STATE OF MICHIGAN

COURT OF APPEALS

JOHN MOODY, DONALD HARMON, RICHARD RAY, DONALD CURRIER, JR., and WALLY MCILMURRAY, JR.,

Plaintiffs-Appellants,

v

MICHIGAN GAMING CONTROL BOARD and GARY M. POST,

Defendants-Appellees.

UNPUBLISHED
July 21, 2011

No. 298697
Wayne Circuit Court
LC No. 10-005984-AA

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order denying their request for injunctive relief to enjoin defendants from enforcing orders that suspended plaintiffs' occupational licenses to participate in horseracing after plaintiffs invoked their Fifth Amendment privilege against self-incrimination at an administrative hearing. For the reasons set forth in this opinion, we affirm.

This case arises from plaintiffs having their racing licenses suspended. On May 20, 2010, plaintiffs appeared at an informal administrative hearing at the Michigan Gaming Control Board (MGCB) office. The purpose of the hearing was to investigate allegations of race-fixing. The MGCB had summoned plaintiffs' bank records; plaintiffs failed to produce them. While plaintiffs were under oath, they invoked their Fifth Amendment privilege against self-incrimination to questions such as whether they had ever failed to put forth their "best effort" in a race and if they had taken money to alter the outcome of a race. The stewards suspended plaintiffs' occupational licenses from May 20, 2010, to December 31, 2010. The stewards explained that plaintiffs "failed to comply with the conditions precedent for occupational licensing in Michigan as outlined in R 431.1035," which essentially requires cooperation in an investigation, including responding to all questions pertaining to racing matters.

On May 26, 2010, plaintiffs filed this action in circuit court. The complaint was styled as "PLAINTIFFS' COMPLAINT AND EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER." It included two counts, which were both labeled "ISSUANCE OF A TEMPORARY RESTRAINING ORDER." Plaintiffs alleged that their licenses were suspended for asserting their Fifth Amendment rights, which defendants treated as a failure to cooperate

with an investigation. Plaintiffs asserted that pursuant to MCL 431.307,[1] they were allowed to refuse to testify upon a showing of "just cause," which they claimed was met by their assertion of a constitutional right. They asserted that the suspension of their licenses was without a factual basis and that injunctive relief was necessary because of their inability to participate in upcoming races. Count II incorporates all of the allegations of Count I and adds, "Plaintiffs have been deprived of their due process – both substantively and procedurally – by the Defendants' actions."

The circuit court scheduled a show cause hearing for June 4, 2010. At the hearing, plaintiffs argued that their licenses were suspended because they asserted their constitutional rights. Plaintiffs noted the administrative rule requiring that a licensee cooperate, appear, testify, and offer evidence. They argued that they complied, except to the extent that they feared the questions may incriminate them. Plaintiffs argued that the proceedings were quasi-criminal in nature, analogous to an attorney disbarment proceeding.

With respect to the elements for issuance of an injunction, plaintiffs argued that they would likely prevail on the merits because "[t]he only reason they were suspended is because they asserted a constitutional right."

The circuit court disagreed with plaintiffs and explained its reasons for denying the injunction as follows:

> I am not satisfied that there would be a likelihood of success on the merits in order to enter an injunction keeping these folks on the job.
>
> The circumstances surrounding this investigation is [sic] of high concern with regard to the public and to issue an injunction under the circumstances allowing them to continue on in light of this investigation and their failure to cooperate would on balance create more harm for the public than to these individuals involved here.
>
> I'm considering the nature of the allegations and the nature of the process involved insuring the integrity of the racing system.
>
> It comes to a screeching halt if the public perceives that there is a fix going on with regard to the racing situation and I think on balance we have more in favor in terms of equities to the public than the individuals involved here.

[1] MCL 431.307(8) states in part, "A person failing to appear before the racing commissioner at the time and place specified in a summons from the racing commissioner or refusing to testify, *without just cause*, in answer to a summons from the racing commissioner is guilty of a misdemeanor punishable by a fine of not more than $1,000.00, or imprisonment for not more than 6 months, or both, and may also be sanctioned by the racing commissioner. . . ." (Emphasis added.) Plaintiffs do not cite this provision in their appellate briefs.

> I am not satisfied there would be a likelihood of success on the merits and that the matter will proceed to hearing and trial if necessary, but the injunction will not issue. That's my call.

This appeal then ensued.

From the outset, though not briefed by either party, we consider whether this appeal is moot. Generally, an issue is moot if circumstances render it impossible for the court to grant relief. *Crawford v Dep't of Civil Service*, 466 Mich 250, 261; 645 NW2d 6 (2002). The determination whether a case is moot must be made before the court addresses the substantive issue. See, *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010).

In this case, plaintiffs' licenses were suspended until December 31, 2010. Thus the question arises as to what plaintiffs could gain from a favorable ruling from this Court, since plaintiffs are no longer subject to the suspension orders. Furthermore, although the parties failed to bring this issue to the attention of this Court, some of the plaintiffs are subject to an order of exclusion by the racing commissioner.[2] Therefore, if plaintiffs are still unable to race, we are unclear whether that inability was the result of the suspension orders that were challenged in this circuit court action or the orders of exclusion.[3]

The parties not anticipating that the issue of mootness would arise in this matter, this Court is limited in its analysis of the issue to answers provided by counsel during oral argument. During oral argument, counsel for the MGCB indicated that the case was moot. Plaintiffs' counsel indicated that the issue was not moot because as long as plaintiffs were suspended, they would not receive a racing license.[4] Thus, plaintiffs argue that the orders of suspension which expired on January 1, 2011, will continue to adversely affect their ability to race. Generally, an issue is moot when an event occurs which renders it impossible for the reviewing court to fashion a remedy to the controversy, but a question is not moot if it will continue to affect a party in some collateral way. *People v Cathey*, 261 Mich App 506; 681 NW2d 661 (2004). Therefore, assuming without deciding, that the circuit court's ruling will continue to have an adverse affect on plaintiffs' ability to engage in horse racing, we turn to the substance of the appeal, namely whether the circuit court abused its discretion in denying plaintiffs' request for a preliminary injunction in this matter.

This Court reviews the denial of injunctive relief for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). Plaintiffs argue that the circuit court abused its discretion by denying a preliminary injunction because they

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[2] We were unable to ascertain the exact number of plaintiffs subject to these orders of exclusion, either through our own research or through inquiry of counsel at oral argument.

[3] Neither counsel provided this Court with copies of the orders of exclusion during oral argument.

[4] We are unable to state with any degree of certainty whether this assertion is correct because none of the plaintiffs applied for a 2011 racing license.

were likely to prevail on the merits of their case, inasmuch as the suspension orders were impermissibly based on their invocation of their Fifth Amendment rights.

"[I]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Id.* at 8 (citation and internal quotation marks omitted). Pursuant to a "longstanding principle," "a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Id.* at 9 (citation and internal quotation marks omitted). Accordingly, "a preliminary injunction should not issue where an adequate legal remedy is available." *Id*. "[T]he three additional factors in a preliminary injunction analysis are (1) whether harm to the applicant absent an injunction outweighs the harm it would cause to the adverse party, (2) the strength of the moving party's showing that it is likely prevail to on the merits, and (3) harm to the public interest if an injunction is issued." *Id*. at 6 n 6.

Although plaintiffs assert that they are likely to prevail on the merits of their claim that their suspensions were improper because the suspensions were premised on their invocation of their Fifth Amendment rights, they ignore the irreparable injury requirement and the other factors necessary for injunctive relief.

Plaintiffs did not show irreparable injury. They asserted that economic hardship would result from the suspensions, but that is insufficient pursuant to *Pontiac Fire Fighters Union Local 376*, 482 Mich at 10. Plaintiff also alleged difficulty in establishing damages from the lost opportunity to race, but similar difficulties may be encountered with other professionals whose income is contingent on performance. Damages may be calculated on the basis of past performance. Additionally, each of the plaintiffs testified in this case that horse racing constituted a significant part of their income over decades. Hence, contrary to plaintiffs' assertions, a calculation of damages would not be merely speculative. Furthermore, the availability of administrative relief and remedies is relevant to whether there has been an irreparable injury. See *Pontiac Fire Fighters Union Local 376*, 482 Mich at 10. The stewards' ruling indicates that plaintiffs had the opportunity to seek review of their suspensions from the racing commissioner and could request a stay of enforcement of the suspensions. The availability of this relief further indicates that the extraordinary remedy of an injunction was not necessary to avoid irreparable injury to the plaintiffs.

Plaintiffs also fail to address the "harm to the public interest" if an injunction is issued, a factor that was critical to the trial court's analysis. The trial court expressed well-founded concerns that the public perception of race-fixing could bring the industry to a "screeching halt." The issuance of an injunction to allow drivers who had been implicated in race-fixing to continue racing had the potential to damage public perception of the integrity of the racing system.

Plaintiffs also fail to address whether the harm that they faced "absent [the] injunction outweigh[ed] the harm it would cause to the adverse party . . . ." *Pontiac Fire Fighters Union Local 376*, 482 Mich at 6 n 6. Defendants assert that their "interest in maintaining an industry free of corruption is paramount, [and t]he potential harmful effects of allowing these individuals to continue to race significantly outweigh the harmful effects if they remain suspended." Plaintiffs do not dispute this interest or attempt to show that their individual interests outweigh it.

Although focusing on the asserted invalidity of their suspensions, plaintiffs neglect to address the other factors necessary to entitlement to injunctive relief. Because plaintiffs did not show that irreparable injury would result from the denial of an injunction and because the public interest weighed against its issuance, the trial court did not abuse its discretion by denying plaintiffs' request for injunctive relief. Having decided that plaintiffs are not entitled to the relief requested from the trial court, we do not address plaintiffs' arguments that defendants' action were based on plaintiffs' assertions of their Fifth Amendment Rights.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro