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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
The Honorable L. Casey Manning, Circuit Court Judge

Case No.: 2021-CP-40-01599
Appellate Case No. 2021-000379

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

Appellants,

v.

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

Respondents.

**ADAMS RESPONSE IN OPPOSITION TO APPELLANTS’
PETITION FOR WRIT OF SUPERSEDEAS**

NOW COMES Respondent Marcia Adams, in her official Capacity as Executive Director of the South Carolina Department of Administration (“SCDOA”), by and through counsel, and responds in opposition to Appellants’ Petition for a Writ of Supersedeas regarding the Order of the Honorable L. Casey Manning, issued on April 9, 2021, in which Judge Manning denied Appellants’ Motion for Temporary Restraining Order (“TRO”) and/or Preliminary Injunction.

PROCEDURAL HISTORY

On Tuesday, April 6, 2021, Appellants filed a Complaint asking the trial court to declare that the “Return in Person Order” contained in Executive Order 2021-12, as implemented by the South Carolina Department of Administration’s guidance in its memorandum entitled “State Government Staffing – Return to Normal Operations,” is “unenforceable” to the extent that it requires non-essential state employees to return to their workplaces in person “without reasonable accommodations for caregiving, health risk, and disability.” (Plaintiffs’ Complaint, p. 19). They also filed a Motion for TRO and/or Preliminary Injunction, requesting that the trial court enjoin the Respondents from implementing the Return in Person Order.

On the afternoon of Wednesday, April 7, 2021, the Honorable Judge L. Casey Manning contacted the parties and scheduled a “Webex video conference” with all parties at 9:30 a.m. on the following morning.

At the meeting on the morning of Thursday, April 8, 2021, Judge Manning indicated that, if a future hearing on the Motion for TRO and/or Preliminary Injunction were necessary, he would convene it on April 15, 2021.

Following the meeting, both Respondents separately filed their responses to Appellants’ motion, and that afternoon, Judge Manning’s clerk sent the following e-mail:

Judge Manning has invited counsel for the defendants to submit a proposed order denying the motion for temporary restraining order and/or permanent injunction. Judge Manning will also accept memoranda in opposition to the proposed order from counsel for plaintiffs. Judge Manning expects to make a decision in this case on tomorrow morning.

(Email of Harvey Edward Shiver II, dated April 8, 2021).

By the next morning, on Friday, April 9, 2021, Respondent Marcia Adams had submitted the proposed order, to which Appellants replied by sending their own opposing brief. That

afternoon, Judge Manning issued his Order denying the Motion for TRO and/or Preliminary Injunction.

On the following Monday, April 12, 2021, Appellants filed a Motion for Reconsideration with the trial court, to which both Respondents separately responded. On the following day, Judge Manning's clerk requested that the Governor's counsel prepare a proposed order denying the Motion for Reconsideration, which was filed on Wednesday, April 14, 2021.

Prior to the trial court's issuance of the order denying the Motion for Reconsideration, Appellants filed this Petition for a Writ of Supersedeas with the South Carolina Supreme Court on April 13, 2021. On the same date, the Petition was transferred to the South Carolina Court of Appeals.

STANDARD OF REVIEW

Rule 65, SCRCP, permits a party to seek injunctive relief, such as a Temporary Restraining Order ("TRO") and/or Preliminary Injunction, if it believes it will suffer irreparable harm or injury during the pendency of the action. However, "[a]n injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). In order to obtain this type of relief, Appellants must establish three elements. First, the Appellants must convince the trial court that they have a likelihood of success on the merits. Second, the Appellants must show that they have an inadequate remedy at law. Third, the Appellants must demonstrate that they will suffer irreparable harm in the absence of an injunction. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (2002); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (S.C. App. 2009).

When reviewing a matter for abuse of discretion, the appellate court must determine whether the “trial court’s decision is unsupported by the evidence or controlled by an error of law.” *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 638 (S.C. App. 2003), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Ordinarily, an appeal from an order granting an injunction or temporary restraining order is not subject to an automatic stay while an appeal is pending. Rule 241(b)(8), SCACR. Appellants are apparently moving for a supersedeas under Rule 241(c)(1), SCACR.

In any event, Appellants have failed to establish that Judge Manning’s order was (1) unsupported by the evidence, or (2) controlled by an error of law. For that reason, Appellant’s petition must be denied.

APPELLANTS’ ARGUMENT

Appellants have based their demands for a TRO and/or Preliminary Injunction on an allegation that the Governor’s Executive Order “exceed[s] the scope of authority granted to the Governor and/or the Department of Administration and is *ultra vires*[,]” (Plaintiffs’ Complaint, p. 19). At its essence, Appellants’ argument is based on the theory that the “Return in Person Order, as implemented by the Memorandum, creates requirements for non-essential state employees that are contrary to the safety, security, and welfare of the State. Both the Governor and the Department of Administration, therefore, have exceeded their statutory authority, usurped the legislative power of the General Assembly, and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution.” (Plaintiffs’ Complaint, ¶ 53). Similarly, they also claim that the Governor exceeded his authority under S.C. Code Ann.

§ 25-1-440 (i.e., committed an *ultra vires* act) by issuing the Return in Person Order contained in EO-2021-12. (Plaintiffs' Complaint, ¶¶ 57-58).

These claims are baseless. For the reasons discussed below, Appellants' motion should be denied.

LEGAL ARGUMENT

I. JUDGE MANNING'S DECISION TO DENY APPELLANTS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION IS AMPLY SUPPORTED BY THE EVIDENCE IN THE RECORD AS WELL AS APPLICABLE LAW.

A. APPELLANTS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS AT THIS STAGE OF THE LITIGATION, WHERE THE GOVERNOR HAS AMPLE AUTHORITY TO AMEND OR RESCIND HIS PRIOR EXECUTIVE ORDERS DURING THE CURRENT COVID-19 EMERGENCY.

Appellants have argued that the Governor does not have the authority to amend or rescind his earlier order from March 19, 2020 (EO-2020-11) that directed non-essential personnel to cease reporting to work, physically or in-person, effective Friday, March 20, 2020. (Plaintiffs' Complaint, ¶ 19). Specifically, Appellants have argued that the Governor's exercise of his authority to amend or rescind his earlier Executive Order is unlawful under current circumstances.

At first glance, such an argument is contrary to the very language of the statute in which the General Assembly authorized the Governor to issue Executive Orders during a declared emergency, stated as follows:

- (a) The Governor, when an emergency has been declared,¹ as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility:

¹ All parties appear to agree that an "emergency has been declared" and, to some degree, still exists. The General Assembly retains the power to terminate the declared emergency. S.C. Code Ann § 25-1-440(a)(2).

- (1) **issue emergency proclamations and regulations and amend or rescind them.** These proclamations and regulations have the force and effect of law as long as the emergency exists;

S.C. Code Ann. § 25-1-440 (emphasis added).

In this case, the Governor has determined that it is “appropriate to modify, amend, or rescind certain emergency measures as part of the process of regularly reviewing such measures to account for new and distinct circumstances and the latest data related to the impact of COVID-19 and to ensure that any remaining restrictions are targeted and narrowly tailored to address and mitigate the current public health threats in the least restrictive manner possible...” (EO-2021-12, p. 4). As a part of this determination, the Governor ordered the following:

I hereby direct all state agencies to immediately expedite the transition back to normal operations. **All Agency Heads, or their designees, shall submit to the Department of Administration, for review and approval, a plan to expeditiously return all non-essential employees and staff to the workplace on a full-time basis.** This Section shall apply to state government agencies, departments, and offices under the authority of the undersigned. I further direct the Department of Administration to continue to provide or issue any necessary and appropriate additional or supplemental guidance, rules, or regulations regarding the application of this Section, or to otherwise provide clarification regarding the same, to such agencies, departments, and offices and to any additional agencies, departments, and offices so as to facilitate and expedite implementation of these initiatives.

(EO-2021-12, p. 12).

Notably, the Department of Administration issued guidance to state agencies as late as March 16, 2021, in which the Department detailed:

- The method by which state agencies may obtain additional time to modify the workplace in order to further mitigate the risk of exposure to COVID-19.
- That employees who were working from home prior to the COVID-19 health emergency would continue to work from home.
- That state agencies must continue to comply with federal and state law, including the Americans with Disabilities Act or the Family Medical Leave Act, when dealing with individual request from employees for accommodations.

- That a state employee could still be required to quarantine away from the office.
- That a state agency could allow an employee to use leave or brief extensions to mitigate problems related to re-entry into the workplace.

(Department Memorandum, March 16, 2021).²

It is apparent that the Appellants disagree with the policy determinations of the Governor in ordering State Employees to return to the workplace on a full-time basis, as was the near-universal working condition of State employees prior to the initial promulgation of EO-2020-11 in March 2020. Appellants have certainly set forth their policy disagreements they have with the Governor, as well as their policy preferences, at length in their Petition and other pleadings. They have failed utterly, however, to set forth a *legal* reason in law why the Governor cannot act to return State employees to work.

In South Carolina, “the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution.” *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935). Stated differently, it is up to the General Assembly “to exercise discretion as to what the law will be.” *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). As the supreme court explained in *Hampton*,

The executive branch is constitutionally tasked with ensuring “that the laws be faithfully executed.” Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly], absent such a delegation, policymaking is an intrusion upon the legislative power.

Id. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15).

²Found at <https://admin.sc.gov/sites/default/files/3-16-2021%20Additional%20FAQs%20-%20State%20Government%20Staffing-Return%20to%20Normal%20Operations%20Memorandum.pdf>. At the very least, the trial court could rely on this evidence to support its decision to deny the Appellants’ motion.

There appears to be no dispute that the General Assembly specifically granted the Governor the power to issue, amend, or rescind emergency proclamations and regulations during the pending declared emergency. S.C. Code Ann. § 25-1-440.

The only apparent effort made by Appellants to support the argument that the Governor exceeded his statutory authority, or “usurped the legislative power of the General Assembly,” or engaged in an *ultra vires* act, is to voice their policy disagreements with him. Specifically, they argue that the “Return in Person Order” does not – in their view – adequately protect the “safety, security, and welfare of the State.” (Plaintiffs’ Memorandum of Law, p. 12; Petition of Appellants, P. 15).

While Appellants may certainly prefer one set of policies over another, and may certainly believe that their preferred policies would better secure the “safety, security, and welfare of the State” than the Governor’s would, they have offered no cogent *legal* argument to support their claims. They have, instead, given voice to their beliefs and/or fears that (1) the Executive Order exposes State employees to increased health risks, or (2) that State employees can do work from home as well as they can at the worksite, or (3) that returning to work may have a disparate impact on some State employees on the basis of sex and disability. (Plaintiffs’ Memorandum of Law, pp. 13-19, Petition of Appellants, p. 15-20).

This showing is absolutely inadequate to support Appellants’ argument or demonstrate a likelihood of success. The trial court rightly found that Appellants’ reliance on *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935) was most unavailing. In *Hearon*, the Court declared that then-Governor Johnston exceeded his authority when he instituted martial law and directed the state militia to occupy state highway commission offices to suppress an alleged “insurrection.” The Supreme Court wryly observed that there was:

no particle of evidence, nor even suggestion, that there existed a state of war, or anything approaching disorder. It is common knowledge that in the area where a state of insurrection was said to exist, the militia was called out and martial law declared, all was as calm, quiet, and peaceful as a May morn; and the courts were open and functioning. Under the Governor's proclamation, the defendants, by force and arms, have taken over the offices, the physical offices, books, properties, and all things pertaining to the state highway department and the state highway commission.

183 S.E. at 21. It is difficult to follow how the bizarre facts referenced in *Hearon* have any bearing on the current case before the Court. Indeed, in the current case, the Governor is actually *easing* emergency restrictions set forth earlier in the COVID-19 crisis, as the Governor has determined that conditions in South Carolina are better than they were in March 2020.

In any event, Appellants have made no showing of any likelihood of success in this matter, and for that reason alone, their motion must be dismissed.

B. IN ANY EVENT, PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE NO ADEQUATE REMEDY AT LAW.

Especially curious – even specious – is Appellants' argument that they have no adequate remedy at law (other than attempting to beguile the Court into committing its own violation of the separation of powers) for the parade of horrors that they believe will befall State employees who return to their physical worksites.

On the contrary, it appears that the trial court's decision to deny Appellants' motion was amply supported in the record. For instance:

- If the employee believed that his employing agency did not sufficiently accommodate a qualified disability, he could bring an action under the S.C Human Affairs Law ("SCHAL") or Americans with Disabilities Act ("ADA").
- If the employee believed that his employing agency improperly denied him leave under the Family Medical Leave Act ("FMLA"), he could bring an FMLA claim.
- If the employee believed that his employing agency subjected him to an adverse action that is grievable under the South Carolina Grievance Procedure Act, S.C.

Code Ann. § 8-17-310, *et seq.*, he could file a grievance and/or appeal under the Act.

- If the employee believed that his employing agency subjected him to race, gender, or disability discrimination under the SCHAL, ADA, or Title VII of the Civil Rights Act of 1964, as amended, he could bring an act pursuant to these statutes.
- If the employee believed that his employing agency subjected him to conditions that cause a workplace injury or illness as defined by the South Carolina Occupational Safety and Health (“SCOSH”) law or the South Carolina Worker’s Compensation Act, he could pursue remedies under these statutes.

It appears, therefore, that the trial court’s decision to deny Appellants’ motion because there are ample alternative legal remedies is amply supported in the record.

C. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANTS FAILED TO SHOW THAT THEY WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED.

As an initial matter, neither the single identified Appellant – Deborah Mihal – nor any other State employee adequately demonstrated to the trial court that she has or likely will suffer any “irreparable” harm if an injunction is not issued. Indeed, the plethora of remedies referenced above – that are available to Mihal and other State employees – indicate that even a presumed economic loss on the part of the State employees cannot constitute an “irreparable harm.” *See District of Columbia v E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000). Nor is this case similar to one where a plaintiff alleges “irreparable harm” in the form of the loss of an entire business or professional practice. *Peek v. Spartanburg Reg’l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (S.C. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

As the trial court noted, the General Assembly has already authorized the Department, in coordination with agencies served, to “develop policies and programs concerning...other conditions of employment as may be needed.” S.C. Code Ann. § 8-11-230(6). Furthermore, as

set forth above, the trial court had ample evidence at hand to support its conclusion that the Department's guidance provides state entities with significant flexibility to address the needs of the myriad State employees who may actually require some form of accommodation or assistance in meeting the demands of their position.

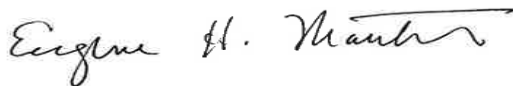
CONCLUSION

For the reasons stated above, Marcia Adams respectfully requests that the Court deny Appellants' Motion for Temporary Restraining Order and/or Preliminary Injunction, and grant Marcia Adams any other such relief as the Court may deem just and proper.

Dated this the 14th day of April, 2021.

Respectfully submitted,

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PROOF OF SERVICE

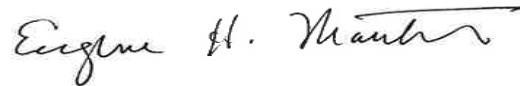
I hereby certify that I have served a copy of Adams Response in Opposition to Appellants' Petition for Writ of Supersedeas by causing a copy of the same to be deposited in the United States mail, first class postage prepaid, addressed to counsel of record and via electronic mail on this 14th day of April, 2021:

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