

Rel: December 14, 2018

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte Advanced Disposal Services South, LLC, et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Jerry Tarver, Sr.

v.

Advanced Disposal Services South, LLC, et al.)

(Macon Circuit Court, CV-17-900076)

On Application for Rehearing

SELLERS, Justice.

Advanced Disposal Services South, LLC; Advanced Disposal Services Alabama Holdings, LLC; Tallassee Waste Disposal

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Center, Inc.; Advanced Disposal Services, Inc.; and Stone's Throw Landfill, LLC (hereinafter referred to collectively as "Advanced Disposal"), petitioned this Court for a writ of mandamus directing the Macon Circuit Court either to join the City of Tallassee ("the City") as a necessary and indispensable party to the underlying action filed by Jerry Tarver, Sr., or, alternatively, to dismiss the action in its entirety, pursuant to Rule 19, Ala. R. Civ. P. On September 28, 2018, this Court granted the petition and issued the writ directing the circuit court to join the City as a necessary party under Rule 19(a), Ala. R. Civ. P.; the Court made no determination whether joinder would be feasible or whether the City was an indispensable party. Tarver filed an application for rehearing.

Tarver argues in his application for rehearing that, in its September 28, 2018, opinion on original submission, this Court "recast" his claims to reach the conclusion that the City is a necessary party to this action. He asserts that our reasoning on original submission is dependent on the notion that he seeks to address the whole of the effluent the City discharges into the Tallapoosa River ("the river") when, he

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claims, he seeks to enjoin only the quantity of the leachate Advanced Disposal deposits into the City's stabilization pond. Tarver then argues that not only does the Court's analysis depend on a recasting of his claims, but the Court also relies on facts not before the circuit court in support of that recasting, namely, "facts as to the percentage of the effluent attributable to [Advanced Disposal's] leachate compared to the percentage of the effluent attributable to other sources." These arguments misapprehend our opinion, on original submission, and ~~we~~ write to address ~~these arguments~~.

Tarver's complaint makes clear that his claims concern not only the leachate the City receives from Advanced Disposal, but also "substantial" amounts of waste the City receives from other sources, resulting in the "discharge" of "waste products" and "hazardous chemicals" into the river, which, he says, ultimately reach Tarver's water supply. Tarver specifically claims that the City's stabilization pond is inadequate to properly treat the waste it receives before discharging the resulting effluent into the river. Tarver asserts in his complaint that he has a right to abate the nuisance caused by the discharge of haloacetic acids,

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trihalomethanes, and other harmful chemicals into the river, which, he says, has caused and continues to cause contamination of the river and his water supply. He seeks an injunction requiring Advanced Disposal and the other defendants "to cease and desist any further pollution of [his] water supply, and to remove their chemicals and toxins from [his water supply]," and "precluding [Advanced Disposal and the other defendants] from further destruction of the Tallapoosa River and [his] water supply." The City owns the stabilization pond in which Advanced Disposal's leachate, as well as waste from other sources, is treated, and the City is the only entity that discharges effluent into the river after using chlorine to treat waste. Thus, the City is an active participant in the factual assertions made in the complaint, and, without its joinder, Tarver cannot be accorded the relief he demands. Rule 19 contemplates that in situations where, as here, ~~i.e.~~, the plaintiff is seeking injunctive relief, a court will look to whether it can fashion complete relief without joinder of the absent party. See, e.g., 4 Moore's Federal Practice § 19.03[2][c] (3d ed. 2014) (noting that courts will invoke the complete-relief clause as its sole

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basis for finding an absentee necessary in a situation where "the absentee's participation will be required to provide injunctive relief to extant parties"); see also Rose v. Simms, No. 95 Civ. 1446, Nov. 29, 1995 (S.D.N.Y. 1995) (not selected for publication in F. Supp.) ("Courts are most likely to rule that complete relief may not be accorded among the parties present in circumstances where the absent party plays a significant role in the provision of some form of injunctive relief.").

Tarver also alleges in the complaint that Advanced Disposal has been illegally discharging excess amounts of leachate into the City's stabilization pond, knowing that the pond was inadequate to treat the leachate properly. Tarver alleged that, "[d]espite repeated violations and ongoing pollution, [the City's stabilization pond] continues to accept substantial amounts of waste from third party generators." In preparation for oral argument, this Court ordered the parties to answer the question whether the City received and treated leachate from any other source and, if so, what approximate percentage of the effluent discharged into the river originated from Advanced Disposal's leachate. From the

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information submitted, the opinion cites statistics indicating that, although the amount of leachate Advanced Disposal deposited into the stabilization pond in January 2017 exceeded its daily contractual limit, that amount was still less than 6% of the pond's average daily flow. The alleged amount of leachate Advanced Disposal discharges into the stabilization pond is revealed by the contract between Advanced Disposal and the City, which was before the circuit court, as well as by Tarver's own averments. Thus, the Court assumes Tarver is criticizing the opinion for relying on what was presented to the Court as the "average daily flow" of the pond. Tarver, however, has never disputed the accuracy of the averment regarding the flow rate. During the hearing in the circuit court, Advanced Disposal's counsel repeatedly argued that its leachate constitutes only 2% of the total pond volume and that, unless the City's ineffective treatment of waste deposited into the pond was enjoined, Tarver would not be accorded any meaningful relief. Tarver never disputed that figure in the circuit court. Advanced Disposal averred in its mandamus petition to this Court that its "contractual maximum delivery to the City's Stabilization Pond is 24,500 gallons

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per day, which is 1.75% of the City's permitted capacity and about 3.75% of its average daily flow." (Emphasis added.) In his answer and brief in opposition to Advanced Disposal's petition, Tarver did not dispute the averment regarding the pond's average daily flow or assert that this Court should ignore it. See generally Ex parte Smith, 942 So. 2d 356, 358 (Ala. 2006) ("The trustee does not dispute [a particular factual] contention in his answer to the mandamus petition; we therefore take it to be true."); Ex parte Turner, 840 So. 2d 132, 134-35 (Ala. 2002) (noting that respondent's "failure to respond to the allegations in [the] petition for a writ of mandamus compels this Court to consider the averments of fact in [the] petition as true"). The figures cited in note 5 of the opinion on original submission are consistent with the allegations in the complaint that the stabilization pond treats "substantial amounts" of waste from parties other than Advanced Disposal.

APPLICATION OVERRULED.

Stuart, C.J., and Bolin, Main, and Mendheim, JJ., concur.

Parker, Shaw, and Bryan, JJ., dissent.

Wise, J., recuses herself.