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WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Mississippi Supreme Court Upholds Clean Water Act Fine

***Titan Tire of Natchez, Inc. v. Miss. Commn. on Envtl. Quality*, No. 2003-CC-01213-SCT (Miss. Dec. 2, 2004)**

Elizabeth Mills, 2L, University of Mississippi School of Law

On December 2, 2004, the Supreme Court of Mississippi upheld the Mississippi Commission on Environmental Quality's (Commission's) decision to find Titan Tire of Natchez, Inc. (Titan) in violation of its National Pollutant Discharge Elimination System (NPDES)[1] permit and to fine Titan $5,000. While determining the reasonableness of the Commission's order, the Court found that there was substantial evidence supporting the Commission's decision; the decision was not arbitrary or capricious; the Commission acted within its power; and Titan did not adequately show that the decision violated its equal protection rights.

Background

Titan's Natchez operation is a subsidiary of Titan International, which manufactures and distributes wheel and tire systems for off-highway applications. Titan's property was previously under different ownership, Armstrong Tire and Rubber Company (Armstrong). In the early 1980's, Armstrong received an NPDES permit which allowed the discharge of storm water runoff and treated process water into state waters. In March of 1987, Fidelity Tire Manufacturing Company (Fidelity) bought this property and facility from Armstrong, and the NPDES permit was reissued to Fidelity. When groundwater contamination was found on Fidelity's property, the Commission ordered remediation of the contaminated soil and groundwater to levels that were satisfactory for the protection of humans and the environment.

The Mississippi Department of Environmental Quality's (MDEQ's) Hazardous Waste/Uncontrolled Site Branch found that the contaminants were naphtha and associated compounds and mandated remediation by Fidelity. Fidelity installed a remediation system to treat the contaminated groundwater and discharge the treated water into state surface waters. Fidelity requested and was granted a modification to the permit, which

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Supreme Court Rules on CERCLA Question

***Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577 (2004)**

Luke Miller, 3L, University of Mississippi School of Law

Aviation is a dirty business, literally. To properly maintain and operate an airport or airplane maintenance facility, large volumes of hazardous materials must be utilized. Aviall Services, Inc. was no stranger to that reality, and when it bought four aircraft engine maintenance sites from Cooper Industries in 1981 Aviall continued to use hazardous materials. After operating the sites for several years Aviall became aware that it, along with Cooper, had been polluting the ground and ground water from spills and leaking underground storage tanks. Aviall quickly notified the Texas Natural Resource Conservation Commission (TNRCC) and voluntarily commenced cleaning up the contamination under TNRCC supervision. No actual judicial or administrative action by TNRCC or the EPA was ever taken. Later, Aviall sold the properties but remained contractually liable for any additional cleanup. Until the time this case was brought Aviall had spent approximately $5 million in cleanup costs, with the possibility of more to come, so the company sued Cooper to recover some of the costs.

Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

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Editor: Josh Clemons, M.S., J.D.

Publication Design: Waurene Roberson

Contributors:
Danny Davis, 2L • Luke Miller, 3L
Elizabeth Mills, 2L • Ronni F. Stuckey, 2L

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Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) is a federal statute establishing authority in the government to clean up or compel responsible parties to clean up contaminated areas.[1] No matter which direction the government decides to proceed, it can recover its response costs from a defined list of potentially responsible parties, or PRPs.[2] These PRPs can also be liable to any other party that incurs costs consistent with an Environmental Protection Agency-established contingency plan.[3] Over time, and through case law, cost recovery was extended to private parties who voluntarily incurred response costs and were seeking to recover those costs from other PRPs, even though the private parties were not subject to suit themselves. The development of these cost recovery actions was only part of the CERCLA equation; contribution is a similar but distinctly different cause of action.

CERCLA originally contained no provision directly stating that contribution was a proper cause of action. However, courts were allowing contribution actions based on the concept that contribution was implied in CERCLA, or through the use of federal common law.[4] In order to put this issue to rest, Congress amended CERCLA in 1986 and provided a section specifically allowing contribution actions. This new section contained some qualifying language that Aviall argued clouded the definition of exactly when a party could bring a contribution action:

> Any person *may* seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title, *during or following any civil action* under § 9606 of this title or under § 9607(a) of this title. … Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under § 9606 of this title or § 9607 of this title.[5]

Aviall's original complaint asserted both a cost recovery claim under § 107 (42 U.S.C. § 9607), and a contribution claim under § 113, along with a few state law claims not subjected to review in this case. Later, Aviall amended its complaint after following what it consid-

See CERCLA, page 12

Municipal Ordinances Survive Commerce Clause Challenge

***Natl. Solid Waste Mgt. Assn. v. Pine Belt Regl. Solid Waste Mgt. Auth.,* 389 F.3d 491 (5th Cir. 2004)**

Danny Davis, 2L, University of Mississippi School of Law

In October the Fifth Circuit Court of Appeals reversed a magistrate judge's ruling that a solid waste flow control ordinance enacted by several cities and counties in southern Mississippi was unconstitutional.

Background

In 1992 a plan was adopted to manage solid waste in several cities and counties in southern Mississippi. The plan recommended the creation of a Regional Solid Waste Management Authority (Authority) and the construction of a regional landfill. The Authority issued a request for proposals, which were to include two options: (1) the bidder would own, build, and operate the landfill for thirty years, or (2) the Authority would build and own the landfill with the bidder equipping and operating it for seven years. The plaintiffs submitted proposals but were not awarded the contract. The Authority chose option 2 of the lowest bidder and issued bonds to finance it. The landfill began operation in 1997.

The Authority collected fees for disposal of waste in order to generate revenue but by 2002 had decided that the amount of solid waste coming into the landfill would not generate enough revenue to make the July 1, 2004 bond payment. The Authority adopted a resolution on July 10, 2002 directing its members to adopt municipal waste flow control ordinances requiring all solid waste generated in the member counties and cities to be transported to its landfill. Each member enacted identical ordinances with a September 1, 2004 effective date. The Authority believed that the additional solid waste coming into the landfill would generate enough revenue to make the facility viable.

Plaintiffs BFI and Waste Management collect commercial and residential trash within the Authority's region and transport it to landfills the plaintiffs own within Mississippi but outside of the region. The plaintiffs filed suit on August 29, 2002 against the Authority and its members, seeking declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983. The statute allows a claim to be brought against a city or state government where the ordinance adopted deprives the plaintiff of rights, privileges, or immunities secured by the Constitution. The plaintiffs alleged that the flow control ordinances as enacted violated the dormant Commerce Clause of the Constitution because the increased cost of using the Authority's landfill would put a burden on their interstate waste contracts. In April 2003 a magistrate judge decided the ordinances were unconstitutional under the dormant Commerce Clause. The defen-

See Commerce Clause, page 13

Landfill photograph courtesy of the DOE

Cruise Ship Rape Victim Prevails Before 11th Circuit

***Jane Doe v. Celebrity Cruises, Inc.*, 2004 WL 2955003 (11th Cir. Dec. 22, 2004)**

Ronni F. Stuckey, 2L, University of Mississippi School of Law

Jane Doe (a pseudonym), a passenger on a July 1999 cruise, sued Celebrity Cruises, Inc. for damages resulting from her alleged rape by a ship crew member, Baris Aydin, which occurred in Bermuda while she was offboard the ship. The appeals court found that the case fell under admiralty jurisdiction; that the district court erred in granting a Federal Rule of Civil Procedure (FRCP) 50(b) post-verdict motion that raised issues not submitted to the jury; and that the cruise line was a common carrier and as such was strictly liable for intentional torts committed by its employees against passengers.

Facts

Jane Doe and several friends took a cruise aboard a Celebrity Cruises ship from New York to Bermuda in July of 1999. Baris Aydin was a ship waiter assigned to Doe. He waited on the Doe party at breakfast, lunch and dinner and received much of his compensation through tipping. On the morning before the ship arrived in Hamilton, Bermuda, one of Doe's friends asked Aydin if he could recommend any places to go out on the island. He recommended the Oasis, a disco club, not far from the ship and easily visible from it. Doe and her friends went to the club and found several ship employees there, including Aydin. Doe and her friends mingled and drank with the crew members for a good portion of the evening. Aydin walked Doe's friends back to the ship and returned to the Oasis to find Doe ill, having had too much alcohol. The bar was closing, and Aydin took Doe on a walk, seemingly to help her find an open restroom, and to get her safely back to the ship. While on this walk, the two went through a park clearly visible from the ship. Here Aydin allegedly forced Doe to the ground and raped her. Thereafter they both went back to the ship. Doe was quite distraught. The ship's doctor examined her, and Celebrity Cruises paid to fly Doe and the rest of her party back to their homes.

Procedural History

On July 14, 2000, Jane Doe filed a complaint against Celebrity Cruises, Inc., Zenith Shipping Corporation, Apollo Ship Chandlers, and Celebrity Catering Services, alleging sexual assault, sexual battery, negligence, breach of contract of carriage, intentional infliction of emotional distress, and negligent infliction of emotional distress. Doe later amended the complaint to charge Celebrity with vicarious or strict liability for the above listed allegations. No issue regarding which of the defendants was Aydin's employer, nor whether his employer was considered a common carrier was raised prior to the verdict. The parties litigated only whether the sexual intercourse was consensual and the damage amount. On the defendants' Rule 50(a) motion the district court dismissed Doe's emotional distress claims.[1] The remaining claims were submitted to the jury.

The jury found for Doe on the sexual battery claim, which required only that sexual penetration occurred without Doe's consent. However, the jury found for defendants on the sexual assault claim, which required either that Aydin "intended to commit sexual battery" and that the sexual intercourse occurred without Doe's consent, or that Aydin intended to cause Doe to fear sexual battery and that this was done without Doe's consent.[2]

Immediately after the verdict announcement, the defendants moved to re-submit the claims and defenses to the jury due to the seeming inconsistencies in the verdict. The district court denied the motion. Defendants then moved for remittitur (reduction) of the verdict amount, for a new trial based on the seeming inconsistency of the verdict, and for a judgment as a matter of law under FRCP Rule 50(b). Defendants also renewed their pre-trial objections to the application of a strict liability standard, arguing that Aydin's conduct was not within the scope of his employment and that defendants were therefore not vicariously or strictly liable for his actions. They also argued that the

strict liability standard should not apply because such liability is only applicable in the case of intentional torts, and the jury found for the plaintiff only on the sexual battery count, which does include specific intent as an element of the offense.

The district court granted the defendants' Rule 50(b) motion for judgment as a matter of law because none of them met the requirement of being both a common carrier and Aydin's employer. The district court vacated the judgment for the plaintiff and entered a judgment in favor of the defendants, and denied as moot defendants' motions for remittitur and for a new trial. Doe appealed the district court judgment, and the defendants cross-appealed the decision with regard to strict liability.

Discussion

Jurisdiction

Doe's contract with Celebrity Cruises included a forum selection clause which required that any disputes stemming from or in relation to the contract must be litigated in Miami, Florida. Therefore, any dispute arising from the cruise had to be brought in Miami.

Doe's complaint based federal jurisdiction on both diversity of citizenship (Doe resides in Connecticut and no defendant is a resident there) and admiralty jurisdiction. All parties agreed that federal maritime law governed the claims. However, the court found that under the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*[3] an analysis of jurisdiction is required before applying admiralty law, even where all parties agree.

In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* the Supreme Court held that a party "must satisfy conditions both of location and of connection with maritime activity" in order to invoke federal admiralty jurisdiction.[4] The connection test must examine the incident to determine if it "has a potentially disruptive impact on maritime commerce" and "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."[5] The Court reasoned that a crew member's rape of a passenger can easily be said to have "potentially disruptive impact on maritime commerce."[6] It also declared that the interaction of passengers and crew members during a cruise clearly holds a "substantial relationship to traditional maritime activity."[7]

The court of appeals examined the location of the tort to determine if it satisfied the *Grubart* test. The court concluded that admiralty jurisdiction did in fact extend to the circumstances in this case because the

See Celebrity Cruise, page 6

Photograph of cruise ship from the ©Nova Development Corp. stock collection

Celebrity Cruise, from page 5

stop in Bermuda was a scheduled part of the cruise, the incident occurred in close proximity to the docked ship, and the incident "began and ended aboard the ship" both with Celebrity's assignment of Aydin as Doe's waiter and his suggestion that Doe visit the Oasis, both of which occurred while the ship was on navigable waters.[8] The court also stated that admiralty jurisdiction is exercised so that maritime law will be applied uniformly, and so that there is not a different standard of care from port to port on a given cruise.

Rule 50(b) Motion

The court found that the district court erred in its Rule 50(b) ruling because it lacked the authority to rule on a post-verdict motion for judgment as a matter of law based on grounds not raised prior to submitting the case to the jury. The court relied on its earlier ruling in *Middlebrooks v. Hillcrest Foods, Inc.*,[9] stating "a Rule 50(a) motion for judgment as a matter of law 'can be renewed after trial under Rule 50(b), but a party cannot assert grounds in the renewed motion that it did not raise in the earlier motion.'"[10]

Liability for Crew Member Assaults

The court found that common carriers are vicariously and strictly liable for the intentional torts committed by their employees against passengers, whether or not the act was committed within the scope of the employee's employment. The court relied on the Supreme Court case *New Orleans & N.E.R. Co. v. Jopes*[11] when it stated, "A common carrier's strict liability to a passenger for crew member assaults during transit rests upon its special implied duty of protection and safe transport that it owes as a common carrier through its employees to its passengers, and not for the reason that the act is incident to a duty within the scope of the crew member's employment…In terms of tort liability, this becomes, in effect, a special non-delegable duty owed by the carrier to the passenger."[12]

Defendants argued that the *Jopes* decision was overruled in a later Supreme Court case, *Kermarec v. Compagnie Generale Transatlantique*.[13] However, the court rejected this argument, stating that the reasonable care standard for common carriers found in *Kermarec* applies only in cases of negligence. The strict liability standard of care under *Jopes* still applies in cases of intentional torts committed by employees of common carriers against their passengers.

Sexual Battery as an Intentional Tort

Defendants argued that because the jury found for the plaintiff on the sexual battery claim, which did not include an element of specific intent, and not on the sexual assault claim, which did include an element of specific intent, that the sexual battery was not an intentional tort, and therefore the standard of care was that of reasonableness under *Kermarec*. However, the court found that sexual battery does in fact have an element of intent which is general rather than specific under Florida law and is therefore to be considered an intentional tort. The court stated that the defendants' argument draws the wrong distinction: "[t]he distinction is not between those torts that have some overt requirement of specific intent and those torts that do not. Rather, the proper distinction is between intentional torts and those torts based on negligence."[14]

Conclusion

The court reversed the district court's ruling granting the defendants' motion under Rule 50(b) because it did not have the authority to rule after the verdict on an issue that had not been raised prior to submission of the case to the jury. The court also reinstated and affirmed the jury's verdict and remanded the case to district court for entry of the jury's final judgment in favor of the plaintiff.

ENDNOTES

1. Rule 50 of the Federal Rules of Civil Procedure permits a judge (rather than the jury) to pass "judgment as a matter of law" on an issue, at a party's request, if the judge determines that there is "no legally sufficient evidentiary basis for a reasonable jury to find for [the other] party on that issue."
2. *Jane Doe v. Celebrity Cruises, Inc.*, 2004 WL 2955003 at *3 (11th Cir. Dec. 22, 2004).
3. 125 S.Ct. 385 (2004).
4. 513 U.S. 527, 534 (1995).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Doe* at *9.
9. 256 F.3d 1241, 1245 (11th Cir. 2001).
10. *Doe* at *11.
11. 142 U.S. 18 (1891).
12. *Doe* at *14.
13. 358 U.S. 625 (1959).
14. *Doe* at *24.

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allowed for the installation of additional groundwater monitoring wells to further determine the extent of the groundwater contamination. The modified permit accounted for an increase in the volume of water that would be discharged when additional monitoring wells were installed, and it also accounted for the associated decrease in concentration of the contaminants, due to dilution by the additional water. However, Fidelity did not install the additional monitoring wells, and after the permit was issued, Fidelity filed for bankruptcy.

In September of 1998, Titan purchased Fidelity's facility and requested renewal for the NPDES permit. According to MDEQ, the purchase of Fidelity made Titan responsible for all environmental issues associated with the property and facility. This included compliance with the modified permit that was issued to Fidelity, even though the additional monitoring wells were never installed. MDEQ claimed that Titan performed due diligence in purchasing Fidelity and should have known the environmental issues that were associated with the site. Additionally, Titan had not asked for any modifications to the permit, and Fidelity's environmental manager, who was familiar with the permits, was kept as Titan's environmental manager after the buyout. Several violations for arsenic and total suspended solids occurred before and after the permit was reissued to Titan in June of 2000. In December of 2001, MDEQ issued a formal complaint against Titan.

Photograph of wastewater runoff courtesy of NOAA

Titan argued that MDEQ's method of calculating the concentration limit was flawed because it was based on *concentration* limits, not *mass* limits, of pollutants. Therefore, the amount of pollutant may have decreased, but since there was less water being discharged, the concentration was actually higher.

The Court's Analysis

When an interpretation of a statute by an agency is being reviewed by the courts, deference is given to the agency's interpretation, as long as it is reasonable. When deciding whether the agency's order should be upheld, four factors are considered: whether the order was supported by substantial evidence, whether it was arbitrary or capricious, whether the decision was beyond the power of the administrative agency, and whether it violated a statutory or constitutional right of the complaining party.

The court determined that there was substantial evidence to uphold the Commission's order. Substantial evidence was determined based on what a reasonable person would deem sufficient to support a conclusion. In Titan's case, the decision was based on discharge monitoring reports from Titan which indicated that the NPDES permit limits were exceeded.

The court also determined that the Commissioner's decision was not arbitrary or capricious. The court stated that the standard for determining whether the decision was arbitrary or capricious is very similar to the standard for substantial evidence. There was proof that the NPDES permit was violated sixteen times between April 1999 and December 2000. Additionally, the maximum fine for the sixteen violations was $400,000, but the Commission fined Titan only $5,000. The court found the Commission's decision to be appropriate.

The court reasoned that the decision was within the power of the Commission. The maximum penalty for each statutory or regulatory violation in this area of the law was $25,000. Therefore, the $5,000 fine was definitely within the power of the Commission to impose. Titan claimed that the concentration limit method for determining violations was flawed and wanted mass

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Final Frustration for Florida Fishermen?

Net Ban Rule Challenge Comes to an End - Probably

Josh Clemons

On December 23, 2004 the Florida First District Court of Appeals (DCA) declared "case closed" in the matter of *Ronald Fred Crum and Keith Ward v. Florida Fish and Wildlife Conservation Commission*, ending an eight-year legal tussle over state agency rules implementing the "net ban amendment" to the Florida Constitution.

Florida's "Net Ban Amendment"

In 1994, Florida voters approved the "Limiting Marine Net Fishing Initiative," commonly known as the net ban amendment. The initiative amended the state constitution to prohibit the use of "gill nets or other entangling nets" in any state waters, and to limit nets being used in nearshore and inshore waters to no more than five hundred square feet of mesh area.[1] The amendment defines a "gill net" as "one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills," and defines an "entangling net" as "a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net."[2] Hand-thrown cast nets are excluded from the ban. The amendment's purpose is stated as follows:

> The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.[3]

Using huge monofilament nets, developed in the late 1960s, commercial fishermen were able to catch enormous quantities of fish with each pull of the net – sometimes up to three hundred thousand pounds. In addition to the potential for overfishing, there was a proportionately big problem with bycatch (catch of non-targeted species). It was hoped that the net ban would ameliorate these problems.

As one might expect, the net ban was strongly promoted by environmental and sportfishing groups, who feared overfishing of stocks and the bycatch of game fish, and equally strongly opposed by commercial fishermen, whose livelihoods would be threatened.[4] The net ban went into effect on July 1, 1995.

The Agency Regulations

The state agency in charge of implementing and enforcing the net ban is the Florida Fish and Wildlife Conservation Commission (formerly the Marine Fisheries Commission). The net ban put the Commission in a slippery enforcement situation, because virtually all nets have the capability of entangling fish. Yet the net ban clearly was not intended to ban *all* nets, because it explicitly allows some kinds of nets to be used in nearshore and inshore waters as long as the nets are less than five hundred square feet in area. So what nets were legal?

The Commission attempted clarification in 1996 by proposing a rule prohibiting the use of seine nets with mesh size larger than two inches (stretched) in nearshore and inshore waters. This rule change would have a devastating impact on the Florida mullet fishery, which relied on nets with three-inch mesh (which had been shown to entangle mullet). Mullet fishermen did not take the rule change lying down.

The Fishermen's Challenge

Fishermen Raymond S. Pringle, Ronald Fred Crum, and Willy Arnold challenged the proposed rule, Rule 46-4.0081(2)(d),[5] before an administrative law judge (ALJ). The earlier rule had allowed wings of a larger mesh sized to be used; the amendment deleted that provision. The fishermen's challenge was made under the Florida Administrative Procedure Act (APA), which allows "[a]ny person substantially affected by a rule or a proposed rule [to] seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."[6] The fishermen also alleged that the rule was inconsistent with § 375.025, Florida Statutes, which establishes guidelines for Commission

rulemaking including consideration of the best available information and allowance for reasonable harvest. Among other things, the fishermen alleged that the rule change would render mullet fishing unviable commercially. On February 20, 1998, the ALJ issued an order declaring that the proposed rule was a valid exercise of the Commission's authority and was consistent with § 375.025. In the course of making her decision the ALJ found that mullet fishing would remain commercially viable if certain novel and unorthodox netting techniques were used.[7]

The fishermen appealed the ALJ's decision to the DCA, under the APA provision allowing judicial review of adverse final agency actions.[8] On March 31, 1999, the DCA affirmed the ALJ's order on the ground that "[t]he courts are bound to give deference to an agency's interpretation of statutes the agency is charged with implementing."[9] At least one judge was skeptical, however, expressing doubt that the ALJ's "speculative, theoretical, Rube Goldberg-like method of fishing is at all viable or practical."[10]

Sometime after filing the administrative petition but before the ALJ issued her order, Pringle and Crum filed an action for a declaratory judgment from the Circuit Court in Leon County that a net they had designed was constitutional under the net ban amendment. The Pringle-Crum net violated the Commission's rule because it featured 485 square feet of three-inch mesh in addition to fifteen square feet of two-inch mesh. Circuit Judge Charles McClure declared that the net was constitutional. Unlike the ALJ, Judge McClure found that the rule was *not* a valid exercise of the Commission's authority. On April 6, 1999, the DCA reversed Judge McClure's decision on the ground that the fishermen had not exhausted their administrative remedies before filing the Circuit Court action.[11] The DCA also noted that under the doctrine of primary jurisdiction the Circuit Court should have refrained from exercising jurisdiction. By litigating in two separate forums, the fishermen had improperly taken "two bites at the apple."[12] With this decision, the ALJ's February 20, 1998 order was controlling, and the net was illegal.

Photograph of gillnetting courtesy of NOAA, photographer Chris Doley

At some point over the next few years Pringle and Crum filed a complaint in the Circuit Court in Wakulla County, seeking a declaration that a net similar to the original Pringle-Crum net but composed entirely of three-inch mesh was legal under the net ban amendment and that the Commission's rules to the contrary were unconstitutional. This challenge, unlike the original challenge to the rule, was not based on the APA or § 375.025. Rather, the fishermen directly challenged the rule on the constitutional grounds that it denied them due process and equal protection under the state and federal constitutions. On February 11, 2002, Circuit Judge Sanders Sauls ruled in the fishermen's favor.[13] Judge Sauls found that the Pringle-Crum net was neither a seine nor gill/entangling net, but rather a "hybrid net implicitly permitted by the language of the Constitutional Amendment."[14] Judge Sauls also found that the right to earn a livelihood is constitution-

See Net Ban, page 10

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ally protected and, while it can be regulated, cannot be completely taken away - which would occur if the regulation were enforced against the fishermen.[15] Thus, Judge Sauls ruled that the regulation was unconstitutional and could not be enforced.[16]

The Commission appealed to the DCA, which reversed Judge Sauls on February 28, 2003.[17] As was the case when it reversed Judge McClure, the DCA's reasoning was that (1) the fishermen had failed to exhaust administrative remedies and (2) the Circuit Court should have refused to hear the case under the doctrine of primary jurisdiction.

On March 17, 2003, Crum and fisherman Keith Ward petitioned the Commission under § 120.565, Florida Statutes, for a declaratory statement about (1) the lawfulness of a second "hybrid" net consisting entirely of three-inch mesh, (2) the constitutionality of the net ban amendment and Rule 68B-4.0081, and (3) whether a hearing on the matter was necessary. On June 11, 2003, Commission Executive Director Kenneth Haddad ruled that (1) the net was unlawful under the net ban amendment because it was a prohibited entangling net, (2) the Commission could not rule on the constitutionality of the amendment or rule, and (3) so much evidence was already available from earlier proceedings that an additional hearing was unnecessary.[18]

The fishermen appealed the Commission's order to the DCA in July 2003. The DCA affirmed the Commission's order on October 26, 2004, without issuing a written opinion. On November 10, 2004, the fishermen's attorney filed motions with the DCA for rehearing and clarification, and requested a written opinion. The court denied the request on December 7, and closed the case on December 23.

Questions Raised by Fishermen

In November 2004 a member of the commercial fishing community in Florida came to the Sea Grant Law Center with questions about some aspects of the case that were particularly frustrating for the fishermen. The questions and the Law Center's responses are summarized below.[19]

Was it proper for the DCA to affirm, without written opinion, the Commission's June 11, 2003 order?

While it is no doubt extremely frustrating to have a court respond to an appeal with nothing more than "PER CURIAM – Affirmed," it is not legally improper. The practice is so common that the ruling is usually referred to simply as a "PCA." The DCA has the discretion to issue written opinions or not as it sees fit. Presumably, in this case the DCA found nothing noteworthy in the Commission's order.

Is there a way to compel the DCA to explain its reasoning?

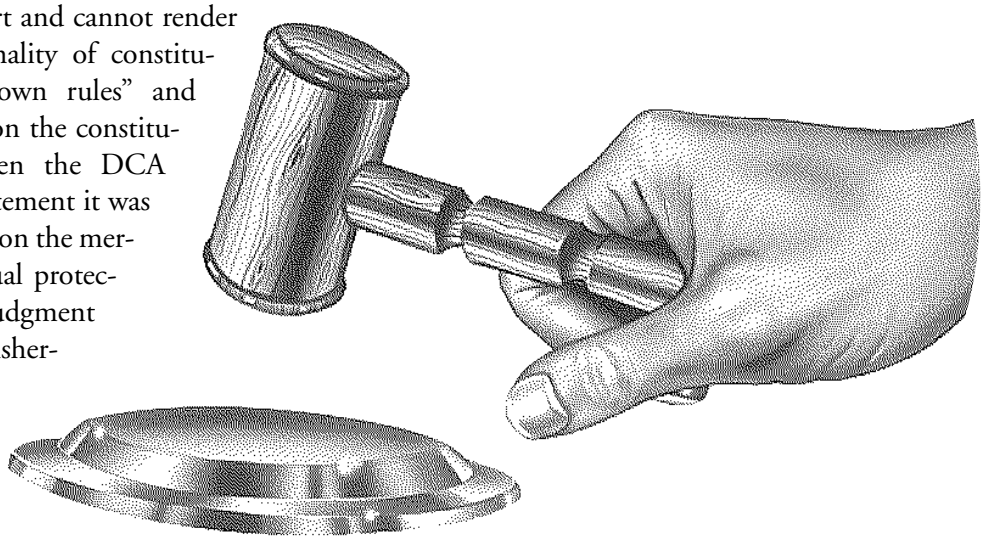
The law is very clear that the answer to this question is "no." An attorney may request a written opinion from a DCA under Florida Rule of Appellate Procedure 9.330(a) but the court is not obligated to provide it. If the DCA denies the request for a written opinion the Florida Supreme Court <u>will not</u> review the denial of the request nor compel the DCA to issue a written opinion, because the Florida Constitution does not give it the power to do so. In a recent case the Florida Supreme Court declared its position adamantly:

> We reiterate that in the future we will dismiss all extraordinary writ petitions, regardless of how they are designated, in which the petition requests that this Court review a district court's denial of a request for a written opinion…and the denial does not include any elaboration, citation, or explanation that would give this Court jurisdiction.[20]

Is it possible to have an appeals court address the merits of the case?

Because the DCA denied the fishermen's request to issue a written opinion on its affirmation of the Commission's declaratory statement, there would appear to be no chance to have an appeals court address the issues that the Commission decided. Likewise, the challenge to the Commission rule based on the APA and § 375.025 seems to have been concluded once and for all by the DCA's March 31, 1999 affirmance of the ALJ's February 28, 1998 order.

However, there has <u>not</u> been a final judgment on the merits of the claim that Rule 68B-4.0081 violates the due process and equal protection guarantees of the state and federal constitutions. Judge Sauls handed down the only judgment on this issue and it was vacated by the DCA. When a judgment is vacated, the judgment has no effect and the parties are put back in the position they were in before the court entered the judgment. Therefore, after the DCA vacated the Sauls judgment, the question of whether the rule is constitutional was still open. The fishermen later asked the Commission to decide the question in their petition for a declaratory statement, but Mr. Haddad correctly pointed out that



"the Commission is not a court and cannot render judgment on the constitutionality of constitutional provisions or of its own rules" and declined to issue a statement on the constitutional question.[21] Thus, when the DCA affirmed the Commission's statement it was not affirming a final judgment on the merits of the due process and equal protection questions. Because final judgment has not been rendered, the fishermen may be able to petition the Circuit Court again for a declaration about the rule's constitutionality. Exhaustion of administrative remedies should not be a problem at this point. There do not appear to be any further administrative remedies available to the fishermen, so the DCA could not use the exhaustion doctrine to reverse a favorable outcome (if the fishermen get one). It seems likely that the DCA would have to address the merits if the case were appealed.

Conclusion

For the time being, the DCA has ended the fishermen's APA and statutory challenges to the Commission's two-inch mesh rule. However, the courts have yet to pass final judgment on the constitutional questions raised by the rule, which include whether the rule violates equal protection requirements and/or deprives the fishermen of their livelihood without due process of law. The final chapter of this saga may have yet to be written.

Endnotes

1. Fla. Const. art. X, § 16.
2. *Id.*
3. *Id.*
4. *See* Robert P. Jones, *Florida's Net Ban – A Study of the Causes and Effects* (Southeastern Fisheries Assn., Inc., undated) (available at <http://www.southeasternfish.org/Documents/commfish.html>); Ted Forsgren, *Commercial Fishermen Pushing for Return of Gill Nets in Florida's State Waters*, Seawatch (Aug. 2004) (available at <http://www.ccaflorida.org/seawatch/august04.html>).
5. Later renumbered as Fla. Admin. Code r. 68B-4.0081(2)(d).
6. Fla. Stat. § 120.56.
7. *Pringle et al. v. Marine Fisheries Commn.*, Case No. 96-5868RP, 1998 WL 866288 at *10 (Fla. Div. Admin. Hrgs. Feb. 20, 1998).
8. Fla. Stat. § 120.68.
9. *Pringle v. Marine Fisheries Commn.*, 732 So.2d 395, 397 (Fla. 1st Dist. App. 1999).
10. *Id.* at 398 (Van Nortwick, J., specially concurring).
11. *Fla. Marine Fisheries Commn. (Div. of Law Enforcement) v. Pringle*, 736 So.2d 17 (Fla. 1st. Dist. App. 1999).
12. *Id.* at 20.
13. *Pringle v. State of Fla., Fish and Wildlife Conservation Commn.*, Case No. 97-271 (Fla. 2d Cir. Ct., Wakulla Cty., Feb. 11, 2002).
14. *Id.* at 13.
15. *Id.* at 15, 21.
16. *Id.* at 25.
17. *Fla. Fish and Wildlife Conservation Commn. v. Pringle*, 838 So.2d 648 (Fla. 1st Dist. App. 2003).
18. *In re: Petition of Ronald Fred Crum and Keith Ward for Declaratory Statement, Nets*, Order No. EO03-05 (Fish and Wildlife Conservation Commn. June 13, 2003) ("Commission statement").
19. The Law Center actively encourages questions from the public about legal issues (although we cannot give formal legal advice). To take advantage of our advisory request service, please visit <http://www.olemiss.edu/orgs/SGLC/National/advisory.htm>.
20. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So.2d 986, 990 (Fla. 2004).
21. Commission statement at 10.

CERCLA, from page 2

ered a precedential holding from the Fifth Circuit Court of Appeals. Aviall argued that the Fifth Circuit indicated that a § 113 claim is a type of § 107 claim.[6] The final complaint by Aviall was an assertion of right to contribution under § 113, but based on the time allowed for filing a lawsuit under § 107. Unfortunately, unlike case law interpretations of § 107 giving parties not yet sued the right to seek recovery costs, § 113 has language indicating that you must be sued under CERCLA *before* seeking contribution from other PRPs. This discrepancy in timing led Cooper to seek summary judgment against Aviall.

The district court first hearing this case found that Aviall had abandoned its § 107 claim and was seeking contribution under § 113 only. Based on the language of § 113, Aviall must first be subject to suit under § 106 (42 U.S.C. § 9606) or § 107 before it can seek contribution. Cooper was awarded summary judgment and Aviall's claim was dismissed.

The Fifth Circuit originally affirmed the lower court's decision, but on rehearing by the full court reversed, finding in favor of Aviall. The reasoning for the Fifth Circuit's final decision was that the last sentence of § 113 is a "savings clause" which preserves a party's right to seek contribution, regardless of whether or not the party is sued under CERCLA. Also, the appeals court decided that the word "may" at the beginning of § 113 is not indicative of "may only," as in "may only seek contribution after x, y, or z has occurred." This finding would not withstand the test of higher scrutiny.

Photograph of airliner from ©Nova Development Corp. stock collection

Supreme Court Decision

The first item the Supreme Court took issue with was the word "may" in the beginning sentence of § 113. Taking the sentence as a whole the Court found that the sentence structure clearly indicates that a party may only seek contribution after a specified condition occurs; in this case it would be the filing of a CERCLA lawsuit against the party seeking contribution. Second, if the word "may" was not given the meaning previously described then Congress had no reason to put the words "during or following" as a condition in the regulation. "During or following" would become superfluous and the Court tries not to read statutory provisions in a way that strips them of their meaning. Finally, the Court addressed the last sentence of § 113, considered the savings clause. This sentence, which seems to preserve the cause of action for contribution despite the other limiting requirements of the statute, actually just preserves any other contribution claim independent of § 113. The expansion of § 113 was not intended, only a recognition that this CERCLA provision may not be the only contribution cause of action available to a PRP. In sum, the Supreme Court found that Aviall had clearly not been sued under either § 106 or § 107; thus the company did not have a proper cause of action under CERCLA for contribution.

The Court went on to clarify what it did *not* decide. It did not decide if Aviall had waived its rights under § 107; if a PRP could seek some sort of cost recovery other than joint and several liability under § 107; or if there is an implied right to contribution under § 107. These topics, no matter how closely related to the case discussed, were too distinct and required full briefing before discussion. So the final holding of the present case is limited to a very precise question concerning only § 113.

ENDNOTES

1. 42 U.S.C. §§ 9604, 9606.
2. *Id.* § 9607.
3. *Id.* § 9607(a)(4)(B).
4. *Cooper Indus.*, 125 S.Ct. at 581.
5. 42 U.S.C. § 9613(f)(1) (emphasis added).
6. *Cooper Indus.* at 582.

Commerce Clause, from page 3

dants appealed to the Fifth Circuit Court of Appeals.

Dormant Commerce Clause

Article I, § 8, cl. 3 of the U.S. Constitution grants Congress full authority over interstate commerce. The Supreme Court has interpreted the Commerce Clause to have a negative aspect, called the 'dormant' Commerce Clause. The dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[1] To determine if an ordinance violates the dormant Commerce Clause a court must determine whether the ordinance discriminates on its face against out-of-state economic interests or regulates evenhandedly intrastate and interstate commerce and merely has a discriminatory effect. A law or ordinance that discriminates on its face is considered unconstitutional unless the state can prove there is no other nondiscriminatory means to advance a legitimate local interest.[2] Generally, ordinances that fall into this category are struck down because of the heavy burden placed on the state to prove its legitimate purpose. For a law or ordinance that regulates evenhandedly and effectuates a legitimate local interest, the court is to use the *Pike* balancing test: an evenhanded ordinance will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits" of the ordinance.[3]

Standing

Before it could consider the merits of the plaintiff's claim the court had to determine if the plaintiffs had standing to sue. The court looked at two types of standing, constitutional and prudential.

To meet the constitutional requirement, a plaintiff "must show (1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision."[4] The court said that the plaintiffs met the constitutional requirement because the flow control ordinance would not allow the plaintiffs to ship garbage they collect within the region to places of their choice. The injury to the plaintiff is the higher operating cost of using the Authority's landfill, which is required by the ordinance, and the injury could be redressed if the court ruled the ordinance was unconstitutional.

The purpose of the prudential standing requirement is to determine if the plaintiff is the proper party to bring the dispute before the court. A court is to determine if the plaintiff's grievance falls within the zone of interests protected by the statutory provision invoked in the complaint, in this case the dormant Commerce Clause. The court looked at the zone of interest question in two parts: whether the plaintiff could challenge the ordinance as being discriminatory on its face against out-of-state interests or if the plaintiff could merely challenge the ordinance as being burdensome.

To be discriminatory on its face, the ordinance must benefit in-state economic interests while burdening out-of-state economic interests. The flow control ordinance required that any garbage collected in the region be shipped to the Authority's landfill. While this does have an effect on interstate commerce, it did not affect the plaintiffs because they were not currently shipping any garbage out of state nor did they allege they had plans to do so. Therefore, the court concluded that the plaintiffs did not have standing to bring a claim that the ordinance was discriminatory on its face. The court also stated that it was not expressing an opinion of whether the ordinance would pass the facially discriminatory test if a suit was brought by a plaintiff who did ship garbage out of state.

. . . an evenhanded ordinance will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits" of the ordinance.

The court next considered whether the plaintiffs had standing to challenge the ordinance as being excessively burdensome on interstate commerce. To challenge the ordinance as being excessively burdensome, the plaintiff must show that he or she conducts interstate business and that the interstate business is burdened by the ordinance. The court concluded that the

See Commerce Clause, page 14

Titan Tires, from page 7

limits used. Since the permit was based on concentration limits, and the EPA allowed the use of both limits, the court deferred to MDEQ's decision to use the concentration limits and found that the Commission's order was within its power.

Finally, the court determined that Titan's statutory or constitutional rights were not violated, and in particular, Titan's right of equal protection was not violated. Titan claimed that MDEQ selectively enforced the penalties by only penalizing Titan and not other surrounding facilities that could have also contributed to the contamination. Titan's claim failed because its claim of selective enforcement was not based on grounds such as race, religion, or exercising constitutional rights.

Conclusion

The Mississippi Supreme Court affirmed the judgment of the Hinds County Chancery Court, upholding the Commission's order to fine Titan $5,000 for violation of its NPDES permit. The court reaffirmed MDEQ's use of the concentration limit test for NPDES permitting and also reinforced the power of MDEQ and the Commission in regulating and enforcing industrial and municipal wastewater discharges.

ENDNOTES

1. NPDES permits, in general, are used for the regulation of industrial and municipal wastewater discharges.

Commerce Clause, from page 13

plaintiffs did have standing because they conducted interstate business, and that the higher rates charged by the Authority could burden the plaintiffs' interstate business. To determine if the burden was excessive, the court used the *Pike* balancing test.

Under the *Pike* test, an "evenhanded" ordinance is one that does not discriminate against out-of-state economic interests on its face and only incidentally burdens interstate commerce. The court is to balance the nature of the local interest and the extent of the burden on interstate commerce. The court decided that the defendants had a legitimate local interest: insuring the economic viability of their landfill. To overcome a legitimate local interest, the plaintiffs must show that the ordinance puts a burden on interstate commerce that exceeds the burden on intrastate commerce. If the ordinance does not have a disparate effect on interstate commerce it will be upheld. The court concluded that, in this case, the burden imposed on interstate commerce was no greater than the one imposed on intrastate commerce.

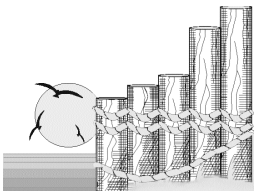
Conclusion

The court reversed the ruling of the magistrate judge that the ordinances unconstitutionally burdened interstate commerce. The court dismissed the claim that the ordinances facially discriminated against out-of-state commerce because the plaintiffs lacked standing. However, the court did not decide whether or not the ordinances were facially discriminatory, which allows a future plaintiff with proper standing to challenge the ordinance on that ground.

ENDNOTES

1. *Natl. Solid Waste Mgt. Assn. v. Pine Belt Regl. Solid Waste Mgt. Auth.,* 389 F.3d 491, 497 (5th Cir. 2004).
2. *Id.*
3. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).
4. *Natl. Solid Waste Mgt. Assn.* at 498.

Lagniappe *(a little something extra)*



The **Mississippi Gulf Coast National Heritage Area Act** was passed by Congress as part of the 2005 Appropriations Act (Pub. L. No. 108-447 (2004)). The Act, which encompasses Pearl River, Stone, George, Hancock, Harrison, and Jackson counties, recognizes the unique cultural, scenic, and environmental qualities of the Mississippi Gulf Coast and Coastal Plain. The state's Department of Marine Resources and Department of Archives and History will, among other things: create a management plan for the area; inventory the area's cultural, historical, archaeological, natural, and recreational resources; provide recommendations for the conservation, funding, management, interpretation, and development of those resources; and make grants and provide technical assistance to tribal and local governments and other entities to carry out the purposes of the Act. Congress has authorized $10 million for the Act, of which no more than $1 million will be available in any given year.

In January the International Trade Commission unanimously ruled that illegally low-priced shrimp "dumped" on the U.S. market injured shrimpers, and upheld the **tariffs on frozen shrimp** from Brazil, China, Ecuador, Vietnam, Thailand, and India. Under the Byrd Amendment, shrimpers and processors could share in the tariff revenue, which is expected to be around $150 million in the first year. Payouts, however, would be at least two years away. The ruling was cheered by Gulf shrimpers, but jeered by seafood distributors and restaurants.

The Coast Guard, which is now a component of the Department of Homeland Security, has issued a rule establishing a **temporary security zone for the Port of Mobile.** The rule prohibits movement within twenty-five yards of all cruise ships moored in the Port, and movement within one hundred yards of any cruise ship that is transiting the Port or the Mobile Ship Channel, without authorization from the Captain of the Port or a designated representative. The rule was passed without the usual notice and comment procedures because the Coast Guard found that good cause existed to take immediate action "to protect cruise ships and passengers from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature."

The U.S. Fish and Wildlife Service has given the go-ahead to the U.S. Army Corps of Engineers for a project - a large berm of sand - designed to protect homes on the west end of Dauphin Island from the ravages of nature. The area suffered damage from Hurricane Georges in 1998 and Tropical Storm Isidore in 2002. Unfortunately for the **threatened piping plover,** a small, federally protected shorebird, the berm project will be constructed on plover habitat that the Service had previously designated as critical for the species' recovery. Ironically, the project was delayed by the infelicitous arrival of Hurricane Ivan.

Speaking of scarce animals, the rare **opossum pipefish** may be breeding in Grand Bay's lush, ecologically diverse seagrass beds. Reporters from the *Mobile Register* photographed what scientists believe to be a specimen of the small, seahorse-like creature, which at present is only known to breed in a small area on the east coast of Florida and has not been documented in Mississippi or Alabama in over thirty years. A NOAA scientist observed that opossum pipefish are so rare that finding one "is like finding a gold mine." For the pipefish's safety, it should be noted that it is not really possible to extract gold from them.

The Alabama Department of Environmental Management has a **new top administrator.** Trey Glenn was hired for the post in January and will begin his tenure as head of the agency on February 1, replacing former chief James Warr. Glenn previously worked as director of the Office of Water Resources for the Alabama Department of Economic and Community Affairs.

Kudos to **Dr. George Crozier**, director of the Dauphin Island Sea Lab, who has been selected to serve on the U.S. Army Corps of Engineers' prestigious National Environmental Advisory Board. The Board advises the Corps' top administrator on environmental matters. Board members are selected based on their expert knowledge, experience in environmental matters, and geographical location. Dr. Crozier will continue to lead the Sea Lab, a role he has performed since 1979.

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••• *Upcoming Conferences* •••

•MARCH 2005 •

Beach Management, Tourism and the Coastal Environment
March 1-5, 2005, Miami, FL
http://www.ihrc.fiu.edu/lcr/news/conference_2005.htm#registration_detail

Living as if Nature Mattered • March 3-6, 2005, Eugene, OR
http://www.pielc.org

International Offshore Pipeline Forum • March 6-8, 2005, Orlando, FL
http://www.asme-ipti.org

Coastal GeoTools '05 • March 7-10, 2005, Myrtle Beach, SC
http://www.csc.noaa.gov/geotools/

2005 Coastal Summit: Defending America's Embattled Coastal Resources
March 9-11, 2005, Washington, D.C.
http://www.asbpa.org

GIS in the Marine and Coastal Environment
March 16-19, 2005, London, Great Britian
http://www.onecoast.net/onecoast/events/GIS_Marine_Coast/

• APRIL 2005•

5th International Conference on Coastal Dynamic
April 11-15, 2005, Barcelona, Spain
http://www.coastaldynamics.org/cd05/index.html

International Conference on Coastal Conservation & Management
April 17-20, 2005, Vilamoura, Algarve, Portugal
http://iccm2005.tripod.com

2005 Groundwater Summit • April 17-20, 2005, San Antonio, TX
http://www.ngwa.org/e/conf/0504175095.shtml

Marine Biodiversity in the Future • April 22 - 25, 2005, La Jolla, CA
http://cmbc.ucsd.edu/

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

University, MS 38677

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