by statute or prevent the state or any municipal corporation or person in the exercise of their rights in equity, under common law, or as provided by statute to suppress nuisances or to abate or prevent pollution.

(Emphasis added.) *See also* R.C. 3734.10, which sets forth the same provisions for injunctive relief for violations of the statutes and rules pertaining to C&DD.

{¶ 29} In this matter, the Attorney General's complaint for a preliminary injunction did not involve the "adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order of the

Director" and did not involve the "approval or disapproval of plans and specifications." As such, it did not involve an "action" of the Director subject to the exclusive jurisdiction of ERAC. Rather, this matter plainly involved allegations of "disposing" of a "massive amount" C&DD that was allegedly decomposing, making the site dangerous and unsafe, and creating an imminent fire hazard. Further, rather than involving the issuance of a permit, the Attorney General specifically pled that the Director "referred this matter to the Attorney General for enforcement by written request pursuant to R.C. 3714.11 and 3734.10." The complaint further alleged that this matter was brought to "enforce" "laws found in R.C. Chapters 3714, 3734, and 3737 and the rules promulgated thereunder." The Attorney General also alleged that BRC and BEI were operating and maintaining an unlicensed C&DD facility, and that defendants were illegally dumping solid waste, and otherwise creating a public nuisance. Moreover, we note that by their own express provisions, R.C. 3714.11 and 3734.10 do not abridge rights of action or remedies in equity, under common law, as provided by statute, or as provided by statute to suppress nuisances or to abate or prevent pollution, and this matter clearly involved a nuisance claim.

{¶ 30} In accordance with the foregoing, this portion of the assigned error lacks merit.

C&DD Processing Facility and EPA Authority

{¶ 31} In the next two portions of the argument, defendants maintain that although the EPA has authority to regulate C&DD "disposal," the EPA has no authority over its facility because BRC operates a "recycling" and "processing"

facility, which requires no special license. Therefore, defendants claim, because "disposal" and "processing" are "mutually exclusive," as a matter of law, BRC is not "disposing" of as of yet "unprocessed" C&DD. In opposition, the Attorney General argues that the issue of whether the facility was engaged in "disposal" or "processing" is a factual determination and that, given the vast amount of material, its age, and the ongoing decomposition of the piles of C&DD, the trial court properly found that BRC was illegally engaging in "disposal" and not simply "processing" C&DD.

{¶ 32} The Attorney General also disputes the contention that enforcement regarding illegal "disposing" of C&DD is precluded simply because some "processing" is also occurring at the facility. The Attorney General acknowledges, as defendants claim, that Ohio does not have a licensing program for C&DD "processing," which is not directly regulated by the EPA. However, the issue is whether the facility is solely engaged in processing.

{¶ 33} R.C. 3745.01 defines a "processing facility" as:

> a site, location, tract of land, installation, or building that is used or intended to be used for the purpose of processing, transferring, or recycling construction and demolition debris that was generated off the premises of the facility. As used in this paragraph, "transferring" means the receipt or storage of construction and demolition debris, or the movement of construction and demolition debris from vehicles or containers to a working surface and into other vehicles or containers, for purposes of transporting the debris to a solid waste landfill facility, a construction and demolition debris facility, or a processing facility. As used in this paragraph, "processing" means the receipt or storage of construction and demolition debris, or the movement of construction and demolition debris from vehicles or containers to a working surface, for purposes of separating the debris into individual types of materials

> as a commodity for use in a beneficial manner that does not constitute disposal. "Processing facility" does not include a facility that is licensed under section 3734.05 of the Revised Code as a solid waste transfer facility or solid waste facility.

{¶ 34} Permitted "storage" of C&DD is the "holding of debris for a temporary period in such a manner that it remains retrievable and substantially unchanged and, at the end of the period, is disposed, reused, or recycled in a beneficial manner." Ohio Adm. Code 3745-400-01(S)(3).

{¶ 35} Conversely, Ohio Adm. Code 3745-400-01(D)(3) defines "disposal" as:

> the discharge, deposit, injection, dumping, spilling, leaking, emitting, or placing of any construction and demolition debris into or on any land or ground or surface water or into the air, except if the disposition or placement constitutes storage, reuse, or recycling in a beneficial manner.

{¶ 36} C&DD must be disposed of in a licensed C&DD facility, solid waste facility, certain types of open burning, or other approved methods that do not constitute a nuisance, health hazard, or pollution. *See* Ohio Adm. Code 3745-400-04(A). Additionally, R.C. 3714.06 also provides that "[n]o person shall establish, modify, operate, or maintain a [C&DD disposal] facility without a * * * license[.]"

{¶ 37} Consistent with this distinction between "processing" and "disposal," Ohio Adm. Code 3745-400-03 recognizes exclusions from the requirements of R.C. Chapter 3714 at "any site where debris is not disposed, such as where debris is reused or recycled in a beneficial manner, or stored for a temporary period remaining unchanged and retrievable."

{¶ 38} Beginning with defendant's assertion that as a matter of law, it cannot be engaged in "disposal" because it is conducting "processing" at the facility, we conclude that this argument is unsupported by the plain language of Ohio Adm. Code 3745-400-03. This provision is clearly fact-specific and requires consideration of whether debris is "disposed," and whether "debris is reused or recycled in a beneficial manner" or "stored for a temporary period and remain unchanged and retrievable." This comports with a common sense recognition that that while some recycling and "processing" of debris may be occurring, other C&DD may simultaneously be handled or neglected in a manner that constitutes "disposal."

{¶ 39} Turning next to the question of whether the trial court correctly found that BRC was illegally engaging in "disposal" and not simply "processing" C&DD, we recognize that in evaluating the trial court's findings of fact, we consider whether they are supported by some competent, credible evidence in the transcript. *See State ex rel. Celebrezze v. R & D Chem. Co.*, 5th Dist. Morrow No. CA-792, 1995 Ohio App. LEXIS 3634 (Aug.9, 1995), citing *Myers v. Garson*, 66 Ohio St.3d 610, 614, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 40} Here, the evidence of record indicated that the disputed pile of C&DD materials had not decreased in size since 2011. The judge properly found that this was not temporary. Further, the evidence demonstrated that the material was producing steam vents from active decomposition, so the court could properly conclude that the material was not "substantially unchanged" or "retrievable."

Therefore, the court did not err in rejecting BRC's claim that it simply engaged in permissible storage in connection with its "processing" of C&DD within the facility exclusion from the requirements for C&DD "disposal" set forth in R.C. Chapter 3714.

Public Nuisance

{¶ 41} Defendants maintain that the trial court abused its discretion in granting the injunction and relied upon clearly erroneous facts in order to conclude that there was an immediate and substantial threat of fire from the facility. Defendants maintain that the temperatures in pile 2 had "stabilized in the range of 80 to 100 degrees" Fahrenheit, carbon monoxide was no longer detected, and it stands to suffer great harm from remediation costs (estimated to be around $500,000) and it lost income from being unable to process C&DD.

{¶ 42} In general, courts will consider the following factors in deciding whether to grant injunctive relief: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *Corbett,* 86 Ohio App.3d at 49. The plaintiff must prove his or her case by clear and convincing evidence. *Pointe at Gateway Condo. Owner's Assn.*, 2013-Ohio-3615, at ¶ 73.

{¶ 43} In this matter, defendants' expert, Ralph Hirshberg, testified that there was insufficient data to conclude that there is an imminent fire risk at the facility. However, the evidence presented by the Attorney General demonstrated

that a week after the January fire at the facility, the temperature on pile 2 was 152 degrees Fahrenheit, and that pile 2 is decomposing, creating a risk of future fires. Cooling of the pile occurred only during the stop-work period. Further, undertaking the required removal of C&DD introduces oxygen, thereby accelerating the decomposition process. Additionally, it is undisputed that the fire fighters faced difficulty reaching the fire and putting it out. This supports the first, second, and fourth factors set forth in *Corbett*.

{¶ 44} Although BRC cited its costs and lost income, it is not a "third party," and there was no evidence that third parties will be harmed. To the contrary, neighboring landowners will benefit from increased safety and elimination of a nuisance. Moreover, the Attorney General was cognizant of the expenses, so it did not seek abatement of a third pile of material, the RSM, and offered to work with defendants on the lawful disposition of the C&DD.

{¶ 45} Finally, insofar as defendants argue that "[a]t no time since [BRC] was formed have either BEI or [BPL] had any role in the operation of the Facility" and that "BEI's role is merely that of a customer that brings C&DD to the Facility for recycling," we note that this is not specifically set forth as an assignment of error herein. In any event, the Director found, and the trial court agreed that the defendants were all "wrapped" together. All defendants were named in the action and their specific roles were set forth in describing how they contributed to the creation of the public nuisance. There is competent, credible evidence in the record to support the judgment.

{¶ 46} In accordance with all of the foregoing, the trial court did not err in issuing injunctive relief in this matter.

{¶ 47} The assigned error is without merit.

{¶ 48} Judgment is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

ANITA LASTER MAYS, J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶ 49} I concur but write separately to discuss some overriding concerns regarding the nature of this case. The Attorney General claims that the preliminary injunction was based on BRC's violations of Ohio's C&DD (construction and demolition debris) rules for the illegal disposal of "Pile 2," located on property where BRC operates a processing facility and not a disposal facility. In order to regulate BRC's conduct, Pile 2 must be deemed to constitute the disposal of materials and

not the storage of processing materials by a processing facility, which is essentially an unregulated entity. Although the legislature authorized Ohio EPA to adopt rules and requirements regulating conduct such as a processing facility's acceptance, storage, and accumulation of C&DD materials and their fire prevention measures under R.C. 3714.022(A) — the crux of the injunctive relief at issue — no such rules have been codified in the Ohio Administrative Code. R.C. 3714.022 became effective on October 6, 2017.

{¶ 50} Instead of promulgating rules and regulations under R.C. 3714.022, Ohio EPA used its authority over disposal sites to seek a preliminary injunction against BRC to remove what Ohio EPA claimed to be a nuisance — Pile 2 on BRC's property — and to impose regulatory oversight of BRC's ongoing operations in furtherance of removing the material. The trial court found that eight years of storage amounted to disposal based on evidence that the material had started to decompose.

{¶ 51} Ohio Adm. Code 3745-400-01(S)(3) defines the permitted storage of materials to mean the temporary holding of debris that is retrievable and "substantially unchanged." No definition of what constitutes "substantially unchanged" or "temporary" is provided. Although the notion — that eight years of storage and some level of decomposition could constitute "disposal" — seems commonsensical, without adopting rules under R.C. 3714.022, processing facilities in Ohio are left to speculate as to what constitutes a violation of Ohio law (at least until hauled into court to answer a complaint for injunctive relief). If eight years is

too long to be considered "temporary," is one year as well? What level of decomposition of the debris constitutes "substantially" changed? These unanswered questions are especially concerning in light of the legislature's unambiguous authorization to authorize the regulation of processing facilities under R.C. 3714.022. Relying on some common- sense recognition of what constitutes the wrongful storage of processing materials undermines the sole purpose of R.C. 3714.022 — to provide Ohio EPA the means of regulating processing facilities in Ohio in such a manner as to put those facilities on notice of their operational requirements.

{¶ 52} It seems that an answer could have been easily provided to BRC before this litigation ensued had R.C. 3714.022 been invoked — i.e., Ohio EPA as part of its regulatory oversight could have adopted a rule requiring stored materials to be processed within a certain time frame at a processing facility. Further, adopting the rules and regulations would have provided the Attorney General and the local community with the tools to address the purported nuisance caused by the accumulation of debris in Pile 2. The harms from the failure to codify regulations under R.C. 3714.022 is thus two-fold: the Attorney General is forced to rely on other avenues of enforcement that are ill suited for the task at hand because of the ambiguity in the definitions as noted above, and at the same time, businesses in processing facilities in Ohio lack any certainty as to their operational requirements so as to avoid this type of litigation.

{¶ 53} Nevertheless, even if we were inclined to agree with BRC's position that the Ohio EPA lacked regulatory authority over a processing facility in general, it should be noted that there is arguably no relief that could be offered in light of proceedings that occurred during this interlocutory appeal. As of February 2020, BRC complied with the trial court's order to remove Pile 2 from its property and the parties filed an agreed order indicating that the nuisance created by Pile 2 has been abated. The trial court journalized the agreed order on February 28, 2020.

{¶ 54} In general, a "'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 10, quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). If an event that makes it impossible to grant the requested relief occurs, the case becomes moot and should be dismissed. *State ex rel. Ohio Democratic Party v. LaRose*, Slip Opinion No. 2020-Ohio-1253, ¶ 5. Further, appellate courts are not constrained to resolve the mootness issue from the appellate record alone. It is well settled that an "'event that causes a case to be moot may be proved by extrinsic evidence outside the record.'" *State ex rel. Nelson v. Russo,* 89 Ohio St.3d 227, 228, 2000-Ohio-141, 729 N.E.2d 1181, quoting *Pewitt v. Lorain Corr. Inst.*, 64 Ohio St.3d 470, 472, 1992-Ohio-91, 597 N.E.2d 92; *Miner v. Witt*, 82 Ohio St. 237, 238, 92 N.E. 21 (1910); *State v. Hagwood*, 8th Dist. Cuyahoga No. 83701, 2004-Ohio-5967, ¶ 5; *see also Wizards of Plastic Recycling, L.L.C. v. R & M Plastic Recycling, L.L.C.*, 9th

Dist. Summit No. 25951, 2012-Ohio-3672, ¶ 4, citing *Miner & Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

{¶ 55} Because the preliminary injunction ordered the removal of Pile 2 with attached conditions to secure that removal, there is arguably nothing more to be resolved in this interlocutory appeal seeking to vacate that order. Unfortunately, this issue was not brought to our attention, and because BRC was not offered the opportunity to address the issue of mootness, I believe it prudent to address the issues raised in the merit briefing. On those issues, I concur with the majority opinion.