SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2010-CA-02098

W. C. FORE d/b/a W. C. FORE TRUCKING, INC. — APPELLANT

VERSUS

MISSISSIPPI DEPARTMENT OF REVENUE f/k/a MISSISSIPPI STATE TAX COMMISSION, MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AND MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY — APPELLEES

BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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W.C. FORE TRUCKING, INC., APPELLANT:

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CERTIFICATE OF INTERESTED PERSONS

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 the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. W. C. Fore d/b/a W. C. Fore Trucking, Inc.,
2. Mississippi Department of Revenue f/k/a Mississippi State Tax Commission, Appellee
3. Mississippi Department of Environmental Quality, Appellee
4. Mississippi Commission on Environmental Quality, Appelle

THIS, the 8th day of July, 2011.

BOBBY R. LONG, Attorney
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I. STATEMENT OF THE ISSUES

1. Whether emergency waste disposal sites established after Hurricane Katrina were subject to the fees imposed on Commercial Non-hazardous Solid Waste Management Facilities pursuant to Miss. Code Ann. § 17-17-219 (1972, as amended);

2. Whether the actions of the Mississippi State Tax Commission (hereinafter "MSTC")[1] in granting favorable treatment to certain emergency waste disposal site operators were arbitrary and capricious and in violation of W.C. Fore's d/b/a W. C. Fore Trucking, Inc.,[2] constitutional rights; and

3. Whether the City of Gulfport's Contractor, Phillips & Jordan, Inc. (hereinafter "P & J") was the operator of that portion of the Delancey Site where the City of Gulfport's hurricane debris was placed and thereby was responsible for any fees imposed on same.

---

[1] The Mississippi State Tax Commission has now been reorganized and its name changed to the Department of Revenue.

[2] As noted in the Lower Court's Opinion, all parties have treated the corporation as an individual and there should be no distinction regarding whether the tax, if any, is owed by the individual or the corporation.

II. STATEMENT OF THE CASE

A) Nature of Case

In August of 2006, Fore was notified by the Mississippi State Tax Commission (hereinafter MSTC) that he was required to submit a "Non-hazardous Solid Waste Fee Annual Report" for two emergency disposal sites, being the Delancey site and the LoBouy site, that were established to handle Hurricane Katrina debris. The notice specifically stated that a report should be filed even though no fees were due. In response to the notice, Fore stated that he was providing emergency relief after Hurricane Katrina and was not operating a commercial disposal site. Thereafter, the MSTC issued a Letter Ruling (L.R.) 06.360, which concluded the following:

. . .

> If these sites were managed for compensation, then these sites would be considered commercial disposal sites and be subject to the filing requirement and payment of $1.00 per ton of solid waste set forth in Miss. Code Ann. § 17-17-219. I can not find anything in this statute that would exempt these facilitites. Please forward to our office documentation from the Mississippi Department of Environmental Quality stating that your site is not a commercial disposal site and we will reconsider our position on this issue.
>
> [Exh. 4-38, R. at p. 191][3]

. . .

L.R. 06.360 also provided that if you disagree with this Letter Ruling you may appeal to Randy Ladner, Director, Office of Revenue. It should be noted that in this Letter Ruling, the MSTC concluded that Fore was subject to the fee; however, in a prior

---

[3]Trial Exhibit No. 4 is the joint 30(b)(6) Deposition Exhibits of the Appellees numbered 1-50 excluding Deposition Exhibits 16 and 23, which were not admitted into evidence. The reference to 38 is Exhibit 38 to the Deposition.

Letter Ruling being L.R. 06.156, the MSTC waived all fees for another emergency site operator for all of 2005 and a portion of 2006. In that Letter Ruling, the MSTC took the position that since this emergency site operator was not notified of the fee prior to February 2006, the emergency site operator should not be required to pay same prior to that date. [Exh. 4 - 36, R. at 191] The MSTC arbitrarily failed to apply this interpretation to Fore and was well aware that Fore also did not receive notification of the fee prior to February of 2006.

Consistent with the directions contained in the Letter Ruling, on December 5, 2006, Fore's attorney notified MSTC of his disagreement with the Letter Ruling and requested a formal appeal of same. On February 7, 2007, the MSTC, through its attorney, Gary Stringer, notified Fore's attorney that the L.R. 06.360 was in error in that there was not an appeal available. In addition, Mr. Stringer noted that an administrative appeal of this matter could not be had until an assessment was made or the MSTC had denied a refund claim.

Fore did not receive any further communications from the MSTC until September 27, 2007, when he received another letter indicating that the MSTC was billing Fore for non-hazardous waste fees, interest and penalties, based on tonnage reported to the Mississippi Department of Environmental Quality (MDEQ). The letter further provided that if no compensation was paid to him for waste received at the facility, he could resolve the discrepancey by reporting the appropriate tonnage on the enclosed Non-hazaroudous Waste Fee Annual Report.

In response to this letter, on October 30, 2007, Fore, through his attorney, submitted the "Mississippi Non-hazardous Solid Waste Fee Annual Report" for both

emergency disposal sites and specifically noted that no fees were due. Thereafter, on March 21, 2008, the MSTC made a formal assessment of $333,182.00 in Non-hazardous Solid Waste Fees, $69,968.22 in interest, and $33,318.20 in penalties. Fore appealed this assessment to the Board of Review on April 22, 2008.

On August 26, 2008, the Board of Review entered its Order upholding and affirming the Assessment of Non-hazardous Solid Waste Fees in the amount of $436,468.42. Pursuant to the provisions of Miss. Code Ann. § 27-77-5 and Title 35, Part I, Chapter 01, Section 107, Sub-section 107.01-107.02 of the Mississippi Administrative Code, Fore perfected his appeal of this determination to the three (3) member Mississippi State Tax Commission. On March 3, 2009, the three (3) member Commission rendered its decision affirming the imposition of the fee in the amount of Three Hundred Thirty-Three Thousand, One Hundred Eighty-Two and 00/100 Dollars ($333,182.00), but removed the interest and penalty [Record Excerpts (R. Ex.) Tab 3] full the amount affirmed by the Commission under protest and on March 31, 2009, filed his Petition against MSTC seeking a refund of the fees paid in the Chancery Court of Harrison County, First Judicial District, Mississippi. On May 18, 2009, the Department of Environmental Quality and the Mississippi Commission on Environmental Quality (hereinafter referred to as "MDEQ") filed a Motion to Intervene as party Defendants. Fore did not oppose the Motion to Intervene.

All four of the Chancellors of the Eighth Chancery Court District recused themselves and on July 29, 2009, the Supreme Court appointed Eugene L. Fair as a Harrison County Chancellor to hear the case. Discovery followed pursuant to scheduling orders agreed to by both sides. Hearings regarding production of evidence

took place and the matter was tried before Judge Fair commencing on March 18, 2010.

On November 29, 2010, Judge Fair entered his Opinion and Final Judgment affirming the Order of MSTC. [R. Ex. Tab 2]

B. Statement of the Facts

Hurricane Katrina devastated the Mississippi Gulf Coast on August 29, 2005. By Proclamation dated September 2, 2005, the Governor declared a state of emergency in areas of the State affected by Hurricane Katrina and directed agencies of the State to discharge their emergency responsibilities as deemed necessary. In addition, on September 13, 2005, the Governor, pursuant to the Constitution and Miss. Code Ann. § 33-15-11(b)(17), signed a Resolution delegating and authorizing the Executive Director of the Mississippi Department of Environmental Quality (MDEQ) to execute an Emergency Order. [See Resolution, Exh. 84, R. at 191] Pursuant to the Emergency Order, the MDEQ found in part as follows:

. . .

> The Hurricane has created conditions that require immediate action to prevent irreparable damage to the environment and serious threats to life or safety throughout the emergency areas. It is the opinion of the Executive Director that an emergency situation exists which creates an imminent and substantial endangerment threatening the public health and safety and the lives and property of the people of Mississippi. Therefore, the undersigned, acting on behalf of the Mississippi Commission on Environmental Quality and consistent with the Governor's Resolution dated September 13, 2005, hereby declares that an emergency exists and entry of this Emergency Order is warranted. Pursuant to this Order, the following measures are ordered to prevent irreparable damage to the environment and serious threats to safety, life and human health within the emergency areas:
>
> [See pages 1 and 2 of the Emergency Order attached to Resolution, Exh. 84, R. at 191]
>
> . . .

One of the measures directed to be taken was the creation of emergency disposal sites for vegetation debris and for building and structural debris that resulted from the hurricane. There were no statutory or regulatory provisions which addressed how emergency disposal sites were to be established and the requirements for same. None of the documents or orders authorizing or establishing emergency sites or the regulations of MDEQ indicated or referenced these emergency sites as being Commercial Non-hazardous Solid Waste Management Facilities or that they would be subject to the fee imposed by Miss. Code Ann. § 17-17-219 (1972, as amended).

On September 10, 2005, Fore entered into a contract with Harrison County for the speedy and efficient removal of debris from public right-of-ways in certain areas of Harrison County outside the various municipalities. [See Contract, Exh. 40, R. at 193] According to the Contract, Fore was responsible for debris pick-up along public right-of-ways, transportation to disposal sites and debris disposal. The Contract stated in part:

> ...This Contract is also entered into under the provision of Section 33-15-17 Mississippi Code of 1972, and pursuant to the Governor's Declaration of Disaster as provided by Section 33-15-31, Mississippi Code of 1972, as well as the President's Declaration of Disaster.
>
> [Exh. 40, p. 1, R. at 193]

In addition to hiring contractors to remove the hurricane debris, the County also requested that MDEQ authorize and approve certain sites as emergency disposal sites for vegetation debris and for building and structural debris as was authorized in the MDEQ Emergency Order. Included within the Board of Supervisors' request were the LoBouy and Delancey sites which were either owned by Fore or available for his use.

At the same time that the Board of Supervisors was requesting approval for

these sites, the City of Gulfport was also seeking approval for the Delancey site to be used for the disposal of debris from within the City. The contractor for this work was Phillips and Jordan, Inc., hereinafter referred to as "P & J". [See Contract Exh. 4-28, R. at 191] Under P & J's Contract with the City of Gulfport, P & J was responsible for loading, hauling and disposing of hurricane debris located within the City of Gulfport. Fore and P & J entered into an Agreement whereby Fore agreed to allow P & J to utilize a portion of the Delancey site for their disposal operations. P & J was the operator of that portion of the Delancey site and provided its own employees and equipment to manage/dispose of its hurricane debris. [R. at 121-122] In consideration for being allowed to utilize a portion of the Delancey site, P & J paid Fore $1.00 per cubic yard for vegetative debris and $1.50 per cubic yard for building and structural debris. [R. at 130] Fore did not own this property and he in turn paid the property owners a fee for utilizing the site on a per cubic yard basis. [R. at 123-129] Fore had a long standing agreement with the owners of the property (the Delancey family) to mine dirt on this property and agreed to pay them $.40 per cubic yard for dirt removed. He also agreed to pay the owners $.40 per cubic yard for debris placed on the property. [R. at 128] The $1.00 to $1.50 per cubic yard price paid to Fore by P & J was the typical price paid by emergency site operators to the property owner when the operator was responsible for managing the debris and the owner had no involvement in the disposal operations. [See examples of other agreements where the owner charged the operator $1.00 per cubic yard for hurricane debris disposal. Ex. 42, R. at 193]

Fore is a life long resident of the Mississippi Gulf Coast and has been in the trucking business for his entire adult life. For the past forty (40) years , Fore has been

involved in cleaning up debris after every major storm that has hit the Gulf Coast. This was done through a contract with one of the various governmental entities. As a part of these contracts, Fore was responsible for the ultimate disposal of the debris. At no time did Fore ever submit any request or application to MDEQ for operating a storm debris disposal site, nor was he ever required to report to MDEQ the amount of debris placed at a particular site or pay any fee. [R. at 107]

On September 16, 2005 and October 4, 2005, and at the request of Harrison County, MDEQ approved the Delancey and LoBouy sites, respectfully, for the emergency disposal of hurricane debris. [Exh. 4-9, 4-12, R. at 191] Although it was Harrison County who initailly requested that these sites be approved, the approval letter was forwarded to Fore. The letters from MDEQ authorizing the sites outlined the requirements or conditions for operating and closing said emergency disposal sites. The letters specifically noted that only hurricane debris was allowed to be placed at either site. In addition, the authority to accept debris only lasted as long as the emergency existed. The authorization letters did not make any reference to the emergency disposal sites being considered Commercial Non-hazardous Solid Waste Management Facilities, nor did they provide that reports would have to be filed with MDEQ and MSTC or that there would be any fee imposed for disposing of debris at the sites. [See Authorization Letters Ex. 4-9 and 4-12, R. at 191] In fact, MDEQ and MSTC have never, prior to Hurricane Katrina, required the submission of any reports or the payment of any fee for operating an emergency disposal site. [See MDEQ's Supplemental Response to Interrogatory No. 9, p. 11, Exh. 41, R. at 193 and R. at 309-312]

After entering into a contract on September 10, 2005 with Harrison County, Fore began placing hurricane debris at the Delancey and LoBouy sites. In addition, P & J began utilizing a portion of the Delancey site for the placement of debris from the City of Gulfport. In February 2006, after the contracts for debris clean up had been entered into and after a significant portion of the debris had been picked up, MDEQ sent a memorandum to emergency site operators which stated, "... these sites, under state law, appear to be commercial disposal sites and are subject to reporting requirements on solid waste disposal activities conducted during Calendar Year 2005." [Exh. 4-15, R. at 191] The memorandum went on to state that reports would also have to be filed with the MSTC and that a fee of $1.00 per ton would have to be paid for debris managed at this site. This was the first time that Fore had received any type of notification from MDEQ or MSTC about a fee being imposed on emergency site operators. As previously noted, this was the first time that MDEQ and MSTC had ever taken such a position with regard to any emegency disposal site. [Exh. 41, R. at 193 and R. at 309-312]

It was, and is, Fore's position that he was providing emergency services pursuant to an emergency order entered in compliance with Miss. Code Ann. § 33-15-31 (1972, as amended) and not operating a Commercial Non-hazardous Solid Waste Management Facility. The MDEQ and MSTC did not agree and, on March 3, 2009, the MSTC affirmed the imposition of fees against Fore in the amount of Three Hundred Thirty-Three Thousand, One Hundred Eighty-Two and 00/Dollars ($333,182.00).

II. SUMMARY OF THE ARGUMENT

A. The Delancey and LoBouy Sites were not Commercial Non-hazardous Solid Waste Management Facilities

As pointed out by the lower court in its Opinion, "...Katrina was, and remains, the most devastating natural disaster in American history...". The amount of debris left in its wake was unimaginable and posed imminent and substantial endangerment threatening the public health and safety and the lives and property of the individuals residing throughout the emergency area. In response to this emergency, the Governor and the Director of the Mississippi Department of Environmental Quality (MDEQ) exercised their emergency powers pursuant to the Mississippi Emergency Management Law, being Miss. Code Ann. § 33-15-1. et seq., (1972, as amended), and issued a Resolution and Emergency Order to address the emergency conditions. Under the terms of the Mississippi Emergency Management Law when such orders are entered "...All existing laws, ordinances, rules and regulations inconsistent with the provisions of this article, or of any order, rules, or regulations issued under the authority of this article shall be suspended during the period of time and to the extent that such conflict, disaster or emergency exists." Miss. Code Ann. § 33-15-31 (1972, as amended). The Emergency Order addressed the establishment of emergency disposal sites to handle the massive amount of hurricane debris.

Although, the Emergency Order authorized the creation of emergency disposal sites, it did not provide how they were to be created or what requirements applied to same. In addition, no statute or regulation of MDEQ, addressed the question of what the requirements were for an emergency disposal site. The only guidelines furnished

the emergency site operators were letters and memorandums that outlined various requirements but none of these guidelines stated or indicated that emergency disposal sites were deemed to be Commercial Non-hazardous Solid Waste Management Facilities. It is Fore's position that in order for his two emergency disposal sites to be considered Commercial Non-hazardous Solid Waste Management Facilities and subject to the fees imposed by Miss. Code Ann. § 17-17-219 (1972, as amended), the Emergency Order, the statute, the MDEQ regulation or the written directions given to emergency site operators at the time the sites were approved would have to provide for same, but they did not. When MDEQ exercised its emergency powers to create these "emergency disposal sites", which are not otherwise authorized by law, the only conditions or requirements that applied to these sites were those identified when the sites were approved. None of the requirements for emergency sites indicated that the said sites were considered Commercial Non-hazardous Solid Waste Facilities or subject to the fees imposed by Miss. Code Ann. § 17-17-219 (1972, as amended). Therefore, to contend that emergency sites are subject to Miss. Code Ann. § 17-17-219 (1972, as amended) would be inconsistent to the requirements adopted for emergency disposal sites pursuant to the Mississippi Emergency Management Law.

B. MSTC's Unequal Treatment of Fore was Arbitrary and Violated His Constitutional Rights

During the course of discovery, Fore learned that the MSTC issued another Letter Ruling to an emergency site operator waiving all fees for 2005 and a portion of the fees for 2006. According to the Letter Ruling, the basis for the waiver was because the emergency site operator had no knowledge of the fee prior to receiving notice from

MDEQ in February, 2006. However, MSTC did not waive any fees for Fore eventhough it was well aware that Fore had no knowledge of the fee until he received the same notice in February, 2006. It is Fore's position that this discriminatory treatment by the MSTC was "arbitrary and capricious" and violated his equal protection rights guaranteed under the Fourteenth Amendment.

The United States Supreme Court, in the case of Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) held that the Equal Protection Clause gives rise to a claim on behalf of a "class of one" when membership in a particular class is not alleged. In order to prevail on such a claim, the plaintiff must establish that he was treated differently from others similarly situated and that there is no rational basis for the difference in treatment. It is Fore's position that he was treated differently from other similarly situated emergency disposal site operators and there was no rational basis for the difference in treatment.

In addition to the foregoing, Fore identified numerous other emergency site operators who received preferential treatment. This difference in treatment by the MSTC was clearly "arbitrary and capricious".

C. Fore Did Not Operate That Portion of the Delancey Site Utilized by Phillips & Jordan, Inc. (P & J)

Fore takes the position that if Miss. Code Ann. § 17-17-219 (1972, as amended) applies to emergency disposal sites, he is not responsible for the disposal fees attributable to debris from the City of Gulfport. The City of Gulfport's Contract for debris pick-up, transportation and disposal was with P & J. It was P & J who operated and managed that portion of the Delancey site where this debris was placed. This was

specifically acknowledged in various correspondence received by Fore from MDEQ as well as other MDEQ official documents. Miss. Code Ann. § 17-17-219 (1972, as amended) imposes the fee on the operator based on the amount of waste managed. Fore was not the operator of that portion of the Delancey site utilized by P & J and he did not manage any of the waste placed by P & J. Therefore, he is not responsible for any fees associated with same.

IV. ARGUMENT

A. Standard of Review

This case involves an appeal from the decision of an administrative agency. Although the law required a full evidentiary judicial hearing, the Court was still bound by the familiar "arbitrary and capricious standard". Under this standard the lower court was required to determine whether the Order of the "MSTC", imposing the fee in question (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make; or (4) violated some statutory or constitutional right of the complaining party. See Mississippi State Tax Commission v. Dyer Investment Company, Inc., 507 So.2d 1287, 1289 (Miss. 1987), 1987 Miss. LEXIS 2521. Additionally, when the appellate court reviews a decision by a chancery or circuit court concerning an agency action, it also applies the same standard of review that the lower courts are bound to follow. Mississippi Comm'n on Environmental Quality v. Chickasaw County Board of Supervisors, 621 So.2d 1211, 1216 (Miss. 1993), 1993 Miss. LEXIS 290. "Ordinarily the scope of judicial review of the action of an administrative agency is limited by the familiar arbitrary and capricious standard. The State Tax Commission is such an agency and, accordingly, both the

Chancery Court and this Court were and are limited in appellate authority." See Tenneco, Inc. v. Barr, 224 So.2d 208, 214-215 (Miss. 1969), 1969 Miss. LEXIS 1291. Additionally, this Court will not defer to the Commission's interpretation of a taxation statute when that interpretation is repugnant to the plain meaning thereof. See Crosby v. Barr, 198 So.2d 571, 573-74 (Miss. 1967), 1967 Miss. LEXIS 1263; State Tax Commission v. Reliance Manufacturing Co., 236 Miss. 462, 470-71, 111 So.2d 225, 228 (1959), 1959 Miss. LEXIS 340; State Tax Commission of the State of Mississippi v. Walter C. Earnest, Jr. and Helen J. Earnest, 627 So.2d 313, 320 (Miss. 1993), 1993 Miss. LEXIS 400.

In addition to the foregoing and as noted by the lower court, courts have adopted certain principles of statutory construction when addressing the application of tax statutes. Specifically, the courts have found that there is no natural law of tax liability. No brooding omnipresence or invisible hand informs the court's consideration of such cases. The amount of tax a taxpayer owes to the state is determinable solely by reference to the positive provisions of the tax laws. Mississippi State Tax Commission v. Dyer Investment Company, Inc., 507 So.2d 1287 (Miss. 1987), 1987 Miss. LEXIS 2521. Tax laws are to be strictly construed against the taxing powers and all doubt resolved in favor of taxpayer. A.C. Lambert, Sr., Chairman, Mississippi State Tax Commission v. Mississippi Limestone Corporation, 405 So.2d 131 (Miss. 1981). On the other hand, if a taxpayer is seeking an exemption, then the burden is on the taxpayer. "All reasonable doubts are resolved against the exemption". MSTC v. Medical Devices, Inc., 624 So.2d 987, 990-991 (Miss. 1993), 1993 Miss. LEXIS 419. In applying the foregoing rules of statutory construction, the lower court held at page 16, "...Fore has

the burden to introduce evidence supporting his claim that he is exempt from operation of the statute which governs those who operate commercial waste disposal facilities." [R. Ex. Tab 2] However, this is an erroneous application of the rules. The question here is whether emergency disposal sites created pursuant to the Mississippi Emergency Management Law after Hurricane Katrina to address a public safety and health crisis were subject to the provisions of Miss. Code Ann. § 17-17-219 (1972, as amended). If there is a question or doubt relating to same, that doubt is to be resolved in favor of Fore. This point was illustrated in the case of A. C. Lambert, Sr., Chairman, Mississippi State Tax Commission v. Mississippi Limestone, 405 So.2d at 131-132. In this case, the Tax Commission argued that Mississippi Limestone was a public warehouse subject to the sales tax imposed pursuant to Miss. Code Ann. § 27-65-23 (1972, as amended). The court rejected this argument and held "...tax laws are to be construed against the taxing powers and all doubt resolved in favor of the taxpayer." Similarly, in the present case, Fore argues he was not operating a Commercial Non-hazardous Waste Facility and all doubts should be resolved in his favor.

B. The Delancey and LoBouy Sites Were Not Commercial Non-hazardous Solid Waste Management Facilities

Fore has never utilized the Delancey and LoBouy sites as Commercial Non-hazardous Solid Waste Management Facilities, nor has Fore ever been licensed or permitted for operating a commercial disposal site. Fore utilized these sites for completing his contract with Harrison County for emergency hurricane debris clean-up. No other individual or entity utilized these sites except for P & J, who utilized a portion of the Delancey site for completing its hurricane debris clean-up contract with the City of

Gulfport. [R. at 120-121] Once the emergency was over and Fore completed his contract with the County, these sites were closed.

There was no specific statutory authority for addressing emergency disposal sites. The legal authority for establishing such sites is found in the Emergency Management Law (§§ 33-15-1, et al.), which directs that the Governor can proclaim a state of emergency. (See Miss. Code Ann. § 33-15-11(b)(17)). Once the Governor proclaims an emergency, he can then direct state officials to take certain actions including issuing Emergency Orders. According to Miss. Code Ann. § 33-15-31(b), the emergency orders entered by the appropriate governmental entity are to have the full force and affect of law. In this instance, the Governor directed the Executive Director of the Mississippi Department of Environmental Quality to excute an Emergency Order, which authorized the establishment of emergency disposal sites.[4] None of the foregoing documents made any reference to a "Commercial Non-hazardous Solid Waste Management Facility", to filing an annual report with the Tax Commission, nor to requring the payment of $1.00 per ton for debris managed at an emergency disposal site. However, the Emergency Order issued by MDEQ did provide under "General Conditions", Section 7(b) the following:

> b. This Emergency Order only serves as relief for the duration of the Order from the regulatory and proprietary requirements of MDEQ...
> [See Ex. 84, R. at 191]

Based on MDEQ's Order, the normal statutory and regulatory requirements did not apply for hurricane debris disposal for the duration of the Order or emergency. The

[4] See Governor's Resolution and MDEQ Emergency Order [Ex. 84, R. at 191].

lower court specifically noted in its Opinion at Page 26 "...Armed with emergency authorization and faced with the monumental task of disposing of the nearly 30 million cubic yards of debris in the three coastal counties, as well as the emergency debris generated throughout the state, MDEQ dispensed with the "time consuming procedures and formalities of establishing nonhazardous waste disposal sites." [R. Ex. Tab 2] This was further illustrated by the testimony of Mark Williams, Manager of the Solid Waste Policy Planning and Grants Program for MDEQ. When asked about where in the MDEQ rules and regulations does it address emergency disposal sites, his response was Section II(o), "Permit Procedures," of the Non-hazardous Solid Waste Management Regulations. This provision provides as follows:

> When a disaster occurs, such as a tornado, hurricane, or flood, and results in urgent need for public solid waste disposal or processing facilities, the Department may approve a site or facility for immediate operations subject to stipulated conditions and for a limited period of time. [See Ex. 21, R. at 192].

According to Mr. Williams, no other provisions in the rules or regulations addressed the "requirements" or "conditions" that emergency disposal sites were required to follow. [R. at 314-317]. Therefore, the Emergency Site Operators could not look to any statute or regulation for guidance in determining what they were required to do and could only rely on the guidelines and conditions given them by MDEQ.[5] These guidelines were set forth by MDEQ in various written policies as well as in the authorization letters provided to Fore and the other emergency site operators. [Ex. 4-2,

[5] It should be noted that MDEQ provided specific notice to permitted site operators of their obligation to pay the $1.00 per ton fee and required that they sign a form acknowledging they were aware of the existence of the fee. This practice was not followed for emergency sites. [Ex. 45(k), R. at 193 and R. at 312-313].

4-3, 4-9, 4-12, R. at 101]. However, none of the written policies and guidelines provided to emergency site operators by MDEQ made any reference to these sites being Commercial Non-hazardous Waste Facilities or being subject to the laws or regulations pertaining to same.

As part of the Emergency Management Law, the Mississippi Legislature recognized that in certain emergencies the normal statutory and regulatory requirements would hinder the necessary response to the emergency. In order to remedy this problem, Miss. Code Ann. § 33-15-31(b) states as follows:

> (b) All orders, rules, and regulations promulgated by the Governor, the Mississippi Emergency Management Agency or by any political subdivision or other agency authorized by this article to make orders, rules and regulations, shall have the full force and effect of law, when, in the event of issuance by the Governor, or any state agency, a copy thereof is filed in the office of the Secretary of State, or, if promulgated by a political subdivision of the state or agency thereof, when filed in the office of the clerk of the political subdivision or agency promulgating the same. All existing laws, ordinances, rules and regulations inconsistent with the provisions of this article, or of any order, rule, or regulation issued under the authority of this article, shall be suspended during the period of time and to the extent that such conflict, disaster or emergency exists.
> **[Emphasis Added]**

Pursuant to the foregoing authority and the Emergency Order which was entered, all existing laws and regulations pertaining to the permitting and the operation of disposal sites were suspended in order to address the existing emergency. The creation and operations of these emergency sites would be controlled exclusively by the Order and written guidelines provided by MDEQ. As previously noted, none of these written guidelines referred to these emergency sites as being Commercial Non-hazardous Waste Facilities or that they would be subject to the requirements for same.

In discussing the application of the Mississippi Emergency Management Law, the Mississippi Supreme Court had an opportunity to address the suspension of public purchasing laws in times of an emergency in the case of Boliver County, Mississippi v. Wal-Mart Stores, Inc. and Town of Winstonville, 797 So.2d 790 (1999). In concluding that the Emergency Management Law controls over other statutory or regulatory provisions the Court held:

. . .

> The circuit court was correct, not only its holding, but also in its articulate reasoning. It is obvious from the language of the Emergency Management Law found at Miss. Code Ann. § 33-15-17, that it is the controlling statute in times of emergency....
> 797 So.2d 795.

. . .

> . . . the Emergency Management Law deals specifically with emergency situations and it cannot be read in pari materia with other statutes, . . .
> 797 So.2d at 796.[6]

. . .

The emergency disposal sites were established pursuant to the Emergency Management Law and the Orders adopted under that authority. As previously noted,

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[6] Rather than looking exclusively to the Emergency Management Law and the written directions given pursuant to said law, the lower court read the Emergency Management Law in pari material with Miss. Code Ann. § 17-17-219, which the Supreme Court in Boliver County concluded you could not do in times of emergency. Additionally, the MSTC argued at trial that to accept Fore's position would mean that the Governor has the power to usurp the legtislature's exclusive power to tax. This is exactly right. The statutory fee imposed by § 17-17-219 is no different than the many other statutory requirements for disposal sites which were waived as a result of the emergency conditions. If such a fee were going to be collected, the emergency guidelines should have provided for same, but they did not.

none of the Emergency Orders, Policies, Written Authorizations or Contracts made any reference to these sites being Commercial Non-hazardous Waste Facilities or to requiring the submission of annual reports to the Tax Commission or to paying $1.00 per ton for the management of hurricane debris. In order for Miss. Code Ann. § 17-17-219 to apply to emergency disposal sites, that requirement would have to be set forth in the emergency orders, policies, written authorizations or contracts, but it was not. There is no positive law that makes emergency disposal sites subject to the fees imposed on commercial sites.

This was apparently recognized by both MDEQ and the MSTC, since both had doubts whether the fees should in fact be imposed as evidenced by the internal communication between them. In an internal e-mail from the Chairman of the Mississippi State Tax Commission to the Department that adminsters this fee dated November 3, 2005, he stated, "...There may be some confusion about whether this particular type of waste is subject to the disposal fee....If there are only a few of these DEQ permitted sites we may need to send each site permittee a letter notifying them of their liability for the fee (if DEQ hasn't already done this).". [Ex. 4-13, R. at 193][7] Additionally, in notes of a telephone conversation between MSTC representatives and Mark Williams of MDEQ the following is stated, "...DEQ did not formally notify sites that they would be subject to a $1.00 per ton fee. They told some verbally. At the time, they were not sure the $1.00 fee would be charged..." [Ex. 85, R. Ex. Tab 2, pp. 21-22] In addition, this doubt is supported by the fact that at no time since the enactment of the

[7] The Court should note that neither MDEQ nor MSTC provided any such notice to emergency site operators until February, 2006 after most of the hurricane debris was cleared.

fee provision (§ 17-17-219) in 1991 has MDEQ or MSTC treated emergency disposal sites as Commelrcial Non-hazardous Solid Waste Facilities or collected a fee on same. [See MDEQ's Supplemental Responses to Interrogatory No. 9, p. 11, Exh. 41, R. at 193 and R. at 309-312] Finally, this doubt was further demonstrated when the MSTC waived the fees for one emergency site operator on the theory that he did not get notice prior to the February 2006 MDEQ Memorandum. [See letter ruling, Ex. 4-36, R. at 191]. Under circumstances where the application of a tax is in doubt, the Mississipi Supreme Court has directed that tax laws should be strictly construed against the taxing powers and in favor of the taxpayers. In this case, the application of Miss. Code Ann. § 17-17-219 to emergency site operators is clearly in doubt and that doubt should be resolved in favor of the operators.

MDEQ told Fore and the other emergency site operators that they did not have to comply with the statutory or regulatory requirements for obtaining a permit or making application for same, because of the emergency, and now they argue that Fore still had to comply with some of the other statutory or regulatory requirements which applied to commercial operations. How were Fore and the other emergency site operators to know what laws and regulations applied? This probably would not have been an issue if the MDEQ had incorporated the fee requirement into the requirements they gave these site operators when they approved their sites or had informed them that they were subject to the other requirements for a commercial disposal site. However, that did not happen and the MDEQ waited for over five (5) months before notifying Fore and the other emergency site operators of those requirements. This was after Fore had signed his contract and after a substantial amount of debris had been placed at the site.

The bottom line is that once the Emergency Management Law was implemented, the requirements for emergency disposal sites were those specifically identifed in the written communications approving the emergency sites which did not include any reference to them being Commercial Non-hazardous Waste Facilities or to the payment of the fee. Therefore, the lower court's finding that Fore was operating a Commercial Non-hazardous Waste Facility and subject to the fees imposed by Miss. Code Ann. § 17-17-219(1) was in error and the Order of the MSTC was not supported by substantial evidence, was arbitrary and capricious, and was contrary to Mississippi law.

C. MSTC's Unequal Treatment of Certain Emergency Disposal Sites was Arbitrary and Capricious and In Violation of Fore's Constitutional Rights

During the course of trial, Fore presented numerous examples of similarly situated emergency site operators having been given preferential treatment. It is Fore's position that this arbitrary and unequal treatment by MDEQ and MSTC was "arbitrary and capricious" and in violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. In discussing the equal protection clause of the Fourteenth Amendment in the application of a state tax, the Mississippi Supreme Court held in Walker, et al., v. Board of Supervisors of Monroe County, Mississippi, 224 Miss. 801, 81 So.2d 225, 232 (1955), 1955 Miss. LEXIS 543 as follows:

> The Fourteenth Amendment to the Constitution of the United States provides, among other things, that: "No state shall make or enforce any law which shall abridge the privileges or immuntities of citizens of the United States; nor shall any state deny to any person within its jurisdiction the equal protection of the laws."
>
> In 12 Am. Jur., Constitutional Law, Section 469, it is said,

> among other things: "It has been repeatedly said that the guaranty of the equal protection of the laws is a pledge of the protection of equal laws.' One court has added the concept that it means equality of opportunity to all in like circumstances. The guiding principle most often stated by the courts is that this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."
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> **[Emphasis Added]**

Traditionally, an equal protection claim required that the plaintiff prove that a state actor intentionally discriminated against him because of his membership in a protected class. However, in Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), the Supreme Court held that the Equal Protection Clause gives rise to a claim on behalf of a "class of one" when membership in a particular class is not alleged.[8] In Olech, the homeowner's complaint alleged that the municipality demanded a 33 foot easement as a condition of connecting her property to the municipality water line, whereas only a 15 foot easement was required from some other property owners in her subdivision. The homeowner claimed that the municipality's demand for additional footage was irrational and wholly arbitrary and in violation of the equal protection clause of the Fourteenth Amendment. The district court dismissed the lawsuit pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. The Seventh Circuit court of

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[8] The lower court concluded on pages 35 and 36 of its Opinion that only one emergency site operator's fees were waived by the MSTC and therefore that site operator was a "class of one" and not Fore. [R. Ex. Tab 2]However, the Supreme Court in Olech, 528 U.S. at 566. found as follows; "...whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." Therefore, it makes no difference as to how many are in a particular class. The question is whether Fore was treated differently from "any" other similarly situated operators and whether that unequal treatment was irrational.

Appeals reversed and certiorari was granted. In affirming the Court of Appeals, the Supreme Court held:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688, (1989).
>
> In so doing, we have explained that "'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'". Sioux City Bridge Co., supra, at 445 (quoting Sunday Lake Iron Co., v. Township of Wakefield, 247 U.S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154 (1918)).
>
> 528 U.S. at 564.

The lower court concluded that the "rational basis test" described by the Supreme Court in the foregoing decision did not apply in this case. According to the lower court, this is a case of selective enforcement or prosecution which requires a showing of "improper motive" and cited Lindquist v. City of Pasadena, 525 F. 3d 383, 397 (5th Cir. 2008), 2008 U.S. App. LEXIS 8118. While it is true that a clear case of selective enforcement or prosecution may require proof of illegitimate animous or ill will, the courts have carved out certain areas where this increased evidentiary burden is not required. The Fifth Circuit concluded in Lindquist that it was not necessary to prove illegitimate animus in a case involving licensing of used car dealers. Additionally, in the case of Mikeska v. City of Galveston, 451 F.3d 376, 378-79 (5th Cir. 2006), 2006 U.S. App. LEXIS 13927, the court found that illegitimate animus was not required when

considering a class of one equal protection claim involving the refusal to permit reconnection of the plaintiff's home utilities while permitting reconnection of the utilitites of similarly situated homes. The Mississippi Court of Appeals in Suddith v. University of Southern Mississippi, 977 So.2d 1158 (Ms. Ct. App. 2007), Miss. App. LEXIS 492, also concluded that "motive" was not a necessary element when addressing an equal protection claim by a university professor asserting that the University was treating him differently from other professors. The Ninth Circuit Court of Appeals in the recent decision of Gerhart v. Lake County Montana, et al., 637 F. 3d 1013 (9th Cir. 2011), 2010 U.S. App. LEXIS 27112; concluded as follows when addressing a claim of unequal treatment in issuing permits for road approaches:

. . .

> In the district court's view, the evidence unambiguously demonstrated that the Commissioners at worst *accidentally* discriminated against Gerhart in denying his approach permit application. In particular, the district court rejected the possibility that Gerhart's difficult history with the County and the complaints lodged against him by neighbors could have influenced the Commissioners' treatment of his application.
>
> This approach was erroneous. By looking for evidence of the Commissioners' personal animosity towards Gerhart, the district court incorrectly analyzed Gerhart's "**class of one**" claim, which does not require a showing of the government officials' subjective bad feelings towards him. Gerhart does not need to demonstrate that the Commissioners harbored ill will towards him in order to meet the "intent" requirement of his "**class of one**" claim. Willowbrook, 528 U.S. at 565. Instead, Gerhart must show that the Commissioners intended to treat him differently from other applicants. Viewing this evidence in the light most favorable to Gerhart, as we must, we conclude there are triable issues of fact on this question.
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> **[Emphasis Added]** at *24 & 25

. . .

Historically, the courts have applied the rational basis test in analyzing an equal protection claim relating to taxation without the requirement of showing of illegitimate animus or ill will. In fact, the cases cited by the Supreme Court in Olech in support of the rational basis test are all tax cases. None of these cases made "ill will" a necessary element of the equal protection claim.

In applying the rational basis test to the application of a local tax, the Court of Appeals of Indiana in the decision of City of Indianapolis, et al., v. Christine Armour, et al., 918 N.E. 2d 401, (Ind. App. 2009) 2009 Ind. App. LEXIS 2669 discussed whether the City's refusal to issue a refund of certain assessments for public improvements to several homeowners in an amount equivalent to the amount forgiven similarly situated property owners violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court discussed in detail the application of the Equal Protection Clause to situations where certain similarly situated individuals were granted preferential treatment and held:

> In sum, the Equal Protection Clause allows broad discretion to state authorities in the creation and administration of a scheme of taxation, and a state authority's disparate treatment of similarly situated taxpayers will be found unconstitutional only if irrational, arbitrary, or capricious. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 108, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003); Nordlinger, 505 U.S. at 10-11; Allegheny Pittsburgh, 488 U.S. at 344. But the Constitution requires a "rough equality in tax treatment of similarly situated property owners," and similarly situated property owners must "be treated alike... both in privileges conferred and in the liabilities imposed." Engquist, 128 S. Ct. at 2153; Allegheny Pittsburgh, 488 U.S. at 343...

The test to be applied in determining whether an equal protection violation occurred in the application of a state tax is whether the Plaintiff (1) was intentionally treated differently from others similarly situated and (2) whether there was a rational basis for the disparate treatment. See also Stotter v. University of Texas at San Antionio, et al., 508 F.3d 812 (5th Cir. 2007) 2007 U.S. App. LEXIS 27397; Whiting v. The University of Southern Mississippi, et al., 451 F.3d 339, 2006 U.S. App. LEXIS 13759 (5th Cir. 2006); Grazzo v. Miss. Dept. of Public Safety, et al., Civil Act. No. 1:09cv719-LG-RHW, 2010 U.S. Dist. LEXIS 7633 (So. Dist. MS 2010); and Suddith v. University of Southern Mississippi, et al., 977 So.2d 1158, 2007 Miss. App. LEXIS 492, (Ms. Ct. App. 2007), cert. denied 977 So.2d 1144, 2008 Miss. LEXIS 150.

At trial Fore produced evidence demonstrating that he was treated differently from other emergency site operators and that there was no rational basis for the disparate treatment. On June 19, 2006, the MSTC issued a letter ruling waiving all the fees imposed against an emergency site operator for the year 2005 in the amount of $60,045.89 and for a portion of the year 2006 in the amount of $55,027.00.[9] According to the letter ruling, the basis given for waiving the fees was because the operator did not receive formal written notification of the non-hazardous solid waste fee due until on or about February 8, 2006.[10] [See Letter Ruling Ex. 49 (d), R. at 193]. A letter ruling is issued by the MSTC when a taxpayer submits a written request seeking clarification of

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[9] As the lower court pointed out on page 11 of its Opinion, the information provided to MSTC is deemed to be confidential. [R. Ex. Tab 2] Therefore, the name of the entity will not be disclosed here but Fore directs the Court to the Letter Ruling. [Ex. 4-49(d), R. at 191]

[10] The first formal written notice provided to Emergency Site Operators was dated February 8, 2006 [Ex. 4-15, R. at 191].

the law. The request is generally submitted through the Commission's Secretary. This written request is forwarded to the appropriate Bureau within the MSTC and the Director of the Bureau prepares a response. The response is then circulated within the MSTC and final approval is obtained prior to forwarding to the taxpayer. [Ex. 3, pp. 11-13, R. at 101] In this instance the Author of the Letter Ruling was Mr. Billy Klauser, Director of the Miscellaneous Tax for the MSTC.[11]

In determining whether Fore and this other emergency site operator were "similarly situated", Fore must demonstrate that they are, "prima facie identical in all relevant respects." Suddith v. University of Southern Mississippi, 977 So.2d at 1173, (citing McDonald v. Vill. of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004); Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)). The lower court concluded that Fore did not prove himself "prima facie identical" to the other emergency site operators. Fore submits that this finding by the lower court was clearly erroneous. As it relates to the one emergency site operator whose fees were waived for all of 2005 and a portion of 2006, the following similarities are found in the record.

1. On October 5, 2005, at the request of Jones County Board of Supervisors, the MDEQ issued a letter granting emergency authorization to this operator to operate an emergency disposal site. [Exh. 4-49(a), R. at 191] Similar letters of authorization were issued to Fore at the request of the Harrison County Board of Supervisors on September 16, 2005 and October 4, 2005 [Exhs. 4-9, 4-12, R. at 193]

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[11] The Court should note that the MSTC assessed fees against this operator for periods after February 8, 2006 in the amount of $133,133.00. The operator challenged the imposition of the fee but the lower court dimisissed his appeal on procedural grounds. The dismissal was affirmed by the Mississippi Court of Appeals in a decision found at No. 2009-CA-01787-COA, 2011 Miss. App. LEXIS 141.

2. This emergency site operator accepted and disposed of hurricane debris for compensation and submitted a report to MDEQ that showed that it accepted 60,045.89 tons of debris for 2005. [Exh. 4-49(c), R. at 191] Fore submitted the same report indicating that he accepted 72,753.02 tons of debris for the Delancey site [Exh. 68, R. at 193] and 34,217.63 for the LoBouy site. [Exh. 72, R. at 193].[12]

3. On June 19, 2006, the MSTC issued a letter ruling to the emergency site operator finding as follows, "since no formal written notification was sent to you of the non-hazardous solid waste fee due on commercial disposal sites prior to February 8, 2006, the tax due for the 2005 tax year and the period of Janaury 1, 2006 through February 9, 2006 will be waived...". [Exh. 4-49(d), R. at 191]. On November 6, 2006, a Letter Ruling was issued to Fore, through his attorney James K. Wetzel, finding that emergency disposal sites managed for compensation were subject to the fees imposed by Miss. Code Ann. §17-17-219. [Exh. 4-38, R. at 191].[13] On December 1, 2006, Fore responded to the Letter Ruling and specifically noted that he had no knowledge of the fees being imposed on these emergency sites. [Exh. 4-39, R. at 191]. However, the MSTC refused to waive the fees for any period and thereafter made an assessment against Fore for the year 2005.

Based on the foregoing, Fore submits that he was "identical in all relevant respects" to this particular site operator. For purposes of administering a state tax, all

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[12] In Fore's report for the Delancey site, he did not include the debris that was being managed by P & J in completing its contract with the City of Gulfport.

[13] The lower court concluded on page 37 of its Opinion that Fore never petitioned or filed a written request with MSTC making a similar request. [R. Ex. Tab 2] It appears the court concluded that Fore did not request a letter ruling; however, this conclusion is clearly in error.

similarly situated taxpayers should be treated the same and the MSTC lacks the discretionary authority to give preferential treatment to anyone. If the MSTC was of the opinion that the fees should be waived for one emergency site operator because he received no written notification of the fees, the same treatment should be afforded all other emergency site operators. To do otherwise would be 'arbitrary and capricious' and in violation of the constitution.

Although it is Fore's position that the foregoing is sufficient to establish a violation of the equal protection clause and that the MSTC's order was "arbitrary and capricious", there was additional evidence presented which demonstrated that other emergency site operators also received preferential treatment which would further support such findings. These examples are as follows:

1. Exhibit 45, [R. at 192] has documentation of an emergency site operator who reported to MDEQ that 634,067 cubic yards being 158,517 tons of debris was deposited at his site in 2005 and 110,828 cubic yards or 27,707 tons for the period January 1, 2006 to January 27, 2006. [Exhs. 45(a) and 45(b), R. at 193] This site was sold to another company in January of 2006. The new company reported receiving 117,500 tons at the site from January 2006 until June 22, 2006. [Exh. 45(f), R. at 193] The old operator did not pay any fees for either 2005 or 2006. The MSTC made an assessment against said operator for the fees for 2006 but took no action with regard to the fees that were owed for the year 2005 in the amount of $158,517.00. [R. at 267-268]. The MSTC intentionally made the decision not to impose or collect the $158,517.00 in fees for the year 2005. [R. at 272]

2. Exhibit 46 [R. at 193] has documentation of an emergency site operator

who reported receiving 200,000 tons of debris for the year 2005. When he reported and paid the fees for this period, he utilized a conversion factor of 0.83 rather than the .25 factor required by MDEQ. This resulted in him paying $16,600.00 rather than $50,000.00. The MSTC made an assessment against said operator for the difference. The assessment was made on October 30, 2007. [Exh. 46(b), R. 193] However, the MSTC has intentionally made the decision not to pursue this matter. No liens have been recorded and no action has been taken to collect these fees. [R. at 274-275] According to the MSTC agency representative Charmin Tillman, "...This one got stalled because of some confusion between my auditor and DEQ in trying to get an answer on the use of a different conversion factor....". [R. at 275].

3. Exhibit 47 [R. at 193] has documentation of an emergency site operator who disposed of 237,969 tons of debris at his site in 2005. This operator should have paid $237,969.00 but instead only paid $134,643.00. In explaining why the MSTC did not assess the $103,000.00 difference, Ms. Tillman testified that the MSTC was waiting for an answer from MDEQ concerning a question raised by the operator. MDEQ never responded and as a result no assessment was made. The time in which to make such an assessment has now expired. [R. at 275-277]. Fore contends that it was the intention of the MDEQ and MSTC not to collect the $103,000.00 from this operator for the 2005 year.

4. Exhibit 48 [R. at 193] has documentation of an emergency site operator who reported receiving 124,507 tons of debris in 2005 but only paid $77,209.66 [Exh. 44, p. 6, subsection (d), and Exh. 48(f), R. at 193] In 2006 the company received 106,509.50 tons of debris but only paid $85,193.87 [Exh. 44, p. 6, subsection (d), and

Ex. 48(g), R. at 193] In a letter to the MSTC dated January 8, 2008, the operator stated that it used the conversion factor of 0.83 for uncompacted leaves and limbs, rather than the .25 factor required by MDEQ, and that the amount they paid was all that was due. [Exhs. 48(d) and 48(e), R. at 193]. The MSTC accepted the operator's position and did not pursue collecting the difference until after the Petition in this case was amended to include an equal protection claim and a Motion was filed to obtain the records of other emergency site operators. [See Motion dated October 6, 2009, R. Ex. Tab 4 and Order R. Ex. Tab 5] When the MSTC's 30(b)(6) designee was asked whether the filing of the Motion to obtain other emergency site operators' records had anything to do with the MSTC's actions in pursuing this matter the response was as follows:

> A. I'm sure that played a part in it. But, honestly, I was not aware of the letter that had been sent to Roger until we started going through the files. And once I saw that letter and saw where the problem was, that's when we-which we do back-end auditing all the time. It's not unusual. It's just one of those things. So, yes, your-your request made us look closer to it. So....
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> [Exh. 3, p. 29, R. at 101]

The MSTC eventually assessed the site operator the difference and the matter at the time of trial was being appealed at the administrative level.[14]

5. Exhibit 50 [R. at 193] has documentation of an emergency site operator who filed reports indicating that it had disposed of 18,731.75 tons of debris at the CR 39 Site 2 [Exh. 50(a), R. at 193]; 6,646.75 tons of debris at the Phillips Pit [Exh. 51 (a), R.

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[14] The equal protection violation occurred at the time Fore was being treated differently by MSTC. The fact that the MSTC may have taken remedial action after becoming aware of Fore's claim that his constitutional rights had been violated is immaterial. By the time the MSTC took said actions, Fore's rights had already been violated. The United States Supreme Court in Oleck found that the Plaintiff had properly stated an equal protection claim even though the Village had relented and agreed to treat the plaintiff similar to other property owners after a three month delay (528 U.S. at 563.) By the time the Village relented, the violation had already occurred.

at 193]; 2,754.50 tons of debris at the Wolfe Pit [Exh. 52 (a), R. at 193]; 10,449 tons of debris at the Hinton Pit [Exh. 53(a), R. at 193]; 4,391.25 tons of debris at the Smith Pit [Exh. 52(a), R. at 193]; and 17,163.25 tons of debris at the Springer Pit [Exh. 55(b), R. at 193]. The operator did not pay any fees for any of these sites. [R. at 285] The MSTC did not attempt to assess these fees until November 24, 2009, after Fore's Motion to obtain these records was filed. [Exh. 50(b), R. at 193] At the time of trial, this operator had appealed these assessments to the MSTC Board of Review. [R. at 285].

6. Exhibit 56 [R. at 193] has documentation of an emergency site operator who reported that it disposed of 44,897 tons of debris in 2006. [Exh. 56(a), R. at 193] Thereafter, the operator filed a return indicating no fees were due which the MSTC accepted. However, at trial MSTC's representative testified that MSTC had changed its position and that this operator was currently being audited. [R. at 288]

7. Exhibit 57 [R. at 193] has documentation of an emergency site operator who reported that it disposed of 182 tons of debris at the Thompson MDOT Pit [Exh. 57(b), R. at 193]; 1,526.5 tons of debris at the Sinclair MDOT Pit [Exh. 58(b), R. at 193]; 2,038 tons at the Fortinberry MDOT Pit [Exh. 60(a), R. at 193]; and 2,338 tons at the Rogers MDOT Pit [Exh. 61(b), R. at 193]. On July 13, 2007, the operator forwarded a letter to the MSTC and stated that they did not meet the definition of a commercial nonhazardous site and therefore no fees were due. [Exh. 57(c), R. at 193]. The MSTC accepted this position until it decided to re-audit the files after Fore filed its Motion to obtain the records. It then assessed the fees against this operator, which at the time of trial was appealed to the MSTC Board of Review. [R. at 289]

8. Exhibit 59 [R. at 193] has documentation of an emergency site operator

who reported it disposed of 250,000 tons of debris in 2006. [Exh. 44 p. 9, subsection (r), R. at 193] Thereafter, the operator filed a return with the MSTC on June 1, 2007 reflecting that it disposed of only 200,000 tons and indicated in the return that no fees were due, which was accepted by MSTC. [Exh. 59(b), R. at 193]. However at trial, MSTC's representative testified that MSTC had changed its position and that the operator was currently being audited. [R. at 290].

All of the above emergency site operators received preferential treatment by the MSTC. They were not required to pay fees in the same manner in which the fees were imposed on Fore. Additionally, each were emergency site operators similarly situated to Fore. They all went through the same approval process and they all disposed of hurricane debris. Therefore, Fore has satisfied the first element of the equal protection test.

The second element of the 'class of one" equal protection test is whether MSTC had a rational basis for the disparate treatment. The rational basis prong of a "class of one" claim turns on whether there is a rational basis for the distinction rather than the underlying government action. Gerhart v. Lake County, Montana, et al., 637 F. 3d 1013 (9th Cir. 2011) 2010 U.S. App. LEXIS 27112, at *27 & 28. In discussing the basis for waiving the fees for one emergency site and not giving the same treatment to Fore, the testimony of the MSTC representative at trial was as follows:

By Mr. Long:

Q If you know, Ms. Tillman, do you know why the taxpayer didn't pay fees:

A Yes.

Q Why is that?

A My predecessor issued a letter ruling giving Five K Farm a pass on the fee for that period.

Q Was there a reason why that decision was made?

A According to the letter ruling, it was because there was no notice given.

Q You heard Mr. Fore, didn't you, Ms. Tillman, testify that he didn't get notice either. Did you hear him testify to that?

A I did.

Q Do you know why he was treated differently?

A I can't answer that.

Q Because you don't know?

A No, because I didn't do this.

[R. at 283]

In the 30(b)(6) deposition of the MSTC, the same MSTC representative testified as follows:

Q Do you know why Mr. Fore did not receive the same treatment as 5K Farms received?

A I do not know why.

Q Is there a reason that you know of that would justify treating one differently than the other?

A I don't know why the two were treated differently.

[Exh. 3, p. 14, R. at 101]

The foregoing responses clearly demonstrate that the decision to treat Fore differently from this particular emergency site operator had no basis, rational or otherwise. It was clearly "arbitrary and capricious" and in violation of the equal protection clause of the Fourteenth Amendment.

The justification given for the disparate treatment for the other emergency site operators discussed above was the result of a breakdown in communication between MSTC and MDEQ or that the MSTC had not gotten around to auditing these operators. In addressing this point the lower court found, "...the MTC cannot audit each and every taxpayer who files or fails to file a return within the time allowed for audit..."." However, the vast majority of the examples given show that the MSTC did in fact audit the sites but just did not impose the fee. For example, Exhibit 45 [R. at 193 and R. at 267-273] reflects that the MSTC did not access any fees for the year 2005 after an audit; Exhibit 46 [R. at 193 and R. at 274-275] the MSTC chose not to pursue collection of $33,400.00 in fees for the year 2005; Exhibit 47 [R. at 193 and at R. 275-277] the MSTC chose not to impose $103,000.00 in fees for the year 2005 after an audit, and other examples where the MSTC took no action until Fore filed a Motion to obtain the records to see how other emergency site operators were being treated. The explanation by the MSTC does not support a finding that the MSTC had a rational basis for the unequal treatment.

As previously discussed, the purpose of the equal protection clause of the Fourteenth Amendment is to protect every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. All persons should

be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The evidence at trial clearly supports the conclusion that the MSTC arbitrarily treated Fore differently from other emergency site operators without a rational basis. As a result, the Order entered by the MSTC was "arbitrary and capricious" and in violation of Fore's constitutional rights, thereby entitling him to a refund of all fees paid for the year 2005 plus interest.

D. Fore Did Not Operate That Portion of the Delancey Site Utilized by Phillips & Jordan, Inc. (P&J)

As outlined in the foregoing argument, Fore takes the position that Miss. Code Ann. § 17-17-219 does not apply to emergency disposal sites, that the actions of the MSTC were "arbitrary and capricious" and that his constitutional rights were violated. Nevertheless, if the court should conclude otherwise, Fore is not responsible for the disposal fees attributable to debris from the City of Gulfport which was managed by a separate entity, P & J.

Fore received his approval for the Delancey site through the Harrison County Board of Supervisors. This was the same process he went through for prior storms he worked. [R. at 108]. He never submitted an application or other request to MDEQ. After P & J obtained its contract with the City of Gulfport on September 10, 2005, it also requested approval for placing debris at the Delancey site through the governing entity, the City of Gulfport. [Exh. 4-28, R. at 191]. Mr. William Powell, Director of Engineering submitted the first letter to MDEQ requesting approval for P & J to use the Delancey site on September 12, 2005, [Exh. 4-18, R. at 191]. According to the testimony of MDEQ representative Mark Williams, MDEQ did not respond to this request because

the site was in the County not in the City. According to Mr. Williams, the governmental entity where the site was located would have to make the request. [R. at 325]. On September 14, 2005, the city of Gulfport made another request to MDEQ for P & J to be able to dispose of debris at the Delancey site. [Exh. 4-20, R. at 191]. MDEQ still did not respond. [R. at 326]. On September 16, 2005, the Harrison County Board of Supervisors passed an Order which stated, "... Contractors employed by the Municipalities of Harrison County shall have the authority to use County approved debris removal sites for disposal of debris . . ." [Exh. 75, R. at 160]. After the passage of this Order, the City of Gulfport, on September 16, 2005, sent a third letter to MDEQ requesting that the Delancey site be approved for their contractor P & J. [Exh. 4-21, R. at 191] When asked about MDEQ's response to this request, Mr. Williamis testified as follows:

Q So the County was approving the City of Gulfport's Contractor to use that site. Is that what is indicated there?

A I guess. That didn't mean anything to us. We approved a site.

Q And DEQ still did not provide to the City of Gulfport the approval process for them to use that site; is that correct?

A No. Again, they weren't the jurisdictional government here.

Q But the jurisdictional government authority had approved that, had they not, based on this order?

A Yes, I am assuming so.

Q So the answer to the question, based on this order, they did approve; is that correct?

A It looks like that way, yes. I don't know what they actually accomplished.

[R. at 328]

At this point in time, the City of Gulfport had submitted all the necessary documentation to MDEQ to have the Delancey site approved for their contractor, P & J. Although MDEQ never responded to the City of Gulfport's request, it did in fact recognize that P & J was the operator of that portion of the Delancey site. The evidence clearly shows that the MDEQ acknowledged in various correspondence received by Fore as well as other MDEQ documents that P & J was the operator of a portion of the Delancey site. In a letter received by Fore from MDEQ dated November 16, 2005, MDEQ concluded as follows, "... It is our understanding that both your company and Phillips and Jordan, Inc. jointly operated and managed certain portions of this emergency disposal site..." [Exh. 4-24, R. at 191] In addition, in a document entitled Post Hurricane Solid Waste Management Issues, MDEQ specifically acknowledged that P & J was the operator of the Delancey site. [Exh. 4-27, Appendix, Table A-3, under Harrison County, R. at 191]. Finally, in a document Mark Williams forwarded to the MSTC on May 17, 2006, identifying the operators subject to the disposal fees for 2005, P & J was identified as being the operator of the Delancey site. [Exh. 29, R. at 192].

Nevertheless, the lower court, on page 28 of its Opinion, erroneously concludes that Fore is responsible for the fee attributable to that portion of the Delancey site where the City of Gulfport's debris was being placed. [R. Ex. Tab 2] This conclusion was based on certain regulations of MDEQ which authorized MDEQ to approve emergency sites or facilities for immediate operation subject to stipulated conditions and for a limited period of time, and which defined the owner as the person who owns a facility or part of a facility and is responsible for the overall operations. [Exh. 21, R. at

192, Non-hazardous Solid Waste Management Regulations, Section II. d, p. 19, and Section I. c, p. 12].[15] However, the lower court fails to recognize that the fee is imposed on the operator who actually managed the debris which in this instance was P & J not Fore.

The MDEQ regulations define the operator to be:

> "Operator" means the person who directly supervises and is personally responsible for the daily operation and maintenance of a Commercial Non-hazardous Solid Wastement Facility."
>
> [Exh. 20, Regulations for the Certification of Operator's of Solid Waste Facilities, Section II, p. 3]

In discussing P & J's use of the Delancey site, Fore testified as follows:

By Mr. Long:

Q Did you ever operate that portion of the Delancey site where Phillips and Jordan were operating?

A No.

Q How were the two sites separated?

A There was a road between them.

Q Did you ever provide any manpower or equipment for debris disposal and management in that location where Phillips and Jordan was operating?

A No.

---

[15] Fore did not own this property but had an agreement with the owner to mine dirt on same. The owner agreed to allow the same terms for mining dirt to be used for the placement of debris. Fore paid the Owner $0.40 cents per yard for debris placed at the site. [Exh. 39, R. at 193 and R. at 128] Fore submitted numerous examples of where the operator pays the property owner a fee for placing debris at the site. Based on those examples the normal fee paid to the property owner is $1.00 per yard. [See Exh. 42, R. at 193] These property owners did not pay a disposal fee to MDEQ. Additionally, Fore allowed P & J to utilize a site which Fore actually owned, Latimer Road site, for the City of Gulfport debris. Fore was not involved in any operations at the Latimer Road site and charged P & J the same fees as he charged at the Delancey site. [R. at 129-130]

Q Did Phillips and Jordan provide their own equipment?

A Yes.

Q Did they provide their own personnel?

A As far as I know. Let me change that. As far as I know about it being their equipment. I don' t really know whose it was. I know it wasn't my equipment.

. . .

[R. at 121-122]

Additionally, Charles Stewart, a professional engineer, who assisted Fore with the Delancey site testified as follows:

By Mr. Long:

Q Other than Mr. Fore, was there anybody else using the site, the Delancey site?

A Phillips and Jordan.

Q Was Mr. Fore involved in their operations at all?

A No, not in their operations. It was a completely separate deal.

Q Did they have their own equipment?

Ms. Jones: Objection, Your Honor. He is leading the witness.

The Court: Sustained.

A It was a completely separate deal. It came from the time you entered the site.

We built inspection towers for the debris that would come in under Cotton Fore's contract. Phillips and Jordan had their own separate inspeciton towers. They had a separate road going to their area.

The roads were divided. The two areas were divided by a road. You had the separate FEMA inspectors for each tower. There was no correlation between the two. It was two separate operations.

. . .

[R. at 236]

The statute Miss. Code Ann. § 17-17-219, imposes the fee and states as follows; "...the operator of a Commercial Non-hazardous Solid Waste Management Facility managing municipal solid waste shall file with the State Tax Commission and the department a statement, verified by oath, showing the total amounts of nonhazardous solid waste managed at the facility during the preceding calendar year, and shall at the same time pay the State Tax Commission One Dollar ($1.00) per ton of municipal solid waste generated and managed...". The levy is imposed on the operator and is based on the amount of waste he actually managed. The evidence clearly supports the conclusion that P & J was the actual operator of that portion of the Delancey site where the City of Gulfport's debris was being placed. The fact that MDEQ failed to issue a letter of authorization to P & J after numerous requests by the City of Gulfport does not change the substance of what actually happened. It obviously knew that P & J was an operator and approved its operations at the site.

On April 18, 2006, Fore submitted Mississippi Department of Environmental Quality Hurricane Debris Disposal Site Reporting Forms for both the Delancey and LoBouy sites. The forms indicate that 34,217.63 tons of debris was placed at the LoBouy site and 72,753.02 tons at the Delancey site. [Exh. 68 and 72, R. at 193] These reports reflect the debris that was collected pursuant to the contract Fore had with Harrison County and the Coast Guard. After Fore submitted these reports, he received a letter from MDEQ inquiring as to the 900,000 yards (225,000 tons) of debris transported to the site from the City of Gulfport. [Exh. 4-30, R. at 191]. However, as

discussed above, MDEQ was well aware that P & J was managing the debris it received from the City of Gulfport. Miss. Code Ann. § 17-17-219 imposes a fee on the operator on the amount of debris it managed at the site. P & J was the operator of that portion of the Delancey site where the City of Gulfport's debris was placed, not Fore. If MDEQ was of the opinion that P & J should have received a separate authorization or if they were going to hold Fore responsible for the debris being managed by P & J, they were obligated to inform the parties involved of their position, which they did not do. Therefore, to the extent Miss. Code Ann. § 17-17-219 applies to emergency disposal sites, Fore did not operate, manage or receive any compensation for operating or managing that portion of the Delancey site where the City of Gulfport debris was placed and would not be responsible for any disposal fees imposed on same. Accordingly, Fore is entitled to a refund of $225,000.00, plus interest, for the debris attributable to the City of Gulfport and the lower court was in error to conclude otherwise.

CONCLUSION

Based on the facts and the law, Fore requests this Court find that the Order entered by the MSTC was "arbitrary and capricious", was not supported by substantial evidence, was contrary to law, and was in violation of Fore's constitutional rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution and the lower court was in error to conclude otherwise. As a result, Fore is entitled to a refund of all fees paid for the year 2005 in the amount of Three Hundred Thirty-Three Thousand, One Hundred Eighty-Two and 00/100 Dollars ($333,182.00), plus interest from the date of payment.

In the alternative, if the Court should determine the fees were due, the Order of

the MSTC, as affirmed by the lower court, upholding the fees against Fore for the City of Gulfport's debris placed at the Delancey site was arbitrary and capricious, not supported by substantial evidence and was contrary to law. Therefore the Order should be set aside and Fore should be granted a refund in the amount of Two Hundred Twenty-Five Thousand and 00/100 Dollars ($225,000.000), plus interest from the date of payment.

RESPECTFULLY SUBMITTED, this the 8th of July, 2011.

W. C. FORE d/b/a W. C. FORE TRUCKING, INC.

BY: DUKES, DUKES, KEATING & FANECA, P.A.

BY: _____
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CERTIFICATE

Pursuant to M.R.A.P. 25(a), I hereby certify that on this date, July 8, 2011, I deposited in the United States Mail, first class postage prepaid, the original and three copies of the foregoing Brief of the Appellant addressed to:

Betty W. Sephton, Clerk
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
P.O. Box 249
Jackson, MS 39205-0249

Honorable Eugene Fair
10th Chancery District
P.O. Box 872
Hattiesburg, MS 39403

I further certify that I have deposited in the United States Mail, first class postage prepaid, one copy of the Brief of the Appellant to the following:

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This, the 8th day of July, 2011.

BOBBY R. LONG