Order

Michigan Supreme Court
Lansing, Michigan

August 30, 2024

165169

MOUNT CLEMENS RECREATIONAL BOWL, INC., K.M.I., INC., and MIRAGE CATERING, INC., Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,

v

SC: 165169
COA: 358755
Ct of Claims: 21-000126-MZ

DIRECTOR OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHAIRPERSON OF THE LIQUOR CONTROL COMMISSION, and GOVERNOR,
Defendants-Appellees.

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On January 10, 2024, the Court heard oral argument on the application for leave to appeal the November 17, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

Plaintiffs are a group of food and beverage establishments that were forced to shut down during the COVID-19 pandemic due to Governor Gretchen Whitmer's executive orders.[1] After they were allowed to reopen, they were subject to restrictions, which they allege resulted in the loss of significant business.[2] Plaintiffs filed suit against the director

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[1] See Executive Order No. 2020-9 (requiring "[r]estaurants, food courts, cafes, coffeehouses, and other places of public accommodation offering food or beverage for on-premises consumption" and "[b]ars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, special licensees, clubs, and other places of public accommodation offering alcoholic beverages for on-premises consumption" to close to the public).

[2] When food and beverage establishments were allowed to reopen in June 2020, they were subject to a number of limitations, including reduced occupancy. See Executive Order No. 2020-110. All places of public accommodation were allowed to open in September 2020, see Executive Order No. 2020-176, but restrictions on food and beverage establishments

of the Department of Health and Human Services, the chairperson of the Liquor Control Commission, and the Governor (hereinafter collectively "defendants"), alleging, among other things, a regulatory taking in violation of the Michigan Constitution. Relevant to this appeal, the Court of Claims granted summary disposition in favor of defendants on this claim.

The Court of Appeals affirmed in a published opinion.[3] The Court of Appeals relied heavily on the analysis of *Penn Central Transp Co v City of New York*, 438 US 104 (1978), in *The Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238 (2022).[4] The Court of Appeals found *Gym 24/7 Fitness* controlling, explaining:

> The upshot is that *Gym 24/7 Fitness* is not distinguishable from the present case. Even if one could argue that the Court in *Gym 24/7 Fitness*

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continued. This Court subsequently held that the Governor's executive orders exceeded her scope of authority under the Emergency Management Act and that the since repealed Emergency Powers of the Governor Act was unconstitutional because it violated the nondelegation doctrine. *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich 332 (2020). During this period, the director of the Department of Health and Human Services began issuing orders under Part 22 of the Public Health Code, specifically MCL 333.2253. Among them were orders that restricted food and beverage establishments from returning to full capacity. In June 2021, the final capacity restrictions on such businesses were lifted. State of Michigan, *Rescission of Emergency Orders* <https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-directives-content/rescission-of-emergency-orders-2> (June 17, 2021) (accessed July 30, 2024) [https://perma.cc/EP3H-22A6].

[3] *Mount Clemens Recreational Bowl, Inc v Dir of Dep't of Health & Human Servs*, 344 Mich App 227 (2022).

[4] *Penn Central* identified three factors that should bear "particular significance" in determining whether a regulatory taking has occurred:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Central*, 438 US at 124 (citations omitted).]

> intermingled, to some extent, concepts of taking and governmental necessity, *Gym 24/7 Fitness* is binding caselaw regarding how to view the COVID-19 regulations in Michigan. Further, even if one looks to the caselaw, such as *K & K Constr*[*, Inc v Dep't of Environmental Quality*, 267 Mich App 523 (2005)], provided by plaintiffs, it does not provide a path to appellate relief. Plaintiffs argue that discovery is needed, but in *Redmond v Heller*, 332 Mich App 415, 448; 957 NW2d 357 (2020), the Court stated that "summary disposition may still be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party." Such is the case here. [*Mount Clemens Recreational Bowl*, 344 Mich App at 244-245.]

Plaintiffs sought leave to appeal in this Court, and we ordered oral argument on the application, to be heard with *Gym 24/7 Fitness*.[5]

For reasons similar to those I relied on to conclude that factual development is necessary in *Gym 24/7 Fitness* to properly analyze the *Penn Central* factors, further factual development is necessary here.[6] I discuss the *Penn Central* factors at length in my dissent in *Gym 24/7 Fitness* and incorporate that discussion by reference here. Plaintiffs in this case have an even stronger argument that the Court of Appeals erred in its *Penn Central* analysis. Plaintiffs' takings claim relates to the restrictions on food and beverage establishments that lasted through June 2021. While all places of public accommodation were allowed to open in September 2020, the class of businesses that continued to have capacity restrictions was smaller than before, and food and beverage establishments had unique restrictions placed on them. These differences would affect all three *Penn Central* factors. The Court of Appeals failed to understand the meaningful distinctions between the facts of this case and those in *Gym 24/7 Fitness*. Contrary to the Court of Appeals' assertion, *Gym 24/7 Fitness* is not "binding caselaw regarding how to view the COVID-19 regulations in Michigan."[7] The Governor alone issued 140 executive orders, which does not include the dozens of COVID-19-related orders issued by the DHHS. It is absurd to think that *Gym 24/7 Fitness*'s analysis of a select few orders—specifically as they affected gyms and fitness centers—could apply broadly to every COVID-19 regulation. The Court of Appeals gave short shrift to plaintiffs' claims—its reliance on a *Penn Central* application to plaintiffs in a completely different industry ignores that takings claims are "fact-

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[5] Unlike the plaintiff in *Gym 24/7 Fitness*, plaintiffs in this case did not raise a categorical-taking claim.

[6] See *The Gym 24/7 Fitness v Michigan*, ___ Mich ___, ___ (2024) (VIVIANO, J., dissenting) (Docket No. 164557).

[7] *Mount Clemens Recreational Bowl*, 344 Mich App at 244.

intensive"[8] and that the *Penn Central* analysis involves "complex factual assessments of the purposes and economic effects of government actions."[9] By looking the other way on claims like these, we "damage the credibility of the judiciary to serve as a bulwark of our liberty and ensure that the government does not take private property without just compensation—even in times of crisis."[10] I would reverse the lower court judgments in this case and remand to the Court of Claims to allow discovery to continue.

For these reasons, I respectfully dissent.

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

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[8] *Resource Investments, Inc v United States*, 85 Fed Cl 447, 466 (2009).

[9] *Yee v City of Escondido*, 503 US 519, 523 (1992). See generally *Penn Central*, 438 US at 124 ("Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.") (quotation marks and citations omitted; alteration in original).

[10] *Gym 24/7 Fitness*, ___ Mich at ___ (VIVIANO, J., dissenting); slip op at 17.