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Apr 14 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2021-000379
Lower Court No. 2021-CP-40-01599

Deborah Mihal and the American Civil Liberties Union
Foundation of South Carolina,.....Appellants,

v.

Governor Henry D. McMaster, in his official capacity; and
Marcia S. Adams, Executive Director of the South Carolina
Department of Administration, in her official capacity,.....Respondents.

**GOVERNOR MCMASTER’S MOTION TO DISMISS/STRIKE AND
REMAND APPELLANTS’ PETITION FOR A WRIT OF SUPERSEDEAS**

Pursuant to Rule 240, SCACR, Respondent Governor Henry D. McMaster, in his official capacity (“Governor McMaster” or “Governor”), without waiving the right to file a return, hereby moves to dismiss/strike and remand Appellants Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina’s (“ACLU”) Petition for a Writ of Supersedeas. For the reasons that follow, the Court should dismiss/strike the Petition and remand to the circuit court.

BACKGROUND

On April 6, 2021, Plaintiffs filed an unverified Complaint for declaratory and injunctive relief in circuit court. In their Complaint, Plaintiffs challenged the provision of Executive Order No. 2021-12 modifying the Governor’s prior directives and requiring state agencies under the

Governor’s authority to “expedite the transition back to normal operations.” Executive Order No. 2021-12, § 5(D). Specifically, Plaintiffs argued (1) the Governor’s executive actions violate the nondelegation doctrine in article III, section 1 of the South Carolina Constitution and the separation of powers doctrine enshrined in article I, section 8 of the South Carolina Constitution; and (2) requiring nonessential state employees to return to the workplace exceeded the Governor’s authority and represented an ultra vires act.

Around the same time, Plaintiffs filed a Motion for a TRO and/or Preliminary Injunction, accompanied by a memorandum, affidavit of Ms. Mihal, unsworn declaration from Appellants’ counsel, and proposed order in support. The Court held a status conference via WebEx with counsel for all parties on April 8, 2021. Both Defendants filed memoranda in opposition to Plaintiffs’ Motion shortly after the status conference. On April 9, 2021, Plaintiffs filed a Reply in connection with their Motion. That same day, the circuit court issued an Order denying Plaintiffs’ Motion for TRO and/or Preliminary Injunction. Plaintiffs filed a Motion to Reconsider the circuit court’s Order on April 12, 2021. By their account, Appellants filed a Motion to Reconsider, but the circuit court sat on it. Not so.

For starters, Appellants never gave the circuit court a deadline by which to rule before they intended to file a petition for extraordinary writs in the appellate courts. Appellants only asked the circuit court for a “decision as quickly as possible and without delay.” Apps.’ Pet. at 75. Further, contrary to Appellants’ representations, they did not “appl[y] for a supersedeas.” Apps.’ Pet. at 9. Nor did the procedural history end there as the Petition suggests. Both Defendants filed memoranda in opposition to Appellants’ Motion to Reconsider on April 12, 2021—the same day Appellants filed the Motion. What is more, Appellants left out that, on April 13, 2021, at the direction of the circuit court, the undersigned counsel prepared and submitted proposed order

denying Appellants' Motion to Reconsider. Yet Appellants moved forward with their appellate filings anyway. On the afternoon of April 13, 2021, Appellants filed a Notice of Appeal and Petition for Writ of Supersedeas in the Supreme Court of South Carolina. That evening, the Clerk of the Supreme Court transferred the case to this Court pursuant to Rule 204(a), SCACR. On April 14, 2021, the circuit court entered an Order denying Plaintiffs' Motion to Reconsider. Shortly thereafter, Appellants filed a Motion to Expedite this Court's consideration of their Petition.

This matter comes before the Court on Governor McMaster's Motion to Dismiss/Strike and Remand Appellants' premature and procedurally improper Petition for a Writ of Supersedeas.

STANDARD

“As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” Rule 241(a), SCACR. And the “automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.” *Id.* “After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule.” Rule 241(c)(1), SCACR. When an exception applies, “any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.” *Id.* Under the rule, “[t]he effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal.” *Id.*

ARGUMENT

Appellants failed to follow the requisite procedure for seeking an order of supersedeas. It is well-settled that, “[e]xcept where extraordinary circumstances make it impracticable, an

application for an order . . . for supersedeas must first be made to the lower court” that “entered the order or decision on appeal.” Rule 241(d)(1), SCACR. In their petition, Appellants contend that, “[o]n the morning of April 12, Appellants moved for the court to reconsider its denial of the Motion for Preliminary Injunction and applied for a supersedeas.” Apps.’ Pet. at 9 (emphasis added). That is not true. Appellants never asked the circuit court for a writ of supersedeas.

Look no further than the Motion to Reconsider they attached to the Petition, which Appellants styled solely as a “Motion for Reconsideration of Order Denying Plaintiffs’ Motion for Preliminary Injunction.” Apps.’ Pet. at 73. In their motion, Appellants said “[i]n light of the emergent circumstances and the need for immediate appellate review in order to prevent irreparable harm, should this Motion not be heard in sufficient time, Plaintiffs further intend to file a notice of appeal, a petition for writ of supersedeas, and a motion for expedited appeal.” *Id.* at 75 (emphasis added). The first time Appellants made that request was to the Supreme Court, which then quickly transferred the case to this Court under Rule 204(a), SCACR. But the circuit court did not receive and deny an application for supersedeas before Appellants sought that relief from the appellate courts. See Rule 241(d)(4)(C), SCACR (stating “[t]he petition shall contain . . . a showing that an application for this relief was made to the lower court . . . and was unjustifiably denied” (emphasis added)).

Appellants, of course, bear the burden of showing it would have been impracticable to first apply to the lower court for a writ of supersedeas. Rule 241(d)(1), SCACR. Respectfully, Appellants cannot and did not shoulder that burden by misrepresenting to the Court that an application was made. The filings accompanying Appellants’ own Petition demonstrate that did not happen. Because Appellants failed to otherwise explain why it was impractical to apply for supersedeas with the circuit court before rushing to the appellate courts, their Petition fails as a

matter of law. The Court should therefore dismiss/strike and remand the Petition for a Writ of Supersedeas to give the circuit court the opportunity to consider their application for the first time.

CONCLUSION

For the foregoing reasons, the Court should dismiss/strike and remand Appellants' Petition for a Writ of Supersedeas to the circuit court. Appellants can always reapply to this Court if the circuit court denies their application. But the Court should require Appellants to properly follow the South Carolina Appellate Court Rules and present an accurate version of events before filing a verified Petition for such extraordinary relief in this Court.

Respectfully submitted,

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Counsel for Respondent Governor Henry McMaster

April 14, 2021
Columbia, South Carolina

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Department of Administration, in her official capacity,.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondent Governor Henry McMaster's Motion to Dismiss/Strike and Remand Appellants' Petition for Writ of Supersedeas on the following counsel of record via email on April 14, 2021.

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Columbia, South Carolina
April 14, 2021

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From: Lisle Traywick
Sent: Wednesday, April 14, 2021 7:42 PM
To: 'Nancy Bloodgood'; 'Susan Dunn'; 'Gene Matthews'
Cc: 'tlimehouse@governor.sc.gov'; Fair, Mardi; Robin Owens; Mihal and ACLU v_ McMaster et al_ _7496_1506_ Correspondence
Subject: Mihal v. McMaster (App. No. 2021-000379) Gov. McMaster's Motion to Dismiss/Strike and Remand Petition for Writ of Supersedeas [IMAN-CLIENTS.FID347687]
Attachments: Mihal v. McMaster (App. No. 2021-000379) Gov. McMaster's Motion to Dismiss_Strike and Remand Petition for a Writ of Supersedeas(37413041.1).pdf; Mihal v. McMaster (App. No. 2021-000379) Proof of Service for Gov. McMaster's Motion to Dismiss_Strike and Remand(37413042.1).pdf

All,

Pursuant to In re Operation of the Appellate Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2020-05-29-02, ¶ (g)(3) (S.C. Sup. Ct. filed May 29, 2020), attached for service upon you via email is Respondent Governor Henry McMaster's Motion to Dismiss/Strike and Remand Appellants' Petition for Writ of Supersedeas, as well as a Proof of Service, being filed in the Court of Appeals.

Should you have any questions or concerns, please don't hesitate to contact us. Thanks and have a nice evening.

Best,

Lisle



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