

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

RUMPKE SANITARY LANDFILL, INC.,	:	APPEAL NO. C-090223 TRIAL NO. A-0703073
	:	
CLAIRE A. STEPANIAK,	:	<i>JUDGMENT ENTRY.</i>
	:	
CHARLES M. STOEPPEL and JOHN J. STOEPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,	:	
	:	
STATE OF OHIO ex rel. RUMPKE SANITARY LANDFILL, INC.,	:	
	:	
STATE OF OHIO ex rel. CLAIRE A. STEPANIAK,	:	
	:	
and	:	
	:	
STATE OF OHIO ex rel. CHARLES M. STOEPPEL and JOHN J. STOEPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
vs.	:	
	:	
COLERAIN TOWNSHIP, OHIO, COLERAIN TOWNSHIP TRUSTEES, BERNARD A. FIEDELDEY, Trustee, KEITH N. CORMAN, Trustee,	:	
	:	
and	:	
	:	
JEFF RITTER, Trustee,	:	
	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.<sup>1</sup>

The defendants-appellants, Colerain Township, Ohio, (“Colerain”) and its related parties, appeal from the trial court’s entry of summary judgment in favor of plaintiffs-appellees, the Rumpke Sanitary Landfill, Inc., (“Rumpke”) and its related parties, on Rumpke’s complaint seeking, inter alia, a declaration that under R.C. 519.211 Rumpke is a public utility exempt from township zoning regulations.

Rumpke sought to expand its landfill to an area 350 acres adjacent to its current facility in Colerain Township, Ohio. The current zoning status of the property, already owned by Rumpke, did not allow its use as a sanitary landfill. Rumpke’s attempts to have the township rezone the property had failed. And Rumpke commenced this litigation.

In its first assignment of error, Colerain argues that the trial court erred in entering summary judgment for Rumpke when genuine issues of material fact remain as to whether Rumpke is a public utility. Because summary judgment presents only questions of law, an appellate court reviews a summary-judgment ruling de novo.<sup>2</sup>

The function of summary judgment is to determine from the evidentiary materials whether triable factual issues exist, regardless of whether the facts are complex.<sup>3</sup> Civ.R. 56(A) makes summary judgment available to “[a] party seeking to recover upon a claim \* \* \*.”<sup>4</sup> A party moving for summary judgment bears the burden of establishing that (1) no issue of material fact remains to be litigated; (2) the moving party is entitled to summary judgment as a matter of law; and (3) it appears from the evidence, when viewed in a light

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

<sup>3</sup> See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412.

<sup>4</sup> See *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667.

most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party.<sup>5</sup>

“As a general rule, Ohio law provides that townships have no power under the zoning laws to regulate the location, erection, or construction of any buildings or structures of any public utility.”<sup>6</sup> R.C. 519.211 was “intended to exempt public utilities providers from regulation by township zoning boards and boards of zoning appeals.”<sup>7</sup> The “exemption ensures that public utilities will be able to construct the facilities required to serve the public interest across the state without undue interference from township zoning resolutions.”<sup>8</sup>

In 2009, this court held that the statutory amendments enacted as part of Am.Sub.H.B. No. 562, the 2009-2010 biennial budget bill, which modified the statutory definition of a “public utility” to exclude “a person that owns or operates a solid waste facility or a solid waste transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer facility,” violated the one-subject rule of Section 15(D), Article II, Ohio Constitution.<sup>9</sup> Therefore, as the Ohio Supreme Court has instructed in *Trustees of Washington Twp. v. Davis*, “[t]o determine ‘public utility’ status for purposes of the R.C. 519.211(A) exemption,” a court must consider the “ ‘factors related to the ‘public service’ and ‘public concern’ characteristics of a public utility.’ ”<sup>10</sup>

The factors relating to the public-service requirement include a demonstration that the entity provides “an essential good or service to the general public which has a legal right

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<sup>5</sup> See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

<sup>6</sup> *Symmest Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 551, 2000-Ohio-470, 721 N.E.2d 1057, citing R.C. 519.211(A).

<sup>7</sup> *Campanelli v. AT&T Wireless Servs., Inc.*, 85 Ohio St.3d 103, 107, 1999-Ohio-437, 706 N.E.2d 1267.

<sup>8</sup> *Symmest Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 556, 2000-Ohio-470, 721 N.E.2d 1057.

<sup>9</sup> *Rumpke Sanitary Landfill, Inc. v. State*, 184 Ohio App.3d 135, 2009-Ohio-4888, 919 N.E.2d 826, ¶13 and 18, discretionary appeal allowed, 124 Ohio St.3d 1442, 2010-Ohio-188, 920 N.E.2d 373.

<sup>10</sup> 95 Ohio St.3d 274, 278, 2002-Ohio-2123, 767 N.E.2d 261, quoting *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 1992-Ohio-23, 596 N.E.2d 423, syllabus.

to demand or receive this good or service.”<sup>11</sup> The entity must also demonstrate that it provides its service to the public “indiscriminately and reasonably.”<sup>12</sup> And the provider must have an obligation to provide the good or service that cannot be arbitrarily or unreasonably withdrawn.<sup>13</sup>

Next the public utility must “conduct its operations in such a manner as to be a matter of public concern.”<sup>14</sup> Factors considered in reaching this determination include the nature of the services provided, competition in the local marketplace, and regulation by a government authority.<sup>15</sup>

Here, from the evidence before the trial court, when construed most strongly in favor of Colerain, we conclude that no genuine issues of material fact remain as to whether (1) Rumpke provides virtually all residents and businesses of Southwest Ohio a vital and essential service—the sanitary disposal of solid wastes in a facility licensed under R.C. Chapter 3734; (2) Rumpke operates in a monopolistic position with no other cost-effective alternative to its services; (3) Rumpke is legally required to dispose of all of the city of Cincinnati’s solid waste; (4) Rumpke has pledged, in sworn statements to the Hamilton County Solid Waste Management District and the Ohio Environmental Protection Agency, that it will remain open and will accept any qualifying solid waste so long as it has the capacity to do so; and (5) the disposal of solid waste is an essential public necessity. Therefore, Rumpke provides an essential public service, and its operations are a matter of public concern. As a matter of law, Rumpke was entitled to the trial court’s declaration that it is a public utility for purposes of R.C. 519.211. The first assignment of error is overruled.

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<sup>11</sup> *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d at 387, 1992-Ohio-23, 596 N.E.2d 423.

<sup>12</sup> *Id.*; see, also, *St. Mary’s v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶57, citing *S. Ohio Power Co. v. Pub. Util. Comm.* (1924), 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus.

<sup>13</sup> See *St. Mary’s v. Auglaize Cty. Bd. of Commrs.* at ¶57

<sup>14</sup> *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d at 388, 1992-Ohio-23, 596 N.E.2d 423.

<sup>15</sup> See *id.*

Colerain next argues that the trial court erred in denying its motion for summary judgment because the plain language of the amended public-utility statute prohibits a privately owned landfill like Rumpke from benefiting from the regulatory exemptions of a public utility. As we have already noted, this court has declared that the Am.Sub.H.B. No. 562 modifications to R.C. 519.211 are unconstitutional and not enforceable.<sup>16</sup> Absent reversal by the Ohio Supreme Court, we will apply this decision in each case submitted for our review.

In its final argument, Colerain asserts that the trial court erred in denying its motion for summary judgment because Rumpke is prohibited from further landfill expansion by a consent decree that it entered to secure a 138-acre rezoning in the township in 2000. The consent decree was reached in a separate action, numbered A-007121. Colerain's argument must fail because the decree did not prevent any further expansion of the landfill. Rather it limited and provided conditions for the rezoning and use of the Southern Expansion Property—a parcel of land separate and distinct from the land at issue here. Moreover, nothing in the text of the decree prevented the trial court from recognizing Rumpke as a public utility in this case. The second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., SUNDERMANN and HENDON, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 17, 2010

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>16</sup> See *Rumpke Sanitary Landfill, Inc. v. State* at ¶18.