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NO. 5-09-0508
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE <i>ex rel.</i> LISA MADIGAN,	)	Appeal from the
Attorney General of the State of Illinois,	)	Circuit Court of
	)	Christian County.
Plaintiff-Appellee	)	
	)	
v.	)	No. 05-CH-95
	)	
ROBERT GROLL, d/b/a Roses Limited,	)	
	)	Honorable
	)	Bradley T. Paisley,
Defendant-Appellant	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Welch concurred in the judgment.

RULE 23 ORDER

Held: The trial court properly granted a summary judgment in favor of the State for open dumping in violation of the Environmental Protection Act, where the defendant had discarded rose production materials by leaving them to rot for more than a decade and allowed the open dumping of litter on the site that he owned and controlled.

The State filed a complaint in the Christian County circuit court against the defendant, Robert Groll doing business as Roses Limited, alleging that the defendant had violated sections 21(a), *i.e.*, the open dumping of waste (415 ILCS 5/21(a) (West 2004)), and 21(p)(1), *i.e.*, the open dumping of waste resulting in litter (415 ILCS 5/21(p)(1) (West 2004)), of the Environmental Protection Act (the Act) (415 ILCS 5/1 *et seq.* (West 2004)). Each party filed a motion for a summary judgment, and the circuit court granted a summary judgment in favor of the State. For the reasons that follow, we affirm.

BACKGROUND

The facts are undisputed. For decades, Roses Limited, a partnership between the

defendant and a few of his relatives, operated a rose production facility upon approximately 25 acres of land near the intersection of Washington and Hickory Streets in Pana, Illinois. The property was broken up into two parts: (1) the property north of Washington Street and (2) the property south of Washington Street. The property on the south side of Washington Street consisted of approximately three acres of land and contained seven greenhouses, or one range of greenhouses, and a boiler room. The property on the north side of Washington Street consisted of approximately 22 acres of land and contained 14 greenhouses, or two ranges of greenhouses, along with some farmland. The greenhouses on this side of the street had a drive running between the two ranges.

The greenhouses themselves were constructed decades ago by using a concrete foundation with dirt floors. Steel trusses were used to hold the glass walls and roofs in place, along with pieces of cypress and redwood. Inside the greenhouses was an irrigation system made of black pipe and corrugated transite panels that were embedded into the ground and were used in the construction of planting beds to grow the roses.

In approximately 1969, the partnership began to close some of the greenhouses. It began with the east range on the north side of Washington Street. After closing that range, the partnership sold the parts (*e.g.*, the glass, wood, and steel) making up those greenhouses. All that remained from those greenhouses were the concrete foundation and the transite panels that were used in constructing the planting beds. Sometime thereafter, the partnership closed the west range on the north side of Washington Street. The partnership did not sell the parts of those greenhouses, and a snowstorm during the 1970s or 1980s caused those greenhouses to collapse.

In 1992, the partnership closed down the greenhouses on the south side of the road. A few years after closing these greenhouses, the partnership hired someone to take them down, and in 2000, the defendant removed the boiler room on that side of the property.

Everything was removed, including the transite panels, which were taken to a landfill at the request of the Illinois Environmental Protection Agency (IEPA). After the greenhouses on the south side of the road closed, the partnership was not active in the rose production business. The property on the south side of the property is not at issue in this case. Rather, the property at issue here is the property on the north side of Washington Street (the site). The IEPA began inspecting the site in 2001, and after years of attempting to work with the defendant to clean up that property, the IEPA recommended that the State file a complaint against the defendant.

On October 4, 2005, the State filed a complaint against the defendant, alleging that on April 3, 2001, IEPA inspectors visited the site and observed used/waste tires, weathered dimensional lumber, white goods and general refuse, coal combustion waste, broken glass panes, plastic sheeting, asphalt-like chunks, and glass and plastic bottles; that on December 12, 2001, IEPA inspectors conducted another inspection of the site, at which time transite panels, coal combustion waste, weathered dimensional lumber, asphalt, concrete and bricks, broken glass, roofing shingles, white goods, plastic sheeting, metal drums and other metal waste, and general refuse were observed; that on April 9, 2002, an IEPA inspector collected samples of transite from the site, and analytical testing revealed that both samples contained chrysotile asbestos; that on November 18, 2002, IEPA inspectors conducted a follow-up inspection on the site, where they observed that the previously observed waste remained on the site, including weathered dimensional lumber, white goods, general refuse, coal combustion waste, broken glass, plastic sheeting, glass and plastic bottles, concrete and bricks, transite panels, asphalt, roofing shingles, metal drums, and other metal wastes; that on May 20, 2004, an IEPA inspector inspected the site and observed that previously observed wastes remained on the site; that weathered dimensional lumber, white goods, general refuse, coal combustion waste, broken glass, plastic sheeting, glass and plastic bottles, concrete and

bricks, transite panels, asphalt, roofing shingles, metal drums and other metal wastes, and other general refuse constitute "refuse" and "waste" as those terms are defined by the Act; that by causing or allowing the open dumping of refuse and waste, the defendant violated section 21(a) of the Act; that on or before April 3, 2001, and continuing through the date of the filing of the complaint, the defendant caused or allowed the open dumping of waste in a manner that resulted in the accumulation of litter at the site; that by causing or allowing the open dumping of waste in a manner which resulted in litter, the defendant violated section 21(p)(1) of the Act; and that these violations will continue unabated until and unless enjoined by the court. The State requested that the circuit court find that the defendant violated sections 21(a) and 21(p)(1) of the Act, permanently enjoin the defendant from further violation of the Act and its regulations, assess a monetary penalty of not more than the statutory maximum against the defendant, award the State costs, including reasonable attorneys fees and expert witness costs, and "[g]rant such other and further relief as the [c]ourt deems appropriate."

Discovery was undertaken, and on April 21, 2008, the State filed a memorandum of law and argument in support of its motion for a summary judgment. The circuit court treated this as a motion for a summary judgment. Attached to the Agency's memorandum of law in support of its motion for a summary judgment were numerous exhibits with attachments thereto.

Exhibit A was the affidavit of Richard Johnson, an IEPA employee, who testified that he inspected the site and prepared reports on six different occasions: April 3, 2001, December 12, 2001, November 18, 2002, May 20, 2004, March 3, 2005, and February 20, 2008. Johnson concluded that the defendant had violated the Act's prohibition of the open dumping of waste, and he stated, "Throughout my repeated inspections of the subject property, these wastes have been found scattered throughout the site in an unsightly,

weathered, and disorganized manner." Attached to Johnson's affidavit was his resume and the inspection reports from each of his inspections, including photographs.

Exhibit B was the affidavit of David C. Jansen, an employee of the IEPA, who testified that he participated in the inspection of the site on April 1, 2001, and April 20, 2001. Jansen concluded that the defendant had violated the Act's prohibition of the open dumping of waste. Attached to the affidavit was Jansen's resume and the inspection reports with pictures from his inspections.

Exhibit C was the affidavit of Steven Youngblut, a field inspector in the asbestos unit of the bureau of air for the IEPA. Youngblut testified that on April 2, 2002, he conducted an inspection of the site and took samples of suspected asbestos-containing material, which testing later revealed contained greater than 1% asbestos. He stated the following:

"If the asbestos-containing waste materials are allowed to remain on the site, these materials would continue to threaten the environment and public health. The site is in the middle of a residential neighborhood and is not currently secured. There is not currently a fence or any significant barrier restricting access should a person walk onto the property. The material is exposed to the weather and the environment and might be broken if it were stepped on or driven over. It might also be damaged if the site were to catch fire. As a result, if the asbestos[-]containing transite is allowed to remain, the asbestos may serve as a risk to public health and safety as well as a potential source of hazardous air pollutants and air contaminants."

Attached to Youngblut's affidavit was his resume and a copy of the test results for the materials containing asbestos.

Exhibit D was the defendant's deposition dated March 21, 2008. In his deposition, the defendant testified that in 1954 he became involved in a partnership called Roses Limited; that he worked at the greenhouse until it shut down in 1992; that over the previous 15 years

he had been to the site less and less and that at the time of his testimony he visited the site maybe once per year; that a cable was strung across the middle of the road in the middle of the property that was used to access the greenhouses; that steel posts that previously supported the roof were left on the property; that pieces of cypress and redwood used to build the greenhouses were left on the property; that black pipe used as an irrigation system was left on the property; that he never hired anyone to remove the transite on the north side of the road; that a few metal posts used on the benches to hold the bushels in place were left on the property; that someone's garbage had been dumped on the property; that a chair and broken glass were on the property; that a small fire pit was on the property and that he imagined some children had probably put it together; that a mattress was on the property; that children had plastic sheeting and some garden hose used in the business were left on the property; that he never removed the transite from the north side of the road because he thought they might use it to "start a nursery or grow some *** Christmas trees" but that "old age kind of got to [him] first"; that the partnership no longer existed; and that at the time of his testimony he had no plans for the property.

Attached to the deposition were the photos taken by Johnson on May 20, 2004, showing general refuse, transite, wood, concrete, concrete debris, plastic, glass, broken glass, wood debris, scattered bricks, dimensional lumber, white goods, and plastic sheeting. Additional photos taken on March 3, 2005, were also attached to the deposition, and they showed refuse, a couple of sheets of metal, transite, broken concrete with vegetation growing on it, broken glass, a chair, debris, piles of coal combustion waste, brick, a small fire pit, demolition debris including asphalt, shingles, dimensional lumber, brick, metal springs from a mattress, plastic sheeting, boards, some garden hose, two appliances, metal, and plastic debris.

Exhibit E was the affidavit of Craig Brooks, a lab manager for Phillip Environmental

Services Corporation (PESC), an accredited laboratory that provides several types of analytical services. Brooks testified that if material contains more than 1% asbestos by weight, then federal asbestos regulations apply and that on April 4, 2002, he tested samples from the site and found the samples to contain 20% to 25% asbestos. Attached to Brooks's affidavit was his resume, a certification of accreditation for PESC to test for asbestos during the time the materials from the site were tested, a current certificate of accreditation for PESC, a copy of the IEPA test method for asbestos, and a copy of the test results dated April 4, 2002.

Exhibit G was an IEPA violation notice dated January 14, 2002, sent to the defendant, charging him with a violation of section 21(p)(1), *i.e.*, the open dumping of waste resulting in litter. The notice ordered the defendant to remove all wastes. Attached to the notice was Johnson's open dump inspection checklist form dated December 12, 2001, along with his narrative and photos taken that day.

On May 1, 2008, the defendant filed a motion for a summary judgment and other alternative relief. Attached to the defendant's motion were five exhibits, consisting of the transcripts of four discovery depositions—of the defendant, Steven Youngblut, David Jansen, and Richard Johnson—and the defendant's affidavit.

On September 8, 2008, the court entered its memorandum of decision on the cross-motions for a summary judgment, granting a summary judgment in favor of the State. On April 9, 2009, the parties appeared before the court for a hearing on remedies. On August 24, 2009, the court entered an order by docket entry enjoining the defendant from any further violations of the Act and imposing a mandatory injunction requiring the remediation of the site by the removal of all "waste." The court declined to impose any monetary fines or costs on the defendant. On September 21, 2009, the defendant filed his notice of appeal. The State filed a cross-appeal but later filed a motion to dismiss that appeal, which we granted.

STANDARD OF REVIEW

"The policy underlying summary judgment proceedings is to facilitate litigation, avoid unnecessary trials, and reduce congestion on the court's calendar." *People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 204 (2008). "When the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, the entry of summary judgment is appropriate." *Lincoln, Ltd.*, 383 Ill. App. 3d at 204. "The court does not decide factual issues and instead determines whether any exist." *Lincoln, Ltd.*, 383 Ill. App. 3d at 204. "Summary judgment should be granted only when the right of the moving party is clear and free from doubt." *Lincoln, Ltd.*, 383 Ill. App. 3d at 204. "When [the] parties file cross-motions for summary judgment, as here, they agree no genuine issue of fact exists, only a question of law is involved, inviting the trial court to decide the issues based on the record before it." *Hartz Construction Co. v. Village of Western Springs*, 391 Ill. App. 3d 75, 79 (2009). "An appellate court addresses the issues *de novo*, without any deference to the trial court's findings." *Lincoln, Ltd.*, 383 Ill. App. 3d at 204.

ANALYSIS

On appeal, the defendant divides the materials on the site into two categories: (1) the materials previously used in the operation of the retired rose production facilities (the rose production materials) and (2) those materials left on the subject premises by others without the partnership's knowledge or consent (the litter). The defendant makes two arguments with regard to the rose production materials. First, the defendant cites to *Jerry Russell Bliss, Inc. v. Pollution Control Board*, 138 Ill. App. 3d 699 (1985), for the proposition that the State failed to present sufficient evidence of the prior use and origin of the rose production materials so as to classify the rose production materials as waste. Second, the defendant

contends that under *Environmental Protection Agency v. Pollution Control Board*, 219 Ill. App. 3d 975 (1991), the rose production materials that were left on the site in anticipation of some future use did not turn the site into a disposal site and, therefore, there was no open dumping under the Act. With regard to the second category of materials, *i.e.*, the litter, the defendant contends that the defendant neither caused nor allowed the littering and "cannot be held responsible for the actions of trespassers over whom he [had] no opportunity to control." Lastly, the defendant contends that because the State failed to allege and request the remediation of the site in its prayer for relief, that relief should not have been granted and the defendant was unfairly surprised as a result thereof. Each argument is addressed in turn.

I. Are the Rose Production Materials "Waste" Under the Act?

As mentioned above, the defendant cites to *Jerry Russell Bliss, Inc.* for the proposition that the State failed to present sufficient evidence of the prior use and origin of the rose production materials so as to classify it as waste. The State counters that *Jerry Russell Bliss, Inc.* does not aid the defendant and that, in any event, the State did present evidence of the prior use and origin of the defunct greenhouse operations.

"The fundamental principle of statutory construction is to ascertain and give effect to the legislature's intent." *Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency*, 215 Ill. 2d 219, 237-38 (2004). "The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law." *Alternate Fuels, Inc.*, 215 Ill. 2d at 238. "We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Alternate Fuels, Inc.*, 215 Ill. 2d at 238. "We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Alternate Fuels, Inc.*, 215 Ill. 2d at 238. "Moreover, words and phrases should not be construed in isolation, but must be

interpreted in light of other relevant provisions of the statute." *Alternate Fuels, Inc.*, 215 Ill. 2d at 238.

The purpose of Act is "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (West 2004). The terms and provisions of the Act shall be liberally construed in effectuating those purposes. 415 ILCS 5/2(c) (West 2004).

Section 21 of the Act provides, *inter alia*, that no person shall cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (West 2004). "Open dumping" means "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (West 2004). "Refuse" means "waste." 415 ILCS 5/3.385 (West 2004). "Waste" means "any garbage, sludge ***, or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining[,], and agriculture operations." 415 ILCS 5/3.535 (West 2004). Thus, we must determine whether the rose production materials are waste as that term is defined under the Act.

In *Jerry Russell Bliss, Inc.*, the court held that because the Act defines the term "waste" as discarded material, "proof of the prior use or origin of a substance must be present to establish that a substance is a 'waste.'" 138 Ill. App. 3d at 706. There, the IEPA spotted the defendant's employees spraying black liquid used as road oil onto the ground. The IEPA tested the black liquid, found that the material contained a toxic hazardous substance, and filed a complaint against the defendant. The Illinois Pollution Control Board (the Board) dismissed the counts regarding the transport and disposal of waste and special waste because no evidence was presented regarding whether the toxic hazardous substance was discarded. On cross-appeal, the IEPA argued the Board erred in dismissing the counts because it had established a *prima facie* case that these violations had occurred when it showed that the road

oil contained the listed toxic hazardous substance. The court disagreed, finding that because no evidence was presented regarding the prior use or origin of the toxic hazardous substance, the Board's dismissal of those counts was proper. *Jerry Russell Bliss, Inc.*, 138 Ill. App. 3d at 706.

Here, unlike in *Jerry Russell Bliss, Inc.*, the court did have evidence of the prior use and origin of the rose production materials. The rose production materials were just that: the materials used in the now-defunct rose production business. The issue here is not the prior use or origin of those materials but whether those materials were discarded. The Act does not define the term "discarded," but that term has been interpreted in three cases: (1) *City of Lake Forest v. Pollution Control Board*, 146 Ill. App. 3d 848 (1986), (2) *Alternate Fuels, Inc.*, and (3) *Northern Illinois Service Co. v. Environmental Protection Agency*, 381 Ill. App. 3d 171 (2008).

In *City of Lake Forest*, the court interpreted the meaning of the term "other discarded material" as that term was used in the definition of the term "waste" under the Act. Specifically, at issue was whether leaves that had fallen from trees were waste under the Act. The court gave the following analysis:

"Here, in determining the meaning of 'other discarded materials,' we must look to the examples provided by the legislature, *i.e.*, garbage and sludge. We cannot say that leaves, which naturally grow and fall from trees, are of the same nature as garbage or sludge which is generated and discarded by people. We also note the legislature specifically included leaves in its definition of 'landscape waste' in the Act [citation] as a separate category of waste, indicating a legislative intent that leaves do not come within the general definition of 'waste' under *** the Act [citation]." *City of Lake Forest*, 146 Ill. App. 3d at 855.

In *Alternate Fuels, Inc.*, at issue, *inter alia*, was whether the materials (shredded

plastic chips) used by the plaintiff, an alternative fuel producer, in its manufacturing process were wastes under the Act. 215 Ill. 2d at 239-43. The trial court granted a summary judgment in favor of the plaintiff, "finding that the materials were not 'wastes' because they were not discarded." *Alternate Fuels, Inc.*, 215 Ill. 2d at 229. On appeal, the IEPA contended that the plaintiff was receiving and processing "discarded material" within the plain meaning of the definition of "waste" under the Act.

The court looked to the definition of the term "waste" under the Act, specifically the meaning of the term "discarded material." *Alternate Fuels, Inc.*, 215 Ill. 2d at 239. Because the word "discarded" was undefined by the Act, the court turned to section 3.380 of the Act (415 ILCS 5/3.380 (West 2002)), which used the term "discarded" in defining "recycling, reclamation or reuse." *Alternate Fuels, Inc.*, 215 Ill. 2d at 239. That section provided as follows:

" 'Recycling, reclamation or reuse' means a method, technique, or process designed to remove any contaminant from waste so as to render such waste reusable, or any process by which materials that would otherwise be disposed of or discarded are collected, separated[,] or processed and returned to the economic mainstream in the form of raw materials or products." (Emphasis omitted.) *Alternate Fuels, Inc.*, 215 Ill. 2d at 239-40 (quoting 415 ILCS 5/3.380 (West 2002)).

From that definition, the court determined the legislature categorized items that may be recycled, reclaimed, or reused into two main categories: (1) "waste" from which contaminants may be removed and (2) "materials." *Alternate Fuels, Inc.*, 215 Ill. 2d at 240. Further breaking down this definition, the court noted that "materials" are subdivided into two categories: (1) those that are "discarded" and (2) those " 'materials that would otherwise be disposed of or discarded [which] are collected, separated[,] or processed and returned to the economic mainstream in the form of raw materials or products.' " *Alternate Fuels, Inc.*,

215 Ill. 2d at 240 (quoting 415 ILCS 5/3.380 (West 2002)). From this the court reasoned as follows:

"While the legislature has not defined 'discarded materials,' the legislature has mentioned what it is not: 'materials that would otherwise be disposed of or discarded [which] are *** returned to the economic mainstream in the form of raw materials and products.' Thus, materials are 'discarded' unless they are returned to the economic mainstream." *Alternate Fuels, Inc.*, 215 Ill. 2d at 240.

Applying that analysis, the court determined that because the defendant returned the materials as a "product" into the economic mainstream, the materials were not discarded. *Alternate Fuels, Inc.*, 215 Ill. 2d at 240.

In *Northern Illinois Service Co.*, the court looked to the analysis provided in *Alternate Fuels, Inc.* and *City of Lake of Forest* in determining that uprooted, dead trees fell within the definition of waste under the Act. In that case, the IEPA filed an administrative citation charging the defendant, an excavation and demolition contractor, with the open dumping of waste resulting in litter in violation of sections 21(p)(1) and 21(p)(7) of the Act, after observing 9,700 cubic yards of uprooted, dead trees piled 10 to 13 feet high on the defendant's site. After a hearing, the Board found that the trees qualified as "other discarded materials" within the Act's definition of "waste."

In addressing the defendant's argument that the trees did not qualify as "other discarded material" within the definition of "waste," the court looked to *Alternate Fuels, Inc.*'s definition that " 'materials are 'discarded' unless they are returned to the economic mainstream.' " (Emphasis in original.) *Northern Illinois Service Co.*, 381 Ill. App. 3d at 176 (quoting *Alternate Fuels, Inc.*, 215 Ill. 2d at 240). Applying that definition, the court concluded that the trees fell within the definition of waste as other discarded material because there was no evidence that the trees had ever been " 'collected, separated[,] or processed and

returned to the economic mainstream in the form of raw materials or products.' " *Northern Illinois Service Co.*, 381 Ill. App. 3d at 176 (quoting 415 ILCS 5/3.380 (West 2004)). The court also rejected the defendant's argument that because there was testimony that the trees had market value as mulch, they could not be deemed discarded, stating, "Whether an item has value has no bearing on whether it is discarded." *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177.

Relying on *City of Lake Forest*, the defendant additionally argued that the trees cannot be deemed waste because they were "totally unlike" the other items, *i.e.*, garbage and sludge, mentioned in the definition of waste. *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177. Distinguishing *City of Lake Forest*, the court rejected the defendant's argument, finding that unlike the leaves in *City of Lake Forest*, the trees did not appear on the defendant's site naturally. *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177. Rather, "the trees were 'generated [in that they were uprooted] and discarded [in that they were placed in a pile and left to decay] by people,' " some of which had been present for over 10 years. *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177. Thus, the court found that the uprooted trees were " 'of the same nature as garbage or sludge which is generated and discarded by people.' " *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177 (quoting *City of Lake Forest*, 146 Ill. App. 3d at 855).

We begin our analysis by looking to the plain and ordinary meaning of "discarded." See *People ex rel. Ryan v. McFalls*, 313 Ill. App. 3d 223, 226-27 (2000) ("The Act does not define 'cause.' In the absence of a statutory definition, 'cause' should be given its plain and ordinary meaning."). The verb "discard" is defined by dictionary and usage as to "cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (citing 1 The New Shorter Oxford English Dictionary 684 (4th ed. 1993)); see, *e.g.*, *Stein v. Chicago Park District*, 323 Ill. App. 3d 574, 577 (2001) (using a dictionary to

ascertain the common meaning of statutory language). Thus, applying the ordinary meaning of the word "discard" leads to the conclusion that "discarded materials" are materials that have been cast aside, rejected, abandoned, or given up. This interpretation is supported by how "discarded material" is defined in the part of the Illinois Administrative Code pertaining to the identification and listing of hazardous waste. See 35 Ill. Adm. Code §§721.102(a)(2), (b), amended at 33 Ill. Reg. 993, eff. Dec. 30, 2008 (A discarded material is any material that is abandoned in one of the following ways: "1) It is disposed of; 2) It is burned or incinerated; or 3) It is accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated").

Applying this definition, we conclude that the rose production materials are waste because the materials are discarded material resulting from a commercial operation in that the rose production materials have been abandoned by the defendant since 1992 when the rose production business ceased operating.

As additional support for our conclusion, we also look to the two tests that have arisen from our case law to determine whether materials qualify as "other discarded materials" under the Act. The first test from *City of Lake Forest* compares the materials at issue to the other examples provided by the legislature, *i.e.*, garbage and sludge. The second test from *Alternate Fuels, Inc.* determines whether the materials are "discarded" by looking to whether the materials are collected, separated, or processed and returned to the economic mainstream.

Applying the *City of Lake Forest* test, we must compare the rose production materials to garbage and sludge. Here, the rose production materials are more like the dead, uprooted trees in *Northern Illinois Service Co.* than the leaves in *City of Lake Forest*. For example, unlike the leaves in *City of Lake Forest*, the rose production materials did not naturally grow and fall from trees, but rather the materials were more like garbage and sludge in that they were generated and discarded by people. Furthermore, like the trees in *Northern Illinois*

Service Co., the rose production materials were discarded in that they were left to decay for more than a decade. Thus, applying this test, we also find the rose production materials to be waste.

The *Alternate Fuels, Inc.* test reaffirms our conclusion on this issue. There, the court determined that "materials are 'discarded' unless they are returned to the economic mainstream." 215 Ill. 2d at 240. In that case, the court dealt with a situation where the defendant was using "discarded" materials but for the fact that the materials were being manufactured and returned to the economic mainstream. Here, however, the defendant is not using the materials for any purpose, had not used the materials since 1992, and had no current plans for the materials. Thus, the rose production materials are not being returned to the economic mainstream and as a result are discarded. *Alternate Fuels, Inc.*, 215 Ill. 2d at 240; see also *Lincoln, Ltd.*, 383 Ill. App. 3d at 206 (finding that by accepting truckloads of debris for a landfill that was allegedly the proposed site for a skiing and snowboarding facility the defendant was not returning the material to the stream of commerce when it permanently kept the material on site for its own use). The fact that the rose production materials may have value does not change this analysis. See *Northern Illinois Service Co.*, 381 Ill. App. 3d at 177 ("Whether an item has value has no bearing on whether it is discarded"). Accordingly, we conclude that the rose production materials are waste under the Act.

II. Does the Defendant's Site Constitute a "Disposal Site" Under the Act?

The defendant next contends that under *Pollution Control Board* the rose production materials that were left on the site in anticipation of some future use did not turn the site into a "disposal site" and that, therefore, there was no open dumping under the Act. The State contends that nothing in *Pollution Control Board* supports the plaintiff's contention. Rather, the State avers that *Pollution Control Board* recognizes that waste need not be transported to another locale for disposal to occur.

In *Pollution Control Board*, the court interpreted the meaning of the term open dumping as that term is used in the Act. In that case, the defendant demolished two buildings and then set fire to the debris on the site where the buildings had stood. The IEPA issued an administrative citation charging the defendant with having caused or allowed the open dumping of waste, which resulted in litter. A hearing was held before the Board, and the Board ruled that the defendant's conduct did not fall within the Act's definition of open dumping. The Board reasoned, " 'Where a person is involved in the continuous process of demolition, the Board is unwilling to construe the Act so that the demolition debris instantaneously results in an open dumping violation.' " *Pollution Control Board*, 219 Ill. App. 3d at 977.

On appeal, the court disagreed with the Board's interpretation of the Act, finding that the demolition debris generated by the defendant met the definition of open dumping under the Act in that the waste was consolidated by the defendant from at least one source at a waste disposal site and that it was undisputed that the disposal site was not a sanitary landfill. *Pollution Control Board*, 219 Ill. App. 3d at 978. Thus, the court found that there was no authority for the Board's limitation of the Act in cases where " 'the demolition, scooping up of the remaining debris and burning took place as one continuous sequence of events.' " *Pollution Control Board*, 219 Ill. App. 3d at 978. The court noted the following with regard to the Board's ruling:

"In ruling as it did, the Board was evidently concerned that unless some qualification were placed on the statute, every contractor engaged in the business of building demolition would automatically run afoul of the Act as soon as he knocked a building down. This concern is based on an incorrect reading of the Act's terms. It assumes that 'open dumping' occurs every time refuse is consolidated at a demolition site. But that is not what the statute provides. Under the Act, 'open

dumping' happens not when refuse is consolidated at the point of demolition, but when it is consolidated at a *disposal* site that does not fulfill sanitary landfill requirements. [Citation.]

Thus, there must be more than demolition. There must also be 'disposal,' which is defined as

'the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste *** into or on any land or water *** so that such waste *** may enter the environment or be emitted into the air or discharged into any waters, including ground waters.' [Citation.]

Accordingly, if buildings are demolished and the resulting waste is cleared away to another location before it is allowed to be dissipated back into the environment or emitted into the air, or discharged into the water, the demolition site cannot be regarded as the 'disposal site,' and the prohibition against open dumping will not be triggered. But that was not the case here. Here, the demolition site became the disposal site when [the defendant] decided to incinerate the debris there instead of moving it away. The Board was therefore incorrect in concluding that [the defendant] had not engaged in 'open dumping.' " (Emphasis in original.) *Pollution Control Board*, 219 Ill. App. 3d at 978-79.

The record in this case shows that in 1969 Roses Limited began to close some of the greenhouses, starting with the east range on the site. Sometime during the 1970s, Roses Limited sold the parts to the greenhouses on the east range, but the concrete foundation surrounding the greenhouses, the transite panels, the irrigation system, and many of the rose production materials were left on the site. Eventually, the west range was also closed, and a snowstorm during the 1970s or 1980s caused the greenhouses in that range to collapse. The record is unclear about how much and what portions of those greenhouses were removed, but

what is clear is that like the greenhouses on the east range, the concrete foundation, the transite panels, the irrigation system, and many rose production materials were left on the site. These materials have remained on the site for decades, have not been used for any purpose, and have no planned future use. Rather, the rose production materials have been left to rot with trees and other vegetation growing through and around the materials on the site. Despite this, the defendant contends that the rose production materials were not disposed of but rather were left as they were constructed in anticipation of some future use. Thus, the defendant avers that the site did not become a disposal site solely because the rose production materials continued to exist at that location. We disagree with the defendant's characterization of the rose production materials and conclude that the site became a disposal site.

Here, like in *Pollution Control Board*, it is undisputed that the site was not a sanitary landfill. What is disputed, however, is whether the site was a disposal site. A clear reading of the definition of the term "disposal" leads us to conclude that it is. "Disposal" means the "deposit *** or placing of any waste *** into or on any land *** so that such waste *** may enter the environment or be emitted into the air." 415 ILCS 5/3.185 (West 2004). Applying that definition to the case at hand, we conclude that the rose production materials were placed on the land so that the materials may enter the environment or be emitted into the air. Moreover, unlike the court in *Pollution Control Board*, we do not agree that, as a general rule, "if buildings are demolished and the resulting waste is cleared away to another location before it is allowed to be dissipated back into the environment or emitted into the air, or discharged into the water, the demolition site cannot be regarded as the 'disposal site.'" 219 Ill. App. 3d at 979. The statute imposes no such requirement. To the contrary, the statute only requires that the waste be disposed of in a manner so that it "*may* enter the environment or be emitted into the air or discharged into any waters." (Emphasis added.) 415 ILCS

5/3.185 (West 2004). The Act does not require that the environment be harmed before a violation occurs. This would be inconsistent with the purpose behind the Act of protecting the environment and liberally construing the provisions of the Act in effectuating that purpose. 415 ILCS 5/2(b), (c) (West 2004). In this case, there is no question that the waste may enter the environment. In fact, IEPA field inspector Youngblut testified in his affidavit as follows: "If the asbestos-containing waste materials are allowed to remain on the site, these materials would continue to threaten the environment and public health. *** The material is exposed to the weather and the environment and might be broken if it were stripped on or driven over. It might also be damaged if the site were to catch fire." The record illustrates that many of the events described in these concerns have already taken place, as Johnson noted in his inspection report of February 20, 2008, that "[s]ome of the transite panels are broken, some are loosely or partially embedded in the soil, and still others are not embedded at all." Moreover, it is uncontested that someone had built a fire pit on the property. If the site were to catch fire, the asbestos might also be emitted into the air. Thus, the site became a disposal site because the waste has been left so that the waste may be emitted into the environment. *Cf. Sycamore Industrial Park Associates v. Ericsson, Inc.*, 546 F.3d 847, 851-52 (7th Cir. 2008) (holding that under the Comprehensive Environmental Response, Compensation, and Liability Act "disposal" did not occur when the asbestos would remain in the building and not enter the environment).

III. Did the Defendant "Cause" or "Allow" Litter on the Property?

With regard to the second category of materials, the defendant concedes that these materials constitute litter, but he contends that the defendant neither caused nor allowed the littering and "cannot be held responsible for the actions of trespassers over whom he [had] no opportunity to control." The State counters by arguing that the Act does not require that the defendant knew about the third-party dumping or expressly gave permission for that

dumping. Rather, by acquiescing in the presence of waste, the defendant allowed the open dumping on his land.

The established rule in Illinois is that knowledge or intent is not an element to be proved in order to prove a violation of the Act. *People v. Fiorini*, 143 Ill. 2d 318, 335-36 (1991). "Illinois courts have held that, because violations of the Act are *malum prohibitum*, the State need not prove a defendant knowingly violated the statute." *McFalls*, 313 Ill. App. 3d at 229. " 'The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.' " *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (1993) (quoting *Fiorini*, 143 Ill. 2d at 346). "[T]he owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source *** or had undertaken extensive precautions to prevent vandalism or other intervening causes ***." *Perkinson v. Pollution Control Board*, 187 Ill. App. 3d 689, 694-95 (1989).

Here, the record demonstrates that copious amounts of litter had been dumped on the site. The exhibits illustrate that everything from used appliances and tires to general trash had been dumped on the site. While the defendant did remove some general refuse and put up a cable across the entrance to the road dividing where the two ranges once stood, the record also indicates that much of this litter remains. Furthermore, the defendant's remedial efforts after receiving the notice of violation does not negate the fact that the open dumping of litter had occurred on the site and that much of this litter still remains on the site. It is undisputed that the defendant owned and controlled the site, and under well-established Illinois law, this is sufficient to support a finding of a violation of the Act. *Perkinson*, 187 Ill. App. 3d at 694-95.

IV. Was the Defendant Unfairly Surprised by Being Ordered to Remediate the Site?

The defendant's last contention is that because in its prayer for relief the State failed to specifically allege and request the remediation of the site, that relief should not have been granted and the defendant was unfairly surprised as a result thereof. The State counters that the complaint's reference to "enjoining further violations" encompasses corrective action and that at a minimum the complaint's reference to "other and further relief" encompasses corrective action, thereby putting the defendant on notice that he could be required to clean up the site.

Section 2-604 of the Civil Practice Law provides that "the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise" (735 ILCS 5/2-604 (West 2008)). "It is settled that the purpose of requiring specific prayers for relief in a complaint is to inform the defendant of the nature of the plaintiff's claim and the extent of damages sought so that the defendant may prepare to meet the demand or permit a default to be taken against him." *Rauscher v. Albert*, 145 Ill. App. 3d 40, 43 (1986).

Here, the State's prayer for relief, the history of this litigation, and the IEPA's past dealings with the defendant leading up to this litigation were sufficient to put the defendant on notice that the State was seeking to have the site cleaned up. Furthermore, the defendant has failed to show, even if he was surprised by the relief granted, how he was prejudiced thereby.

In the State's prayer for relief, the State requested, *inter alia*, that the court permanently enjoin the defendant from further violation of the Act and to "[g]rant such other and further relief as the [c]ourt deems appropriate." By the State requesting that the defendant be permanently enjoined from further violation of the Act, the defendant should have been put on notice that the State was seeking to have the site cleaned up. This is true

because in order for the defendant to no longer be in violation of the Act, he would have to clean up the waste that was on his site in violation of the Act, which he has not done. Moreover, by requesting "such other and further relief as the [c]ourt deems appropriate," the defendant was given further notice of the possibility that the court might order the defendant to clean up the site. See *Gleicher, Friberg & Associates, M.D., S.C. v. University of Health Sciences, the Chicago Medical School*, 224 Ill. App. 3d 77, 87-88 (1991) (rejecting the defendant's contention that the injunctive relief awarded was improper where damages only were sought in the prayer for relief because the plaintiff's prayer for relief also sought "such other and further relief as shall be just" and the defendant was not unduly surprised or prejudiced). This is especially true considering that since the IEPA began working with the defendant in 2000 to remove the boiler room and the transite panels on the south side of Washington Street, the goal has been to clean up the property. In fact, the IEPA violation notice dated January 14, 2002, ordered the defendant to remove all waste from the site. Additionally, in the State's memorandum of law and argument in support of its motion for a summary judgment, the State sought, *inter alia*, the following relief: "injunctive relief by ordering the Defendant to promptly and properly remediate the site or an order requiring the Defendant to pay for the required remediation."

Moreover, even if we were to find that the defendant was unfairly surprised by being ordered to clean up the property, the defendant has failed to show how he was prejudiced thereby. In fact, the defendant's only contention with regard to prejudice is that had the defendant known that the State was seeking a mandatory injunction to clean up the property, he "might have proceeded very differently if the state's true intention in pursuing this litigation had been properly disclosed to him." The defendant has failed, however, to explain how he would have proceeded differently and, if he had done so, how the result would have been different. See 735 ILCS 5/2-604 (West 2008) (safeguarding against "prejudice");

County of Cook v. Patka, 85 Ill. App. 3d 5, 15 (1980) (finding it unfair to seek the relief against the defendant without prior notice but refusing to reverse where prejudice was not shown). Here, while the State should have more specifically set forth its prayer for mandatory injunctive relief in its complaint, the record makes clear that the defendant knew that the State was seeking to have the site cleaned up, and the defendant has failed to show how he was prejudiced, even if he was surprised, an argument that is belied by the record.

CONCLUSION

We conclude that the defendant caused or allowed the open dumping of waste in violation of the Act and that the circuit's court order requiring the defendant to clean up the site was not prejudicially surprising. Accordingly, we affirm the judgment of the circuit court.

Affirmed.