

**IN THE CIRCUIT COURT OF CARROLL COUNTY, ARKANSAS
CIVIL DIVISION**

STEVEN HEDRICK;
and X-DUMPSTERS,

PLAINTIFF

vs.

CASE CV NO. 2023-85

CITY OF HOLIDAY ISLAND,

DEFENDANT

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S RENEWED MOTION TO DISMISS**

Steven Hedrick and X-Dumpsters ("Plaintiffs"), by and through undersigned counsel, hereby file this Response in Opposition to Defendant City of Holiday Island's ("Defendant") Renewed Motion to Dismiss.

INTRODUCTION

In this case, Plaintiff asserts that Defendant lacks the power to prohibit Plaintiff from entering into contracts with residents and businesses to provide services that *supplement* or are *in addition to* regularly scheduled solid waste disposal services provided by Carroll County Solid Waste District ("CCSW"). Contrary to the Defendant's claims, Plaintiff does not challenge the authority of the City of Holiday Island (the "City") to require all residents and businesses through Ordinance No. 2022-004 (hereinafter "the Ordinance") to contract with CCSW for *regularly scheduled* solid waste disposal services. Br. in Support of Renewed Mot. to Dismiss ("MTD") at 2.

Based on this fundamental misunderstanding of Plaintiff's claims, Defendant cites cases that are inapposite or irrelevant. The Arkansas Constitution requires a direct connection between a government restriction that confers a monopoly or that infringes on the right to engage in a lawful occupation and the public's health and safety. Plaintiffs have stated a claim upon which relief can be granted because the

Ordinance prohibition on the collection of solid waste as a supplement to the regularly scheduled disposal of solid waste provided by CCSW is not directly related to public health and safety.

BACKGROUND

The City enacted Ordinance No. 2022-004 on April 19, 2022. The Ordinance authorizes the city to select a single entity that all residents and businesses in the City must contract with for the disposal of solid waste. Am. Compl., Ex. 3. The Ordinance also prohibits *any other entity* from collecting solid waste in the City. *Id.*

Plaintiff Steven Hedrick runs Plaintiff X-Dumpsters which is a roll-off dumpster rental business. Am. Compl., ¶¶ 1, 2, 8, 13. Plaintiffs rent out dumpsters to residents and businesses for them to fill and then hauls the dumpsters away and disposes of the waste in accordance with Plaintiffs' license granted by CCSW. *Id.* at ¶¶ 9, 11–16.

Plaintiffs became aware of the Ordinance and its effect on Plaintiffs ability to operate Plaintiffs' roll-off dumpster rental business in the City through letters received on April 27, 2022, and November 8, 2022. *Id.* at ¶¶ 39–41. Plaintiffs now have ceased operations in Holiday Island and as a result have been forced to turn down numerous job opportunities. *Id.* at ¶¶ 44, 47. Plaintiffs continue to operate a roll-off dumpster rental business in other areas of Carroll County and remain licensed to do so by CCSW, who is the City's selected contractor and the *only entity* authorized to collect solid waste in the City. *Id.* at ¶ 48.

LEGAL STANDARD

A party moving to dismiss bears a heavy burden. “In reviewing a trial court’s decision on a motion to dismiss ... we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint.” *Neal v. Wilson*, 316 Ark. 588, 595–96, 873 S.W.2d 552, 556 (1994) (*citing Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992)).

LEGAL ARGUMENT

I. Defendant is not entitled to state action immunity from claims brought under Arkansas' Constitution.

State action immunity was created by the United States Supreme Court to protect states specifically from *antitrust* lawsuits. *See Parker v. Brown*, 317 U.S. 341, 350–51 (1943). This case, however, is not a federal antitrust case. While Defendant cites to an Eighth Circuit decision applying state action immunity to an Arkansas municipality, that case is a federal antitrust case, and not the Arkansas Constitution's anti-monopoly clause. *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 522 (8th Cir. 1985). Defendant does not point to a single authority applying state action immunity to claims brought under the Arkansas Constitution because there is none. Because Plaintiffs' claims are brought *under* the Arkansas Constitution, and not federal anti-trust law, state action immunity is inapplicable.

II. The Arkansas Constitution is unequivocal in its prohibition on monopolies and none of the exceptions to that prohibition are applicable here as evident from Defendant's materially distinguishable citations.

The Arkansas Constitution declares: "monopolies are contrary to the genius of a republic, and shall not be allowed." Ark. Const. art. II, § 19. The Arkansas Supreme Court has explained that "[t]his language is too clear to need elucidation, and no amount of judicial interpretation should ever be permitted to cause the slightest deviation from the clear language of the constitutional inhibition." *N. Little Rock Transp. Co. v. City of N. Little Rock*, 207 Ark. 976, 981, 184 S.W.2d 52, 54 (1944). The only exception to this clear constitutional prohibition is when government action is *necessary* for public health and safety. *See Dreyfus v. Boone*, 88 Ark. 353, 114 S.W. 718, 721 (1908) (for a monopoly to be permissible it "must be reasonable, and must be directed solely to legitimate regulation of the subject-matter undertaken.")).

Here, Defendant has gone beyond what was necessary to achieve a legitimate public health and safety purpose. Specifically, Plaintiff is already licensed by CCSW to provide solid waste disposal services. As such, CCSW has recognized that he can do so safely and in a manner that is not a threat to the public health. What's more, he does not seek to provide regularly scheduled solid waste disposal services that CCSW provides under the Ordinance. Prohibiting Plaintiff from providing these services is, therefore, not necessary to protect the public health and safety, or to even protect CCSW's monopoly on *regular* trash services.

Defendant cites three authorities that purportedly stand for the proposition that a city has the authority to ban all entities from providing supplemental or add services. Those are readily distinguishable.

First, Defendant points to *Smith v. City of Springdale* for the proposition that “a city is authorized to enter into proper exclusive contracts for sanitation services.” 291 Ark. 63, 65, 722 S.W.2d 569, 570 (1987). The Court explained “monopolies are upheld when deemed necessary in executing a duty incumbent on city authorities ... for the preservation of public health.” *Id* at 65–66, 722 S.W.2d at 570. The challenge there was not to a prohibition on offering supplemental services, but instead was a challenge to the existence of a monopoly itself and the taxation created to support the monopoly. *Id.* at 64–65, 722 S.W.2d at 570.

Next, Defendant points to *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, for the proposition that the “intent to displace competition can be inferred from the statutory scheme because it is a ‘necessary and reasonable consequence of engaging in the authorized activity.’” 769 F.2d 517, 521 (8th Cir. 1985) (citation omitted).¹ The challenger in *L&H Sanitation* did not allege the award of an

¹ This language quoted by Defendant in the Motion to Dismiss comes from a section in *L&H Sanitation* considering whether state action immunity from a Federal Sherman Act Antitrust claim applies. The circumstances then in which the Eighth Circuit were making this “inference” relied on by Defendant were much different.

exclusive trash disposal contract violated the Arkansas Constitution's anti-monopoly provision, but instead raised claims under the Sherman Antitrust Act and claims under the federal Due Process Clause and Equal Protection Clauses. *Id.* at 519. The challenger was a competitor to the selected contractor and was challenging the grant of a monopoly as a whole as they wanted to provide services *in place of* the selected entity.

Finally, Defendant offers an Arkansas Attorney General opinion, Ark. Op. Att'y Gen. No. 2006-062 (June 20, 2006), that dealt with the diversion of recyclable materials and Arkansas's statutory scheme explicitly giving municipalities authority to "enact laws concerning ... the prohibition of the diverting of recyclable materials by persons other than the generator or collector of the recyclable material." Ark. Code Ann. § 8-6-211(e).

None of these situations involve a business seeking to provide supplemental services rather than supplant those offered by CCSW that are at the heart of the Ordinance. And none deal with the specific factual allegations—which must be taken as true—that such supplemental services have been and can continue to be provided in a way that does not threaten the public's health and safety.

III. Plaintiffs have successfully pleaded at this stage of litigation that the Ordinance and Arkansas law, to the extent it allows the Ordinance, violates the guarantees of the "fundamental" rights of life, liberty, and property.

The right to "acquire and possess property" is one of "the 'rights of persons'" and "it is the most essential to human happiness." *Leep v. St. Louis, I.M. & S. Ry. Co.*, 58 Ark. 407, 25 S.W. 75, 77 (1894). As such, "[s]tatutes limiting and regulating occupations which before were of common right can find no excuse except as they relate to the public and are for its benefit ... [and] only where it is *necessary* to attain the end desired. *State ex rel. Att'y Gen. v. Gus Blass Co.*, 193 Ark. 1159, 105 S.W.2d 853, 857–58 (1937) (emphasis added). When Arkansas courts examine a law abridging the right to engage in a lawful occupation, the court will first determine whether the law *truly* is geared toward health, safety, and public welfare. Generally, "[t]he state cannot by statute, under the guise of the police power, impose

arbitrary or unreasonable restrictions upon private property or its use.” *Bachman v. State*, 235 Ark. 339, 343, 359 S.W.2d 815, 817 (1962).

The Arkansas Supreme Court struck down a statutory provision giving the State Board of Barber Examiners the power to set the minimum wage for haircuts and shaves as violating Article II, Sections 2 and 19 of the Arkansas Constitution. *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189, 192 (1942). The Court further explained that even though the legislature alleged that this was in furtherance of health and safety, and even though the legislature may regulate other aspects of barbering, the wage setting itself was not related to public health or safety. *Id.* at 192. Two decades later, the Court held that a regulation that required a tobacco company to supply “open account” letters from three-fourths of the cigarette manufactures with general distribution in Arkansas violated Article II, Section 2, of the Arkansas Constitution because “it imposes an unusual and unnecessary restriction on a lawful occupation” after determining that the law was not aimed at health, safety, or public welfare. *McCastlain v. R. & B. Tobacco Co.*, 242 Ark. 74, 79, 411 S.W.2d 882, 885 (1967). Three decades after that, the Arkansas Supreme Court found that a law was unconstitutional when it interfered *arbitrarily* with the Plaintiff’s business enterprises. *Ports Petroleum Co. of Ohio v. Tucker*, 323 Ark. 680, 916 S.W.2d 749, 753 (1996). There, the Court held that “we cannot agree that legislation which hampers innocent and legitimate competition can in any way be deemed to be rational irrespective of the goal to be accomplished.” *Id.* at 755.

Under these authorities, the first step in examining the constitutionality of laws that restrict the right to engage in a lawful occupation is to determine whether the challenged portions of the Ordinance are *related* to public health and safety. Here, Plaintiffs have alleged that the health and safety concerns that prompted the Ordinance—mainly a need for regularly scheduled means to dispose of solid waste in the City—is not threatened when a licensed solid waste disposal company provides supplemental waste

disposal services that do not threaten the existence of the regularly scheduled solid waste disposal services.

The Defendant argues that the Ordinance is necessary to address illegal dumping. But that is a factual question, not a legal one, and there is no evidence that *Plaintiffs* ever engaged in such conduct.

Because the challenged aspect of the Ordinance is arbitrary and not directly related to public health or safety it is unreasonable and therefore violates the Arkansas Constitution's cumulative protections for the right to engage in a lawful occupation.

IV. Ark. Code Ann. § 8-6-211 is unconstitutional as applied to Plaintiffs to the extent that it permits Defendant to prohibit Plaintiffs from operating a supplement ad hoc solid waste disposal service.

Defendant has also alleged that the City has authority under Ark. Code Ann. § 8-6-211 to prohibit Plaintiffs from operating a roll-off dumpster rental business. MTD at 4. Section 8-6-211 should not be read that broadly. But to the extent that Section 8-6-211 allows a municipality to prohibit a licensed entity from offering supplement solid waste services that do not supplant the monopoly then the statute is unconstitutional as applied here and only to the extent that it authorizes the specific prohibition.

In short, the challenged provisions of the Ordinance are not directly related to public health and safety and thus fall outside the narrow exception for the anti-monopoly provisions of Article II, Section 19, of the Arkansas Constitution and its cumulative protections for the right to earn a living by arbitrarily interfering with a lawful occupation without a reasonable connection to public health. *See N. Little Rock Transp. Co. v. City of N. Little Rock*, 207 Ark. 976, 980, 184 S.W.2d 52, 54 (1944); *McCastlain v. R. & B. Tobacco Co.*, 242 Ark. 74, 79, 411 S.W.2d 882, 885 (1967). The statute is unconstitutional for the same reasons to the extent that it permits the challenged provisions of the Ordinance.

As Ark. Code Ann. § 8-6-211 is unconstitutional as it is being applied by Defendant to Plaintiff, it provides no shield of liability to Defendant's for their unconstitutional Ordinance preventing Plaintiffs from operating a roll-off dumpster rental business.

CONCLUSION

As Plaintiffs have sufficiently pleaded at this stage of litigation a claim upon which relief can be granted, this Court should deny Defendant's Renewed Motion to Dismiss Plaintiffs Amended Complaint.

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CERTIFICATE OF SERVICE

I, Whitfield Hyman, hereby certify that on November 20, 2023, a true and correct copy of the above and foregoing was filed with the Clerk of the Court via electronic filing who will send notice of same to the attorneys of record listed below.

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