

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-TS-00673

RICHARD H. BENNETT, et al.

APPELLANTS

VERSUS

PEARL RIVER COUNTY, MISSISSIPPI

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF PEARL RIVER COUNTY

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Richard H. Bennett, Appellant
2. Concerned Citizens of Pearl River County, which may be a Mississippi non-profit corporation, Appellant
3. Pearl River County Board of Supervisors, presently consisting of:

Anthony Hales, Danny Wise, Larry D. Davis, Robert Thigpen,

and Bettye Stockstill
4. William H. Jones, attorney for Appellants
5. Claiborne McDonald, IV, attorney for Pearl River County Board of Supervisors
6. Lawrence C. Gunn, Jr., attorney for Pearl River County Board of Supervisors



Attorney for Pearl River County Board of
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STATEMENT OF THE ISSUES

The appellees do not concur in the statement of the issues presented by the appellants. Rather, the appellees feel that the issues are:

I.

Does Mississippi law allow for a countywide election to determine whether a landfill should be enlarged?

II.

Did the appellants have standing as private citizens to apply for a writ of mandamus to require the Board of Supervisors to hold an election to decide if the county landfill should be expanded?

III.

Did the circuit court act properly within its discretion to deny the petition for writ of mandamus?

STATEMENT OF THE CASE

A. Proceedings in the Circuit Court

This is a suit for mandamus brought by an individual, Richard H. Bennett, and an unidentified group of citizens calling themselves "Concerned Citizens of Pearl River County, Mississippi." The complaint asks that the Board of Supervisors be required to hold an election to determine if the county landfill should be enlarged. (R.3; R.E. 10)

The Board filed an appropriate answer with defenses, and the plaintiff moved to strike all of these defenses. (R. 20) The Board moved for summary judgment (R. 33), and the circuit court heard both motions at one time and entered its opinion and judgment denying the relief sought by the

plaintiffs and dismissing the case with prejudice. (R.114-120; R.E. 3-9)

Final judgment was entered on March 28, 2007. (R. 1, 114; R.E. 2,9)

On March 30, 2007, plaintiff filed a motion to reconsider, which suspended the time to appeal the final judgment. (R. 121)

The court denied the motion to reconsider on April 13, 2007, and a notice of appeal was timely filed on April 25, 2007. (R. 126)

STATEMENT OF THE FACTS

Pearl River County adopted a countywide solid waste management plan in 1999. The county had no choice but to adopt a plan, as Mississippi Code §17-17-227 mandates all local governments must have such a plan.

The plan was adopted after the statutorily required public notice, public hearings, and approval by the Mississippi Commission on Environmental Quality, a branch of the Mississippi Department of Environmental Quality.

Pearl River County's solid waste management plan provides in Section 9.1, Page 82, (R. 42) that it may be amended from time to time. Major amendments require a public hearing. One such proposed amendment is what spawned this lawsuit.

Transamerica Waste Central Landfill, Inc. applied to the Board in May 2005 for an expansion of Pearl River County's landfill. The Board denied that request on August 10, 2005. (R. 56)

The plaintiffs in this case apparently wanted to prevent any future possibilities of expansion of Pearl River County's landfill, and presented a petition to the circuit clerk on October 14, 2005. This petition, actually a series of postcards, is the petition which ultimately is the focus of this case, and at the time the petition was made to the Board of Supervisors, there was no pending request for

an expansion of the landfill.

However, on April 10, 2006, Transamerica made an amended request for expansion of the landfill, and the complaint in this case followed shortly. (R. 57)

The suit asked for the court to order the Board to conduct a countywide election to determine if Transamerica's request should be granted. The request to the court is based upon the following petition to the Board:

We, being qualified electors of Pearl River County, Mississippi hereby petition the Board of Supervisors of Pearl River County, Mississippi to either pass an order and/or ordinance putting the following proposition in force and effect or immediately submit the same to a vote of the qualified electors of this County, after giving 30-days notice of said election, said notice to contain a statement of the proposition to be voted on at said election: Proposition: As of June 1, 2005, there is in effect a Solid Waste Plan for Pearl River County, Mississippi. In order for there to be any expansion of that Solid Waste Plan, either in service area or in size with respect to any existing Landfill situated within the territorial jurisdiction of Pearl River County, such expansion shall be authorized and permitted only through an election held pursuant to Title 19, Mississippi Code, Section 19-3-55.

Since the circuit court's dismissal of the plaintiffs' case, the Board of Supervisors has granted Transamerica a modified version of its requested expansion.

SUMMARY OF THE ARGUMENT

I. Mississippi Law Does Not Allow for a Countywide Election to Determine Whether a Landfill Should be Enlarged

Management of landfills by local governments is governed by Mississippi's Solid Waste Disposal Law, Mississippi Code §17-17-227 (Rev. 2003). The specific requirements of this statute are the type of exception recognized in Mississippi Code §19-3-55 (Rev. 2003), the statute which gives the citizens the right to petition the Board of Supervisors. Because the Solid Waste Disposal Law constitutes a specific statutory requirement, mandating the Board of Supervisors to manage the

county's solid waste management plan, it controls over the code section which would otherwise allow the electorate to vote on issues concerning the landfill.

II. The Appellants Lack Standing as Private Citizens to Apply for a Writ of Mandamus to Require the Board of Supervisors to Hold an Election to Decide if the County Landfill Should be Expanded

Plaintiffs can have standing to petition for a writ of mandamus only if they are able to demonstrate that they have an interest separate from or in excess of that of the general public. *Jackson County School Board v. Osborne*, 605 So.2d 731 (Miss. 1992). This rule concerning standing is especially true in the case of a petition to require a public body to call an election. *Wilson v. City of Laurel*, 249 So.2d 801 (Miss. 1971).

In this case the plaintiffs have not demonstrated that they have any interest different from the rest of the citizens of Pearl River County. The circuit court acted properly in determining that these plaintiffs have no standing to pursue a petition for writ of mandamus; See, for comparison, *Dupree*, etc.

III. The Circuit Court Acted Within Its Discretion in Denying the Writ of Mandamus

The circuit court has wide and broad discretion in deciding whether to grant a writ of mandamus. *Board of Supervisors of Prentiss County v. Mississippi State Highway Commission*, 42 So.2d 802 (Miss. 1949).

Even in cases where there may be a clear legal right to a writ of mandamus, nonetheless a circuit court may under appropriate circumstances deny the writ based upon the unique circumstances of the case. *Chatham v. D.B. Johnson*, 195 So.2d 62 (Miss. 1967).

In this case, even if the Board's arguments in Sections I and II above are not accepted, there

are still a variety of circumstances that justified the circuit court's denial of the petition for writ of mandamus.

ARGUMENT

I. Mississippi Law Does Not Allow for a Countywide Election to Determine Whether a Landfill Should be Enlarged

The law of this state does not allow an election to be held to govern management of a landfill subject to the Solid Waste Management Plan of Pearl River County.

It is true that the legislature by Mississippi Code § 19-3-55 (Rev. 2003) has given the citizenry the right to petition the government for elections that affect a countywide interest in most circumstances, but there is an exception stated at the beginning of the statute:

(Unless otherwise specifically required by law) the Board of supervisors of any county shall upon the filing of a petition touching any matter affecting the entire county and over which it has jurisdiction, signed by twenty-five percent of the qualified electors of the county, either pass an order putting said proposition in force and effect or immediately submit the same to a vote.... (emphasis added.)

Plaintiffs overlook the introductory clause, "unless otherwise specifically required by law." In this instance, there is a clear and specific law, Mississippi Code § 17-17-227 (Rev. 2003), which governs the creation, maintenance, operation, and amendments of Pearl River County's solid waste management plan. Management of the landfill is simply not a subject that may be submitted to popular vote. The Board of Supervisors is required to operate landfills under the Solid Waste Management Plan by mandate of the legislature, and even if the citizens were to vote otherwise, the Board would nonetheless be compelled to operate in a manner approved by the Mississippi Department of Environmental Quality.

This case is distinguishable from *Mississippi Waste of Hancock County, Inc. v. Board of Supervisors of Hancock County*, 818 So.2d 326, (Miss. 2001), where this Court held that a petition under §19-3-55 was proper to determine by vote of the citizens of the county whether a county landfill should be publicly or privately owned and operated. That issue is not an issue that is preempted by §17-17-227. When Pearl River County first adopted its countywide solid waste disposal plan, the citizens of the county could have petitioned for a countywide election to determine if the county would in fact adopt the plan, join a regional waste authority, or adopt some other approved means of disposing of solid waste. Once the plan is in effect and implemented, however, day by day operation and amendments to the plan are governed by §17-17-227 and the regulations of MDEQ. (See MDEQ regulations for amendment of solid waste plan at R. 43-55) Every change to the operational structure of the plan cannot be subject to a popular vote.

Mississippi's Solid Waste Disposal Law contains a penalty and fine provision, Miss. Code §17-17-29, which can subject violators to fines up to \$25,000 a day. It is unclear what might happen if, for instance, the citizens of Pearl River County were to vote to do something that is otherwise prohibited by the Commission regulations. If the Board complied with the mandate of the electorate, that compliance might subject Board members or other county officials to criminal prosecution and possible fining under §17-17-29(5). Mississippi's Solid Waste Disposal Law simply does not contemplate that management of approved landfills should be overseen through popular vote; rather, this particular governmental function is delegated by the legislature to the Board of Supervisors and the Commission.

This Court has explained the interplay between federal, state, and local government requirements concerning landfills in *Golden Triangle Regional Solid Waste Management Authority v. Concerned Citizens Against Location of Landfill*, 722 So.2d 648 (Miss. 1998). In

1993 the Federal Environmental Protection Agency mandated that local governments create solid waste disposal laws which would comply with EPA regulations. Some counties and municipalities have elected to form regional solid waste management authorities under the provisions of Mississippi Code §17-17-301 (Rev. 2003), while others have elected to handle their solid waste disposal laws on a county by county level, following the requirements of Mississippi Code §17-17-227 (Rev. 2003). This latter option is the route Pearl River County has chosen to take.

The Board of Supervisors administers the county Solid Waste Management Plan as required by law in connection with the Mississippi Department of Environmental Quality and in accordance with the requirements of Mississippi Code §17-17-227 (Rev. 2003). This plan was initially adopted by Pearl River County in 1999. The county had no choice but to adopt such a plan, as §17-17-227 mandates it. Under this law, all local governments must develop and maintain a solid waste management plan subject to the approval of the Mississippi Commission on Environmental Quality, a branch of the Mississippi Department of Environmental Quality.

Pearl River County's plan has a provision for amendments to be made. (See Section 9.1, page 82, of the plan; the entire plan was available at the hearing of the motions, but the complete document is huge and was not made an exhibit.) If any interested person seeks an expansion of the existing facility or an expansion of the area serviced by a landfill which is governed by the plan, Miss. Code §17-17-227(8) and Section 9.1 of the plan give the Board of Supervisors the authority to amend the plan from time to time, and MDEQ has promulgated administrative regulations for local government bodies to follow. See "Guidance for Modifying a Local Solid Waste Management Plan," September 2006, published by the Mississippi Department of Environmental Quality, Solid Waste Policy, Planning and Grants Branch, offered as Exhibit 2 at the hearing. (R. 43-55)

Any requested amendment must go through the administrative process set forth in MDEQ guidelines. Notice of the proposed amendment must be published at least twice in a local newspaper and a public hearing must be held. (Miss. Code §17-17-227(5)(a)). The Board may amend the proposed plan based on public comments; Miss. Code §17-17-227(5)(b), and final approval must be given by the Commission, §17-17-227(6); see also MDEQ Document and Section 9.1 of the plan, Exhibits 1, and 2 to the Board's motion.

Pearl River County has thus implemented a solid waste disposal plan under the mandate of the legislature, which in turn is obligated to comply with Federal EPA guidelines. Whether the citizens like it or not, the Board must continue administering the solid waste management plan under the guidance and oversight of the Commission of Environmental Quality. MDEQ regulations and the internal provisions of the plan itself govern the process for amendments of the plan to be made from time to time, as has been done here. Amendment of the plan is simply not something that the law allows to be put to popular vote.

II. The Appellants Lack Standing as Private citizens to Apply for a Writ of Mandamus to Require the Board of Supervisors to Hold an Election to Decide if the County Landfill Should be Expanded

It is settled law that an individual plaintiff such as Richard Bennett does not have standing to pursue a writ of mandamus if he does not have any interest separate from or in excess of that of the general public. *Jackson County School Board v. Osborn*, 605 So.2d 731 (Miss. 1992). Ordinarily, a suit seeking mandamus should be brought by the Attorney General, the Governor, or some other public official, and a private person may seek such a writ only where there is a showing of an interest that affects him differently from any other member of the public. *Fondren v. State Tax Commission of the State of Mississippi*, 350 So.2d 1329 (Miss. 1977).

This is especially true in the case of an effort to require a public body to hold an election.

This Court has held that an individual may not petition for a writ of mandamus to require a public body to call an election where there is no allegation or claim that the plaintiff has an interest separate from or in excess of that of the general public or that the individual would suffer any specific legal injury or damage apart from the body of citizens as a whole. *Wilson v. City of Laurel*, 249 So.2d 801 (Miss. 1971).

The above cited cases mandated dismissal of the plaintiff's claim. There is no allegation at all in the complaint alleging that Mr. Bennett or the "Concerned Citizens" have any interest different from every other citizen of Pearl River County, nor was a showing of any special interest made at the hearing.

The appellants' lack of standing in this case is demonstrated by contrasting their status to that of the petitioners in the recent case of *Dupree v. Carroll, et. al.*, 2006-CA-01875-SCT, decided October 25, 2007. In *Dupree*, the petitioners were three Hattiesburg councilmen. They sought a writ of mandamus to require Hattiesburg's mayor to submit his departmental head choices for approval at the beginning of his mayoral term. The mayor challenged their standing, but this Court, in affirming the Circuit Court of Forrest County, noted that these three persons clearly had an interest over and above that of the other citizens of Hattiesburg. As elected councilmen they have the right and the duty to vote on the mayor's nominations for important executive positions of the city. Other citizens of Hattiesburg do not possess these same rights and duties. Those three petitioners had standing because their interests were separate from and in excess of those of the general populace, unlike the plaintiffs in this case, who have not demonstrated any personal interest in this case over and above that of the other citizens of Pearl River County.

The rule concerning standing makes a lot of sense, especially in a case such as this one. Every citizen of Pearl River County is affected by the Board's decisions concerning management of the landfill. While the individuals who signed the petition obviously side with Mr. Bennett, there

may be many other citizens of the county who feel differently, i.e. those citizens who did not sign the petition. Mr. Bennett is just one individual in a county of many thousands of citizens. He has no legally cognizable interest in how the landfill is managed any differently from the populace as a whole. The Board is charged with making the best decisions it can under all circumstances to manage the county landfill, and one citizen ought not be able to bring a suit complaining of what the Board does. That is why this Court has adopted the rule that a plaintiff in cases such as this must show that he has some legally protectable interest separate and apart from everyone else in the county, and in this case there is no such showing. The lower court's finding that Mr. Bennett lacks standing is another reason mandating affirmance of this case.

III. The Circuit Court Acted Within Its Discretion in Denying the Writ of Mandamus

A circuit court has wide and broad discretion in deciding whether to grant a writ of mandamus. *Board of Supervisors of Prentiss County v. Mississippi State Highway Commission*, 42 So.2d 802 (Miss. 1949). If there is any reason why the action of the trial court in denying the writ can be upheld, this Court must affirm. *Chatham v. Johnson*, 195 So.2d 62 (Miss. 1967).

Chatham v. Johnson firmly established that the question whether to grant a writ of mandamus is a matter of discretion with the trial judge, and this Court further observed:

The judge in exercising this discretion should take into consideration the variety of circumstances determining whether the writ should issue. He should consider, among other things, the facts of the particular case, the consequences of granting the writ and the nature and extent of the wrong which would result from the refusal to grant the writ. 195 So.2d 65.

The circuit court did consider the facts of this particular case and the consequences that would result from not granting the writ.

The judge had several valid reasons to deny the plaintiff's request:

1. The petition presented by the plaintiffs is worded in a very curious and ambiguous

manner;

2. It is doubtful whether there is even such an entity as "Concerned Citizens of Pearl River County";
3. Sound public policy reasons, if not the absolute requirement of Mississippi statutory law, dictate that landfill management is best done by the Board, not by the electorate;
4. The voters of Pearl River County are assured ample opportunity to participate in the policy making decisions concerning the landfill, without having a countywide election.

1. The Wording of the Petition

The petition states verbatim:

We, being qualified electors of Pearl River County, Mississippi hereby petition the Board of Supervisors of Pearl River County, Mississippi to either pass an order and/or ordinance putting the following proposition in force and effect or immediately submit the same to a vote of the qualified electors of this County, after giving 30-days notice of said election, said notice to contain a statement of the proposition to be voted on at said election: Proposition: As of June 1, 2005, there is in effect a Solid Waste Plan for Pearl River County, Mississippi. In order for there to be any expansion of that Solid Waste Plan, either in service area or in size with respect to any existing Landfill situated within the territorial jurisdiction of Pearl River County, *such expansion shall be authorized and permitted only through an election held pursuant to Title 19, Mississippi Code, Section 19-3-55.* (emphasis added.)

It appears that the petition requests the Board to enact an ordinance, or, if it does not pass the ordinance, to hold an election. The question is, what would the ordinance provide and what proposition would be on the ballot if an election were held?

Read literally, this question would require the voters to vote either "yes" or "no" on this question: "Should there be an election to authorize an expansion of the landfill?" If the results of this election were to be in the affirmative, apparently the Board would then be required to hold a second election to determine if expansion of the landfill should be allowed.

In other words, the petitioners asked the circuit court to order an election to determine

whether to have an election. This is non-sensical, but read literally, that is what the petition requests.

We can speculate that the drafters of this petition perhaps wanted the Board of Supervisors to order an election to determine whether the landfill should be expanded. Or, it may also be that the supporters of this petition wanted to have the election process in place to deal with future expansions of the landfill and at present are only wanting to establish the precedent of having an election so that the voters can determine whether there should be further elections in the future.

Plaintiffs' petition would require the Board to conduct not just one, but at least two and possibly more, special elections. The circuit court may have been puzzled over the ambiguity of the petition and may have wondered whether a writ of mandamus is proper where the plaintiffs' petition to the Board employs such strange verbiage as this one. The confusing wording of the petition is one good reason to justify denial of the petition.

2. The Concerned Citizens of Pearl River County

The record is not entirely clear, but there is some concern whether there is even a corporate entity such as the "Concerned Citizens of Pearl River County."

The Board raised this point with the trial court in its response to the plaintiff's motion to strike. The Board pointed out to the circuit court that there was a serious question whether Concerned Citizens of Pearl River County is a non-profit corporation or not, and if it is such a corporation, whether it comprises a different group of citizens from the ones who are involved in this lawsuit. As the Board expressed its concern to the circuit court: "Given the extraordinary nature of the relief 'Concerned Citizens' seek in their complaint, the Board feels it appropriate to ask the court to make the necessary inquiry to determine whether this plaintiff has a legal existence."

At the hearing that was held in this matter, the circuit court noted that there was some serious

question whether “Concerned Citizens” was in fact a viable corporate entity (R. 100-101), and not once in the record of this case is there any assurance given to us by the plaintiffs that there is in fact a legal organization that has the existence to qualify as a plaintiff. The uncertainty over the nature and existence of this one plaintiff is one of the factors the Court obviously took into consideration in its discretion to deny the writ of mandamus.

3. Management of the Landfill

In Section I of this brief the appellees’ have demonstrated why management of the landfill must be a function of the Board rather than something is delegated to popular vote. Even if all of the arguments advanced in Section I of this brief, however, were not the law, nonetheless the circuit court acted well within its discretion in determining that the Board of Supervisors, rather than the electorate or the circuit court, can do the best job of managing a landfill. Pearl River County’s plan has been approved by MDEQ and complies with the regulations of the Mississippi Commission on Environmental Quality. An amendment process is in effect. The process assures ample public comment and citizen participation.

Under all these circumstances, the Board of Supervisors suggests that this Court should exercise its discretion to not get involved in this political process. A court may decline to grant a writ of mandamus where to refuse the writ would be in the public interest, *Board of Supervisors of Prentiss County v. Mississippi State Highway Commission*, 42 So.2d 802 (Miss. 1949), and the Court has discretion to not grant a writ of mandamus even if there is a clear right, *Chatham v. Johnson*, *supra*. (In this case there is not even a clear right to the writ of mandamus).

Even if the management of Pearl River County’s solid waste management plan is something that could be managed through an election, even if the petition presented to the Board of Supervisors

was clear and unambiguous in what is requested, and even if the plaintiffs had standing, nonetheless, the circuit court was well within its discretion to deny the writ of mandamus. This court should affirm.

4. Opportunities for Public Participation

One other circumstance the circuit court obviously considered is that Pearl River County's plan assures public participation through the political process. If there is a proposed amendment to the plan, notice of such amendment is published at least twice in local newspapers and a public hearing must be held. (Miss. Code §17-17-227(5)(a)). Public comments are allowed, and the Board is authorized to modify the requested amendment depending on the content of these public comments. (Miss. Code §17-17-227(5)(b)). In other words, the electorate of Pearl River County is not shut out of the process. It is in fact, included in the political process by virtue of the notice and public hearing requirements. The availability of participation in the political process is another circumstance the circuit court considered in determining that the court should exercise its discretion to deny the present petition for writ of mandamus.

The circuit court recognized that not only is the granting or withholding of a writ of mandamus discretionary, this discretion is so broad that the court even has the right to withhold granting a writ where the public interest might be adversely affected. *Board of Supervisors of Prentiss County*, supra. As the Court recognized in *Chatham v. Johnson*, "The writ of mandamus will not issue in every case *even where there is a clear legal right*" (emphasis added). 195 So.2d 65.

The circuit court had numerous reasons to elect not to grant the writ of mandamus, even if the law allowed an election to be held to manage the county landfill. As explained above, the law does not allow such to occur. Even if it did, however, the lower court's decision to deny the writ of

mandamus was well within the court's discretion and ought to be affirmed.

CONCLUSION

For reasons outlined above, the Board of Supervisors of Pearl River County request this Court to affirm the judgment of the circuit court, which denied the petition for writ of mandamus.

This the 8 day of November, 2007.

Respectfully submitted,



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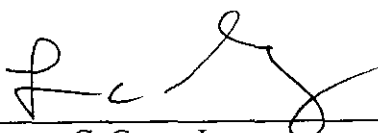
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed by United States Mail, postage prepaid, or served by facsimile or electronic mail, a true and correct copy of the above and foregoing document to:

William H. Jones
Attorney at Law
P. O. Box 282
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Honorable Prentiss Harrell
Circuit Court of Pearl River County
Post Office Box 488
Purvis, Mississippi 39475

THIS 8 day of November, 2007.



Lawrence C. Gunn, Jr.