No. 124417

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS ex rel. KWAME RAOUL, Attorney General of the State of Illinois, Plaintiff, vs. **ELIZABETH REENTS,** an individual, Defendant-Appellee, and **STATELINE RECYCLING, LLC**, an Illinois limited liability corporation, etal Defendant.	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-17-0860 There heard on Appeal from Circuit Court for the Seventeenth Judicial Circuit, Winnebago County, Number 2017 CH 60 The Honorable J. Edward Prochaska presiding

BRIEF OF DEFENDANT APPELLEE ELIZABETH REENTS

MARK ROULEAU
Law Office of Mark Rouleau
ARDC 6186135
4777 E. State St. - #7
Rockford, IL 61108
815/229-7246
fax 815/229-7251

E-FILED
4/23/2020 4:19 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 124417

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS ex rel. KWAME RAOUL, Attorney General of the State of Illinois, Plaintiff, vs. **ELIZABETH REENTS,** an individual, Defendant-Appellee, and **STATELINE RECYCLING, LLC**, an Illinois limited liability corporation, etal Defendant.	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-17-0860 There heard on Appeal from Circuit Court for the Seventeenth Judicial Circuit, Winnebago County, Number 2017 CH 60 The Honorable J. Edward Prochaska presiding

BRIEF OF DEFENDANT APPELLEE ELIZABETH REENTS

MARK ROULEAU
Law Office of Mark Rouleau
ARDC 6186135
4777 E. State St. - #7
Rockford, IL 61108
815/229-7246
fax 815/229-7251

Table of Points and Authorities

THE CONSTITUTIONALITY OF ACTUAL PHYSICAL SEARCHES CONDUCTED BY THE STATE AS PLAINTIFF IN CIVIL PROCEEDINGS

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the State of Illinois in Article I §6

> SECTION 6. SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized. (Source: Illinois Constitution, emphasis added)

STATUTES INVOLVED

415 ILCS 5/2(c)

> The terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act as set forth in subsection (b) of this Section, but to the extent that this Act prescribes criminal penalties, it shall be construed in accordance with the Criminal Code of 2012.

415 ILCS 5/4

> Sec. 4. Environmental Protection Agency; establishment; duties.
>
> * * *
>
> (c) The Agency shall have authority to conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential

contaminant or noise sources, of public water supplies, and of refuse disposal sites.

(d) In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:

(1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; or

(2) In accordance with the provisions of this Act, taking whatever preventive or corrective action, including but not limited to removal or remedial action, that is necessary or appropriate whenever there is a release or a substantial threat of a release of (A) a hazardous substance or pesticide or (B) petroleum from an underground storage tank.

415 ILCS 5/44.1

Sec. 44.1. (a) In addition to all other civil and criminal penalties provided by law, any person convicted of a criminal violation of this Act or the regulations adopted thereunder shall forfeit to the State (1) an amount equal to the value of all profits earned, savings realized, and benefits incurred as a direct or indirect result of such violation, and (2) any vehicle or conveyance used in the perpetration of such violation, except as provided in subsection (b).

(b) Forfeiture of conveyances shall be subject to the following exceptions:

(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Section unless it is proven that the owner or other person in charge of the conveyance consented to or was privy to the covered violation.

(2) No conveyance is subject to forfeiture under this Section by reason of any covered violation which the owner proves to have been committed without his knowledge or consent.

(3) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the covered violation.

(c) Except as provided in subsection (d), all property subject to forfeiture under this Section shall be seized pursuant to the order of a circuit court.

(d) Property subject to forfeiture under this Section may be seized by the Director or any peace officer without process:

(1) if the seizure is incident to an inspection under an administrative inspection warrant, or incident to the execution of a criminal search or arrest warrant;

(2) if the property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal proceeding, or in an injunction or forfeiture proceeding based upon this Act; or

(3) if there is probable cause to believe that the property is directly or indirectly dangerous to health or safety.

(e) Property taken or detained under this Section shall not be subject to eviction or replevin, but is deemed to be in the custody of the Director subject only to the order and judgments of the circuit court having jurisdiction over the forfeiture proceedings. When property is seized under this Act, the Director may:

(1) place the property under seal;

(2) secure the property or remove the property to a place designated by him; or

(3) require the sheriff of the county in which the seizure occurs to take custody of the property and secure or remove it to an appropriate location for disposition in accordance with law.

(f) All amounts forfeited under item (1) of subsection (a) shall be apportioned in the following manner:

(1) 40% shall be deposited in the Hazardous Waste Fund created in Section 22.2;

(2) 30% shall be paid to the office of the Attorney General or the State's Attorney of the county in which the violation occurred, whichever brought and prosecuted the action; and

(3) 30% shall be paid to the law enforcement agency which investigated the violation.

Any funds received under this subsection (f) shall be used solely for the enforcement of the environmental protection laws of this State.

(g) When property is forfeited under this Section the court may order:

(1) that the property shall be made available for the official use of the Agency, the Office of the Attorney General, the State's Attorney of the county in which the violation occurred, or the law enforcement agency which investigated the violation, to be used solely for the enforcement of the environmental protection laws of this State;

(2) the sheriff of the county in which the forfeiture occurs to take custody of the property and remove it for disposition in accordance with law; or

(3) the sheriff of the county in which the forfeiture occurs to sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds of such sale shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs, and the balance, if any, shall be apportioned pursuant to subsection (f).

(h) Property seized or forfeited under this Section is subject to reporting under the Seizure and Forfeiture Reporting Act.

(Source: P.A. 100-173, eff. 1-1-18; 100-512, eff. 7-1-18; 100-863, eff. 8-14-18.)

RULE INVOLVED

Rule 214 - Discovery of Documents, Objects, and Tangible Things-Inspection of Real Estate

(a) Any party may by written request direct any other party to produce for inspection, copying, reproduction photographing, testing or sampling specified documents, including electronically stored information as defined under Rule 201(b)(4), objects or tangible things, or to permit access to real estate for the purpose of making surface or subsurface inspections or surveys or photographs, or tests or taking samples, or to disclose information calculated to lead to the discovery of the whereabouts of any of these items, whenever the nature, contents, or condition of such documents, objects, tangible things, or real estate is relevant to the subject matter of the action. The request shall specify a reasonable time, which shall not be less than 28 days after service of the request except by agreement or by order of court, and the place and manner of making the inspection and performing the related acts.

STATEMENT OF FACTS

The State of Illinois filed a Complaint For Injunctive Relief And Civil Penalties "at the request of the Illinois Environmental Protection Agency" alleging numerous violations of the Illinois Environmental Protection Act against the defendant ELIZABETH REENTS and the corporation who is alleged to have occupied the premises at the time that REENTS obtained her tax deed to the property. (C 7-31). As part of these proceedings the State alleged that the subject property "has never been permitted by the Illinois EPA for the disposal of waste" (C.12 ¶22).

The State of Illinois made a demand to search the premises pursuant to Supreme Court Rule 214 seeking to:

> "[A]llow representatives of the Illinois Attorney General access to the real property controlled and/or owned by Reents located at 2317 Seminary Street, Rockford, Winnebago County, Illinois, including any buildings, trailers, or fixtures thereupon. . . . At this inspection, representatives of the Illinois Environmental Protection Agency may also accompany Attorney General representatives and ***conduct an inspection pursuant to their authority under 415 ILCS 5/4 (2014)***." (emphasis added, C 246)

At the time that the State of Illinois sought to conduct a search of the premises pursuant to both Supreme Court Rule 214 and 415 ILCS 5/4 (2014) the more than ten acre property was posted with no trespassing signs (C.299 &305) entirely fenced in, gated and locked. (SA.7 ¶4, affidavit of Kazmerski) Prior to seeking the search the property pursuant to Supreme Court Rule 214 and 415 ILCS 5/4 (2014) the State obtained an injunction against a prior owner (defunct delinquent tax payer) closing the property and enjoining any type of operations on the property. (C.290-291). On March 1, 2011 the STATE OF ILLINOIS obtained a mandatory injunction (2009 CH 824). On April

8, 2015 a Tax Deed was recorded by the Winnebago County treasurer conveying the property to REENTS as Trustee. (C.299 IEPA narrative report Kathy Guyer).

At no time prior to its Rule 214 request for a search had the State sought or obtained the permission of ELIZABETH REENTS to inspect the premises. (C 173). The subject property is surrounded by a fence and gate which the plaintiff locked. (C 173, 397-399, 372 ¶3, 5, 373 ¶10) The State alleges that REENTS has not sought to obtain a permit to operate a land fill on the premises. (C 223 ¶22)

Defendant REENTS objected to granting permission to the State and its enforcement agency the IEPA access to the premises asserting "that this [214 search request] is an improper attempt to circumvent the Constitutional requirement for a warrant . . . [and] interposing a 4th Amendment Constitutional objection as well as one under the Illinois State Constitution Article 1 Section 6, to a civil discovery site inspection" (C 257). The State filed a Motion for an Order to Compel Discovery (C 236-266) asserting that the Rule 214 request for a warrantless search was relevant because the State alleged that the property obtained by REENTS through a tax deed was the subject of its complaint. Asserting that the State "is entitled to access the Site for purpose of conducting an inspection and ***performing*** [unspecified] ***related acts***, including the taking of photographs, at a reasonable time and in a reasonable manner." (emphasis added, C240 ¶21)

The State further asserted that "[t]he Illinois EPA is entitled to conduct an inspection of the Site pursuant to its authority under the Act . . ." citing 415 ILCS 5/4 (C 240) which states in part:

> "(d) ***In accordance with constitutional limitations***, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of:
>
> (1) Inspecting and investigating to ascertain possible violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order;" (emphasis added)

The State's complaint was not verified nor was its motion to compel. The State did not present any evidence or affidavits to support any of its factual claims or the reasonableness of its request. The State simply asserted that because they filed suit regarding the alleged condition of the premises a warrantless search under 415 ILCS 5/4(d) and Supreme Court Rule 214 was constitutionally appropriate.

The trial court granted the order compelling ELIZABETH REENTS to allow the State and the IEPA investigators to search the subject premises the relevant portion of the order states:

> "Plaintiff's motion to compel as to the rule 214(a) inspections of Reents' Real Estate is granted, including the Illinois EPA participating in the inspection;" (¶2 C 351)

The order does not expressly state which of fifty-nine (59) properties that the defendant owns in Winnebago County (as determined by a current online search of the Winnebago County Treasurer's name search http://treasurer.wincoil.us/ 1/24/18) nor does it expressly incorporate the language from the State's 214 request for inspection allowing the search to include "any buildings, trailers, or fixtures thereupon" (C 246) In rendering its decision Judge Prochaska stated:

> "I think Supreme Court Rule 214 does apply to all civil cases and it indicates that, that any party may request direct by any other party permission, access to real estate for purposes of making surface or subsurface inspections, surveys, photographs, taking tests, whenever the nature contents or condition of the real

> estate is irrelevant to the subject matter. Here, I think, clearly the subject, the subject matter is the, is the premises that is owned currently by Elizabeth Reents.
>
> It is clearly an -- alleged to the violations of the Illinois EPA that's what's alleged in the complaint. It's all about the property; it's all about the subject matter. And, I think, Supreme Court Rule 214 gives the plaintiff absolute right to, to inspect that property. This is not a -- it's not a criminal case. I think that although certainly the Fourth Amendment isn't thrown out the window, this is not a criminal case, it's a civil case.
>
> The landfill is a highly regulated activity, alleged landfill is a highly regulated activity under the Illinois EPA and, I think, the physical status of the site is highly relevant in this particular case. So I am going to grant the motion to compel over objection." (R 14-15)

The defendant ELIZABETH REENTS has never conducted any business at the premises, nor has she permitted or allowed others to do so. She has never been involved in a highly regulated business.

The trial court entered an order holding the plaintiff in "friendly contempt" (C. 353) and the defendant ELIZABETH REENTS filed a timely notice of appeal in the case. (C 367). While this case was pending on appeal the State filed a motion and affidavit seeking an administrative warrant to search the subject premises which the trial court granted.

ARGUMENT

STANDARD OF REVIEW

A trial court's order compelling discovery is ordinarily reviewed for a manifest abuse of discretion; however, the proper standard of review will depend on the question that was answered in the trial court. If the facts are uncontroverted and the issue is the lower court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the lower court's judgments. ***Klaine v. S. Ill. Hosp. Servs***, 2016 IL 118217 at ¶13, 47 N.E.3d 966 (2016), 400 Ill. Dec. 1.

Generally, the standard of review for discovery orders is differential; however this court has held that it uses a de novo standard to review motions to quash search warrants and to suppress evidence. ***People v. Boose***, 2018 IL App (2d) 170016 (Ill. App., 2018) Where the facts are not disputed, as in this appeal, whether a defendant's constitutional right was violated is reviewed *de novo* . ***People v. Henderson***, 2016 IL App (1st) 142259, 77 N.E.3d 1046 (Ill. App., 2017) (right of confrontation).

Where no evidence by affidavit verification or otherwise is presented to the court supporting the reasonableness of the request to search ELIZABETH REENTS's premises pursuant to Supreme Court Rule 214 and 415 ILCS 5/4 (2014) and where the more than ten acre premises subject to the 214 inspection or search is completely enclosed, locked and posted "no trespassing"; where the property or its prior owners have never sought to subject the property to regulatory administration as a landfill; where the State is the plaintiff, Supreme Court Rule 214 and the Environmental Protection Act require more than unverified allegations in a complaint to determine the

reasonableness and relevance of the requested search. The fourth amendment demands a factual showing, "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amends. IV, XIV; (***Franks v. Delaware***, 438 U.S. 154 at 164, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978); ***People v. Laws***, 84 Ill.2d 493 (1981) 419 N.E.2d 1150. The Illinois Constitution (Ill. Const. 1970, art. I, § 6;) goes "a step beyond" the United States Constitution requiring an affidavit. "A long legal tradition in this State requires more than just the word of an official accuser . . . to support a finding of probable cause." ***People v. Bassk***, 2019 Ill.App (1st) 160640 ¶3 (Ill. App. 2019)

The court did not receive any evidence prior to finding the defendant ELIZABETH REENTS in contempt of court for failing to allow the State of Illinois to conduct a warrantless search of her premises. Therefore, it cannot be said that there was any showing of specific relevance or proportionality.

A PARTY DOES NOT LOSE THEIR CONSTITUTIONAL RIGHTS VIS A VIE THE BECAUSE THE GOVERNMENT SUES THEM IN CIVIL COURT.

"[A] party's civil discovery obligations do not automatically render Fourth Amendment rights and remedies inapplicable." ***United States v. Alavi Found***. (***In re 650 Fifth Ave. & Related Props.***), 830 F.3d 66 at 75 (2nd Cir., 2016).

The United States' Appellate Court Second Circuit held that the trial court erred when it ruled that the Claimants' civil discovery obligations obviated the need for any Fourth Amendment analysis as a party's civil discovery obligations. ***United States v. Alavi Found***. (In re 650 Fifth Ave. & Related Props.), 830 F.3d 66 at 75 (2nd Cir., 2016).

The Attorney General previously argued in ***Kaull v. Kaull***, 2014 IL App (2d) 130175 (Ill. App., 2015) that the protections of the Fourth Amendment and the Illinois Constitution against unreasonable searches and seizures did not apply to a civil discovery order in an action ***between private parties*** citing to ***Union Oil Co. of California v. Hertel***, 411 N.E.2d 1006, 89 Ill.App.3d 383 (Ill. App., 1980). This case however is not between private parties but rather is an enforcement action taken by the Attorney General on behalf of the State of Illinois. Discovery or production obligations do not displace Fourth Amendment protections. *See* ***United States v. Eng***, 971 F.2d 854, 861 (2d Cir. 1992)

Although, the court in ***Carlson v. Jerousek,*** 2016 IL App (2d) 151248, 68 N.E.3d 520 (Ill. App., 2016) was confronted only with nongovernmental private parties it recognized the application of the Constitutional Right of Privacy with respect to civil discovery seeking electronically stored information. Unlike ***Carlson***, here the State is a party to the action. The government's complaint alleges only past conditions and past alleged violations regarding the subject property. All the violations alleged to exist were ***prior*** to filing the complaint (or amended complaint). In ***Carlson*** as in this case the movants did not support their motions to compel with "any affidavits or other evidence . . . describing the information retrievable through such an inspection or the methods that would be used to conduct the search." (***Carlson*** at ¶11) In this case the State has not shown by affidavit or other evidence that a current inspection is relevant to any of the allegations of the complaint involving conditions or violations alleged to have previously occurred. To the extent that the State was seeking to obtain information to

substantiate new violations, such use of the civil discovery rules by the State is clearly intended to circumvent the State and Federal Constitutional probable cause requirements as well as those of the Illinois Environmental Protection Act section 415 ILCS 60/15(3)&(4).

WHEN THE STATE AS PLAINTIFF DEMANDS INSPECTION OF THE DEFENDANT'S ENCLOSED, LOCKED AND POSTED BUSINESS PREMISES PURSUANT TO SUPREME COURT RULE 214, IT IS A SEARCH UNDER THE FOURTH AMENDMENT, THE FOURTEENTH AMENDMENT, AND ARTICLE 1 §6 OF THE CONSTITUTION OF THE STATE OF ILLINOIS, THUS REQUIRING A FACTUAL SHOWING SUFFICIENT TO OBTAIN AN ADMINISTRATIVE WARRANT.

Supreme Court Rule 214(a) provides in part: "(a) Any party may by written request direct any other party to . . . permit access to real estate for the purpose of making surface or subsurface inspections or surveys or photographs, or tests or taking samples, . . . whenever the nature, contents, or condition of such documents, objects, tangible things, or real estate is relevant to the subject matter of the action . . ."

The Supreme Court Rule 214 Request for Site Access of the Government granted by the trial court over the objection of defendant REENTS seeks to:

> "[A]llow representatives of the Illinois Attorney General access to the real property controlled and/or owned by Reents located at 2317 Seminary Street, Rockford, Winnebago County, Illinois, including any buildings, trailers, or fixtures thereupon. . . . At this inspection, representatives of the Illinois Environmental Protection Agency may also accompany Attorney General representatives and ***conduct an inspection pursuant to their authority under 415 ILCS 5/4 (2014)***." (emphasis added, C 246)

The Fourth Amendment to the Constitution of the United States of America secures persons and their property from unreasonable searches and seizures without warrant providing:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)

The fourteenth amendment makes the fourth amendment applicable to the states. ***Soldal v. Cook County,*** 506 U.S. 56, 61, 113 S.Ct. 538, 543, 121 L.Ed.2d 450, 458 (1992). ***Redwood v. Lierman***, 772 N.E.2d 803, 265 Ill.Dec. 432, 331 Ill. App.3d 1073 (Ill. App., 2002). "This prohibition is applicable to commercial premises. *New York v. Burger*, 482 U.S. 691, 699, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). 'An owner or operator of a business thus has an expectation of privacy in commercial property.' *Id* ."This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." ***59th & State St. Corp. v. Emanuel***, 2016 IL App (1st) 153098, 70 N.E.3d 225 (Ill. App., 2016) ¶18 (emphasis added).

The Constitution of the State of Illinois in Article I §6 prohibits invasions of privacy and searches without warrants stating:

> SECTION 6. SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS
> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.
> (Source: Illinois Constitution, emphasis added)

This Constitutional right applies to civil (quasi criminal ordinance enforcement) proceedings as well. ***City of Chicago v. Lord***, 122 N.E.2d 439, 3 Ill.App.2d 410 (Ill. App. 1 Dist., 1954). "[S]ection 6 of article I, which creates a right of freedom from invasion of privacy, appl[ies] only to actions by government or public officials. *Barr v. Kelso-Burnett Co.* (1985), 106 Ill.2d 520, 526, 88 Ill.Dec. 628, 478 N.E.2d 1354, citing *USA I Lehndorff Vermoegensverwaltung GmbH & Cie v. Cousins Club, Inc.* (1976), 64 Ill.2d 11, 20-21, 348 N.E.2d 831; *People v. Smith* (1979), 72 Ill.App.3d 956, 964, 28 Ill.Dec. 766, 390 N.E.2d 1356." ***People v. DiGuida***, 604 N.E.2d 336, 152 Ill.2d 104, 178 Ill.Dec. 80 (Ill., 1992). Many of the cases cited to by the State in its brief involve only private parties. In this case the plaintiff is the State and one of its enforcement agencies (the IEPA) so this requirement is clearly satisfied.

Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant") ***Camara v. Municipal Court,*** 387 U.S. 523, 528-29, 87 S.Ct. 1727, 1730-31,18 L.Ed.2d 930, 935 (1967). It has been long recognized that the fourth amendment's prohibition on unreasonable searches and seizures applies to commercial premises as well as private homes. (***See v. City of Seattle*** (1967), 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943; ***New York v. Burger*** (1987), 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601; see also ***Dow Chemical Co. v. United States*** (1986), 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226.) The Supreme Court has held that one in business, like the occupant of a private home, has a constitutional right to be free from unreasonable official entries onto private commercial premises. ***See v. City of Seattle*** (1967), 387 U.S.

541, 87 S.Ct. 1737, 18 L.Ed.2d 943. Even if a public official enters with the intention of abating a nuisance, the official ordinarily must have a warrant. ***Michigan v. Tyler,*** 436 U.S. 499, 504-05, 98 S.Ct. 1942 1947, 56 L.Ed.2d 486, 495 (1978). Essentially the action of the State in this case is to abate a nuisance and to impose "civil" penalties.

The fourth amendment's protection against unreasonable searches and seizures fully "applies in the civil context." ***Soldal,*** 506 U.S. at 67, 113 S.Ct. at 546,121 L.Ed.2d at 462. For example, in ***Bezayiff v. City of St. Louis,*** 963 S.W.2d 225, 228, 231-32 (Mo.App.1997), an ordinance allowed the city to enter private property to remove disabled automobiles without first obtaining the consent of the landowner or obtaining a warrant. The Court of Appeals of Missouri held that "[t]he ordinance is unconstitutional under the Fourth Amendment insofar as it purports to authorize removal of vehicles from private property without a warrant." ***Bezayiff,*** 963 S.W.2d at 235. In ***Redwood v. Lierman***, 772 N.E.2d 803, 265 Ill.Dec. 432, 331 Ill. App.3d 1073 (Ill. App., 2002) the Appellate Court found ***Bezayiff*** to be persuasive." (772 N.E.2d at 811). In ***Conner v. City of Santa Ana,*** 897 F.2d 1487, 1489, 1492 (9th Cir.1990), the court held that the government violated the fourth amendment by entering the plaintiffs' fenced property.

The Illinois Environmental Protection Act expressly references administrative inspection warrants and probable cause in 415 ILCS 5/44.1(d) of the Environmental Protection Act. Furthermore, the Act expressly restricts searches or inspections to be conducted ***in accordance with constitutional limitations*** 415 ILCS 5/4(d). If the Environmental Protection Act were read as allowing warrantless searches it would be

unconstitutional. See ***People v. Krull***, 107 Ill.2d 107, 481 N.E.2d 703, 89 Ill.Dec. 860 (Ill., 1985).

The statute before the Court in ***Krull*** provided for the warrantless inspection of the records required to be kept by licensees and for the inspection of licensees' business premises. (Section 5-401(e) (Ill.Rev.Stat.1981, ch. 95 1/2, par. 5-401(e))) It stated:

> "Every record required to be maintained under this Section shall be opened to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records."

The Appellate Court, in ***Krull***, found the statute allowing warrantless searches of business premises unconstitutional as it failed to "provide for the regularity and neutrality required by the fourth amendment" (481 N.E.2d 703 at 707, 89 Ill.Dec. 860 at 865). The Motor Vehicle Act was amended to place explicit limitations on the Secretary of State in executing inspections including:

> (3) The licensee or a representative of the licensee shall be entitled to be present during an inspection conducted pursuant to Chapter 5, however, the presence of the licensee or an authorized representative of the licensee is not a condition precedent to such an inspection.
>
> (4) Inspection conducted pursuant to Chapter 5 may be initiated at any time that business is being conducted or work is being performed, whether or not open to the public or when the licensee or a representative of the licensee, other than a mere custodian or watchman, is present. The fact that a licensee or representative of the licensee leaves the licensed premises after an inspection has been initiated shall not require the termination of the inspection.
>
> (5) Any inspection conducted pursuant to Chapter 5 shall not continue for more than 24 hours after initiation....
>
> ....

(7) No more than 6 inspections of a premises may be conducted pursuant to Chapter 5 within any 6 month period except pursuant to a search warrant...." ***Bionic Auto Parts and Sales, Inc. v. Fahner***, 721 F.2d 1072 (C.A.7 (Ill.), 1983)

In ***Bionic Auto Parts*** the Seventh Circuit Court found that amendments circumscribed the previously open-ended authorization to conduct inspections "at any reasonable time during the night or day". (721 F.2d 1072 at 1077). The Seventh Circuit stated: “To satisfy the "certainty and regularity" requirement, the inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches. We hold that the amended statute provides adequate safeguards for the inspection scheme and therefore does not run afoul of the Fourth Amendment.”

Unlike the Motor Vehicle Code provisions before the court in ***Bionic Auto Parts*** or ***Krull*** the Environmental Protection Act does not even require that inspections be conducted during business hours let alone require a representative to be present. It does not limit the length of time for inspections or the frequency with which the inspections may occur. The only restriction identified in the act is that the inspections are to be conducted “in accordance with constitutional limitations”. This gives absolutely no guidance to the inspector regarding what limitations are necessary to satisfy the "certainty and regularity" requirement.

The Illinois Environmental Protection Act contains numerous provisions for criminal penalties and prosecutions, (See for example 415 ILCS 5/2(c)) and the State has not excluded the possibility of a criminal prosecution for violations.

The right to privacy under Article I §6 of the Illinois Constitution is broader than that afforded under the Fourth Amendment to the United States Constitution. ***People v.***

Krueger, 675 N.E.2d 604, 175 Ill.2d 60, 221 Ill.Dec. 409 (Ill., 1996) departing from lockstep with Federal Constitutional Fourth Amendment analysis where in ***Illinois v. Krull,*** 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the United States Supreme Court found administrative searches by government employees under a statute later found to be unconstitutional fell within the good-faith exception to the exclusionary rule. The Illinois Supreme Court held that the good-faith exception as expressed in ***Krull*** —which dealt with an officer's reliance upon a statute later declared unconstitutional— would not be recognized in Illinois for purposes of our state constitution.

The appellate court in ***Carlson v. Jerousek***, 2016 IL App (2d) 151248, 68 N.E.3d 520 (Ill. App., 2016) wrote:

> "The Illinois Constitution contains even broader protection, providing that '[t]he people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means.' (Emphasis added.) Ill. Const. 1970, art. I, § 6. The Illinois Supreme Court has observed that "the Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and * * * the protection of that privacy is stated broadly and without restrictions." *Kunkel*, 179 Ill.2d at 537, 228 Ill.Dec. 626, 689 N.E.2d 1047 (citing *In re May 1991 Will County Grand Jury* , 152 Ill.2d 381, 391, 178 Ill.Dec. 406, 604 N.E.2d 929 (1992))." (2016 IL App (2d) 151248 at ¶34).

Unlike this case, ***Carlson*** involved only private parties and no state actors. In ***Carlson*** defendant obtained an order from the court compelling mirroring of the drives on computers belonging to the plaintiff and plaintiff's employer's computers. The issue at the heart of that appeal was "the circumstances under which a party to a civil suit may inspect the contents of another person's computer through forensic imaging, seeking metadata and other information."(¶25) The court stated: the discovery rules "do not

permit the requesting party to rummage through the responding party's files for helpful information. Under Rules 213 and 214, a party must request specific information relevant to the issues in the lawsuit from the other party". (2016 IL App (2d) 151248, ¶29).

In reviewing the constitutional claims the Appellate Court held that "constitutional provisions do not forbid all invasions of privacy, but only those that are unreasonable. U.S. Const., amend. IV (freedom from "unreasonable searches and seizures"); Ill. Const. 1970, art. I, § 6 (freedom from "unreasonable * * * invasions of privacy"). The civil discovery rules adopt two safeguards to ensure that the discovery of private information will be "reasonable" (and hence constitutional): relevance and proportionality." (2016 IL App (2d) 151248, ¶35).

Carlson does not mention the affidavit, oath, affirmation or the probable cause requirements of the fourth amendment and Article I §6 of the Constitution of the State of Illinois in its opinion focusing only on the "reasonable" (and hence constitutional): relevance and proportionality" embodied in Rule 214. The court found that the orders compelling the mirroring of the various computers failed to meet the relevance and proportionality standards embodied in the rules remanding the case for further proceedings.

The court addressed the issue of "state action" in ***Kaull v. Kaull***, 26 N.E.3d 361 (Ill. App., 2014) where the defendant made a facial challenge to the constitutionality of the removal of the "good cause" requirement from Supreme Court Rule 215 regarding mental and physical examinations of parties. The court stated: "We agree with [parties

seeking DNA test] that applying the fourth amendment to requests for discovery in civil cases ***between private parties*** undermines the core principles of modern discovery." (Emphasis added, 26 N.E.3d 361 at ¶47). See also ***Union Oil Co. of California v. Hertel***, 411 N.E.2d 1006, 89 Ill.App.3d 383 (Ill. App. 1 Dist., 1980).

"[S]ection 6 of article I, which creates a right of freedom from invasion of privacy, apply only to actions by government or public officials. *Barr v. Kelso-Burnett Co.* (1985), 106 Ill.2d 520, 526, 88 Ill.Dec. 628, 478 N.E.2d 1354, citing *USA I Lehndorff Vermoegensverwaltung GmbH & Cie v. Cousins Club, Inc.* (1976), 64 Ill.2d 11, 20-21, 348 N.E.2d 831; *People v. Smith* (1979), 72 Ill.App.3d 956, 964, 28 Ill.Dec. 766, 390 N.E.2d 1356." ***People v. DiGuida***, 604 N.E.2d 336, 152 Ill.2d 104, 178 Ill.Dec. 80 (Ill., 1992)

Unlike the other cases questioning the constitutionality of discovery provisions allowing for searches or seizures without a showing of probable cause, this case is brought by a Governmental actor, the State of Illinois, in conjunction with its administrative body the IEPA. (C 7) The motion granted by the trial court allowed the State unrestricted search of the property conveyed by tax deed to the defendant ELIZABETH REENTS "including any buildings, trailers, or fixtures thereupon" without restriction of any kind. The trial court entered the order granting the unrestricted search without any affidavit, oath, affirmation or showing of probable cause.

When the State of Illinois sought its order to compel REENTS to allow the State and its governmental enforcement personnel from the IEPA unlimited access to the property acquired by the defendant by tax deed the State did not provide any affidavit or verification or attempt to establish probable cause or the reasonable need to search the

property. In the trial court the State cited to ***Kaull v. Kaull***, 26 N.E.3d 361 (Ill. App., 2014) asserting that the rules of discovery apply without Constitutional limitation as the boundaries of the area constitutionally protected against unreasonable search and seizure are fixed at the limits of relevance. (***Kaull*** citing to ***Monier v. Chamberlain***, 202 N.E.2d 15, 31 Ill.2d 400 (Ill., 1964) both of which involved private and not public actors.)

Kaull involved a parentage issue between private parties. The case did not entail a search of a locked enclosed property. The court found requiring the defendant to provide samples for DNA testing under the rule did not involve state action implicating the Fourth, Fourteenth Amendments nor Section 6 of Article 1 of the Illinois Constitution. The court decided ***Kaull*** without addressing the constitutionality of the change to the rule removing the "good cause" language as the constitutional issue was unnecessary for the disposition of the case. (26 N.E.3d 361 ¶41).

In this case the State in part sought to support its 214 request for the warrantless search and ***performing*** [unspecified] ***related acts***, on the basis that in order to conduct a search of the premises the IEPA is not required to obtain a warrant pursuant to 415 ILCS 5/4 (C 241) which expressly states that such searches must be conducted "***[i]n accordance with constitutional limitations"***. Citing to the Illinois Pollution Board opinion[1] ***Illinois EPA v. Shafer,*** PCB 11-28 (July 26, 2012) (available online at http://www.ipcb.state.il.us/documents/dsweb/Get/Document-76707), where the party raising the constitutional issue, the pro se defendant Thad Shafer, representing himself

[1] C.241 & 260 MOTION FOR AN ORDER TO COMPEL DISCOVERY**,** C.86-87 PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ELIZABETH REENTS' "MOTION TO QUASH AND DISMISS". C. 100 PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ELIZABETH REENTS' "MOTION TO DISMISS §2-615 and §2-613"

simplistically argued in his brief "even the FBI and the Illinois State Police must obtain a search warrant before they search persons or property but apparently the U.S. Constitution doesn't include Dustin Burger, an employee from the IEPA." (op. page 12) The PCB reasoned "Because the Act does not specifically require Agency inspectors to have a warrant before performing inspections, a warrant is not necessary for an Agency search to be "reasonable" under the Fourth Amendment. Therefore, the Fourth Amendment's requirement that warrants be supported by ***probable cause*** is not applicable to reasonable Agency searches." (emphasis added op. 12). The pro se respondent did not seek review of the decision. Since the date of that decision there have been several important cases involving legislation and ordinances purporting to authorize warrantless searches that are not limited in scope, time, place or manner. Interestingly when the State finally sought an administrative warrant in this case they cited to multiple cases providing for the issuance of "administrative warrants." (A.44-45 par. 8)

Assuming arguendo that the defendant's ownership of the subject premises obtained by way of a tax deed makes her engaged in a highly regulated business this Court must still apply ***Burger*** to determine the reasonableness of the demand for an unrestricted search of the enclosed premises. In ***Burger***, the Supreme Court held that the warrantless inspection of a pervasively regulated business will be deemed reasonable under the fourth amendment "only so long as three criteria are met." *Id.* First, there must be a substantial governmental interest underlying the regulatory scheme pursuant to which the inspection is made. Second, the warrantless search must

be necessary to further that regulatory scheme. Third, the statutes inspection program must provide an adequate substitute for a warrant by advising the owner of the commercial premises that its property will be subject to periodic inspections undertaken for specific purposes and limiting the discretion of the inspectors in time, place and scope. *Id*. at 702–03, 107 S.Ct. 2636." ***59th & State St. Corp. v. Emanuel,*** 2016 IL App (1st) 153098, 70 N.E.3d 225 (Ill. App., 2016)

In ***59th & State St. Corp. v. Emanuel,*** the court found that the ordinance failed to satisfy the third criteria for reasonableness identified by the Supreme Court in ***Burger,*** as it gave the City "an unlimited ability to conduct any inspections at any time, place and manner." The ordinance was constitutionally defective as it failed to satisfy the reasonableness requirement of the fourth amendment, by failing to limit the discretion of the inspectors in time, place and scope.

The State's assertion that no warrant is required based upon 415 ILCS 5/4 and ***Shafer*** is unfounded in light of the holdings in ***59th & State St. Corp. v. Emanuel, People v. Krull,*** 107 Ill.2d 107, 481 N.E.2d 703, 89 Ill.Dec. 860 (Ill., 1985); ***Bionic Auto Parts & Sales, Inc. v. Fahner*** (7th Cir.1983)***,*** 721 F.2d 1072, as well as the cases cited to by the State in its motion for the administrative warrant in this case. Furthermore, the Environmental Protection Act expressly references administrative inspection warrants and probable cause in 415 ILCS 5/44.1(d)

Rather than seeking an administrative warrant the State has sought to circumvent showing probable cause or meeting any of the requirements to conduct a search of the premises by filing a suit and using the Civil Rules of Discovery. It would be improper to

allow the Government to circumvent the aforesaid Constitutional protections simply by filing a civil lawsuit and seeking discovery. The order granting the 214 request provides unbridled access to the defendant's property including any buildings, trailers, or fixtures thereupon to perform unspecified related acts. This is similar to asking a "party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation." See, ***Carlson v. Jerousek***, 2016 IL App (2d) 151248, 68 N.E.3d 520 (Ill. App., 2016)

THE CONSTITUTIONALITY OF ACTUAL PHYSICAL SEARCHES CONDUCTED BY THE STATE AS PLAINTIFF IN CIVIL PROCEEDINGS REQUIRES A FACTUAL SHOWING OF CREDIBLE, PERSUASIVE EVIDENCE IN ADDITION TO BEING RELEVANT AND PROPORTIONAL.

The State in its brief asserts that the only basis for review of the trial court's grant of a search of the defendant's fenced, gated, locked and posted property is whether the search is relevant to the unverified assertions in the State's complaint.[2] The State argues that the civil discovery rules "allow "any party" access to real estate to conduct an inspection when relevant to the subject matter of the action and within the rules' limitations while overseen by the circuit court." In support of this claim the State cites to numerous cases involving constructive searches as opposed to actual searches (see ***Scott v. Association for Childbirth at Home, Intern.,*** 430 N.E.2d 1012, 88 Ill.2d 279, 58 Ill.Dec. 761 (Ill. 1981). None of the cases cited by the State involve entry into a fenced,

[2] At the hearing on the State's motion to compel the search of the property defendant's counsel argued that the State's "afraid to file an affidavit telling this Court why they thought they have an entitlement to examine this, I mean, if it, if it were so simple, they should do it." (R.11) The State never responded to this argument and they did not present an affidavit supporting their motion to issue a warrant until after this case was on appeal.

posted, gated, and locked property where no activity was ongoing. Very few of the cited cases involved governmental entities.

In ***City of North Chicago v. North Chicago News, Inc.,*** 435 N.E.2d 887, 106 Ill.App.3d 587, 62 Ill.Dec. 89 (Ill. App. 1982) a municipality prosecuted an action seeking to enjoin the defendant from selling obscene books, magazines and motion pictures. The trial court entered an order requiring the defendant to produce certain publications to the municipality which the defendant claimed constituted a warrantless seizure. The issue of the governmental status was never raised by any of the parties or the court. The court noted that the publications subject to the court's order were "were for sale to the general public in its store, and could readily have been obtained by the plaintiff if necessary in order to support its petitions." (106 Ill.App.3d at 594) They were not in an enclosed area not open to the general public. Obviously, those facts did not broach a search requiring a warrant upon oath or affirmation. The publications in ***City of North Chicago*** were in "plain view" and could have been purchased by the municipality. Those publications were readily available without a warrant, where in this case the more than ten-acre property is posted, fenced, gated and locked could not be accessed without the assistance of the courts. Thus, in ***City of North Chicago*** there was no need to determine the constitutional issue regarding the need for a warrant upon oath or affirmation.

The State also cites to ***U.S. v. Conces***, 507 F.3d 1028 (6th Cir. 2007) as support for its position that the government has the right to conduct searches pursuant to discovery requests and that it need not present any evidence in order to conduct an actual search of the defendant's fenced and locked property. ***Conces***, involved post judgment

discovery to enforce an injunction entered against the defendant. It involved interrogatories and requests to produce documents not an actual physical search of enclosed property. Another of the State's cases supposedly supporting this assertion is ***United States v. Int'l Bus. Mach. Corp.* (*IBM*)**, 83 F.R.D. 97, 103 (S.D.N.Y. 1979). That case involved a motion to quash the duces tecum. The court carefully contrasted the difference between production of documents versus "'actual searches and inspections of commercial premises'" (83 F.R.D. 97 at 101) citing to ***See v. City of Seattle***, 387 U.S. 541, 544-45, 87 S.Ct. 1737, 1740, 18 L.Ed.2d 943 (1967). Neither of these cases apply to a situation where the government seeks to use a civil discovery rule to allow a warrantless search of a completely enclosed property without presenting any evidence let alone "credible and persuasive" evidence demonstrating the need for the invasion of privacy.

Marshall v. Barlow Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) involved an actual attempt to conduct a physical search of the land owners business premises. In that case the Supreme Court held that warrantless searches under OSHA or do not "vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained." (436 U.S. at 324) The Court also noted that "when an entrepreneur embarks upon such a [highly regulated] business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." (436 U.S. at 313) See also ***State v. Dubois Livestock, Inc.,*** 174 A.3d 308 (Me. 2017) ("By applying for and obtaining a license with a host of laws, regulations, and conditions that apply to facilities that accept solid waste, Dubois had a lowered expectation of privacy in the commercial

premises." p.12) In this case all of the evidence shows that defendant has never voluntarily chosen to conduct a landfill.

There are other cases dealing with physical searches of unenclosed landfill areas. In ***Department of Environmental Protection v. Emerson***, 616 A.2d 1268 (Me. 1992) the Maine Supreme Court concluded that unenclosed area of landfill covered with tires and debris was "open field" outside protection of the Fourth Amendment. See also ***State v. Dubois Livestock, Inc.*** 174 A.3d 308 (Me. 2017) where the defendant could not successfully claim constitutional protection from warrantless search of an unenclosed composting premise and not any enclosed structures. In ***Idaho Dep't of Envtl. Quality v. Gibson*** Docket No. 46217 (Idaho, March 11, 2020) the Idaho Supreme Court found that where the defendant's was open "24/7" to those who wanted to access it. There were no physical barriers stopping [the investigator] from entering the facility there was no valid fourth amendment claim regarding the search. ***Miller v. Pollution Control Bd.***, 642 N.E.2d 475, 267 Ill.App.3d 160 (Ill. App. 1994) is a case involving an administrative citation issued by a County Health Department solid waste inspector who observed the litter on Miller's property from a public road. The property owner sought to suppress the evidence which was obtained without an administrative warrant. The appellate court stated that "[t]his was not a search because no justified expectation of privacy is present when the incriminating objects or activities are readily noticeable to persons on neighboring lands. (1 W. LaFave, Search & Seizure § 2.3(c), at 391 (2d ed. 1987).) [The inspector] then entered the land to photograph the litter. Entry upon land to photograph conditions visible from neighboring property is not an unreasonable search

and seizure." (267 Ill.App.3d at 169). The search sought by the State in this case is that which cannot be seen by plain view from public places. The property is in excess of ten-acres and is completely fenced and locked. Clearly, where the property is not open to the public, where it is completely enclosed posted and locked there is a fourth amendment search involved requiring either consent or a warrant.

The State repeatedly cites to ***Kaull v. Kaull***, 2014 IL App (2d) 130175 (Ill. App. 2015) as support for its position. ***Kaull*** is easily distinguished from the instant case in multiple respects. ***Kaull*** was a parentage action between private parties and did not contest the court's order but rather the change in the Supreme Court Rule removing the prior "good cause" requirement. The party seeking the discovery actually presented affidavits and evidence to support their motion. (2014 IL App (2d) 130175 at ¶6). Before entering the order for DNA testing the court found that the movant presented "ample evidence" (¶72) "credible, persuasive evidence" (¶16) supporting the movants need for the discovery. In this case the State has argued that it was not required to present any evidence supporting its demand to search the more than ten-acres which is posted, fenced, gated and locked. The record in this case is void of any evidentiary basis to support the government's 214 demand to conduct a search of the property. In ***Kaull*** the court recognized that "a rule that permits compelled disclosure of private information without a constitutionally sufficient showing would violate the privacy clause of the Illinois Constitution." (2014 IL App (2d) 130175 at 48). In this case the State has consistently maintained the position that it is not required to make any factual showing that the search would be relevant to the issues presented in the unverified complaint,

let alone a showing by "credible, persuasive evidence" supporting its need its need for the search of the premises.

WHEN THE GOVERNMENT SEEKS TO CONDUCT A SEARCH OF MORE THAN TEN-ACRES OF LAND WHICH IS COMPLETELY ENCLOSED AND LOCKED AND POSTED, FAILING TO REQUIRE THE GOVERNMENT TO MAKE A FACTUAL SHOWING BY CREDIBLE, PERSUASIVE EVIDENCE OF THE REASONABLENESS OF THE PROPOSED SEARCH IS AN ABUSE OF DISCREATION.

Several lower court cases have adopted the requirement that to pass sufficient muster for an order compelling a search of a person's DNA in cases involving only private parties there must be "credible, persuasive evidence" supporting the need for the search. See ***Kaull v. Kaull***, 2014 IL App (2d) 130175 (Ill. App., 2015) (applying the evidentiary standard while finding that the order compelling DNA testing was reasonable); ***Jarke v. Mondry***, 2011 IL App (4th) 110150. ***Lasley v. McDermott (In re Estate of Lasley)***, 44 N.E.3d 1117 (Ill. App. 2015) (adopting the standard from ***Jarke***).

Similarly, in ***Pate v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.***, 2013 IL App (1st) 123322-U, the trial court noted that given the evidence gathered thus far established good cause for allowing an examination. The Appellate Court in ***Pate*** citing ***Leeson v. State Farm Mutual Automobile Insurance Co.***, 190 Ill. App. 3d 359, 366 (1989) said "the trial court should deny discovery if there is insufficient ***evidence*** that it is relevant or will lead to material that is relevant." (Emphasis added, ***Pate*** 2013 IL App (1st) 123322-U at ¶20); see also ***Mistler v. Mancini***, 111 Ill. App. 3d 228, 32 (1982).

When the government demands a search of an enclosed property and buildings the need to establish an evidentiary basis demonstrating the reasonableness of the search is

far more compelling opposed to merely relying on unverified pleadings. Overturning the trial court's order allowing broad access to the plaintiff's computer the ***Carlson*** court noted "[a]t no point did the defendants support their motion with any affidavits or other evidence". ***Carlson v. Jerousek***, 2016 IL App (2d) 151248 at ¶11, 68 N.E.3d 520 (Ill. App. 2016). In the instant case the trial court abused its discretion by failing to require the government to provide an evidentiary basis for its request before ordering REENTS to submit to the search.

UNDER EITHER A DE NOVO OR ABUSE OF DISCRETION STANDARD THE TRIAL COURT LACKED ANY RATIONAL BASIS TO HOLD THE DEFENDANT IN CONTEMPT FOR REFUSING TO ALLOW A SEARCH OF HER PROPERTY

The property is shown in the public records to be 10.6 acres and is completely fenced with a structure on the property. The State did not present the court with any evidentiary basis for its need to examine the property simply relying on the unverified allegations in its' the complaint.[4] The desire on the part of the State to conduct a broad unrestricted search of the premises pursuant to Supreme Court Rule 214 was to engage in fishing expedition.

The trial court did not require any factual showing by the State for the need to inspect the property. The request for the Supreme Court Rule 214 inspection sought to "allow representatives of the Illinois Attorney General access to the real property controlled and/or owned by Reents located at 2317 Seminary Street, Rockford,

[4] All of the allegations contained in the complaint were about the condition of the property at the time the action was filed and would not support the need for further inspection at the time the order to compel the search was sought.

Winnebago County, Illinois, including any building, trailers, or fixtures thereupon. " With "representatives of the Illinois Environmental Protection Agency [to] conduct an inspection pursuant to their authority under 415 ILCS 5/4 (2014)." (A. 78). This request clearly seeks to conduct an administrative search under the Illinois Environmental Protection Act and not merely discovery under Supreme Court Rule 214.

The State in its motion to compel asserted that the unlimited search should be allowed "because the Site is Relevant to the Subject Matter of this Action" (A. 84) As part of its motion to compel the State again asserted "[t]he Illinois EPA is entitled to conduct an inspection of the Site pursuant to its authority under the Act because the Site contains a landfill, which is a regulated commercial activity." (A. 85) Thus, again demonstrating that the State was impermissibly seeking to conduct an administrative search governed by the Illinois Environmental Protection Act under the guise of civil discovery and Supreme Court Rule 214. The State even concedes this point in their brief where it discusses the involvement of the IEPA inspectors. (See footnote 2).

The State makes the erroneous assertion that the only persons that could serve as experts for inspection related to this litigation are the State's law enforcement personnel. The State seeks to argue this matter both ways asserting that they should be treated as any private party with respect to discovery and access to property however unlike private parties they seek to involve public law enforcement personnel to conduct a generalized unrestricted search/inspection under the Environmental Protection Act. No private party seeking to conduct such an inspection of property would be able to (1) conduct an inspection under the authority of 415 ILCS 5/4 (2014); and (2) they would

not be able to conduct such inspection with the use of State law enforcement personnel as opposed to private persons with environmental expertise. The State cites to three cases on this issue none of which is on point. None of the cases cited involved a governmental actor as a party, governmental law enforcement personnel as representatives and no searches that were to be conducted pursuant to statutory law enforcement authority.[5] According to the IEPA its statutory authority to conduct these searches includes testing, test pits, soil borings, analyzing leachate and other inspection procedures.[6]

"[T]he court should, when necessary, fashion guidelines for control of evidence, setting forth what tests or inspection may be conducted; when, where and by whom; who may be present, including representatives of all parties to the cause; how far tests or inspections can go; and what authority each of the parties shall have in that regard, and such type of production order should be neither burdensome nor prejudicial to the requesting party." ***United Nuclear Corp. v. Energy Conversion Devices, Inc.***, 110 Ill.App.3d 88, 441 N.E.2d 1163, 65 Ill.Dec. 649 (Ill. App., 1982).

---

[5] (415 ILCS 60/15) (from Ch. 5, par. 815):

> 3. The Director upon being denied access to any land may apply to the court of jurisdiction for a search warrant authorizing such access for purpose of carrying out provision of this Act. The court may upon receiving such request issue such warrant.
>
> 4. The Director, with or without the aid and advice of the court of jurisdiction, is charged with enforcing the requirements of this Act and rules adopted hereunder. In the event the enforcement agent of local jurisdiction refuses to act on behalf of the Director, the Attorney General may so act.

[6] https://www2.illinois.gov/epa/topics/cleanup-programs/srp/Pages/landfill-info.aspx (last accessed 4/22/2020)

In this case the court placed absolutely no limitations of any kind upon the State's 214 search request. There were no protocols establishing what testing or inspections could be conducted on the property. There were no limitations as to what could be examined or inspected in the building. The Court order allowed the IEPA personal to conduct an unfettered warrantless administrative search which could potentially include testing, test pits, soil borings, analyzing leachate and other inspection procedures. This order permitting a general search fails for the same reasons that this court denied the 214 examination of business computers in ***Carlson v. Jerousek,*** 2016 IL App (2d) 151248, 68 N.E.3d 520 (Ill. App., 2016)

415 ILCS 5/4(d) AUTHORIZING THE IEPA TO ENGAGE IN WARRANTLESS SEARCHES UPON ANY PRIVATE OR PUBLIC PROPERTY AT ALL REASONABLE TIMES IS CONSTITUTIONALLY DEFECTIVE

By seeking the order from the court to allow the IEPA to "***conduct an inspection pursuant to their authority under 415 ILCS 5/4 (2014)***." The State has not merely sought to conduct ordinary civil discovery. The State has sought to have the court order REENTS to allow a warrantless inspection pursuant to the unrestricted unbridled statutory inspection scheme incorporated in the Environmental Protection Act, thus placing the constitutionality of **415 ILCS 5/4(d)** before this court.

This Court has held that because a person's privacy interests enjoy greater protection under the Illinois Constitution, "some showing of individualized suspicion as well as relevance must be made" before a subpoena for evidence of a noninvasive nature may be issued. ***Will County,*** 152 Ill.2d at 393, 178 Ill.Dec. 406, 604 N.E.2d 929.

Grand Jury subpoenas must be supported by probable cause ***People v. Watson***, 825 N.E.2d 257, 214 Ill.2d 271, 292 Ill.Dec. 1 (Ill., 2005).

The provisions of the Environmental Protection Act allow warrantless searches of any private or public property at all reasonable times without any other guidance or restrictions upon the investigator. (415 ILCS 5/4(d)). This is constitutionally defective as it fails to meet all three of the criteria necessary under ***New York v. Burger*** , 482 U.S. 691, 699, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

In ***Burger***, the Supreme Court held that the warrantless inspection of a pervasively regulated business will be deemed reasonable under the fourth amendment "only so long as three criteria are met." *Id.* First, there must be a substantial governmental interest underlying the regulatory scheme pursuant to which the inspection is made. Second, the warrantless search must be necessary to further that regulatory scheme. Third, the statutes inspection program must provide an adequate substitute for a warrant by advising the owner of the commercial premises that its property will be subject to periodic inspections undertaken for specific purposes and limiting the discretion of the inspectors in time, place and scope. *Id*. at 702–03, 107 S.Ct. 2636." ***59th & State St. Corp. v. Emanuel,*** 2016 IL App (1st) 153098, 70 N.E.3d 225 (Ill. App., 2016)

In ***59th & State St. Corp. v. Emanuel,*** the court found that the ordinance failed to satisfy the third criteria for reasonableness identified by the Supreme Court in ***Burger,*** as it gave the City "an unlimited ability to conduct any inspections at any time, place and manner." The ordinance was constitutionally defective as it failed to satisfy the

reasonableness requirement of the fourth amendment, by failing to limit the discretion of the inspectors in time, place and scope. The Environmental Protection Act (415 ILCS 5/4(d)) allows the inspectors to determine what is a reasonable time, manner and scope for their search without limitation.

Rather than seeking an administrative warrant the State has sought to circumvent showing probable cause or meeting any of the requirements to conduct a search of the premises by filing a suit and under the guise of the Civil Rules of Discovery while still seeking an order seeking the order from the court to allow the IEPA to "conduct an inspection pursuant to 415 ILCS 5/4" merely on the unsworn allegations contained in the State's complaint and without any evidentiary support whatsoever. It would be improper to allow the Government to circumvent the aforesaid Constitutional protections simply by filing a civil lawsuit and seeking discovery. The order granting the 214 request provides unbridled access to the defendant's property including any buildings, trailers, or fixtures thereupon to perform unspecified related acts is similar to asking a "party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation." See, ***Carlson v. Jerousek***, 2016 IL App (2d) 151248, 68 N.E.3d 520 (Ill. App., 2016)

People v. Madison**,** 121 Ill.2d 195, 520 N.E.2d 374, 117 Ill.Dec. 213 (Ill., 1988) *overruled on other grounds by Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), is the controlling decisional law on this issue**.** In ***Madison*** this Court stated:

> "[C]ontrary to the State's assertions that the warrant requirement is meaningless in this context, we find that it serves a useful purpose. As originally enacted, the

> statute authorizing warrantless administrative inspections contained no guidelines concerning how the inspections were to be conducted and no limits on the discretion of the State in making inspections. Both this court and the Federal district court held the statute unconstitutional under the standards established in *Donovan v. Dewey* (1981), 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262. (*People v. Krull* (1985), 107 Ill.2d 107, 116, 89 Ill.Dec. 860, 481 N.E.2d 703, rev'd on other grounds (1987), 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364; *Bionic Auto Parts & Sales, Inc. v. Fahner* (N.D.Ill.1981), 518 F.Supp. 582, aff'd in part & vacated in part (7th Cir.1983), 721 F.2d 1072.) The statute was then amended to include safeguards designed to limit State officials' discretion by restricting the manner in which warrantless inspections could be conducted."

In the ***Madison*** case the statute in question was far more specific than the one used by the State to obtain the order in this case. In ***Madison*** the statute "Records Required to be Kept" (Ill.Rev.Stat.1983, ch. 95 1/2, pars. 5-401 through 5-404), specified the business records (auto salvage) yards must keep, detailing the State's right to inspect these records, and outlining the possible consequences for failure to keep required records providing in part:

> "In the event information comes to the attention of the individuals conducting an inspection that may give rise to the necessity of obtaining a search warrant, and in the event steps are initiated for the procurement of a search warrant, the individuals conducting such inspection may take all necessary steps to secure the premises under inspection until the warrant application is acted upon by a judicial officer." (***Madison***, 121 Ill.2d at 199-200, 520 N.E.2d at 377, 117 Ill.Dec. at 215, emphasis added)

The State's assertion that no warrant is required based upon 415 ILCS 5/4 and ***Shafer*** is unfounded in light of the holdings in ***59th & State St. Corp. v. Emanuel; People v. Prolerized Chicago Corp.,*** 225 Ill.App.3d 307, 167 111.Dec. 560, 587 N.E.2d 1175***; People v. Krull,*** 107 Ill.2d 107, 481 N.E.2d 703, 89 Ill.Dec. 860 (Ill., 1985); ***Bionic Auto Parts & Sales, Inc. v. Fahner*** (7th Cir.1983)***,*** 721 F.2d 1072; all of which point to the clear constitutional defects of (415 ILCS 5/4(d)). Furthermore, the Environmental Protection

Act expressly references administrative inspection warrants and probable cause in 415 ILCS 5/44.1(d).

CONCLUSION

The judgment of the appellate court remanding the case to the trial court should be affirmed. The trial court did not receive or require any evidentiary basis for the demand for the intrusive search of the defendant's property. There is no showing of the need for the search in order to prove the allegations of the State's complaint as it merely addresses past acts and conditions of the property. The evidence sought by the search is not in plain view, and is not subject to the eventual discovery or open fields doctrines. The search is on posted property behind cyclone fences, which are gated and locked. At the time of the demanded search the property was not open to the public and there were no activities upon the property. Furthermore, of the evidence may be under the surface and inaccessible absent, soil boring and excavation.

It is clear from the pleadings and argument in its brief that the State sought and still seeks to use the Supreme Court Rule 214 as a means to circumvent the Constitutional requirements imposed upon administrative searches. The request for the inspection expressly seeks to allow the IEPA inspectors to "conduct an inspection pursuant to their authority under 415 ILCS 5/4 (2014)." Without placing any evidence before the trial court the State in its motion asserted "[t]he Illinois EPA is entitled to conduct an inspection of the Site ***pursuant to its authority under the Act*** because the Site contains a landfill, which is a regulated commercial activity."(Emphasis added). This

is not ordinary civil discovery requests. By asking to act in their authority under the act the State has converted the matter from simply a "civil discovery" to an administrative inspection and bringing before this court the obvious defects in 415 ILCS 5/4.

The State has not identified the scope of the inspection so that a properly tailored protective order could be entered. The portion of the Environmental Protection Act (415 ILCS 5/4) allowing warrantless should be stricken as facially unconstitutional. The court erred by granting an order allowing an unlimited inspection of the entire premises including the enclosed building on the premises, potentially containing numerous items not pertinent to any issue in this case. The order of the trial court should be vacated for much the same reasons as the court vacated the production order in ***Carlson v. Jerousek***.

This court should make a clear statement that when a party seeks a physical search of enclosed premises pursuant to Supreme Court Rule 214 the party must make a factual showing by credible persuasive evidence establishing that such inspection or testing is necessary. Lastly, the defendant requests that this court vacate the order of contempt against her as she has shown no disdain for the court and merely refused to comply with the discovery order in good faith to secure appellate interpretation of this legal issue.

Respectfully submitted
ELIZABETH REENTS

By: //s// Mark Rouleau
Mark Rouleau

MARK A. ROULEAU (291)
ARDC# 6186135
4777 East State Street –Unit 7
Rockford, Illinois 61108
(815) 229-7246
rouleau-law@comcast.net

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 34 pages.

//s// Mark Rouleau
Mark Rouleau

MARK A. ROULEAU (291)
ARDC# 6186135
4777 East State Street –Unit 7
Rockford, Illinois 61108
(815) 229-7246
rouleau-law@comcast.net

No. 124417

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS ex rel.KWAME RAOUL Attorney General of the State of Illinois,

Plaintiff - Appellant

vs.

STATELINE RECYCLING, LLC, an Illinois limited liability corporation, and **ELIZABETH REENTS**, an individual.,

Defendant – Appellee.

On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-17-0860,

There Heard on Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 17 CH 60,

Trial Judge Honorable Edward Prochaska presiding

NOTICE OF FILING DEFENDANT-APPELLEE REENT'S BRIEF

NOTICE OF FILING

Comes now Defendant Appellee, **ELIZABETH REENTS**, by one of her attorneys, Mark Rouleau, e-filed BRIEF OF PLAINTIFF – APPELLANT, Thursday, April 23, 2020

ELIZABETH REENTS,

//s//Mark Rouleau
Appellee's Attorney Mark Rouleau

MARK ROULEAU
Law Office of Mark Rouleau
ARDC 6186135
4777 E. State St. - #7
Rockford, IL 61108
Email: Rouleau-law@comcast.net & ccf@rouleau-law.com

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true and certifies that a copy of the foregoing instrument e-filed with the Supreme Court of Illinois at 4/23/2020 2:27 PM and was served upon

Counsel On Appeal For Appellant(s)
Name: Kwame Raoul
Attorney General of the State of Illinois,
Aaron T. Dozeman, Assistant Attorney General
Civil Appeals Division
Office of the Illinois Attorney General
Address: 100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
Telephone: (312) 793-1473
civilappeals@atg.state.il.us
adozeman@atg.state.il.us
Amaskaleris@atg.state.il.us

by e-mail and by adding their email address when e-filing on 4/23/2020 2:27:36 PM I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

_//s//Mark Rouleau_____
Appellee's Attorney Mark Rouleau

MARK ROULEAU
Law Office of Mark Rouleau
ARDC 6186135
4777 E. State St. - #7
Rockford, IL 61108
815/229-7246
fax 815/229-7251

Email: Rouleau-law@comcast.net & ccf@rouleau-law.com