STATE OF MICHIGAN

COURT OF APPEALS

MONTMORENCY/OSCODA COUNTY JOINT SANITARY LANDFILL COMMITTEE, a State of Michigan statutory committee,

Plaintiff-Appellant,

v

THE COUNTY OF ALPENA, a Michigan municipal corporation, and BROWNING-FERRIS INDUSTRIES OF MICHIGAN, INC., a Michigan corporation,

Defendants-Appellees.

UNPUBLISHED
October 8, 1996

No. 181874
LC No. 94-1072-CZ(S)

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff[1] appeals by right the circuit court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8). We reverse and remand.

This case arose when plaintiff sought declaratory relief and damages from defendants Alpena County (the County) and Browning-Ferris Industries of Michigan, Inc. (BFI). The County had apparently named plaintiff and the Crawford-Otsego landfill[2] as its primary export disposal sites for solid waste generated within the county. Plaintiff alleged that defendants violated the Solid Waste Management Act (SWMA), MCL 299.401 *et seq*.; MSA 13.29(1) *et seq*. (currently MCL 324.11501 *et seq*.; MSA 13A.11504 *et seq*.), when the County permitted BFI to haul all or substantially all of the waste generated in Alpena County to a BFI-owned landfill located in Presque Isle County, even though the BFI landfill was not authorized in the County's solid waste plan.

BFI moved for summary disposition pursuant to MCR 2.116(C)(8), arguing, among other things, that the SWMA was unconstitutional under *Fort Gratiot Sanitary Landfill v Michigan Dep't of Natural Resources*, 504 US 353; 112 S Ct 2019; 119 L Ed 2d 139 (1992). BFI also argued that the United States Supreme Court's finding in *C & A Carbone v Town of Clarkston*, 511 US 383;

114 S Ct 1677; 128 L Ed 2d 399 (1994), that the town's flow control ordinance violated the Commerce Clause, applied to this case. The trial court allowed the County to adopt BFI's motion for summary disposition.

The trial court ultimately granted defendants' motions for summary disposition. The court found that the *Fort Gratiot* decision did not declare the entire solid waste management act unconstitutional. Rather, the offending language could be severed which saved the statute and its provisions for a comprehensive intrastate plan to regulate solid waste management and disposal. The court found, however, that, under *Carbone*, *supra*, plaintiff failed to show that no other nondiscriminatory alternatives were available. The court concluded that plaintiff's solid waste management constituted a burden on interstate commerce for the same reasons set forth in *Carbone*.

Plaintiff argues that defendants were not entitled to summary disposition because the *Fort Gratiot* decision did not invalidate Michigan's comprehensive statutory scheme for regulating intrastate solid waste processing and disposal. Plaintiff further argues that, because Michigan's restrictions apply only to intrastate solid waste transport and disposal, *Carbone* is in inapplicable to invalidate the state's comprehensive scheme to regulate solid waste management. We agree.

MCR 2.116(C)(8) permits summary disposition when the "opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8), therefore, determines whether the opposing party's pleadings allege a prima facie case. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The court accepts as true all well-pleaded facts. *Id*. Summary disposition pursuant to MCR 2.116(C)(8) is valid if the allegations fail to state a legal claim. *Id*., 373-374.

The pivotal issue to be decided is whether certain provisions of the SWMA, MCL 299.401 *et seq*.; MSA. 13.29(1) *et seq*., which authorize Michigan counties to regulate the intrastate import and export of solid waste, violate the United States Constitution's Commerce Clause, US Const, art 1, § 8. MCL 299.413a; MSA 13.29(13a)[3] provides in part:

> A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

The second statute, MCL 299.430(2); MSA 13.29(30)(2)[4] states:

> In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

This issue was previously addressed by our Court in *Citizens for Logical Alternatives and Responsible Environment v Clare County Bd of Com'rs*, 211 Mich App 494; 536 NW2d 286 (1995). There, this Court ruled that *Fort Gratiot*, *supra*, clearly expressed its intent to avoid interference with the state's waste disposal plan beyond that necessary to ensure that the state's provisions do not violate the federal Commerce Clause. It, therefore, concluded that *Fort Gratiot* invalidates, as unconstitutional per se, only those portions of the provisions that attempt to limit the interstate importation or exportation of solid waste.

The *Citizens* Court also rejected the argument that *Carbone*, *supra*, controlled. This Court held that the defendant landfill operator was not prevented from seeking out-of-state markets nor deprived out-of-state businesses from having access to state's local markets. It found that, rather than burdening interstate commerce, the statute apparently afforded out-of-state businesses preferential access to local markets. We find that the *Citizens* Court correctly interpreted the holdings in *Fort Gratiot*, *supra*, and *Carbone*, *supra*. In any event, we are obligated to follow the holding of *Citizens*, *supra*, by virtue of Administrative Order 1996-4. We therefore reverse the trial court's grant of summary disposition in favor of defendants.

Next, plaintiff argues that, because the statutory scheme regulates only intrastate commerce in solid waste, it does not burden interstate commerce, and therefore, the scheme is a permissible exercise of the state's power to regulate trade carried on solely within its borders. This issue was also addressed in *Citizens*. In *Citizens*, this Court held that *Carbone*, *supra*, did not require invalidation of the solid waste management act's §§ 13a and 30(3). The panel stated:

> Following the *Fort Gratiot* Court's invalidation of the interstate restrictions contained in § 13a and § 30(2), the statute neither prevents [the defendant] from seeking out-of-state markets nor deprives out-of-state businesses from having access to this state's local markets. In fact, rather than burdening interstate commerce, the statute appears to now afford out-of-state businesses preferential access to local markets. [*Id.*, p 500.]

Again, we find that Citizens correctly interpreted the holdings in *Fort Gratiot*, *supra*, and *Carbone*, *supra*. In any event, we are obligated to follow the holding of *Citizens*, *supra*, by virtue of Administrative Order 1996-4.

Finally, plaintiff argues that, because the unconstitutional portions of 13(a) and 30(2) are severable, the remaining constitutional portions remain valid. Because this issue was decided in plaintiff's favor, we need not address it. See, e.g., *Kacenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

At oral argument, defendants relied on *Oehrleins, Inc v Hennepin County*, 922 F Supp 1396 (D Minn 1996) to support their argument. We first note that the Minnesota District Court decision is not binding on this Court. We also conclude that *Oehrleins*, which involved a claimed

restraint on export of refuse from Minnesota, is totally inapplicable to this case. Therefore, defendants' reliance is misplaced.

Reversed and remanded. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] The Attorney General filed an appellate brief as amicus curiae.

[2] Crawford-Otsego landfill is not a party to this appeal.

[3] Currently MCL 324.11513; MSA 13A.11513.

[4] Currently MCL 324.11538(6); MSA 13A.11538(6).