Order

Michigan Supreme Court
Lansing, Michigan

November 1, 2024

165998

T & V ASSOCIATES, INC., d/b/a RIVER CREST CATERING,
Plaintiff-Appellee,

v

SC: 165998
COA: 361727
Ct of Claims: 21-000075-MM

DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellant.

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On order of the Court, the application for leave to appeal the June 29, 2023 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part II(A) of the judgment of the Court of Appeals and hold that the case is moot. We consequently VACATE the remainder of the Court of Appeals opinion and REMAND this case to the Court of Claims for entry of an order granting the defendant's motion for summary disposition.

Plaintiff, T & V Associates, Inc., doing business as River Crest Catering, is a corporation that owned a catering service and banquet facility, which was operating in early 2021. Plaintiff challenges restrictions that defendant, the Director of Health and Human Services, put in place during the COVID-19 pandemic in March 2021. Specifically, plaintiff claims in its amended complaint that defendant's March 19, 2021 order entitled "Emergency Order under MCL 333.2253—Gatherings and Face Mask Order," which was effective from March 22, 2021, through April 19, 2021, violated plaintiff's procedural and substantive due process rights. Plaintiff also claims that MCL 333.2253, the authority upon which defendant issued the order, violated the separation of powers.[1] Plaintiff seeks

[1] At the time, MCL 333.2253 provided, in relevant part:

> (1) If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health

declaratory relief, asking the court to declare the order and MCL 333.2253 void. Defendant moved for summary disposition, arguing, in relevant part, that the claims were moot. The Court of Claims concluded that the case was not moot, but nevertheless granted defendant's motion on another ground. Plaintiff appealed, and defendant again moved to dismiss the case as moot, but the Court of Appeals denied the motion. Judge KRAUSE dissented. On the application itself, Judge GADOLA authored a published opinion, joined by Judge BOONSTRA, affirming the lower court's opinion that the case was not moot.[2] Judge YATES dissented. Defendant now seeks leave to appeal in this Court.

A moot case " 'seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.' "[3] In other words, a case is moot when it involves "nothing but abstract questions of law which do not rest upon existing facts or rights."[4] "It is well established that a court will not decide moot issues."[5] "[T]he burden of demonstrating mootness is a 'heavy one.' "[6] While the general rule is that courts do not review moot cases, there are exceptions. One exception is when an issue "is one of public significance that is likely to recur, yet may evade judicial review."[7]

We conclude that the instant case is moot and does not fall under the exception to the mootness doctrine. The order that plaintiff challenges is no longer in effect and has not been for over three years. Additionally, while plaintiff continues to be a catering corporation, it has ceased operating the facility that was affected by the orders. For these reasons, the instant case presents nothing but abstract questions and does not rest on

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> services and enforcement of health laws. Emergency procedures shall not be limited to this code. [MCL 333.2253, as amended by 2006 PA 157.]

[2] *T & V Assoc, Inc v Dir of Health & Human Servs*, ___ Mich App ___ (2023).

[3] *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610 (1920).

[4] *Gildemeister v Lindsay*, 212 Mich 299, 302 (1920).

[5] *People v Richmond*, 486 Mich 29, 34 (2010).

[6] *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306 (2001), quoting *Los Angeles v Davis*, 440 US 625, 631 (1979).

[7] *Richmond*, 486 Mich at 37.

existing facts or rights. A judgment would have no practical effect on an existing controversy.[8]

Regarding the exception for cases that are of public significance and likely to recur yet evading review, the question is whether the issue is "*likely* to recur."[9] A possibility that an issue will recur is not sufficient. Several relevant facts have changed substantially since the order was issued—the COVID-19 emergency has ended, and there are higher vaccination rates as well as more effective treatments available.[10] While it is possible that an order similar to the one plaintiff now challenges will be issued in the future, we do not believe it is likely. Additionally, as Judge YATES explained in his dissent, MCL 333.2253

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[8] See *Gildemeister*, 212 Mich at 302.

[9] *Richmond*, 486 Mich at 37 (emphasis added).

[10] *Resurrection Sch v Hertel*, 35 F4th 524, 529 (CA 6, 2022) (reasoning, when considering the application of the voluntary-cessation doctrine to a challenge to a mask mandate, that "the relevant circumstances have changed dramatically since the Department imposed its statewide mask mandate in October 2020. At that time, nobody was vaccinated and treatments were less effective than they are now. The relevant circumstances now, in contrast, are largely the same circumstances that prompted the State to rescind the mandate").

has been substantially amended.[11] Consequently, we do not believe that the issues plaintiff raises are likely to recur.[12]

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[11] 2022 PA 274. See *T & V Assoc, Inc*, ___ Mich App at ___ (YATES, J., dissenting); *id*. at ___ n 3 ("The amendment cabined the authority of the Director to 'prohibit the gathering of people for any purpose' by adding two restrictions set forth in MCL 333.2253(4) and (5) and expressly subjecting the Director's authority under MCL 333.2253(1) to those restrictions. To be sure, neither of those restrictions deals with the operations of restaurants and banquet facilities, but the amendment has a significant impact on the Director's authority."). While it is true, as Justice VIVIANO notes, that the additional subsections concern visitation of certain individuals in healthcare facilities, they still significantly, if generally, curtail defendant's powers under MCL 333.2253. The amendments could well affect an analysis of plaintiff's claim regarding whether MCL 333.2253 violates the separation of powers, as the amendments provide more instructions regarding the authority delegated to defendant. *In re Certified Questions From the US Dist Court, Western Dist of Mich*, 506 Mich 332, 360 (2020) (" '[T]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. . . . [T]he answer requires construing the challenged statute to figure out what task it delegates *and what instructions it provides*.' "), quoting *Gundy v United States*, 588 US 128, 135-136 (2019) (opinion by Kagan, J.) (emphasis added).

[12] In certain Michigan cases and federal cases, courts have stated another requirement of the exception for issues of public significance that are likely to recur but evade review—that the issue be likely to recur specifically to the same complaining party. See, e.g., *Weinstein v Bradford*, 423 US 147, 149 (1975) (requiring that "there was a reasonable expectation that the *same complaining party* would be subjected to the same action again") (emphasis added); *Mead v Batchlor*, 435 Mich 480, 487 (1990), abrogated on other grounds by *Turner v Rogers*, 564 US 431 (2011) (emphasizing that the "*defendant* faces the possibility of future contempt proceedings") (emphasis added). It is uncertain whether Michigan common law requires an issue to be likely to recur specifically to the same complaining party. *Paquin v St Ignace*, 504 Mich 124, 145 (2019) (MARKMAN, J., dissenting). But we need not clarify our test at this time because we do not believe the instant case falls under the exception regardless. For the reasons above, we would not apply the exception because we do not believe the instant issue is generally likely to recur. There is even more evidence that the issue is not likely to recur to plaintiff, as plaintiff has closed its services and facility affected by the order.

Having determined that the exception for issues that are likely to recur yet may evade judicial review does not apply, we conclude that the case is moot and that defendant's motion for summary disposition should be granted.[13]

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[13] In his dissenting opinion, Judge YATES discussed another exception to the general rule that we do not review moot cases—the voluntary-cessation doctrine. Under that doctrine,

> "[v]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." [*Ed Subscription Serv, Inc v American Ed Servs, Inc*, 115 Mich App 413, 430 (1982), quoting *United States v W T Grant Co*, 345 US 629, 632 (1953).]

The doctrine "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc v City of Waukesha*, 531 US 278, 284 n 1 (2001). However, the voluntary-cessation doctrine does not apply, i.e., a case remains moot, so long as there is " 'no reasonable expectation that the wrong will be repeated.' " *W T Grant Co*, 345 US at 633, quoting *US v Aluminum Co of America*, 148 F2d 416, 448 (CA 2, 1945). In plaintiff's answer to defendant's application, plaintiff argues that if this case is moot, the voluntary-cessation exception applies.

As Justice VIVIANO notes, the voluntary-cessation exception has not been adopted by Michigan courts in a precedential opinion. See *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 378 (2022) (GLEICHER, C.J., concurring). However, if we were to adopt the exception, we do not believe the exception would apply here. Largely the same reasons supporting our conclusion that the exception for cases that are of public significance and likely to recur does not apply also support the conclusion that the voluntary-cessation exception would not apply. There is " 'no reasonable expectation that the wrong will be repeated.' " *W T Grant Co*, 345 US at 633, quoting *Aluminum Co of America*, 148 F2d at 448. Additionally, there is no evidence that defendant rescinded the order to evade judicial review. See also *Resurrection Sch*, 35 F4th at 529 ("[T]he State rescinded the mask mandate not in response to this lawsuit, but eight months later, along with several other pandemic-related orders. In doing so the State cited high vaccination rates, low case counts, new treatment options, and warmer weather."). Therefore, the principle motivating the voluntary-cessation doctrine—that a party should not avoid judicial review by temporarily changing their course of action—is inapplicable. See *City News & Novelty*, 531 US at 284 n 1.

VIVIANO, J. (*dissenting*).

I dissent from the majority's decision to peremptorily reverse the Court of Appeals on the issue of mootness. At issue in this case is a challenge to the authority of the director of the Department of Health and Human Services (DHHS) to restrict gatherings in and operation of food service establishments, which the DHHS did in response to the COVID-19 pandemic. The majority resolves the case on mootness grounds but gives only scant attention to plaintiff's arguments that the case falls under an exception to our general mootness doctrine. The issues in this case are of significant public interest and warrant careful consideration from this Court. I would grant leave to appeal.

Plaintiff, T & V Associates, Inc., is a corporation that operated a catering service and banquet facility until 2021. In March 2021, defendant, the director of DHHS, issued an order pursuant to MCL 333.2253 that prohibited gatherings at food service establishments in excess of 50% of normal seating capacity or 100 people, whichever is less.[14] The order also required indoor dining areas to close between 11:00 p.m. and 4:00 a.m.

In April 2021, plaintiff filed a complaint in the Court of Claims seeking declaratory relief, asking the court to rule that MCL 333.2253 is an unconstitutional delegation of legislative authority and that defendant exceeded her authority under MCL 333.2253. In June 2021, all restrictions on indoor dining and gatherings were lifted. Although plaintiff permanently closed its physical business location sometime toward the end of 2021, it remains an existing corporation.

Defendant sought summary disposition, arguing that the claim was moot, that plaintiff lacked standing, and that plaintiff failed to state a claim upon which relief could be granted. The Court of Claims granted defendant's motion. The court concluded that the claim was not moot and that plaintiff had standing but that MCL 333.2253 is not an unconstitutional delegation of legislative authority; thus, plaintiff had failed to state a claim upon which relief could be granted. The Court of Appeals reversed in a split, published decision. *T & V Assoc, Inc v Dir of Dep't of Health & Human Servs*, ___ Mich App ___ (June 29, 2023) (Docket No. 361727). The majority agreed with the Court of Claims on the issues of mootness and standing but reversed on the nondelegation doctrine issue. Defendant sought leave to appeal in this Court.

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[14] This order, issued under the Public Health Code, came after this Court held that the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., is unconstitutional and that Governor Whitmer exceeded her authority by issuing pandemic-related executive orders under the Emergency Management Act, MCL 30.401 *et seq*. See *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich 332 (2020).

"As a general rule, this Court will not entertain moot issues or decide moot cases." *TM v MZ*, 501 Mich 312, 317 (2018) (cleaned up). This Court has explained mootness as follows:

> [A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made the subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it. [*League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020) (citation and quotation marks omitted).]

We have previously recognized "that the burden of demonstrating mootness is a 'heavy one.' " *MGM Grand Detroit, LLC v Community Coalition for Empowerment Inc*, 465 Mich 303, 306 (2001) (citation omitted).

There are exceptions to the general mootness rule. First, "even though an issue is moot, it is nevertheless justiciable if the issue is one of public significance that is likely to recur, yet may evade judicial review." *People v Richmond*, 486 Mich 29, 37 (2010). The majority concludes, with little analysis, that it is unlikely that an order like the challenged one in this case will be issued in the future. I am not convinced that is correct and believe the question warrants more thorough examination. The majority also contends that "MCL 333.2253 has been substantially amended," *ante* at pp 3-4, noting the enactment of 2022 PA 274. But even as amended, MCL 333.2253(1) still allows defendant to "prohibit the gathering of people for any purpose" and to "establish procedures to be followed during the epidemic" if she "determines that control of an epidemic is necessary to protect the public health," which is the operative language that plaintiff challenged in its complaint. The only limitations that 2022 PA 274 added to MCL 333.2253 relate to visitation of certain individuals in healthcare facilities, which does not apply to this case. Thus, for purposes of the restrictions on plaintiff's establishment, MCL 333.2253 remains virtually unchanged.[15]

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[15] In considering this exception, one relevant question would be what the precise contours of the exception are. The United States Supreme Court has said that it applies if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v Bradford*, 423 US 147, 149 (1975). But, as the majority acknowledges, neither this Court nor the Court of Appeals has

Second, the majority gives short shrift to plaintiff's argument regarding the "voluntary cessation" doctrine. See *United States v W T Grant Co*, 345 US 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot."). The Court of Appeals opinion below appears to be the first binding opinion in Michigan to recognize the doctrine. See *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 378 (2022) (GLEICHER, C.J., concurring) (noting that, at the time, the doctrine "ha[d] not yet been adopted in Michigan").[16] The majority cursorily concludes that orders similar to the one challenged here will not be issued in the future, referring back to its analysis of the first exception. Again, I am not convinced this is correct. And if the "voluntary cessation" doctrine is now recognized under Michigan law, the precise contours of the doctrine could be outcome determinative here. For example, is it necessary, as the majority appears to believe, that the voluntary cessation occur in order to evade judicial review? If not, plaintiff's argument that the doctrine applies here may have merit. Whether we should recognize this doctrine and what specific requirements the doctrine includes are important issues that warrant a closer look than the cursory review the majority gives these questions.

The substantive issues in the case—whether MCL 333.2253 violates Const 1963, art 3, § 2 as an unconstitutional delegation of legislative authority and, regardless of the constitutionality of MCL 333.2253, whether defendant exceeded her authority under that statute—are matters of significant public interest. This is evident from the effects they had on "the course of social and economic life in our state—they interfered with our civil liberties and our daily lives, including where and how we work, socialize, educate our children, and worship." *Moore Murphy Hospitality, LLC v Dep't of Health & Human Servs*, 509 Mich 926, 928-929 (2022) (VIVIANO and BERNSTEIN, JJ., dissenting). The Court of Appeals majority concluded in its thoughtful published opinion that the COVID orders issued by the DHHS director were unconstitutional under the analysis this Court set forth in *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich

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recognized the requirement that the same complaining party must be likely to be subjected to the action at issue in the future. See *Paquin v St Ignace*, 504 Mich 124, 144-146 & nn 6-8 (2019) (MARKMAN, J., dissenting) (discussing application of the "same complaining party" requirement in the federal courts and noting that the requirement has not been adopted in Michigan). Whether this requirement is part of Michigan's mootness doctrine could be dispositive here. While plaintiff has closed the doors to its physical catering business, the likelihood would appear to be significantly greater that other similar businesses might again be subject to restrictions similar to those issued during the COVID-19 pandemic.

[16] The Court of Appeals did discuss the exception in a case not binding under MCR 7.215(J)(1). See *Ed Subscription Serv, Inc v American Ed Servs, Inc*, 115 Mich App 413, 430 (1982).

332 (2020). That is a momentous ruling affecting the rights of all Michiganders—I would not so lightly toss it aside.

Given the importance of the substantive issues in the case and the heavy burden of demonstrating mootness, a determination that the case is moot should be made only after careful consideration, including an opportunity for the parties to fully brief the issues and make oral arguments. Because the majority does not choose this course, I respectfully dissent.

BERNSTEIN, J., joins the statement of VIVIANO, J.