

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

IN THE MATTER OF:

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Plaintiff,

V

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES; GRETCHEN
WHITMER, in her official capacity as Governor of
the State of Michigan

Respondent-Defendant,

Court of Appeals Case No: 360175
Circuit Court Case No: 21-18522-AE
Honorable Colin G. Hunter

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**APPELLEE'S ANSWER AND OPPOSITION TO APPELLANT'S MOTION FOR
VOLUNTARY DISMISSAL UNDER MCR 7.218**

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1. On January 13, 2022 the Otsego County Circuit Court ruled that MCL 333.2253, under article 3 section 2 of the Michigan Constitution, is clearly an unconstitutional delegation of power from the Legislative to the Executive branch.
2. The court severed MCL 333.2253 from the Michigan Public Health Code under MCL 8.5
3. The action is an administrative appeal filed by the *Iron Pig* restaurant in Gaylord Michigan under the Administrative Procedures Act MCL 24.306(1).
4. On February 3, 2022 the Michigan Department of Health and Human Services (MDHHS) filed an Application for Leave to Appeal in the Court of Appeals.
5. On the next day, February 4, 2022, MDHHS filed a Bypass Application in the Michigan Supreme Court.
6. In the Bypass Application MDHHS stated that the Otsego County Circuit Court ruling is “dangerous”. MDHHS asserts that the court exceeded its authority under the Administrative Procedures Act.
7. Amicus briefs were filed by the Michigan Senate and the House of Representatives and the Mackinac Center for Public Policy.
8. On April 1, 2022, the Michigan Supreme Court denied the application because the Court was not persuaded that the questions presented should be reviewed “before consideration by the Court of Appeals”
9. Justices Viviano and Bernstein dissented stating “[w]e would take this case now to give the court an opportunity to provide clarity on a topic of great importance to our citizens.”
10. The dissent continued “the “present case is a sequel of sorts to *In re Certified Questions*, 506 Mich at 385.” “After the Court’s decision in *In re Certified Questions*, the executive

branch turned to the Public Health Code, and especially MCL 333.2253, as the primary source of authority for its orders pertaining to the epidemic.”

11. The dissent indicated MDHHS is requesting an “overruling” of *In re Certified Questions*.
12. Finally, the dissent determined that under “the circuit court’s ruling, the DHHS can no longer rely on MCL 333.2253.”
13. On May 25, 2022 Judge Shapiro, in a Court of Claims action, determined that the delegation at issue in MCL 333.2253 is constitutional and the issue is not moot. *T&V Associates v Michigan Department of Health and Human Services* Case No. 21-000075-MM Court of Claims.
14. *T&V* is a declaratory action. *The Iron Pig* is an action under the Administrative Procedures Act.
15. On June 8, 2022 *T&V* filed an appeal in the Court of Appeals.
16. On June 16, 2022 MDHHS filed a letter with the Court of Appeals advising of the *T&V* opinion as a basis to accept its Application.
17. On July 20, 2022 the Court of Appeals granted the application.
18. On August 17, 2022 MDHHS filed a Docketing Statement referencing the *T&V* opinion.
19. On the same date, August 17, 2022 in the *T&V* action, MDHHS filed a motion to dismiss the appeal as moot.
20. On September 19, 2022, the Court of Appeals denied the motion. In a dissent, Judge Krause stated Plaintiff in this matter “sought only declaratory relief. At this juncture that relief would constitute an advisory opinion, based on a statute *that may or may not still exist* in its present form.” (emphasis supplied)
21. On October 21, 2022 the *T&V* appeal was Noticed.

22. On November 9, 2022, in the *Iron Pig* appeal, MDHHS filed its brief.
23. The *Iron Pig* brief is not due and will include a counter-statement of questions involved under MCR 7.212.
24. The date to file a motion for voluntary dismissal, if at all, was June 8, 2022, the date *T&V* filed a claim of appeal.
25. However, MDHHS waited until November 23, 2022 at 2:44 p.m., the day before Thanksgiving, to file a motion for voluntary dismissal under MCR 7.218.
26. MDHHS is aware the answer period is 7 days under MCR 7.211.
27. The premise of the motion for voluntary dismissal is the *T&V* appeal.
28. However, no opinion in *T&V* by the Court of Appeals has been issued.
29. Further, a party in *T&V* may appeal to the Michigan Supreme Court.
30. If the Court of Appeals affirms *T&V* in a published opinion, the *Iron Pig* anticipates MDHHS will collaterally enforce MCL 333.2253 against the *Iron Pig* with the *T&V* opinion, even though *T&V* is not premised under the Administrative Procedures Act.
31. If the Court of Appeals dismisses the *Iron Pig* and affirms or reverses *T&V* in an unpublished opinion, there is no precedent regarding MCL 333.2253 under MCR 7.215.
32. MDHHS states the motion for voluntary dismissal was filed “in hopes” that the *Iron Pig* “may be spared any unnecessary effort” through a prompt dismissal of the instant appeal.
33. The *Iron Pig* had its liquor and food licenses suspended and fines were issued under MCL 333.2253.
34. The owner of the *Iron Pig* was held in contempt of court and fined in the Ingham County Circuit Court under MCL 333.2253.

35. The *Iron Pig* and other bars and restaurants in the State of Michigan have a justiciable interest in the Otsego County Circuit Court decision.

36. As Justices Viviano and Bernstein stated: the “powers exercised by DHHS altered the course of social and economic life in our state—they interfered with our civil liberties and our daily lives, including where and how we work, socialize, educate our children, and worship. It “is our job to decide the extent to which the executive branch may properly wield that power in the first place.”

RELIEF SOUGHT

Plaintiff respectfully requests the Court deny Appellant’s Motion for Voluntary Dismissal.

Dated: November 30, 2022

/s/David M. Delaney
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WORD COUNT STATEMENT

This document contains 1064 words and complies with MCR 7.211 (B)(1).