E-FILED AND/OR JOURNALIZED
COMMON PLEAS COURT, ERIE COUNTY, OHIO
Jun 12 2020 12:17 PM
LUVADA S.WILSON
CLERK OF COURTS
2020 CV 0201
Binette, Roger E

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et..al…	:	Case No. 2020-CV-0201
Plaintiffs	:	Judge Roger E. Binette
vs		
Amy Acton, et.. al… [1]	:	**JUDGMENT ENTRY**
Defendants	::::	

This matter is before this Court on Plaintiffs' *First Amended Verified Complaint for Declaratory Judgement and Immediate Injunctive Relief (Complaint)* (filed on or about June 5, 2020), *Defendant Amy Acton Hearing Brief (Defendant Brief)* (filed on or about June 7, 2020) and Plaintiffs' *Motion For Temporary Restraining Order and Preliminary Injunction* (*TRO Motion)* (filed on or about June 8, 2020).

This Court has reviewed the filings of the parties, and **FINDS** as follows:

1. Plaintiffs filed their *Complaint* and *TRO Motion* - in general - asking this Court to declare that actions by Defendants violate their Constitutional Rights (property, Due process, Equal Protection, etc..) by issuing and enforcing an Order issued by the Defendant Amy Acton (Defendant Acton). The 'Stay at Home Order' issued on May 29, 2020 (May 29th Order). Thus, enjoining Defendants from continuing to enforcing it against them;

2. In *Defendant's Brief* Defendant Acton asserts -in general - that this Court lacks Subject Matter jurisdiction, Plaintiffs' have not sought Class Certification, and that she has the authority to make Orders to stop and prevent the spread of a contagious and infection disease during a pandemic. Thus, her Order does not run afoul of the Constitutional protections (rights) of the Plaintiffs;

3. After reviewing that filing, this Court conducted an evidentiary hearing on the stated filings on June 8, 2020; Plaintiffs presented one (1) witness at the hearing. To-wit: Brian Shanle ("Mr. Shanle"), and four (4) exhibits. Specifically, The Re-opening Plan (Exh. #10); Resume of Brian Shanle (Exh. #9), The Governor's Press Release (Exh. #7) and Responsible RestartOhio: General Protocals and Regulations (Exh. #5); [2]

4. Defendants presented one (1) witness as well. To-wit: Erie County Health Commissioner Peter Schade (Comm. Schade), and two (2) exhibits. Specifically, State of Ohio COVID – 19 Dashboard (Exh. #A) and newspaper article on Gov. DeWine authorizing Cedar Point, Kings Island, waterparks to re-open June 19 (by Susan Glaser, Cleveland.com) (Exh. #B);

5. Mr. Shanle testified – in general – to Kalahari's operations, 'summer seasons', labor status (i.e.. amount of employees, lifeguards, J-1 workers, furloughs, training, etc..), Re-opening Plan, their working with Defendant Erie Co. Health Department on their Re-opening Plan, their ability to comply with the Safety regulations in Defendant Acton's May 29th Order; etc.. He further testified as to the economic impact the closure has had on Kalahari, as well as on business and local government (i.e.. tax revenues, utility payments, sales, etc…) . Finally, that the safe re-opening approximately three (3) weeks ago of its other resort in Wisconsin with there being no known health issues regarding the spreading of the virus;

6. Comm. Schade testified – in general – to the COVID-19 virus (i.e.. dangers, contagious, communicability, etc..), the out-breaks of the virus in Erie Co., and the prevention of spreading (i.e.. masks, social distancing, etc..). He testified that there have been 19 deaths in Erie Co. from it, with 15 of them occurring at the Ohio Veterans Home. That the residents from there are not really ones that would go to Plaintiffs' business. Further, he testified about businesses in Erie Co. Specifically, that he has given assistance to businesses for

[1] During the pendency of this action Defendant Acton has resigned her position. However, the action was brought against her in her official capacity. Therefore, the substitution via Civ.R. 25 (D)(1) is applicable, and the action shall proceed onward.
[2] Plaintiffs also displayed for this Court a video of the Kalahari Resort and its operations, but did not mark it, nor offer it, as an exhibit.

their re-opening; with Plaintiff Kalahari being one of them. Further, that other non-essential businesses have opened in the area, but not all. How Plaintiff Kalahari's pools and the surrounding activities concern him in regards to the transmission of the virus (i.e.. chlorine, kids screaming, singing, saliva, etc..), but how Plaintiff Kalahari's Re-opening Plan is a good plan, he would approve it, and does not object to the plan. His only issue with the reopening is the 'timing of it'. Specifically, that Plaintiff Kalahari is safe to open on June 19th, not on June 18th because that is what Defendant Acton and Gov. DeWine's timetable is. When pressed as to why June 19th and not June 18th, he answered that he believed they are waiting for more data. He concluded by confirming that he was aware of the re-opening of the State of Georgia, and there being no real health issues from that;

LAW

Whether to grant or deny this action (i.e.. an injunction, temporary restraining order) is in the sound discretion of this Court.[3] In determining whether to grant an injunction this Court must look at the specific facts and circumstances of the case.[4] Further, that this Court has discretion as to the terms to be included in the remedy, and it has broad discretion to fashion the terms of an injunction. Finally, that the specific language and terms of an injunction lie in the sound discretion of this Court.[5] The credibility of the witnesses is for the trier of fact; in this case this Court. [6] To grant the relief requested the Movant must have a clear legal right, the Movant will suffer Immediate and Irreparable Harm if the relief requested is not granted, and the Movant has no other adequate remedy available. [7]

The factors this Court has to consider in granting or denying the preliminary injunctive relief requested are:

1) Whether the movant has shown a substantial likelihood or probability of success that they will prevail on the merits of their underlying claim/action,

2) Whether moving party would suffer irreparable harm/ injury if the injunction is not granted,

3) Whether others (3rd parties) would suffer substantial harm/ injury if the injunction is granted, and

4) Whether the Public Interest would be served if the injunction is granted. [8]

The movant party must prove the four (4) factors by Clear and Convincing Evidence. [9] Further, no one factor is dispositive, and when there is a strong likelihood of success on the merits, Preliminary Injunction relief may be justified even though a plaintiff's case of irreparable injury may be weak.[10] Additionally, the four factors must be balanced (weighed) with the flexibility, which traditionally has characterized the law of equity. [11] Further, the four factors are to be weighed, it is not required that they all must be met. Individually, none of the Factors are dispositive over the others. [12] Additionally, Irreparable harm/ injury is defined as an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. Whether a party will suffer

---

[3] *Mike Mc Garry & Sons Inc. v. Gross* 2006-Ohio-1759; *Myers v. Wild Wilderness Raceway LLC* 2009-Ohio-874; and *DK Prods Inc. v. Miller* 2009-Ohio-436; *Electroniic Classroom of Tomorrow v. Ohio Dept. of Educ.* 2017-Ohio-5607 (10th Dist)

[4] *Mike Mc Garry & Sons Inc. v. Gross* 2006-Ohio-1759.

[5] *Myers v. Wild Wilderness Raceway LLC* 2009-Ohio-874.

[6] *Id.*

[7] *Buzzard, Exr. v. Pub. Emp. Retirement Sys. of Ohio* 139 Ohio App.3d 632; *Langley v. Fetterolf* 89 Ohio App.3d 14, 623 N.E.2d 577.

[8] *KLA Logistics Corp v. Norton* 2008-Ohio-212; *Convergys Corp. v. Tackman* 2008-Ohio-6616; *State ex. Rel Dann v. R&J Partnership Ltd.* 2007-Ohio-7165; *Mike Mc Garry & Sons Inc. v. Gross* 2006-Ohio-1759; and *DK Prods. Inc. v. Miller* - 2009-Ohio-436.

[9] *Id..*

[10] *KLA Logistics Corp v. Norton* 2008-Ohio-212.

[11] *Mike Mc Garry & Sons Inc. v. Gross* 2006-Ohio-1759.

[12] *Hardrives Paving & Const., Inc. v. Mecca Tp. Bd. of Trustees*1999 WL 959864 11th Dist.; *Blakeman's Valley Office Equip., Inc. v. Bierdeman* 2003 -Ohio- 1074

irreparable harm in the absence of an injunction, the moving party need not demonstrate actual harm. Rather a threat of harm is a sufficient basis on which to grant injunctive relief. A showing of irreparable harm requires proof of 'actual irreparable harm or the existence of an actual threat of such injury'.[13]

FINDINGS

Likelihood or probability of success of prevailing on the merits of their underlying claim/action,

Defendant Acton is the Director of Health, who in her capacity, issued various 'closure Orders'. A brief summary of the Orders – pertinent to this matter - is important before addressing the parties' positions.

1. Defendant Acton issued an Order on March 22, 2020 (March 22nd Order). Which, amongst other things, required 'non-essential' business operations to cease; Plaintiffs were not among those considered 'essential'. 'Non-essential' business operations were not specifically defined, yet 'Essential' ones were defined,

2. Defendant Acton issued an Amended Order on April 2, 2020 (April 2nd Order), without any legislation or rulemaking via Administrative process. Which, in effect, continued the original requirement for non-essential business. However, it clarified that a violation of her Order(s) could be punished as a criminal offense. To-wit: a Misdemeanor of the 2nd degree, punishable by fine and / or jail incarceration,

3. On April 30, 2020 Defendant Acton issued a Director's Stay Safe Ohio Order (April 30th Order). As in the past, this April 30th Order was issued without legislative action or Administrative rulemaking process. Moreover, it continued to restrict 'non-essential' businesses similar to Plaintiffs'.

4. On May 29, 2020, prior to the expiration of the April 30th Order, Defendant Acton issued the May 29th Order. The May 29th Order remained in effect until 11:59 p.m. on July 1, 2020, unless she rescinds or modifies it at a sooner date and time. As in the past, this Order was issued without legislative action or the Administrative rulemaking process. Further, it continued to restrict 'non-essential' businesses like Plaintiffs.

Defendant Acton issued these Orders via statutory authority she believed she draws from being the Director of The Department of Health in times of a pandemic. [14] Specifically, from R.C. §3701.13, R.C. §3701.352, and R.C. §3701.99

The pertinent part of R.C. §3701.13 reads as follows:

> The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established....

The pertinent part of R.C. §3701.352 reads as follows:

> No person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.

The pertinent part of R.C. §3701.99 reads as follows:

> C) Whoever violates section 3701.352 or 3701.81 of the Revised Code is guilty of a misdemeanor of the second degree.

---

[13] *Convergys Corp. v. Tackman* 2008-Ohio-6616 and *DK Prods. Inc. v. Miller* - 2009-Ohio-436.

[14] Defendant Acton further cites R.C. §3701.56 as it pertains to local health departments enforcement of her Orders. This would apply to Defendant Erie Co. Health Dept.

As to their 'likelihood of prevailing successfully on the merits', Plaintiffs assert that Defendant Acton does not possess the authority to close their business. Alternatively that the authority given to her is impermissibly unbridled and in violation of certain Constitutional Rights. In support they set forth various Constitutional challenges to Defendant Acton's authority and Orders as stated herein. Amongst them are that the statutes in question are void for vagueness, and violate separation of powers, Due Process and Equal Protection of the laws.

Plaintiffs' claim that R.C. §3701.352, in conjunction with R.C. §3701.13, empowers the Department of Health (Defendant Acton) unfettered discretion to create their own criminal offenses. This is impermissibly vague because it fails to provide Due Process to its citizens, allows for subjective enforcement because it fails to have sufficiently define and precise standards, and inhibits Judicial review. Basically, it fails to give guidance to others because it does not contain sufficient definite and precise standards to allow others (i.e. courts, police, etc..) to ascertain whether the legislating authority's guidance has been followed. Moreover it is vague in guidance to the citizens. Further, Due Process requires that the State provide meaningful standards in its laws, to allow those enforcing them to apply them. This is to avoid arbitrary and discriminatory enforcement by those applying them.

Plaintiffs further contend that allowing the creation of a criminal offense via R.C. §3701.352, when solely reliant on R.C. §3701.13, runs afoul of separation of powers. More specific, that consolidation of power to make a policy and criminalize it by an unelected official offends the idea of a free government based on separation of powers. To-wit: the ability, and failure, to go through the 'rule making' process via R.C. §119 ensures that no 'checks and balances' exists. This allows for the denial of affected parties to have an input /voice in the enactment of what they could be held accountable for in regards to their future actions. The General Assembly intended that they have that input /voice in the process when legislating R.C. §119.

Plaintiffs additionally challenge that their Equal Protection and Due Process rights are violated in regards to the interference with their fundamental property rights. The right to use, enjoy, acquire, dispose of, etc.. of their property is being infringed upon by the virtue of the disparate treatment of their property rights. The classification of their business that prohibits its use - even though they are willing and able to abide by the safeguards set forth by Defendant Acton - yet others are allowed to operate as long as they comply with the same safeguards set forth, is impermissibly discriminatory, arbitrary, and overbroad. Basically, that the purpose of Defendant Acton's Orders is for 'safety'. Yet, the Order classifies them on their 'identity', rather than 'safety'. This classification is arbitrary and unduly oppressive, and results in disparate treatment.

Defendants counter that Plaintiffs cannot show reasonable likelihood of success on the merits for a variety of reasons. First, they reference the wrong provision of the statute. Specifically, Plaintiffs focus on Defendant Acton's authority to issue her May 29th Order via R.C. §3701.13 during times of 'quarantine and isolation'; which Defendant assert is incorrect. She issued her May 29th Order pursuant to that statute 'to make special Orders…..for preventing the spread of contagious or infectious disease'. Thus, the May 29th Order was not restricted to a 14 day limitation, as was asserted in the *Rock House Fitness et..al... v. Amy Acton, etc..* case [15].

Next, Defendants offer that the Ohio Constitution allows for the use of police powers concerning property when

[15] Lake Co. Common Pleas Court granting Injunctive relief (filed on May 20, 2020)

exercised in the interest of public health, safety, morals, or welfare. Plaintiffs' request for heightened scrutiny in regards to their property rights is in error due to their reliance on 'taking' and 'eminent domain' cases; not police power cases. Further, that there has been no 'taking', because Defendants have not engaged in a physical invasion, nor a deprivation of all economical benefit of their property. They were allowed to operate their hotel rooms.

Defendants challenge that there is no Equal Protection concern in regards to regulation of Plaintiffs' property. To-wit: that the Federal and State Equal Protection clauses are to be construed and analyzed identically. The legal standard in this matter is 'rationally related to a legitimate goal of government. Moreover, with an ongoing pandemic, there is an expanded scope of a state's police powers. Thus, making it more difficult for claiming relief under the Equal Protection clause under the 'heighten scrutiny' Plaintiffs assert. Specifically, that even fundamental rights can reasonably be curtailed during a public health crisis for the safety of the general public. Defendants point to numerous federal cases upholding 'closure Orders' on these grounds, and some that find 'slowing the spread of COVID-19 is a compelling interest; not just a legitimate interest.'

Defendants contend that there is no vagueness to the May 29th Order, because any reasonable person is able to know what is and what is not required, and if their conduct will or will not violate the Order. Basically, Defendants claim that Plaintiffs understand it, they just don't agree with it. Further, the same is true for R.C. §3701.13 and the enforcement statutes, they are not vague.

As for delegation of authority by the legislative body, Defendants concur that any delegation requires 'standards and rules' for those receiving that authority. However, they propose that the law allows for an exception when it concerns police powers for the protection of health, safety, or general welfare of the public and it is impossible or impractical to provide them. That latitude is given to those receiving that authority when it is difficult, if not impossible, to have those standards. However, they are to be guided by the 'general policy of the law-making body'.

Court's Analysis:

First, and more importantly to other issues raised herein, this Court is concerned with where Defendant Acton draws her authority to issue the May 29th Order. Specifically, Defendant Acton's May 29th Order states

> *....pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious disease" Order the following ...*

In that regard Defendants are correct that it was issued pursuant to her authority *to ...prevent the spreading of the disease...'*, not in relation to her authority concerning '*quarantine and isolation*'. Defendants point out that was the problem with the decision in the *Rock House* case. However, a literal reading of R.C. §3701.13 reveals that it does ***not*** state Defendant Acton has "the authority to make special orders for preventing the spread of contagious or infectious disease". Thus, her citation to that statute is misplaced, and the validity of the May 29th Order – on its face - is questionable. (SEE Attached for full reading of the statute).

The question becomes then, if not from R.C. §3701.13, where does she get that authority? Maybe from caselaw, but certainly not from R.C. §3701.13. At best, it could be argued that its from **R.C. §3701.14 (A)** where it states

> *(A) The director of health shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and* ***take prompt action to control and suppress it.***

Putting that unargued challenge aside,[16] this Court will continue its analysis making the assumption that the other parties have made. To-wit: that Defendant Acton possesses that authority. Defendant Acton has stated that the purpose of May 29th Order is 'safety'. There's been no proof submitted to this Court that Defendant Acton's Order 'stops' the spread of contagious or infectious disease. Moreover, there has been no evidence that Defendant Acton's Order of the continuous closure has any effect on the prevention and spreading of the virus in regards to Plaintiffs business – that is if their business was done safely as proscribed by the Reopen Ohio program. Further, Gov. DeWine has expressed in the June 5th press conference that businesses like Plaintiffs' have "*...elaborate plans that we believe are consistent with protection of the public*". Further, Comm. Schade has testified that Defendant Kalahari has a good plan in place to re-open safely. Additionally, Defendant Kalahari – through Mr. Shanle – has testified that the local health department office Craig Ward informed them they had a good plan, and could open, but they (Defendant Health Dept) had to comply with Defendant Acton's Order. Defendant Kalahari further contends that it – unlike some other businesses – has the ability to 'limit access' of the amount of people at their facility. Thus, ensuring more safety for the participants at their business. Additionally, they are willing to comply with the *Safely Reopen Ohio* requirements. In furtherance, Defendant Kalahari's other facility in Wisconsin opened May 27, 2020 (approx. three (3) weeks ago), utilizing the same 'safety plan and measures' as Defendant Kalahari employs. They have experienced no health-related issues.

The question then is, why the continued closure of Plaintiff Kalahari's business at this point? Comm. Schade offered only that it appears Defendant Acton (and Governor DeWine) were "waiting on more data". This Court wonders, what data are they looking for? Do they have data from other waterparks that are currently in use, in which to compare to Defendant Kalahari. And, if so, why are those waterparks allowed to be in use and Kalahari is not allowed to. The answer would appear that they don't have that type of data available, due to the May 29th Order that prohibits all waterparks to not be in operation. So, what other 'non-essential' business operation currently allowed to conduct business are they going to use to decide if Plaintiff Kalahari can conduct business safely. On another note, Comm. Schade testified his fear is not the Defendant Kalahari's pools aren't properly chlorinated (to kill the virus), but rather it is the "surrounding activity" that concerns him. The transmission of the virus by kids screaming, singing, saliva, etc.. near and around the pools. What data is available, or are they waiting for, from other non-essential businesses that are currently operating with this same concern in which to compare to Plaintiff Kalahari. If it's not 'safety' issues, nor 'waiting on more data', then it is reasonable to believe it is because of its classification on 'identity'; what it does (waterpark), and not on what it is ('safety'). Closure of a business based on 'identity' and not on 'public safety', is an improper classification, and violates the Due Process and Equal Protection of that business. By allowing other safe non-essential businesses to be open, but restricting Defendant Kalahari's safe non-essential business from opening violates their rights.

Plaintiff Cedar Point Park LLC did not present any evidence of a safety plan, nor that worked with Comm. Schade on their re-opening. Neither that Comm. Schade has approved of such a safety plan. This is not to infer that they don't have one in place, just that no evidence of one was presented to this Court.

The statutes granting her the authority, power to enforce, and criminalize also violates the separation of powers that exist in our Constitutional framework to protect our citizens from the consolidation of power in one person. Laws and

[16] None of the parties in this case have challenged the statute's non-inclusion of those words in R.C. §3701.13 herein.

policy are to be made by our elected legislature, accountable to its citizens. The delegation of their power to an Administrative agency is for the purpose of shaping that policy, which then goes through the rulemaking process. *Chanbers v. St. Mary's School* 82 Ohio St. 3d. 563; *D.A.B.E., Inc. v. Toledo-Lucas County Bd. Of Health*, 96 Ohio St. 3d. 250 (2002). Yet, what occurred with this statute is it allows Defendant Acton to make policy – legislate by issuing an Order – then criminalize the same policy she has made. To even a greater extent the criminalization of it is based on strict liability (mens rea), with no provision for defenses. Moreover, Ohio criminal statutes require 'intent' to be set forth in concert with a particular crime. [17]This unbridled and unfettered consolidation of authority in one unelected official is dangerous grounds to tread on. Not that Defendant Acton would or has already issued such an Order – she has not, but for sake of an example alone of where this could lead, the following scenario is offered. Hypothetically speaking, if the Director has determined that the spread of the virus is great among the elderly (age 65 years plus) and the children of younger years (age 9 years and younger). Based on the Director's '…authority to make special Orders for preventing the spread of the virus…' the Director determines that isolation / quarantine – separating those groups from other - is appropriate. The Director issues an Order that all those age 65 plus are to be taken to a northern county and quarantined there. While all those children 9 years and younger are to be taken to a southern county and quarantined there. If a parent or family member balked at the Order, resisted in allowing their child to be taken from them, that family member could face criminal charges. And, face possible incarceration as a sentence! Again, it is to be noted, that this Court is not saying Defendant Acton has issued such an Order, or to infer that she would issue such an Order. The example was only given for the purpose of this analysis - to demonstrate the overly broad authority her office possesses. That being said, the example sounds far-fetched, but the grant of authority given in the statues Defendant Acton operates under in issuing her Orders does not appear to inhibit such nefarious actions. Or does it ? One doesn't know because such authority is overbroad, and vague on the amount actually given.

Along those lines, the statute confers 'Ultimate' authority…. Ultimate is defined as *being or happening at the end of a process; the final.*[18] When Defendant Acton issues an Order, such as the May 29th Order, does anyone have the authority to override or revoke it considering she possesses ultimate authority. The Erie Co. Commissioners believe Gov. DeWine does, as evidence by Resolution # 20-150 and Commissioner Old's June 3rd letter - but does he ? Does the R.C. §3701.et seq… reserve that right to the Governor, or to the Legislative body to override the Order when it is given by the one who possesses the 'Ultimate – final – authority'. The statute is vague as to that. More troubling is that the grant of power to an Administrative agency must be narrowly construed; not broadly. Yet, this statute provides no guidance for others in that regard. Moreover, if one unelected, unaccountable to the public, official is allowed to invoke unfettered Orders, which can criminalize an otherwise non-criminal activity only for disobedience to her Orders, then the right to Due Process is extinguished. The same is true for Plaintiffs. Should they choose to enjoy their fundamental right to their property [19]by conducting business safely, in the face of the May 29th Order, they could face being criminally charged.

This Court notes that almost all the cases cited by Defendant for the use of police powers stem from Orders, statutes, etc.. that were either enacted by the legislative authority or the Administrative process. Defendant Acton's Orders were

---

[17] R.C. §2901.20 (A)
[18] Dictionary.com
[19] Ohio recognizes that ownership, use, etc.. of property is a fundamental right. *City of Norwood v. Horney* 110 Ohio St. 3d. 353 (2006);

neither. They were Orders she issued; an unelected official, not accountable to the citizens. Further, other cases cited did not concern a person's fundamental right (*City of Toledo v Tellings,* 2007-Ohio-3724); as this case does (fundamental right to property). Further, Defendant directs this Court to limit its inquiry that which was set forth in the *In Abbott,* 954 F.3d. 772 (5th Cir. 2020) case. More specifically, 'whether Defendant Acton's action during this public health crisis is taken in an arbitrary, unreasonable manner, or through an arbitrary or oppressive regulation.

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

The authority to issue Orders, create strict liability crimes without legislative or Administrative oversight, and impose criminal sanctions. To restrict the fundamental right of property based on an impermissible classification of 'identity' rather than on 'safety'. To violate the separation of powers by delegating policy making, rather than policy shaping, to an Administrative agency without proper oversight or reservation of authority to override Orders. All these are a concern for this Court in regards to Due Process and Equal Protection rights of the citizens being violated.

Defendants also ask this Court to follow the dicta by Chief Justice Roberts in *South Bay United Pentecostal Church et.. al.. v. Newsom,* ____ U.S. ___ 2020 U.S. Lexis 3041 wherein he said

> *The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U. S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Marshall v. United States, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)*

However, as pointed out by Plaintiffs, the operative words used by Justice Roberts is *unelected federal judiciary'.* That the concern of 'interfering with decisions by the officials' would be by those 'unaccountable to the people'. To-wit: *unelected judges.* In this State the judiciary is elected by the people, and thus accountable to them. It is the administrative official here, creating laws with criminal sanctions for non-compliance, that is '*unelected'* and interfering with the citizens fundamental rights.

Based on the foregoing, Plaintiffs have shown by clear and convincing evidence that there is a likelihood or probability of success of prevailing on the merits of their underlying claim/action,

2) Whether moving party would suffer irreparable harm/ injury if the injunction is not granted,

Plaintiffs contend that they suffer – and will continue to suffer - irreparable harm/ injury if the injunction is not granted. That interference with their fundamental Constitutional right to property alone suffices to prove the irreparable harm. In addition, the financial losses to their business further this injury. They contend that some of the same arguments

made for 'likelihood of success' (above) apply herein to show the irreparable harm /injury. [20]

Defendants contend that since Plaintiffs are allowed to open for business on June 19th, that there is no harm to them. They would have to show that they have the ability to open prior to June 19th.

Plaintiffs assert that they are able to open prior to June 19th . They can open as soon as June 11th. Further, based on the testimony of the loss of profits, jobs, etc.. each week that goes by is a loss to them.

From the testimony at the hearing, this Court is cognizant of the financial losses to Plaintiff Kalahari due to the extended closure. Additionally, although Defendants contend that Plaintiffs can re-open on June 19th, the May 29th Order does not state that explicitly. The May 29th Order is effective until July 1st, unless earlier rescinded or modified at an earlier date. Thus, there is no Order in place. It is Gov. DeWine's press release of June 5th that states 'waterparks and amusement parks…' are permitted to reopen on June 19th. Which then begs the question about whether a governor has the authority to override an Order issued by the one with 'Ultimate authority..' and can 'issue special Orders to prevent the spread of disease…'. Certainly the statutes conferring that authority to the department and director doesn't state that.

Plaintiffs have no adequate remedy at law. They cannot recover for their loss compensation, loss of employees,[21] and overall other business losses. There is no administrative appeal process in place for challenging the interference with, and taking of, Plaintiffs' Fundamental Constitutional property rights by Defendant Acton's May 29th Order. Injunctive relief allows Plaintiffs to stem the tide of their irreparable harm.

Based on the foregoing, Plaintiffs have shown by clear and convincing evidence that they would suffer irreparable harm/ injury if the injunction is not granted,

3) Whether others (3rd parties) would suffer substantial harm/ injury if the injunction is granted,
and
(4) Whether the Public Interest would be served if the injunction is granted

Both parties seem to address these factors together; almost as they interchanged. Therefore, this Court will address them likewise, although they are different.

Plaintiffs did not really address if others would suffer substantial harm / injury if the injunction was granted. Rather, they address the inverse – would 3rd parties suffer if it wasn't granted. Plaintiffs offer the Erie County Board of Commissioners Resolution #20-150 dated June 3, 2020, which addresses the effect Defendant Acton's Order has had on the Erie Co. Citizens. Specifically, they state that it has had a *…major impact of our tax receipts and employment numbers.* In conjunction with Resolution # 20-150 they offer a letter by Commissioner Matt Old dated June 3, 2020. The correspondence buttresses the financial and employment impact stated in Resolution #20-150. Both request that Governor DeWine consider amending Defendant Acton's May 29th Order. Additionally, they add the concern about power such as Defendant Acton possesses, would continue to rest in one unelected, unaccountable to the people, person to wield as she chooses. Finally, that there is no sound evidence that Defendant Acton's Order stops the spread of the virus.

Defendants assert only that there is a pandemic, and Defendant Acton's actions have helped decrease the spread of the virus. So, if the May 29th Order is enjoined it would put lives at risk.

---

[20] Plaintiffs dismissed their claim for money damages via Civ. Rule 41 (A) in their filing, and on the record at the evidentiary hearing.

[21] Mr. Shanle testified about the problem of having always to hire employees, and the loss of employees during this time of shut down.

In conjunction with Plaintiffs' foregoing arguments, they seem to also suggest that failure to grant the injunction could lead to a loss of confidence in the peoples' government. This is based on a combination of factors. Such as the violation of separation of powers, thus allowing more power to exist in one person resulting in their rights being violated. The lack of having a voice in legislative or rulemaking actions. The concern for improper classification, and then disparage treatment based on that classification. Enjoining it would be in the public's interest.

This Court also finds that the public interest would be served in other ways by granting this injunctive relief. Citizens have been laid off or furloughed from jobs, obeyed 'Stay at Home' Orders, and tried to fill both roles as parent and teacher due to classrooms shutting down. This can lead to many emotional and stressful issues ('cabin fever', inadequacy, frustrations, etc..). In general, prolonged 'closures' have deteriorating effects on humans, whom are social by nature. Getting away from home, taking time out for recreation or a vacation as a family at a facility like Plaintiff Kalahari's, can help ease the tensions and frustrations. [22] The celebration of family events, such as weddings, receptions, and anniversaries can again occur; with the ability of Plaintiff Kalahari to restrict the amount of individuals there (for purposes of social distancing). Extended family members that have been confined to their own homes may be able to reunite there, and enjoy together a time of relaxation and refreshing. These examples, and other similar ones, demonstrate that public interest would be served by granting the injunctive relief sought herein.

Alternatively, Defendants are not harmed by granting the requested injunctive relief. This is because they have been improperly granted the power to create and criminally enforce, with strict liability, laws simply by a decision of an unelected, unaccountable to the general public, administrative officer by virtue of an *Order*. Application of which is, can and does trample of the fundamental rights of the citizens. Further, in regards to Defendants' concern of the 'spreading of the virus' by allowing Plaintiffs' business to open prior to June 19th, this Court points to Comm. Schade's testimony. That 15 of the 19 deaths in Erie Co. were people who would not likely go to Plaintiffs' businesses; they were in the Ohio Veterans Home.

Based on the foregoing, Plaintiffs have shown by clear and convincing evidence that others (3rd parties) would not suffer substantial harm/ injury if the injunction is granted. Moreover, the Public Interest would be served if the injunction is granted.

HOLDING

Plaintiff Kalahari has an approved safety plan for reopening. They are willing to comply with the safety requirements of Defendants. They have re-opened their Wisconsin facility – utilizing the same plans - with no known health issues related to the virus. There appears to be no reason they should remain closed at this juncture. The only reason they are is that an unelected official, with unbridled authority – that was given in offense to the separation of powers and used to infringe of Due Process and Equal Protection rights - issued the May 29th Order.

This Court has weighed the four (4) factors and finds that Plaintiff Kalahari has proven by clear and convincing evidence those factors "as applied" to them. This is not to be construed as it applying to 'all' waterparks. Although none of those factors are controlling over the others, this Court specifically finds there is a substantial likelihood or probability

[22] Gov. DeWine, in the past in his updates, has commented on 'getting out of the house, taking a walk in the park, etc…' is a good thing for our citizens.

of success that Plaintiff Kalahari will prevail on the merits of their underlying action. Moreover, they are currently, and would continue to, suffer irreparable harm/ injury if the injunction is not granted. This is not to diminish the other factors this Court finds. To-wit that 3rd parties would not suffer substantial harm/ injury if the injunction is granted and the Public Interest would be served if the injunction is granted.

However, at this juncture, Plaintiff Cedar Point Park LLC has failed to present clear and convincing evidence of all four (4) factors for this Court to grant the preliminary injunctive relief they seek.

That based on the foregoing, along with the entire record in this case,[23] Plaintiffs Kalahari's *Motion for TRO* and *Preliminary Injunction* are 'well-taken', and should be granted. However, Plaintiffs Cedar Point Park LLC's is not well-taken, and should be denied.

Finally, in issuing this ruling, it is not this Court's intent to degrade, disparage or impinge on the reputation of these good public servants (Defendant Acton and Governor DeWine). Neither is it this Court's authority to legislate, nor to shape policy therefrom. However, it is this Court's duty to ensure that the Constitutional Rights of the citizens of this great State of Ohio are not infringed upon. That is the standard from which this Court rules.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, Plaintiff LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions' temporary injunctive relief is **GRANTED as follows:**

1. Plaintiff LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions is allowed to re-open its business operations forthwith;

2. Defendants are enjoined from imposing penalties - predicated solely on non-compliance with the May 29, 2020 Order issued by Defendant Acton - on Plaintiff LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions for reopening its business operations at this juncture;

3. With Plaintiff LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions reopening its business operations at this juncture, Defendants are enjoined from enforcing penalties for non-compliance with the May 29, 2020 Order issued by Defendant Acton conditioned on their operations are – and remain - in compliance with all applicable safety regulations contained in Defendant Acton's May 29, 2020 Order or the State's supplemental guidelines governing business like those of Plaintiff LMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions Kalahari.

IT IS FURTHER ORDERED that Plaintiff's Cedar Point Park, LLC's temporary injunctive relief is **DENIED at this time.**

IT IS FURTHER ORDERED that this Court is not requiring Plaintiffs to post bond due to the extended infringement on the Constitutional rights addressed herein. In the alternative, pursuant to Civ.R. 65 (C) the bond is set at zero dollars.

IT IS SO ORDERED.

RE Bell 6/12/2020

JUDGE

[23] Which includes the filings of the parties and the exhibits thereto.

ATTACHED

3701.13 Department of health - powers..

The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established. The department may approve methods of immunization against the diseases specified in section 3313.671 of the Revised Code for the purpose of carrying out the provisions of that section and take such actions as are necessary to encourage vaccination against those diseases.

The department may make special or standing orders or rules for preventing the use of fluoroscopes for nonmedical purposes that emit doses of radiation likely to be harmful to any person, for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as are best controlled by a general rule. Whenever possible, the department shall work in cooperation with the health commissioner of a general or city health district. The department may make and enforce orders in local matters or reassign substantive authority for mandatory programs from a general or city health district to another general or city health district when an emergency exists, or when the board of health of a general or city health district has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by sections 3709.02, 3709.03, 3709.05, 3709.06, 3709.11, 3709.12, and 3709.14 of the Revised Code. In such cases, the necessary expense incurred shall be paid by the general health district or city for which the services are rendered.

The department of health may require general or city health districts to enter into agreements for shared services under section 9.482 of the Revised Code. The department shall prepare and offer to boards of health a model contract and memorandum of understanding that are easily adaptable for use by boards of health when entering into shared services agreements. The department also may offer financial and other technical assistance to boards of health to encourage the sharing of services.

As a condition precedent to receiving funding from the department of health, the director of health may require general or city health districts to apply for accreditation by July 1, 2018, and be accredited by July 1, 2020, by an accreditation body approved by the director. The director of health, by July 1, 2016, shall conduct an evaluation of general and city health district preparation for accreditation, including an evaluation of each district's reported public health quality indicators as provided for in section 3701.98 of the Revised Code.

The department may make evaluative studies of the nutritional status of Ohio residents, and of the food and nutrition-related programs operating within the state. Every agency of the state, at the request of the department, shall provide information and otherwise assist in the execution of such studies.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 02-12-2004; 05-06-2005