

**STATE OF ALABAMA  
COURT OF CIVIL APPEALS**

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**Oral Argument Docket for November 1, 2017**

**9:30 a.m.**

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**2160598** Anthony Keith, Ronald C. Smith, Esther Calhoun, William T. Gipson, and LaTonya Gipson v. Lance R. LeFleur and Alabama Department of Environmental Management (Appeal from Montgomery Circuit Court: CV-17-900021)

**Appellant / Petitioner**

David Alan Ludder

**Appellee / Respondent**

Paul Christian Sasser, Jr  
Steven Shawn Sibley

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**PLEASE NOTE:**

Counsel are advised that members of the Court have read all briefs prior to oral argument and will be familiar with the facts as stated in the briefs.

All attorneys who participate in the argument of this case should report to the Clerk of the Court of Civil Appeals in the Samford Wright Center Auditorium on the campus of Samford University, 800 Lakeshore Drive, Birmingham, Alabama 35229, 30 minutes before call of the docket and indicate their appearance in the case.

*Rebecca C. Oates*

**Rebecca C. Oates  
Clerk, Court of Civil Appeals**

*Keith v. LeFleur*

Alabama Court of Civil Appeals  
Christian Feldman\*

Plaintiffs<sup>1</sup> filed this case on January 9, 2017 against Lance R. LeFleur (the “Director”) in his capacity as the Director of the Alabama Department of Environmental Management (“ADEM”).<sup>2</sup> Plaintiffs sought declaratory judgment “[as] several ‘rules’ and policies adopted or implemented by the Director [were] invalid. . . .”<sup>3</sup> Specifically, they claim to suffer discriminatory effects due to actions<sup>4</sup> taken by the ADEM.<sup>5</sup> Defendants subsequently filed a motion to dismiss for lack of subject matter jurisdiction; the Circuit Court of Montgomery County granted the Motion to Dismiss without issuing an opinion.<sup>6</sup> This dismissal gave rise to the present appeal.

Plaintiffs filed their Complaint claiming injuries due to the ADEM’s grant of permits for two landfills close to Plaintiffs’ homes. Plaintiffs allege injuries to their legally cognizable interests granted by various statutory authorities, including the Civil Rights Act of 1964. Specifically, they allege that the ADEM receives federal funding from the U.S. Environmental Protection Agency (“EPA”) and as such are not permitted to “use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex. . . .”<sup>7</sup> Further, recipients of the funding are required to implement “grievance procedures that assure the prompt and fair resolution of complaints” for alleged violations.<sup>8</sup> Plaintiffs note that the ADEM implemented these policies in “Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.”<sup>9</sup> The crux of their action contends that these “grievance procedures” were implemented incorrectly, and thus the Plaintiffs’ legal interests in valid administrative procedures have been violated.

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<sup>1</sup> Plaintiffs are Anthony Keith, Ronald C. Smith, Esther Calhoun, William T. Gipson, and Latonya J. Gipson.

<sup>2</sup> Principal Brief of Appellants at 1, *Keith v. LeFleur*, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> In particular, these actions are “the issuance of permits or other approvals that allow the generation of offensive odors and disease vectors . . . by regulated facilities that invade Plaintiffs’ properties. . . .” *Id.* at 2.

<sup>5</sup> Principal Brief of Appellants at 1, *Keith v. LeFleur*, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>6</sup> *Id.* The Motion to Dismiss was filed pursuant to Alabama Rules of Civil Procedure 12(b)(1). *Id.*; see Ala. R. Civ. P. 12(b)(1).

<sup>7</sup> Complaint at ¶12, *Keith v. LeFleur*, No. CV- 2016-900939, (Jul. 13, 2016). A later Amended Complaint was filed on January 9, 2017 for which the allegations and statements of fact were the same. Principal Brief of Appellants at 1 n.2, *Keith v. LeFleur*, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>8</sup> Complaint at ¶13, *Keith v. LeFleur*, No. CV- 2016-900939 (Jul. 13, 2016).

<sup>9</sup> *Id.* at ¶16. This was adopted in October of 2004. *Id.*

In their six-count Complaint, Plaintiffs made a number of allegations. These include claims that: (1) the “grievance procedures”<sup>10</sup> were adopted without the agency providing notice and an opportunity to be heard at a public hearing;<sup>11</sup> (2) the Director exceeded his statutory authority to adopt any such “rules” or “environmental policies”;<sup>12</sup> (3) the ADEM exceeded its statutory authority to adopt such “rules”;<sup>13</sup> and (4) that the ADEM’s allowance of “alternative cover material” violated the Solid Wastes and Recyclable Materials Management Act which caused damages to Plaintiffs.<sup>14</sup>

Defendants LeFleur, and the ADEM, moved to dismiss, claiming there was no alleged “justiciable controversy.”<sup>15</sup> In particular, Defendants claimed that Counts I – V should be dismissed for failure to plead a concrete injury to a cognizable legally protected interest.<sup>16</sup> Further, Defendants argued Count VI should be dismissed, as it “was really a disguised attempt to challenge conditions of specific landfill permit and thereby improperly bypass the administrative appeals process.”<sup>17</sup> Finally, Defendant ADEM asserted sovereign immunity.<sup>18</sup>

### Issues

On appeal, the Alabama Court of Civil Appeals is addressing three primary issues: (1) does the trial court lack subject matter jurisdiction over Counts I – V of the Complaint for failure to plead allegations necessary to establish standing; (2) does the trial court lack subject-matter jurisdiction over Count VI based on the doctrine of

<sup>10</sup> Memorandum 108

<sup>11</sup> Specifically, the Plaintiffs aver in Counts I and II that these “grievance procedures” meet the definition of a “rule” as defined by the Alabama Code. *Id.* at 5. Furthermore, according to the Ala. Code § 41-22-5(d) no “rule” can be implemented without notice, and an opportunity to be heard. *Id.* Due to failure to provide notice the grievance procedures are invalid. *Id.* As much, the Plaintiffs allege that they have a legally recognized interest in filing administrative complaints protected under the Civil Rights Act of 1964. *Id.* at 7-8. The failure to comply with the notice requirement in an interference and invasion of their legally cognizable rights. *Id.* at 8.

<sup>12</sup> In Count III and IV, Plaintiffs aver that Defendant LeFleur, acting in his capacity as Director of the ADEM, overstepped his statutory authority in adopting Memorandum 108. Principal Brief of Appellants at 10. As such, they aver that the procedures are invalid. *Id.* They aver that failure to adopt valid procedures has interfered with their legal right to file administrative complaints of discrimination, or “obtain[] valid administrative resolutions.” *Id.* Because of this, Plaintiffs maintain that they have been caused to suffer discriminatory and adverse effects in subjecting them to obnoxious odors and disease vectors generated from the regulated landfills permitted by the ADEM. *Id.* at 11.

<sup>13</sup> In Count V, Plaintiffs make similar allegations described more thoroughly in note 12, *supra*. However, this time against the ADEM directly, as opposed to against Defendant LeFleur as Director.

<sup>14</sup> See, Principal Brief of Appellants at 5-21, *Keith v. LeFleur*, No. 2160598 (Ala. Civ. App. Jun. 1, 2017). More specifically, in Count VI Plaintiffs maintain that the ADEM’s issuance of regulations pursuant to certain Admin Codes, allow landfills to use “alternative cover materials in lieu of earth for a periodic cover of solid waste at landfills. *Id.* at 19. This, they claim, is a direct violation of the Solid Wastes and Recyclable Materials Management Act. *Id.* Due to this, the ADEM approved these “alternative cover materials” for use at the two landfills near Plaintiffs’ properties. *Id.* at 19-20. According to Plaintiffs, if the solid waste had been covered by earth, as is required by the Solid Wastes Act, then they would not be subjected to offensive odors and disease vectors. *Id.* Thus they request Declaratory and Injunctive Relief.

<sup>15</sup> Brief of Appellees at 1–2, *Keith v. LeFluer*, No. 2160598, (Ala. Civ. App. Jun. 29, 2017).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 1–2.

<sup>18</sup> *Id.*

exhaustion of administrative remedies; and (3) does the trial court lack subject matter jurisdiction over the ADEM due to sovereign immunity?

### Plaintiffs' Arguments

Plaintiffs argue that their Complaint contained “sufficient allegations to satisfy the constitutional requirements for standing . . . [and] [d]ismissal of Plaintiffs’ Complaint . . . is not warranted by the facts.”<sup>19</sup> Plaintiffs’ standing argument is three-fold. They maintain that they plead sufficient facts to establish constitutional standing, standing for the Alabama Administrative Procedure Act, and standing under the Declaratory Judgment Act.<sup>20</sup> In this argument Plaintiffs address each individual count and detail how the essential elements of standing are met. Plaintiffs also contend that they had a legal interest in presenting data prior to the implementation of the “grievance procedures” and that they were denied this right when the procedures were implemented without notice.<sup>21</sup> They further maintain that they are victims of discriminatory action by the agency, i.e. the ADEM’s remittance of regulated facilities in close proximity to Plaintiffs’ homes which subjects Plaintiffs and Plaintiffs’ property to odors and disease vectors, as well as diminishes the value of their homes. Finally, they maintain that they had various statutory and regulatory rights granted to them, which the ADEM violated in various manners in their implementation of administrative procedures and guidelines.<sup>22</sup> A favorable judicial decision would adequately redress their injuries as “declaratory and injunctive relief” allows “Plaintiffs to seek and obtain valid administrative resolutions of their Complaint that Department actions have resulted in discrimination.”<sup>23</sup>

Plaintiffs additionally argue that Count VI should not have been precluded based on the doctrine of exhaustion of administrative remedies.<sup>24</sup> According to Plaintiffs, “Count VI . . . seeks a declaration that Ala. Admin. Code rs. 335-13-4-.15(2), 335-13-4-.22(1) (a)(1), and 335-13-4-.23(1) (a)1” are invalid.<sup>25</sup> Moreover, they argue that they are challenging the ADEM’s regulations which allows exceptions to other statutory requirement<sup>26</sup>; and are therefore contrary to law.<sup>27</sup> Due to this, the doctrine of exhaustion of administrative remedies does not apply.<sup>28</sup> This is so because this doctrine is a “judicially imposed prudential limitation” not a question of subject-matter jurisdiction.<sup>29</sup> That is to say, when the issue is substantive, such as a matter of law, rather than procedural, the doctrine does not apply.<sup>30</sup> Plaintiffs contend, in this instance, the question is one of statutory interpretation determining the validity of certain sections of the

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<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 23.

<sup>21</sup> Principal Brief of Appellants at 32, Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>22</sup> *See generally, id.* at 31-58.

<sup>23</sup> *Id.* at 53.

<sup>24</sup> Principal Brief of Appellants at 63, Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> Specifically, the requirement to cover solid waste landfills periodically with earth.

<sup>27</sup> *Id.* at 64.

<sup>28</sup> Principal Brief of Appellants at 64, Keith v. LeFluer, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Alabama Administrative Code -- which is purely a question of law.<sup>31</sup> Therefore, it is not barred. Plaintiffs additionally argue that Alabama precedent specifically holds that a declaratory judgment challenging the validity of a regulation is not subject to the requirement to exhaust all administrative remedies.<sup>32</sup> Contrary to Defendants' argument, Plaintiffs are not contesting an administrative decision; they are contesting the administrative regulation itself.<sup>33</sup> Therefore, they claim dismissal was not warranted.

In regards to the third and final issue presented upon appeal, Plaintiffs' concede that the ADEM may indeed have sovereign immunity.<sup>34</sup> However, they note that the agency was added pursuant to Ala. Code § 41-22-10.<sup>35</sup> Nevertheless, citing to two cases, they note that there is conflicting precedent which has never been explicitly overruled.<sup>36</sup> They "submit the issue to the Court for decision as to whether the more recent judicial decisions . . . have implicitly overruled [conflicting] holding[s]" and thus granted immunity to State agencies.<sup>37</sup>

#### Defendants' Arguments

Conversely, Defendants counter these three particular arguments. They argue: (1) the Plaintiffs lack standing for their challenge to the ADEM Title VI Guidance Memoranda; (2) Plaintiffs' challenge to the ADEM's allowance of "alternative cover materials" is invalid because they failed to utilize the administrative appeals process; and (3) that the ADEM is not a valid defendant as they are protected by sovereign immunity.<sup>38</sup>

Defendants' first argument maintains, "Plaintiffs must show an actual concrete and particularized injury in fact – an invasion of a legally protected interest, a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision."<sup>39</sup> First, Defendants argue that the injuries Plaintiffs complain of are not fairly traceable to the opposed "grievance procedures."<sup>40</sup> Indeed, they argue that there is no causal connection between the injuries and any of the alleged wrongdoing. First, Defendants argue that Plaintiffs' injuries of

<sup>31</sup> *Id.* at 65.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Principal Brief of Appellants at 67, *Keith v. LeFleur*, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>35</sup> *Id.* (citing ALA. CODE § 41-22-10). The statute states that "The agency may be [a named] party" if the regulation at issue "interferes with or impairs . . . the legal rights and privileges of the plaintiff." *See* ALA. CODE § 41-22-10 (West 2017).

<sup>36</sup> *Id.* at 68. In one case, the Alabama Court of Civil Appeals held that the Alabama Constitution does not bar a plaintiff's claim for injunctive or declaratory relief against a state agency under Ala. Code §41-22-10. *Ex Parte Ala. State Bd. of Chiropractic Exam'rs*, 11 So. 3d 221, 226 (Ala. Civ. App. 2007). In the second case, the Alabama Court of Civil Appeals permitted plaintiffs to join a state agency in an action that was filed pursuant to Ala. Code §41-22-10 because the agency was the body responsible for promulgating and enforcing the rule. *Prime Lithotripter Operations, Inc. v. LithoMedTech of Ala., LLC*, 855 So. 2d 1085, 1092 (Ala. Civ. App. 2001).

<sup>37</sup> Principal Brief of Appellants at 69.

<sup>38</sup> *See generally*, Brief of Appellees, *Keith v. LeFleur*, No. 2160598 (Ala. Ct. Civ. App. Jun. 29, 2017).

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

being exposed to offensive odors and disease vectors and racial discrimination are not caused by the adoption of the grievance procedures.<sup>41</sup> Secondly, failure to provide notice of adoption of the grievance procedures did not interfere with their right to submit views challenging it.<sup>42</sup> This is so because there is no “concrete interest” that is interfered with, only a procedural interest.<sup>43</sup> Finally, they state that Plaintiffs suffer no injury to their interests created by 42 U.S.C. §2000-d-1.<sup>44</sup> Indeed, (1) there is no private right granted by that regulation, and (2) the claimed injury is due to the invalidity of the “grievance procedures” – which their very action is seeking to have declared invalid.<sup>45</sup> That is, they do not allege that the substance of the Guidance Memoranda caused them any injury.<sup>46</sup>

Defendants’ second argument concerns only Count VI of Plaintiffs’ Complaint. In Count VI, Plaintiffs claimed that they were subjected to offensive odors and disease vectors because of the ADEM’s authorization of “alternative cover materials.”<sup>47</sup> Specifically, Plaintiffs maintain that “alternative cover materials” are expressly prohibited by the Solid Wastes and Recyclable Materials Management Act, which requires earth covers of solid waste at landfills.<sup>48</sup> Defendants argue that, despite Plaintiffs’ wording, they are challenging the operating conditions of the landfills that have been approved by the ADEM.<sup>49</sup> Thus, Defendants argue, the Complaint was prematurely filed in the Circuit Court. Rather, in order to challenge a permit decision by the ADEM, it must go through the proper statutory procedures set out by Ala. Code § 22-22A-7.<sup>50</sup> That is, [w]hen a special statutory procedure has been provided as an exclusive method of review for a particular type of case, no other statutory review is available.”<sup>51</sup> Defendants contend that Plaintiffs are attempting to use a declaratory judgment action as a substitute for the mandated procedural framework.<sup>52</sup> Therefore, the count was correctly dismissed.

Defendants’ final argument is that the ADEM is not a proper defendant as they are protected by sovereign immunity under Section 14 of the Alabama Constitution.<sup>53</sup> The provision provides that “the State of Alabama shall never be made a defendant in any court of law or equity.”<sup>54</sup> This includes State Agencies such as the ADEM.<sup>55</sup> Defendants argue that under Alabama precedent this immunity is absolute and therefore the claims brought against the ADEM were properly denied.

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<sup>41</sup> *Id.* at 9-10.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.*

<sup>44</sup> Brief of Appellees, Keith v. LeFleur, No. 2160958 (Ala. Civ. App. Jun. 29, 2017).

<sup>45</sup> *Id.* at 13.

<sup>46</sup> *Id.*

<sup>47</sup> Principal Brief of Appellants at 19, Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jun. 1, 2017).

<sup>48</sup> *Id.* at 19.

<sup>49</sup> Brief of Appellees at 14, Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jun. 29, 2017).

<sup>50</sup> *Id.* at 14-15.

<sup>51</sup> *Id.* at 15 (quoting City of Graysville v. Glenn, 46 So. 3d 925, 931 (Ala. 2010)).

<sup>52</sup> *Id.*

<sup>53</sup> Brief of Appellees at 16, Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jun. 29, 2017).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Oral Arguments

Oral arguments in the case of *Keith v. LeFleur* will be held before the Alabama Court of Civil Appeals on Wednesday, November 1, 2017. The event will take place at the Leslie S. Wright Center on the campus of Samford University. Oral arguments will begin at 9:00am and last until 12:00pm. The event, hosted by Cumberland School of Law, the Birmingham Bar Foundation, and Appellate Courts of Alabama, is free and open to the public. Cumberland Law Review is privileged to publish these case summaries in anticipation of the oral arguments and will also report on the appellate courts' decisions following oral arguments.