No. 280P22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff-Appellant, v. ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants-Appellees.	)	From Alamance County COA No. 21-428

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
(Defendants–Appellees After 5 Events, LLC, Jason Turner, and Robert Turner)

****

INDEX

TABLE OF CASES AND AUTHORITIES

No. 280P22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

KODY H. KINSLEY, in his official capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff-Appellant, v. ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER, Defendants-Appellees.	)	From Alamance County COA No. 21-428

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW
(Defendants–Appellees After 5 Events, LLC, Jason Turner, and Robert Turner)

****

TO THE HONORABLE SUPREME COURT
OF NORTH CAROLINA:

Defendants–Appellees, After 5 Events, LLC, Jason Turner, and Robert Turner, respectfully respond to the Petition for Discretionary Review filed by the Plaintiff–Appellant. In opposition to the Petition, Defendants–Appellees show the following:

FACTS

ACE Speedway is a race track located in Alamance County. It has a seating capacity of around 5,000 spectators. (Doc. Ex. p. 183, ln. 17). Three races were conducted in 2020 prior to the institution of this action. The attendance for the three races was: May 23 – 2,550 spectators; May 30 – a little over 1,600; June 6 – 1,200. (R. S. p. 463, ln. 17-25). The break even point for the racetrack is around 1,000 spectators. (Doc. Ex. p. 178). There are 45 people employed to put on a race. (Doc. Ex. 178, ln. 12-13).

Prior to the first race, Defendant–Appellee, Jason Turner, met with "stakeholders", including the Alamance County Health Director, Sheriff Terry Johnson, and a member from DHHS, among others. At this meeting, Defendant–Appellee Turner received a tentative guidance document for conducting the races from the Health Director. The document was based on a

template from the Department of Health and Human Services. (Doc Ex. pp. 169-170). In conducting the races, these Defendants–Appellees by and large complied with the guidance document. (Doc. Ex. p. 179, ln. 17-22). The precautions set forth in the guidance document and carried out by the Defendants–Appellees included contact tracing by way of a sign in roster; plexiglass being installed at concession stand windows; use of touchless thermometers to check temperatures; screening questions placed at entrances; six feet markers were placed at common areas, concession stands, fuel stations, and tire stations to maintain social distancing; announcements were made over the PA system to remind people to keep social distancing; hand sanitizer was provided at all common spaces; and commonly used surfaces and hand washing stations were disinfected with a bleach mixture. (Doc. Ex. 179-185).

As of June 15, 2020, there were 295 active cases of COVID-19 in Alamance County. (Doc. Ex. p. 161, ln. 22). Twelve people were in the hospital with none in the hospital in Alamance County. (Doc. Ex. p. 162, ln. 4-6; Doc. Ex. p. 163, ln. 16-18). From the beginning of the outbreak of COVID-19, there had been 34 COVID-19 related deaths in Alamance County as of June 15, 2020. 29 of those deaths had been in a nursing home. (Doc. Ex. p. 165, ln. 3-10). No cases of COVID-19 in Alamance County were linked to any races held at ACE Speedway.

(R. S. p. 437, ln. 20-24). The population of Alamance County is approximately 166,000 people. (R. S. pp. 445, ln. 25 – 446, ln. 3).

The basis of the Complaint in this action is a violation of the mass gathering limits of 25 persons in outdoor arenas which was part of Executive Order 141 issued by Gov. Cooper. (R.p. 16, ¶'s 26-27; R.p. 137). After the issuance of this Executive Order, Defendant–Appellee, Jason Turner, made several critical comments to the press regarding the Governor's Executive Order. (Doc. Ex. p. 195, ln. 14-20). These comments were made a part of the basis for the lawsuit by the Plaintiff–Appellant. They are reflected in paragraphs 28, 29, and 30 of the Complaint. (R.p. 16-17).

After these comments, the Governor became personally involved with shutting down ACE Speedway. On May 30 while on the way to meet with these Defendants–Appellees, a person from Gov. Cooper's Office called Sheriff Johnson. The Sheriff explained that he was on his way to the racetrack to meet with these Defendant–Appellees. (Doc. Ex. p. 143, ln. 2–11). Sheriff Johnson then met with these Defendants–Appellees at the request of Gov. Cooper and requested that they call off the race which was scheduled. (R.p. 18, ¶ 31). Gov. Cooper, through his counsel, sent a letter to the Sheriff and Chairman of the Board of Commissioners explaining that holding races with more than 25 spectators in

attendance was in violation of Executive Order 141. (R.p. 18, ¶ 35; R.p. 52).

Sheriff Terry Johnson has been in law enforcement for 49 years, and has been sheriff of Alamance County for 19 years. (Doc. Ex. p. 152, ln. 16-19). In his 49 years of law enforcement, this is the first time he received a letter from the Governor requesting an investigation of a particular business. (Doc. Ex. p. 153, ln. 13-17).

Major Jackie Fortner of the Alamance County Sheriff's Office conducted an investigation of ACE Speedway. (Doc. Ex. p. 197; Doc. Ex. p. 142, ln. 2-8). In addition to ACE Speedway conducting races, several other race tracks held races at the same time as ACE Speedway. These include Piedmont Drag Strip in Guilford County, 311 racetrack in Stokes County, some tracks in Wake County, and Dixie Speedway. (Doc. Ex. p. 149, ln. 5-18). No Order of Abatement was issued for these other tracks by the Plaintiff–Appellant. (R.p. 142, ¶ 139). Sheriff Johnson publicly stated that he refused to take any further action to enforce Executive Order 141 against ACE Speedway. (R.p. 61, ¶ 5.8).

These Defendants were singled out for enforcement by the Governor and the Plaintiff due to the comments made by Defendant–Appellee, Jason Turner, to the media. (R.p. 142, ¶ 137).

The Order of Abatement, by its own terms, would continue in effect until

"the expiration of Executive Order No. 141..." (R.p. 64). The Complaint of the Plaintiff–Appellant was dismissed with prejudice after Executive Order 141 expired, and not because of an abatement of an imminent health hazard. (R.p. 137).

BACKGROUND

A. ACE Speedway violates Executive Order 141.

There is no question that ACE Speedway violated the Governor's Executive Order 141 which limited attendance at the Speedway to 25 spectators. There was no medical basis for such a limitation in an outdoor venue which seats over 5000 people. Since the minimum number of spectators needed to break even on a race was around 1000 spectators, the executive order had the effect of ordering the race track to shut down.

However, prior to holding the races in violation of the Executive Order, the Turners meet with the local Health Department and an employee of the Plaintiff in order to receive a guidance document outlining the extensive steps needed to carry on a race in a safe manner during the Covid outbreak. ACE Speedway complied with this guidance from the Health Department and the State DHHS. The only issue identified by the Plaintiff is that the racetrack did not comply with the artificial limit of 25 spectators in the 5000 seat outdoor venue.

B. The Secretary Issues the Order of Abatement.

As stated in the Petition for Discretionary Review, an Order of Abatement may issue to an owner or operator of a property when "...an imminent hazard exists..." N.C. Gen. Stat. § 130A-20. An imminent hazard exists when there is "a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, [or] an immediate threat of serious adverse health effects..." N.C. Gen. Stat. § 130A-2.

As a factual matter, there was no imminent hazard in operating ACE Speedway with a capacity over 25 spectators. There is no evidence that anyone contracted Covid by attending races at ACE Speedway before or after the issuance of the Order of Abatement. In fact, there were few cases of Covid in Alamance County at the time of the issuance of the Order of Abatement. Out of a population of 166,000, there were only 295 total cases.

It has also been established as a matter of law that an imminent health hazard did not exist. The Plaintiff in this case took a voluntary dismissal with prejudice. A voluntary dismissal with prejudice is a final judgment on the merits. *Smith v. Polsky*, 251 N.C. App. 589, 595, 796 S.E.2d 354, 359 (2017). It acts the same as if the action had been prosecuted to a final adjudication. *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999). When there is a

filing of a voluntary dismissal with prejudice, the party concedes that none of the grounds for relief are present. *Id.*

In a case such as the one presently before the Court, where injunctive relief is sought, a voluntary dismissal of a complaint is equivalent to a finding that the defendant was wrongfully enjoined. *M. Blatt Co. v. Southwell*, 259 N.C. 468, 472, 130 S.E.2d 859, 862 (1963). Therefore, there has been a legal concession that there was not an imminent health hazard existing.

Further, as indicated in the Petition for Discretionary Review and in the voluntary dismissal filed by the Plaintiff, the Order of Abatement and the resulting civil action were both brought to enforce Executive Order 141, not to abate an imminent health hazard. The Order of Abatement provided by its own terms that it would continue until Executive Order 141 expired. Had the Order of Abatement truly been issued because of an imminent health hazard, there would have been no reason to take a voluntary dismissal when the Executive Order expired. The Order of Abatement would have continued until the health hazard no longer existed.

The issuance of an Order of Abatement shutting down a business in order to enforce an executive order was wrongful. N.C. Gen. Stat. § 166A-19.30(d) provides that the violation of an executive order issued by the Governor is a misdemeanor. An executive order cannot be enforced by an order of abatement.

As this Court has previously stated, "the general rule is that where a statute creates a liability where none existed before and denominates a violation of its provisions a misdemeanor, and prescribes remedies for its enforcement, such remedies are usually regarded as exclusive..." *Moose v. Barrett*, 223 N.C. 524, 527, 27 S.E.2d 532, 534 (1943).

C. The Trial Court Issued a Preliminary Injunction Against ACE Speedway.

The Appellant's citation to the findings of the trial court in a preliminary injunction is misplaced. The ruling granting the preliminary injunction is not only not binding on this Court, it is not a "proper matter for consideration". *Gene's, Inc. v. City of Charlotte*, 259 N.C. 118, 121, 129 S.E.2d 889, 891 (1963).

Further, the findings in an order from a preliminary injunction hearing are "'not authoritative as '" the law of the case, "'for any other purpose, and the judgment or order [is] not *res adjudicata* on'" final hearings." *Childress v. Yadkin Cty*., 186 N.C. App. 30, 43, 650 S.E.2d 55, 64–65 (2007), *quoting, Schloss v. Jamison*, 258 N.C. 271, 276, 128 S.E.2d 590, 594 (1962).

D. The Trial Court Denies the Secretary's Motion to Dismiss ACE's counterclaims.

The Appellant in this section of its Petition admits that the reason the Order of Abatement was issued was because of the Governor's Executive Order, not

because of an imminent health hazard. The Appellant alleges that the abatement order expired immediately on the Governor rescinding his prior order. If the Order of Abatement was based on an imminent health hazard, then it would terminate when the health hazard ceased to exist, not when the Governor decided to rescind an Executive Order. The trial court correctly denied the Appellant's Motion to Dismiss the Counterclaims of these Appellees.

E. The Court of Appeals properly upheld the trial court's decision.

The Appellant in its Petition argues that the constitutional claims of the Appellees are not colorable because they would not pass a rational–basis review. This Court has previously held that sovereign immunity does not bar a claim based on the violation of the Declaration of Rights section of the North Carolina Constitution. *Corum v. Univ. of N. Carolina Through Bd. of Governors,* 330 N.C. 761, 785-786, 413 S.E.2d 276, 291-292 (1992). In order to survive a motion to dismiss, a party does need to plead a colorable claim. "[T]he claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Deminski on behalf of C.E.D. v. State Bd. of Educ*., 2021-NCSC-58, ¶ 17, 377 N.C. 406 (2021). The Court of Appeals properly performed an analysis of the facts pleaded in this case, and concluded that a colorable claim had been stated under the Constitution.

The Appellant argues that the Court of Appeals failed to analyze the pleadings using a rational–basis test. This test is alleged by the Appellant to be proper to review "public–health regulations." Appellant cites no cases in which such a review is conducted for an Order of Abatement. This appeal does not involve the validity of a public health regulation, but instead the improper use of an order of abatement to enforce an executive order.

As to the selective enforcement claim of the Appellees, the Appellant raises the issue that it had filed another case against a race track. However, there is nothing in the Record on Appeal concerning this case. It was raised, as indicated by the Appellant, in its Court of Appeals brief in a footnote. Further, it is unclear why this case is similar to the case at bar. The Appellant states on page 10 of its Petition that the case was filed on September 17, 2020. On the next page, of the Petition, the Appellant states that the mass gathering limit which formed the basis of the Order of Abatement against ACE speedway was lifted by Executive Order 163 on September 4, 2020.

This Court has held that there is sufficient evidence to show a constitutional violation when a deprivation of plaintiffs' freedom of speech was the moving force behind an injunction closing a business. *Moore v. City of Creedmoor*, 345 N.C. 356, 366–67, 481 S.E.2d 14, 21 (1997). This is what happened in the present case.

The Appellees spoke out in the press against the Executive Orders of the Governor. The Governor became personally involved and contacted the Alamance County Sheriff. The Sheriff had never had this happen in his 49 years in law enforcement. Further, the Sheriff had an investigation conducted by his office, and determined that there were several other race tracks in the area which were conducting races. Since the State was not taking action against those tracks, the Sheriff refused to charge the Appellees with violating the Executive Order of the Governor.

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

I. The Decision of the Court of Appeals does not Warrant Discretionary Review.

A. Prior Court Precedent.

The decision of the Court of Appeals in this case is in keeping with long held precedent of this Court. As stated above, this is not a case challenging a public health regulation. It is a case challenging the Secretary ordering the closing of an ordinary business in order to improperly enforce an executive order by the governor.

This Court has held on many occasions that the State, including the Secretary, cannot order a person to keep from engaging in an ordinary vocation.

This is what was done in this case. As stated in *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 863 (1940), "[w]hile many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable." *In accord*, *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (quoting *Harris*, and recognizing fundamental right to "earn a livelihood"). *See also, State v. Ballance*, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949) (legislature cannot deny right to maintain themselves and their families); *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (police power "must not invade personal and property rights guaranteed and protected by" Constitution). Further, as stated in *Harris*, the right to engage in an ordinary vocation is "the principal purpose of the Constitution itself." *Harris,* S.E.2d at 863. The Secretary in this case did not issue a regulation, he issued a prohibition on engaging in an ordinary vocation.

At this stage of the litigation, all that is needed to deny the motion to dismiss is for these Appellees to have pleaded a colorable claim that there is a violation of the right to earn a living guaranteed by Art. I, sec. 1 of the North Carolina Constitution. As the decision below shows, this was done, and the decision of the trial court was properly upheld.

B. Significant Public Interest.

This case does not involve significant public interest. The State of Emergency issued by the Governor has expired, and the outcome of this case will not effect any current laws, regulations, or executive orders. As noted by the Appellant, the law under which the Governor's executive order which was attempted to be enforced by the Order of Abatement has been amended. 2021 Session Laws 180.

Further, there does not appear to be a large number of lawsuits pending challenging actions taken by the State during the Covid pandemic. The Appellant lists only two cases, *Howell v. Cooper,* No. 22-571 (N.C. Ct. App.) and *N.C. Bar & Tavern Ass'n v. Cooper*, No. 20 CVS 6358 (Wake Cty. Super. Ct.) (Notice of appeal filed). Neither of these cases involve the issuance of an order of abatement.

The Appellant further argues that there could be additional suits during a pandemic for the State doing too little or too much to protect the public health. Neither of these questions are presented by this appeal. This case involves the violation of a constitutional right by the State in improperly issuing an order of abatement precluding the Appellees from engaging in an ordinary vocation.

The Appellant also argues that based on sovereign immunity, a case should not be permitted for the violation of a constitutional right as it could have a

chilling effect on the State, and that the State could face staggering financial liability for its unconstitutional actions. These concerns have previously been rejected by this Court.

Sovereign immunity does not bar an action based on a violation of the Declaration of Rights. As stated in *Corum v. Univ. of N. Carolina Through Bd. of Governors,* 330 N.C. 761, 413 S.E.2d 276 (1992):

> The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.
>
> It is also to be noted that individual rights protected under the Declaration of Rights from violation by the State are constitutional rights. Such constitutional rights are a part of the supreme law of the State. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court as hereinabove set forth. Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Id., N.C. at 785–86, S.E.2d at 291–92.

Violation of constitutional rights stated in the Declaration of Rights of the Constitution, such as the two Constitutional claims set forth by these

Defendants–Appellees, may be brought against the State. The ability to bring an action for the violation of the Constitution includes the awarding of monetary damages for these constitutional violations. *Corum*, N.C. at 785, S.E.2d at 291.

II. The Decision of the Court of Appeals on ACE's Selective Enforcement Claim does not Warrant Discretionary Review.

The decision by the Court of Appeals is in accord with prior Supreme Court precedent, and does not have significant public interest. As indicated *supra,* this Court has held that there is sufficient evidence to show a constitutional violation when a deprivation of plaintiffs' freedom of speech was the moving force behind an injunction closing a business. *Moore v. City of Creedmoor*, 345 N.C. 356, 366–67, 481 S.E.2d 14, 21 (1997).

The Appellees have pleaded the deprivation of their freedom of speech was the moving factor behind the Order of Abatement closing their business. The Appellant in his Complaint alleged that part of his cause of action was the statements of the Appellees criticizing the Governor's executive orders. They are reflected in paragraphs 28, 29, and 30 of the Complaint. Following the statements by the Appellees, the Governor's office took the unprecedented action of sending a letter to the Sheriff at the Governor's direction, directing him to take action against Ace Speedway. The Governor's Office then called the Sheriff to be sure

that he was in fact directing the race track to close. The Sheriff testified that he had not received such a letter from another Governor in his 49 years of law enforcement. At this same time, many other race tracks were operating without involvement of the Governor's office and without an Order of Abatement being issued. These racetracks include Piedmont Drag Strip in Guilford County, 311 racetrack in Stokes County, some tracks in Wake County, and Dixie Speedway. The reason for the Order of Abatement being issued was not due to an imminent health hazard, but was due to one of these Appellees criticizing the Governor's action in the press.

These facts go far beyond simply complaining to the press in order to be "immunized for violation the law" as alleged by the Appellant. These actions by the Governor and the Secretary show an intentional decision to shut a business based on the exercise of free speech rights, and not because of the violation of the law. One can only believe that this type of targeting by the chief executive of the State is such a rare occasion as not to implicate legal principals of major significance.

CONCLUSION

These Appellees, After 5 Events, LLC, Jason Turner, and Robert Turner, respectfully request that this Court deny discretionary review of the judgment

below.

Respectfully submitted, this the 13th day of September, 2022.

KITCHEN LAW, PLLC

/s/ S. C. Kitchen

BY: S. C. Kitchen
Attorney for Defendants-Appellees,
After 5 Events, LLC, Jason Turner,
and Robert Turner
NC Bar No. 9309
502 Main St. Ext.
Unit 110
Swansboro, NC 28584
Telephone: (888) 308-3708
Fax: (888) 308-3614
Email: ckitchen@ktlawnc.com

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in accordance with N.C. R. App. P. 26(c) in the following manner:

( ) by causing a copy of same to be placed in an official depository under the exclusive care and custody of the United States Postal Service, postage prepaid, first class, addressed to the following:

(X) by emailing the document to the following:

John P. Barkley
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
jbarkley@ncdoj.gov

Nicholas S. Brod
Assistant Solicitor General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
nbrod@ncdoj.gov

Ryan Y. Park
Solicitor General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
rpark@ncdoj.gov

James W. Doggett
Deputy Solicitor General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
jdoggett@ncdoj.gov

Frank Longest, Jr.
Holt, Longest, Wall, Blaetz, and Moseley, PLLC
3453 Forrestdale Dr.
Burlington, NC 27215
Flongest@hlwbmlaw.com

This the 13th day of September, 2022.

KITCHEN LAW, PLLC

/s/S. C. Kitchen

BY: S. C. Kitchen
Attorney for Defendants-Appellees,
After 5 Events, LLC, Jason Turner,
and Robert Turner
NC Bar No. 9309
502 Main St. Ext.
Unit 110
Swansboro, NC 28584
Telephone: (888) 308-3708
Fax: (888) 308-3614
Email: ckitchen@ktlawnc.com