FOURTH DIVISION
May 15, 2014

No. 1-13-1253

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE VILLAGE OF HILLSIDE, ILLINOIS, an Illinois Home Rule Municipal Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	06 CH 05718
CONGRESS DEVELOPMENT COMPANY,	)	Honorable Sophia Hall
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not commit a willful and deliberate violation of the terms of an agreed order that required defendant to pay the costs of the plaintiff-village for monitoring the closure of defendant's landfill when defendant stopped the payments after the landfill was closed; therefore the trial court's order denying plaintiff's motion for a rule to show cause why defendant should not be held in contempt for failure to comply with the order is affirmed.

¶ 2 In February 2011, plaintiff, the Village of Hillside, an Illinois Home Rule Municipal Corporation (Hillside or the Village), filed a motion for a rule to show cause in the circuit court of Cook County seeking an order directing defendant, Congress Development Company, a general partnership (Congress or CDC) to show cause why it should not be held in contempt for failing to comply with a court order requiring defendant to reimburse plaintiff's expenses "for continued oversight, inspection and consultation related to" the closure of defendant's landfill in Hillside. Plaintiff's motion also sought an order finding CDC in contempt for failing to comply with the reimbursement requirement in the court order, an order for CDC to resume payment and to pay outstanding reimbursement amounts, and attorney fees and costs.

¶ 3 Following an evidentiary hearing, the trial court denied plaintiff's motion for a rule to show cause. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Defendant began operating the landfill on the site of a former rock quarry in Hillside in 1980. The landfill site is 75.1 acres but the permitted waste boundary is approximately 55 acres. In March 2006, plaintiff filed a complaint against defendant to abate a nuisance. The complaint alleged, in part, that Congress, as owner and operator of the landfill, caused or allowed the release of noxious odors into the air that have caused residents and employees of businesses in Hillside to become ill in such a way that it interferes with their welfare and livelihood, endangers the public health, and results in annoyance or discomfort. The complaint alleged Congress's conduct violated Hillside ordinances and created a common law public nuisance. Five days later, the circuit court of Cook County entered an agreed interim preliminary injunction and order on

plaintiff's complaint. In March 2007 the trial court entered an agreed order for emergency engineered closure (closure order), which superseded and replaced the agreed interim preliminary injunction and order.

¶ 6 The closure order required Congress to perform enumerated tasks with regard to the landfill. The order provided a final deadline to complete all work and close the entire facility by December 31, 2008. The State of Illinois filed a separate cause of action against Congress (hereinafter state's case), resulting in an August 2010 consent order (state's order). The closure order at issue in this case contained the following provision in paragraph 29, which forms the basis of Hillside's motion for rule to show cause:

> "CDC shall reimburse the Village for reasonable out-of-pocket costs and expenses incurred after the date of entry of this Order for consultants, experts, Village staff and Village emergency personnel needed for continued oversight, inspection and consultation related to the subject matter of this Order. CDC shall remit payment to the Village within 30 days of receipt of invoices from the Village."

¶ 7 The landfill was closed on December 31, 2008. On appeal, plaintiff argues CDC has not yet fully complied with the closure order because it has not completed the tasks required by paragraphs 10 and 12 of the closure order. Congress determined that it had performed all of the tasks enumerated in the closure order by the end of 2010. On February 2, 2011, defendant sent notice to plaintiff that Congress would cease making reimbursement payments required under paragraph 29 of the closure order effective January 2, 2011. On April 20, 2011, Hillside filed its

revised motion for rule to show cause why defendant should not be held in contempt of court for failure to make the payments required by paragraph 29. Plaintiff argued that CDC has not fully complied with the subject matter of the closure order, therefore Hillside must still provide oversight, inspection and consultation related to closure of the landfill, and, under the consent order, CDC is still responsible for plaintiff's expenses. Defendants asserted that the landfill is now closed, Congress has completed everything required under the closure order, and there is, accordingly, no further requirement for Congress to pay the fees of the Village's consultants in connection with oversight of the requirements of that order.

¶ 8 a. Paragraph 10 of the Closure Order

¶ 9 Paragraph 10 of the closure order states the requirements for the final cover system at the landfill. The parties alternatively disputed whether the (i) design of the final cover system adequately addressed the conditions noted in the closure order, whether the (ii) construction of the final cover system addressed the conditions, or whether the (iii) design and construction of the final cover system adequately addressed the conditions.

¶ 10 i. Design

¶ 11 The only disputed element of inadequate design is whether the design of the landfill cover system adequately addressed having filled waste in a deep, wet quarry environment while achieving the closure and postclosure performance standards in 35 IAC Parts 811 and 812. Plaintiff's expert, David Hendron, opined that CDC has not complied with this requirement. The basis of his opinion was "the continued presence of odor around the landfill which indicates that systems to collect and extract the gas are not functioning. Defendant's expert, Jesse Paul Varsho,

opined Congress had designed the landfill's final cover system as required by the closure order. The basis of Varsho's opinion that Congress had designed the landfill's final cover system in a manner that addressed the unusual features of having filled waste in a deep, wet, quarry environment while achieving the closure and post-closure performance standards in chapter 35 of the Illinois Administrative Code, parts 811 and 812, was that:

> "The final cover design along with the gas collection and control system design included multiple redundant environmental control systems to address a wet quarry environment, which included a slip liner system, a robust settlement monitoring plan, and a comprehensive O and M maintenance program."

¶ 12 ii. Construction

¶ 13 The disputed requirement of the closure order related solely to the construction of the final cover system was the requirement to construct the final cover system to address the generation of substantial volumes of high temperature, pressurized landfill gas. Plaintiff's expert Hendron opined that CDC's systems do not fulfill the commitment to address the generation of substantial volumes of high temperature pressurized landfill gas. The basis of that opinion is that there are "still huge amounts of high volumes of high temperature and pressurized landfill gas that remain in the landfill." Defendant's expert Varsho opined that the construction of the cover addresses the generation of substantial volumes of high temperature pressurized landfill gas

because the materials used (steel instead of plastic) for the gas collection and control system (GCCS), and the number of gas collection features (redundancy in the vertical gas extraction wells, the horizontal gas collection system, the perimeter slant well system, and the perimeter toe trench system), "all serve as ways to address the pressurized landfill gas."

¶ 14 On cross-examination, Hendron testified that he did not think that the closure order has a specification for high temperatures and pressures to be reduced, but they must be contained. He testified the present systems are not containing the effects of the high pressures and temperatures. Hendron testified he has twice personally observed physical manifestations of the conditions described in paragraph 10 of the closure order in approximately 100 visits. One was a November 2009 leachate geyser, which Hendron testified was "a good visual demonstration of how much pressure was in the bowels of this landfill." But on cross-examination, Hendron testified the well that produced the geyser was not part of the gas collection and control system constructed during 2008, but was an old well that predated the wells that were put in more recently. The geyser resulted from work being done on the site. Hendron characterized that work as poorly planned and poorly executed. There have been no further geyser events, and well replacement, installation, and maintenance has been going on since that time. Nonetheless, Hendron believes the subsurface pressure conditions that were present in November 2009 were still present when he testified.

¶ 15 iii. Design and Construction

¶ 16 The disputed requirements of the closure order related to the design *and* construction of the final cover system were the requirements to design and construct the final cover system to

address leachate and condensate, landfill subsidence and settlement, surrounding piezometric conditions, and potential migration pathways to and from the landfill. The parties also disputed whether placement of the final cover was achieved by December 31, 2008, as required by paragraph 10.

¶ 17 A. Leachate

¶ 18 Hendron opined Congress has not met the requirement to design and construct the final cover system to address leachate and condensate because leachate levels remain above groundwater levels, leachate levels have resulted in watered out horizontal and vertical gas collection wells, and "as far as the condensate is concerned, the settlement of the gas line piping they included in the original composite cover system have settled so much that they are not operational." Hendron testified that soil is still being added to achieve the planned grade of a minimum 5% slope, which would "promote run off of leachate and condensate and avoid watering out of the system," but it is not done. Hendron testified that Weaver Boos, an engineering firm employed by the landfill, prepared an accelerated closure plan that called for land form grades of 10%, which are steeper than the original design of the landfill, but that plan intended to achieve settlement back to the original design grades for this landfill of 5%. Hendron testified he did not believe the landfill had achieved a 10% slope in the western section of the landfill--the deepest and most problematic section of the landfill--and fill is continuing to be added.

¶ 19 Varsho agreed that a high leachate level can impede the ability of a vertical gas collection well to draw gas. Varsho opined that Congress submitted a design and construction of the final

cover system in a way that addressed leachate. The basis of his opinion was the elimination of storm water entering into the waste mass, which then reduced the volume of leachate within the landfill. He also opined that Congress designed the construction of the final cover system to address condensate because the gas collection and control system was designed such that Congress had the ability to remove gas condensate that would collect in critical low points within the gas collection and control system piping.

¶ 20 On cross-examination Hendron testified that the current system is extracting leachate using the leachate extraction wells and some gas wells, and there is "some condensate and other sources of fluids going through there," but his "judgment right now is that a lot of the leachate extraction wells are not that productive in terms of extracting leachate from the landfill, and particularly leachate extraction wells in the western third." As of December 31, 2010, Varsho agreed that his report of the groundwater level surrounding the landfill and the leachate level in the landfill meant that on average leachate in the landfill was 12 feet above groundwater around the landfill, and across the entire 55 acres of the landfill, the average leachate level is approximately 12 feet above the surrounding groundwater level.

¶ 21 Hendron's latest analysis at the time of the hearing showed that leachate levels in the western third had dropped possibly 10 feet. Hendron also described the accelerated closure plan to include a cover that minimized the development of leachate by providing an impermeable cover system and multifaceted gas collection system. Varsho testified that as of August 2012, the average level of leachate in the landfill as a whole was lower than the average level of groundwater surrounding the landfill site, and the landfill has facilities to remove leachate from

its waste. Approximately 100 thousand gallons of leachate were removed from the landfill every day between 2009 and 2012.

¶ 22 B. Subsidence

¶ 23 Hendron opined Congress has not met the requirement to design and construct the final cover to address substantial landfill subsidence and settlement, and unstable subsurface conditions. Hendron testified that to the extent the cover system is constructed, the design failed to consider the amount of settlement that was going to occur at this site and still has not considered that amount of settlement. He testified that CDC is "still *** providing additional soil material to account for the substantial landfill subsidence and settlement that went on and will continue." Varsho testified that Congress designed construction of the final cover system to address substantial landfill subsidence and settlement, and unstable surface conditions. Varsho opined it did so by "using different design elements such as a slip liner system and a composite liner system that utilized both man-made products and natural products such as clay and soil."

¶ 24 Varsho agreed that settlement could also be a factor in the ability of the GCCS to draw gas. Some areas of the western third of the landfill have settled over 50 feet. Varsho testified that in September 2007, the western section was settling at a rate of 1.446 feet per month. As of June 2012, the western section was settling at a rate of 0.371 feet (between 4 and 5 inches) per month. During the same time period the eastern portion of the landfill settled at a rate of around 3 inches per month. Varsho testified that the rate of settlement across the western section has declined in the last five years. Varsho testified the trend of settlement rates is a decreasing trend through June 2011.

¶ 25 C. Piezometric Conditions

¶ 26 Hendron's opinion as to whether the design and construction properly addressed the surrounding piezometric conditions was that the design "has not yet fully considered the surrounding piezometric conditions" because the leachate extraction system has not provided the inward gradient planned in the original design. The construction has not fully taken the surrounding piezometric conditions into account, in Hendron's opinion, because the piezometric levels and the leachate levels as of August 2012 still show that there is an outward gradient at the site. Hendron testified that the design and construction of the cover system has not yet been successful to create the conditions to prevent migration from the landfill. He based that opinion on the fact that a groundwater study "shows that it has not been as yet met." Varsho testified that as of the end of 2010, only 10 to 15% of the landfill had achieved a 20-foot inward gradient. In September 2011, at his deposition, Varsho testified that 30% of the landfill met the 20-foot inward gradient condition. Nonetheless, Varsho opined Congress designed and constructed the final cover system in a way that addresses surrounding piezometric conditions, and potential migration pathways to and from the landfill caused by surrounding geologic conditions.

¶ 27 D. Placement of Final Cover

¶ 28 Hendron opined that CDC did not complete the work for certification of closure of the entire 55-acre site by December 31, 2008 as required by the closure order. Based on Hendron's review of the reports, his discussions with CDC, and his visits to the site before and after December 31, 2008, Hendron opined that Congress did not complete the installation of the final cover for the entire site by the required date. He also testified that at the time of his testimony,

CDC had still not completed installation of the final cover over the entire landfill in accordance with the performance standards set out in the Weaver Boos design. Varsho opined that Congress installed the final cover for the entire 55-acre landfill and submitted for certification of closure to IEPA on or before December 31, 2008.

¶ 29 b. Paragraph 12 of the Closure Order

¶ 30 The parties disputed whether (i) CDC filled the landfill to authorized grades, (ii) the gas collection and control system is in place and functioning effectively, and (iii) the final cover is in place on the western section of the landfill, all as required by paragraph 12 of the closure order.

¶ 31 i. Fill to Grade

¶ 32 Hendron testified that, based on the August 2012 monthly report, the landfill has not yet been filled to authorized grades. Varsho testified that he personally observed that Congress filled to authorized grades from west to east, in addition to reviewing survey data, and testified that it was filled up to the authorized grades.

¶ 33 ii. Gas Collection and Control System

¶ 34 Hendron opined that the gas collection and control system that was placed is not functioning. Hendron testified that very little methane is being pulled from the western section. He testified that the August 2012 monthly report shows that 30% of the vertical extraction wells in the western third have high oxygen content. Hendron testified that "the only way that you can get an oxygen content more than five per cent would be to have a break somewhere in the *** well, unless of course, you're actually drawing air from that well down through the cover." He also testified that the August 2012 monthly report shows that all of the extraction points for the

horizontal gas collection system in the western section have oxygen contents above 10%."

¶ 35 When cross-examined, Varsho agreed that application of vacuum is "one of the key design parameters in a landfill gas management or collection system," but as of September 2011 there were gas wells at the landfill that were under positive pressure. On re-direct examination, Varsho testified that the pressure in the gas collection and control system for the western section is monitored as a whole. Varsho testified that after September 30, 2007, the GCCS on the western section was under vacuum and was under vacuum at the time of the hearing. However, between 6 and 8 vertical gas collection wells on the western section were under positive pressure in September 2007. As of September 2012 that number was lower, but Varsho did not know the precise number. Varsho testified as follows:

> "Based on review of the operational data from the gas collection and control system such as gas flows, pressure distributions within gas collection conveyance piping, methane readings at the perimeter, methane probes, and surface emissions scans, essentially how much fugitive gas is coming through the final cover system, the gas collection control system is functioning effectively."

¶ 36 iii. Final Cover Western Section

¶ 37 Hendron opined CDC had not achieved placement of final cover on the western section of the landfill by September 30, 2007, as required by the closure order based on reports he reviewed, his visits to the site, the fact that soil was still being placed in that area, and his

understanding that CDC is replacing the "temporary umbrella cover with a new umbrella cover." Varsho opined Congress installed the final cover system on the western section of the landfill no later than September 30, 2007, based on his personal observations of the cover system being installed and his review of engineering documentation signed and stamped by a professional engineer--including photo logs, conformance specifications, and daily summary reports--documenting that the final cover system was installed in the western section.

¶ 38 c. Trial Court's Ruling

¶ 39 On March 21, 2013, the trial court entered a final order and judgment. The court's final order and judgment incorporated the court's written decision and stated that defendant is not in indirect civil contempt of court and, accordingly, judgment is entered in favor of defendant and against plaintiff on the motion for rule to show cause.

¶ 40 This appeal followed.

¶ 41 ANALYSIS

¶ 42 1. Standard of Review

¶ 43 We first address the standard of review. Plaintiff asserts that the majority of the underlying facts are undisputed and, to that extent, the trial court's decision is subject to *de novo* review. "[T]he proper standard of review is dictated by the nature of the question presented to the trial court." *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1001 (2003). Here, the trial court was required to make factual findings. Accordingly, we will apply the standard of review applicable to contempt proceedings. Compare *Id*. We agree with the standards recently stated by this court on review of this type of proceeding:

> "Generally, civil contempt occurs when a party fails to do something ordered by the trial court, resulting in the loss of a benefit or advantage to the opposing party. [Citation.] Contempt that occurs outside the presence of the trial court is classified as indirect contempt. [Citation.] The existence of an order of the trial court and proof of willful disobedience of that order is essential to any finding of indirect civil contempt. [Citation.] The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. [Citation.] The burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order. [Citation.] Whether a party is guilty of indirect civil contempt is a question for the trial court, and its decision will not be disturbed on appeal unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion." (Internal quotation marks omitted.) *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20.

¶ 44 2. The Trial Court Did Not Impose an Incorrect Burden of Proof

¶ 45 We next address plaintiff's argument the trial court imposed an incorrect burden of proof. Plaintiff argues that the trial court erroneously imposed the burden on plaintiff to prove CDC's

violation was *not* excused, rather than requiring CDC to prove its "violation" *was* excused, and that plaintiff proved that CDC willfully violated the closure order. Plaintiff also argues that the trial court's finding that CDC's violation was excused was an abuse of discretion because the trial court erroneously failed to consider unrebutted evidence that CDC had not complied with several requirements of the closure order.

¶ 46 "A circuit court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. [Citations.]" (Internal quotation marks omitted.) *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 10. "A reviewing court should examine whether the trial court acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. [Citation.]" (Internal quotation marks omitted.) *In re Marriage of Levinson*, 2013 IL App (1st) 121696, ¶ 34. "[T]his court may affirm a trial court's judgment on any grounds which the record supports even if those grounds were not argued by the parties." *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74. "While this court will examine the record for the purpose of affirming a judgment, it will not do so for the purpose of reversing it ***. [Citation.]" (Internal quotation marks omitted.) *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 386 (1978).

¶ 47 In support of its argument, plaintiff asserts that because it is undisputed that CDC stopped payments without first seeking modification of the closure order or relief from the order in the court, then the trial court had only to determine whether CDC met its burden of proving that it had a valid excuse for stopping payments. Plaintiff argues that defendant's "excuse" was

that all operative requirements of the closure order had been satisfied. Plaintiff mischaracterizes the trial court's written decision to support its position and argues that the trial court acknowledged that CDC's assertion of full compliance was merely a defense to its violation of the court's order.

¶ 48 The court's written decision expressly (and correctly) finds that plaintiff must show that defendant's act was a willful violation, and that plaintiff can satisfy this burden by showing that the subject matter of the closure order had not been accomplished at the time CDC stopped payments. The trial court implicitly held that the closure order makes satisfaction of the requirements in the closure order the only condition precedent to stopping reimbursement payments under paragraph 29, not agreement of the parties or order of the court. For the following reasons, we agree. Plaintiff's argument mistakenly presumes that stoppage of the reimbursement payments under paragraph 29 of the closure order is a violation of the order absent agreement of the parties or order of the court. Consistently with this view, plaintiff's motion for a rule to show cause argued that the reimbursement requirement in paragraph 29 of the closure order "has no defined end date, nor does it allow for unilateral termination." The trial court's written decision is to the contrary.

¶ 49 The closure order is an agreed order. "An agreed order, also termed a consent order or a consent decree [citation], is not an adjudication of the parties' rights but, rather, a record of their private, contractual agreement [citation]." *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971 (2009). "[T]he rule for construction of decrees is that they should be construed as a whole, including consideration of other parts of the record, the pleadings and the issues." *Dunaway v.*

Storm, 30 Ill. App. 3d 880, 884 (1975). "[W]e interpret the agreed order at issue here *de novo*." *Bloomington Urological Associates, SC v. Scaglia*, 292 Ill. App. 3d 793, 798 (1997).

> "A Consent Decree is considered a contract between the parties and, accordingly, the law of contracts controls its interpretation. [Citation.] Like other contracts, consent decrees must be construed to give effect to the intention of the parties which, when there is no ambiguity in the terms, must be determined from the language of the consent decree alone. [Citation.] A term will be found to be ambiguous only if it is reasonably or fairly susceptible to more than one interpretation; a term or provision is not rendered ambiguous merely because the parties do not agree on its meaning or application." *Allied Asphalt Paving Co. v. Village of Hillside*, 314 Ill. App. 3d 138, 144 (2000). See also *Thompson v. Gordon*, 241 Ill. 2d 428, 443 (2011).

¶ 50 The language in the closure order is susceptible to only one reasonable interpretation. The plain language of paragraph 29 of the closure order, read as a whole, reflects the intent that when there will be no further activities "related to the subject matter of this Order," then the obligation to reimburse Hillside to monitor those activities will also cease. The substance of the closure order is to achieve defined goals related to closure of the Hillside landfill by certain dates. The closure order does not impose an ongoing obligation on CDC, but imposes deadlines for accomplishing explicit tasks. Other provisions in the closure order also reflect the parties'

intent that all of the requirements in the closure order have defined end dates. The closure order requires CDC to submit a permit application for a postclosure plan "[u]pon the achievement of or prior to final closure." The closure order does not impose an obligation on either party to request agreement or to seek a judgment that those requirements have been met before the reimbursement obligation is terminated. The closure order lists objective criteria by which to judge whether its requirements have been met.[1]

¶ 51 Further, the closure order provides a penalty for CDC's failure to "achieve any of the performance dates specified in this Order" if such default is not cured within 21 days of written notice to CDC. Plaintiff's construction of the closure order would put the power of that penalty in its own hands. If Hillside must agree to when performance is complete, it could simply withhold approval (and force CDC into court in its view) and enjoy a penalty.

¶ 52 Plaintiff's argument that the provision in paragraph 16, permitting either party to seek modification of the closure order is evidence that an agreement or determination by the court, that the requirements of the closure order have been met, is required before the reimbursement obligation is terminated is not persuasive. The achievement of the very purpose of the closure order would not be a modification of its terms. The language in paragraph 16 of the closure order expresses an intent that the parties may modify the order to the extent deadlines cannot be

[1] The closure order requires the submission of a permit modification application including a plan "to achieve the CDC Landfill's permitted final grade." The design of the cover system must address "the unusual features" of the site "while achieving the closure and post-closure performance standards in 35 IAC Parts 811 and 812." Further, the "control devices that may be deemed necessary for closure, shall be installed and operated in accordance with permits granted by Illinois EPA." The closure order also required CDC to "submit to Illinois EPA an application for certification of closure."

achieved, not to determine if and when the requirements are met.[2]

¶ 53 The language and purpose of the closure order is not consistent with the view that stopping reimbursement payments requires a modification of the closure order. The closure order only expressly requires CDC to give notice of completion to Hillside. Paragraph 27 states, in part: "CDC shall make necessary submittals to the Village to document progress and completion of the work required by this Order." Accordingly, we reject plaintiff's argument that the parties must agree that the requirements have been met or that a determination by the court is required before the reimbursement requirement can be terminated. If the parties had so intended, that intention could have been stated expressly. "A written contract is presumed to include all material terms agreed upon by the parties. [Citation.] *** A presumption exists against provisions that easily could have been included in the contract but were not." *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301-02 (2006). The closure order is not rendered ambiguous by plaintiff's contrary interpretation. The closure order does not expressly require that the work must be approved by Hillside before it may be deemed completed.[3] Based on the plain language of the closure order, it would be unreasonable to interpret the closure order to require Hillside's

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[2] "This Order may be modified by written agreement of the parties, or by further order of this Court for good cause shown. The Court shall make a presumption of good cause in the event a delay results from a *force majeure* event. For the purposes of this Order, *force majeure* is an event arising solely beyond the control of CDC *** that prevents the timely or complete performance of any of the requirements of this Order." (Paragraph 16)

[3] Plaintiff protests the relevance of IEPA permits or regulations or both. Based on the unambiguous language in the closure order, to which this court's analysis is limited (*Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (describing "four corners rule")) if any approval was required, it was required from IEPA.

agreement before its terms could be deemed satisfied. We will not so construe the closure order now. *Gordon*, 241 Ill. 2d at 449 ("a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented.").

¶ 54 Having construed the closure order in this manner, we hold that the trial court applied the correct burden of proof. CDC stopped reimbursement payments upon its belief the subject matter of the closure order had been achieved. Plaintiff had the burden to prove the requirements in the closure order had not been achieved, and, therefore, that defendant's act was a willful or contumacious violation of the court's order.

¶ 55 3. The Trial Court Did Not Abuse its Discretion in Finding that Plaintiff Failed to Prove, By a Preponderance of the Evidence, that CDC Did Not Satisfy the Disputed Requirements of the Closure Order

¶ 56 Plaintiff argues that it proved that CDC had not complied with several requirements of the closure order when CDC stopped payments.

¶ 57 Initially, we note that in addition to the points discussed herein, the parties also disagreed over the scope or effect of a settlement agreement modifying the provision in the closure order related to the receipt of solid waste, and whether CDC's operation of any impermeable geomembrane components is in accordance with specific IEPA permits. Plaintiff did not fully brief any issues with respect to either of those disagreements, nor do we find them germane to the arguments the parties did raise.

¶ 58 a. Paragraph 10 of the Closure Order

¶ 59 i. Design

¶ 60 The trial court found that 35 Ill. Admin. Code § 811.314(c) contains "the only specificity about the components of the final cover referenced in the Closure Order." The court held that plaintiff failed to prove by a preponderance of the evidence that "the presence of pipes and the nature of the soil cover did not satisfy the IEPA requirements." We note that the "features of having filled waste in a deep, wet quarry environment" are largely, but not exclusively, detailed in the closure order itself as the features the design and construction "shall address." Plaintiff has not argued that any design elements of the final cover system are insufficient to satisfy any identified IEPA regulations or any other features of this landfill other than those already specified in the closure order.

¶ 61 "Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) provides, in part, that '[p]oints not argued [in an opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.' " *Fink v. Banks*, 2013 IL App (1st) 122177, ¶ 14. By failing to present any argument regarding the failure of the design of the final cover system (1) to achieve the closure and postclosure performance standards in any identified IEPA regulations, or (2) to address any other "unusual" features of the landfill, plaintiff waived this issue.

¶ 62 ii. Construction

¶ 63 In this court, plaintiff argues that the trial court erred in holding that plaintiff failed to prove by a preponderance of the evidence that the cover system does not adequately address high temperature, pressurized landfill gas, leachate, and condensate, because those subsurface conditions are still present. The trial court did not abuse its discretion in its judgment in favor of

defendant on this element of the closure order. A reasonable person could take the view that plaintiff has failed to prove by a preponderance of the evidence that defendant has not complied with this requirement in the closure order. Nothing in the closure order says that CDC had to eliminate the high volumes of high pressure and high temperature landfill gas. The closure order says only that the design and construction of the final cover system must address those conditions. Thus, plaintiff's argument that it proved that CDC failed to adequately address those conditions because those conditions continue to exist must fail. The mere existence of the conditions the cover system had to address is irrelevant. The question is whether the design and construction of the system adequately addresses the conditions, not whether the conditions persist.

¶ 64 Plaintiff does not dispute that CDC constructed the cover system using steel instead of plastic for the gas collection and control system, or with the redundancies about which Varsho testified, to address the high-temperature pressurized landfill gas. Plaintiff's expert admitted there have been no further "physical manifestations" of the substantial pressure in the landfill. "A proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005). Based on the evidence, a reasonable trier of fact could find that plaintiff did not prove that it is more probably true that the construction of the final cover system does not adequately address high-temperature pressurized landfill gas. Accordingly, we find no abuse of discretion. *Payne*, 2013 IL App (1st) 113519, ¶ 10.

¶ 65 iii. Design and Construction

¶ 66 Again, the disputed requirements of the closure order related to the design *and* construction of the final cover system were the requirements to design and construct the final cover system to address leachate and condensate, landfill subsidence and settlement, surrounding piezometric conditions, and potential migration pathways to and from the landfill. Plaintiff asserts on appeal that Hendron's report found that the leachate collection system is not complete because there is an indication that few of the wells are operational. Plaintiff also argues the construction of the cover system does not adequately address substantial landfill subsidence and settlement and unstable subsurface conditions because soil is still being brought in to address ongoing settlement, preventing finalization of the gas collection and control system (by burying the pipes), and negatively impacting the gas extraction wells. Plaintiff argues the trial court failed to consider the foregoing unrebutted evidence due to its misconception of the proper burden of proof.

¶ 67 We have already held the trial court did not apply an improper burden of proof. The trial court's judgment on the disputed elements of the closure order challenged as to both design and construction is not arbitrary or fanciful, nor does it ignore recognized principles of law. One such principle is that it is for the trier of fact to consider the conflicting evidence and resolve the discrepancies. *Bridgeman v. Terminal R.R. Ass'n of St. Louis*, 195 Ill. App. 3d 966, 971 (1990). Where conflicting testimony raises a question of fact, it is to be decided by the trier of fact, and this court will not substitute its judgment for that of the trier of fact. *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 623 (2007). The evidence conflicted on leachate removal, subsidence, and piezometric conditions. "The appellate court should not usurp the function of the [trier of fact]

and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 472 (2001). Further, the trier of fact is entitled to believe one expert over the other where the experts offer divergent conclusions. *Hardy v. Cordero*, 399 Ill. App. 3d 1126, 1132 (2010).

¶ 68 The trial court could reasonably resolve the conflicting evidence of the sufficiency of the design and construction of the disputed elements of the final cover system in favor of defendant. The trial court heard evidence that the system to address leachate is in fact removing leachate from the landfill. The fact that the system may have not yet achieved its designed goals does not equate to a finding that the system has not been designed and constructed in such a way as to address the problem. The system is addressing the problem even if it has not eliminated the problem. Similarly, the fact that more settlement has occurred than was predicted, and that remedial measures have in fact hastened settlement in some areas or may have delayed the achievement of designed grades in others, did not require the trial court to find that CDC did not properly address settlement and subsidence in the closure cover design and construction.

¶ 69 Based on the evidence, we find that there is no *genuine* dispute that the closure cover design and construction does *address* leachate, settlement, and piezometric issues. Any dispute lies in its effectiveness. But there is also no dispute that conditions at the landfill are constantly changing. CDC, with Hillside's input, sought to correct shortcomings in the design and construction of the final cover system. At worst, the initial design and construction required modification, which we will not equate to an inadequate initial design and construction under the terms of the closure order. The evidence does not weigh so heavily in favor of plaintiff that we

can say that the trial court's judgment is against the manifest weight of the evidence. Accordingly, we find no abuse of discretion.

¶ 70 Turning to the matter of the placement of the final cover, the trial court's written judgment finds that the final cover was in place by December 31, 2008. The court found the only possible deficiencies in the final cover were the existence of exposed pipes and an alleged lack of vegetative cover. The court ruled that exposed pipes would not violate a provision of the closure order, and that plaintiff had misstated the vegetative cover requirement. Regardless, the court found that the nature of the final vegetative cover is part of the process of postclosure maintenance activities that did not have to be completed by December 31, 2008 under the closure order.

¶ 71 On appeal, plaintiff argues that "the issue was not about pipes." Rather, plaintiff argues, the failure to "complete installation of those pipes" means that "the final cover system was not complete." (Emphasis omitted.) Plaintiff disputes the trial court's finding that Varsho testified that those pipes were buried in the summer and fall of 2010, before CDC stopped reimbursement payments. Plaintiff asserts Varsho never so testified. On the contrary, Varsho's admission that it will be years before the pipes are buried evidences CDC's failure to complete the gas collection system, leachate collection system, and the final cover on the western section. Plaintiff argues that Hendron also testified that the impermeable composite cover is torn.

¶ 72 The experts disagreed as to whether the final cover is in place. It is clear from the trial court's written decision that it considered the evidence and based its ruling thereon. A trier of fact is free to evaluate the evidence presented, and accept or reject it in whole or in part. *In re*

Marriage of Felson, 171 Ill. App. 3d 923, 928 (1988). See also *Lorenz v. Pledge*, 2014 IL App (3d) 130137, ¶ 24 (jury was free to reject expert opinion in favor of its own determination based on the evidence). The trial court acknowledged the testimony that the pipes are not buried, but rejected that testimony as evidence that the final cover is not complete. This court finds whether or not the pipes are buried inapposite. As the court noted, nothing in the closure order references pipes. Further, according to plaintiff, Hendron reported CDC did provide a repair for the torn cover, which Hendron called temporary. Hendron testified that a permanent repair is required to abate the escape of odors from the landfill. The trier of fact could reasonably find that defendant's repair is sufficient to complete the final cover system under the closure order. The trial court did not abuse its discretion in its ruling.

¶ 73 b. Paragraph 12 of the Closure Order

¶ 74 We again point out that the parties disputed whether (i) CDC filled the landfill to authorized grades, (ii) the gas collection and control system is in place and functioning effectively, and (iii) the final cover is in place.

¶ 75 i. Fill to Grade

¶ 76 Again, Hendron testified that, based on the August 2012 monthly report, the landfill has not yet been filled to authorized grades. On the other hand, Varsho testified that he personally observed that Congress filled to authorized grades from west to east, in addition to reviewing survey data, and testified that it was filled up to the authorized grades. "The trial judge is in the best position to resolve any such conflicts, observe the witnesses' demeanor and determine their credibility. [Citation.] As the trier of fact, the judge may accept one expert opinion over

another." *City of Marseilles v. Radke*, 307 Ill. App. 3d 972, 977 (1999). We cannot say that the trial court abused its discretion with regard to this element.

¶ 77 ii. Gas Collection and Control System

¶ 78 Plaintiff argues that the evidence was not conflicting as to the functionality of the gas collection and control system. Plaintiff asserts on appeal that Hendron's report found that the gas collection and control system is not complete and is partially "watered out"[4] or not functioning properly due to settling, or both. Plaintiff also argues that the last semi-annual report Varsho prepared before CDC halted payments indicated that many gas wells required extensions and repairs as a result of settlement; and that leachate levels were above the level of the surrounding groundwater which negatively impacted the gas collection system in the western section. Plaintiff relies on evidence that off-site odors can be an indicator that the GCCS is not functioning properly, and evidence regarding the continued presence of odors beyond the CDC landfill boundary. Plaintiff asserts that the complete halt to odors spreading beyond the landfill boundary was in fact the principal purpose of the closure order. Plaintiff's expert testified that odors from the landfill continue to be present beyond the landfill's boundaries, and plaintiff notes that evidence of odors beyond the landfill's borders is unrebutted. Plaintiff argues this is "in violation of CDC's admitted obligation under the Closure Oder."

¶ 79 Defendant argues that the closure order defines "effective functionality" of the GCCS as the presence of negative vacuum. Plaintiff argues that effective functionality requires the

[4] For a vertical gas collection well to be "watered out" means that the liquid level inside the landfill is higher than the gas-collecting section of the well.

complete cessation of nuisance odors.

> "Where the only dispute concerns the meaning of a contract provision, we must first address the threshold issue of whether the contract is ambiguous. [Citation.] Whether a contract is ambiguous is a question of law. [Citation.]
>
> A contract is ambiguous if it is susceptible to more than one reasonable interpretation. [Citation.] In determining whether a contract is ambiguous, a court must construe the contract as a whole, reading each term in light of the others. [Citation.] It is presumed that each part of a contract was inserted deliberately and for a purpose consistent with the overall intention of the parties. [Citation.] If possible, we must interpret a contract in a manner that gives effect to all its provisions." *Bank of America National Trust and Savings Ass'n v. Schulson*, 305 Ill. App. 3d 941, 945-46 (1999).

¶ 80 The closure order, construed as a whole, is not ambiguous. There is no genuine dispute that one *effect* of a GCCS is to reduce the escape of malodors from the landfill. We recognize that IEPA regulations require a gas management system (35 Ill. Admin. Code § 811.311(a) (1994)), and section 811.311(d) states that the "operator shall design and operate the system so that the standards of subsections (a)(1), (a)(2), and (a)(3) will not be exceeded." 35 Ill. Admin. Code § 811.311(d) (1994). The standard in section (a)(3) is "[m]alodors caused by the unit ***

detected beyond the property boundary." 35 Ill. Admin. Code § 811.311(a)(3) (1994). Similarly, defendant's permit modification for the closure of the landfill (modification 38) contains a provision requiring it to apply to IEPA for an application for a significant modification "either proposing a gas collection/management system or demonstrating that the facility is not the cause" *if* malodors "attributed to the unit are detected beyond the property boundary." It is clear that IEPA regulations are intended, at least in part, to prevent the spread of malodors beyond landfill boundaries. But we cannot construe the closure order to require the complete cessation of nuisance odors as the measure of effective functionality of the GCCS.

¶ 81 The trial court did not equate the requirements in paragraph 12 of the closure order with regulatory requirements, as the court did with regard to the requirements in paragraph 10. We cannot say that no reasonable person would take the same view as the trial court, or that the court's ruling does not employ conscientious judgment. Paragraph 10 of the closure order required the final cover system to achieve the performance standards in parts 811 and 812 of the solid waste regulations. However, the gas management system is not part of the final cover system. See 35 Ill. Admin. Code §§ 811.314 (final cover system); 812.114 (closure plans); 812.313 (design of final cover system). The closure order does not make any reference to IEPA regulations with regard to the GCCS. Therefore, the trial court could reasonably rely solely on the language in the closure order.

¶ 82 The closure order does not mention the cessation of malodors beyond the landfill boundary. The closure order only required "placement and effective functionality (negative vacuum) of a gas collection and control system." The closure order describes effective

functionality as "negative vacuum." The parties agreed that achieving a vacuum in the GCCS is "one of the key design parameters" in a GCCS. Therefore, the trial court properly construed effective functionality to mean the achievement of negative vacuum. As the court noted, the evidence is conflicting as to the extent and consistency of the negative vacuum. The trial court heard evidence that the GCCS system as a whole was under negative vacuum. We do not find that the trial court abused its discretion in ruling that plaintiff failed to satisfy its burden to prove CDC had not achieved effective functionality of the GCCS.

¶ 83 This order makes no determination with regard to any regulatory, statutory, or common law remedies that might be available to Hillside if the landfill is producing malodors beyond its boundaries. Our order is expressly limited to a determination of whether the trial court abused its discretion in ruling that plaintiff failed to prove by a preponderance of the evidence that CDC did not comply with the requirements of the closure order related to the GCCS. We hold the trial court did not abuse its discretion.

¶ 84 iii. Final Cover Western Section

¶ 85 Finally, we address the parties' dispute over whether CDC achieved placement of the final cover on the western section by September 30, 2007. On appeal, plaintiff argues CDC did not achieve placement of the final cover on the western section because it is still installing part of the liner system, is continuing to place cover material in that area, and is replacing the cover. Plaintiff's arguments fail to demonstrate an abuse of discretion in the trial court's judgment regarding placement of the final cover on the western section as required by the closure order. Joshua McGarry, who is the environmental manager at the landfill and is in charge of day-to-day

operations, testified that a perimeter liner system was being installed on the western section at the time of his testimony. As part of that work, he stated gas lines that were in the way of construction of the perimeter liner system were being moved. McGarry also testified that a new liner system would be installed at an unspecified time in the future to cover the interior of the western section. The trial court did not allow McGarry to testify as to why those systems were being installed. Nonetheless, the record does contain the state's order in the state's case. The state's order specifically requires "a new geomembrane liner *** over the perimeter of the landfill west of the 850 Easting line." There was also testimony that the state's order is the only reason that Congress is going to install a replacement final cover in the western section. Thus, there is evidence in the record that the work on which plaintiff relies to argue that defendant did not achieve placement of the final cover in the western section pursuant to the closure order is either unrelated to the closure order or, based on Hendron's testimony, is simply to repair the liner system that was installed.

¶ 86 Moreover, if we were to accept plaintiff's general view that work at the landfill is continuing, therefore oversight *pursuant to the closure order* is still required, Hillside's oversight would continue until no further repairs or maintenance were necessary to any of the systems required by the closure order. That view of the "finality" of a final cover system is inconsistent with plaintiff's expert's testimony regarding the design of the final cover system (and the IEPA regulations for final cover systems). For example, Hendron did not criticize the inclusion of a slip liner in the final cover system. A slip liner was installed so that the impermeable liner system would not break as settlement occurred. Hendron also testified that the Weaver Boos

accelerated closure plan called for landform grades of 10% that are steeper than the original design of the landfill, but the plan intended to achieve settlement back into the original design grades for this landfill of 5%. A reasonable trier of fact viewing all of the evidence could conclude that the addition of soil is not for the purpose of completing the final cover system but for the purpose of maintaining the final cover system as expected settlement continues. The trier of fact could make that determination even in the face of Hendron's testimony that soil was being added to achieve planned grading. Assuming the trier of fact accepted that testimony--which it was not required to do--there is nothing in the closure order that requires adherence to planned designs when conditions change. The parties agree that conditions at the site are dynamic. But to deny finality to CDC on that basis would subject it to oversight for a much longer period than we believe was intended by the parties in the closure order.

¶ 87 The primary goal in construing a contract is to give effect to the intent of the parties as determined from the plain language of the contract. *Premier Title Co. v. Donahue,* 328 Ill. App. 3d 161, 164 (2002). "In determining the intent of the parties, a court must consider the contract document as a whole and not focus on isolated portions of the document." *Richard W. McCarthy Trust Dated September 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535 (2011). Based on the language in the closure order, the parties intended that CDC would reimburse Hillside for its expenses for oversight related to the subject matter of the closure order. We find that the subject matter of the closure order was stopping operations at the landfill and putting into place the infrastructure required in a closed landfill. There is nothing in the plain language of the closure order to suggest that Hillside was to be reimbursed for oversight of all future activities at

the landfill. The evidence permitted the trier of fact to conclude that it was more probably true than not that CDC had placed the final cover system on the western section and was now performing maintenance of that system. Accordingly, we will not find an abuse of discretion in the trial court's judgment on this element.

¶ 88 CONCLUSION

¶ 89 For all of the foregoing reasons, the trial court's judgement is affirmed.

¶ 90 Affirmed.