DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
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October 27, 2021

CASE NO.: **1D21-2685**
L.T. No.: 2021-CA-1382

Governor Ron DeSantis, in his official capacity as Governor of the State of Florida; Richard Corcoran, in his official capacity as Florida Commissioner of Education; et al.	v.	Allison Scott, individually and on behalf of W.S., a minor; Lesley Abravanel and Magnus Andersson, individually and on behalf of S.A. and A.A., minors; Kristen Thompson, individually etc. et al.;
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDER ON APPELLANTS' EMERGENCY MOTION TO REINSTATE THE AUTOMATIC STAY

The Department of Health ("DOH") has the statutory authority to adopt rules, after consulting with the Department of Education ("DOE"), that govern "the control of preventable communicable diseases" within the public schools. § 1003.22(3), Fla. Stat. On July 30, 2021, Governor Ron DeSantis issued Executive Order 21-175, directing this very action, to "ensure safety protocols for controlling the spread of COVID-19 in schools." The order, though, directed that any rule promulgated "not violate Floridians' constitutional freedoms; . . . not violate parents' rights under Florida law to make health care decisions for their minor children; and . . . [p]rotect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements." Fla. Exec. Order No. 21-175 (July 30, 2021). The order also required that any rule "be in accordance with Florida's 'Parents' Bill of Rights' and protect parents' right to make decisions regarding masking of their children in relation to COVID-19." *Id.*

DOH promulgated Emergency Rule 64DER21-12, which became effective August 6, 2021. *See* Fla. Admin. Code R. 64DER21-12 (Protocols for Controlling COVID-19 in School Settings), Vol. 47, No. 153, Fla. Admin. Reg. (August 9, 2021).[1] This emergency rule outlined procedures for controlling COVID-19 in schools, including protocols for when students are exposed to, test positive for, or are symptomatic of the virus. While it allowed students to wear masks, it also required that schools allow parents and legal guardians to opt-out their children from any mask-wearing requirement.

[1] This rule later was withdrawn.

The appellees sought emergency declaratory relief as to both the executive order and the emergency rule on the following grounds: (Count I) that the parental opt-outs in the executive order were in violation of the constitutional requirement to provide safe public schools; (Count II) that the executive order's parental opt-outs contravened the home rule powers of local school districts; (Counts III and IV) that the executive order violated the due process clause of the Florida Constitution by usurping the authority of local school districts and the authority of DOH; (Count V) that the emergency rule infringed on the appellees' constitutional right to safe public schools; and (Count VI) incorporating all previous counts and seeking emergency injunctive relief against the executive order.

After a four-day evidentiary hearing, the trial court rendered a final order that granted the appellees' request for injunctive relief against DOE, Florida's commissioner of education, and the State Board of Education (collectively, "the Education Defendants"), predicated, ostensibly, on counts III and IV. The court denied relief on the appellees' other claims. The trial court's order enjoined the Education Defendants from "violat[ing] the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights granted by the statute[,]" and prohibited them from "enforcing or attempting to enforce the Executive Order and the policies it . . . generated and any resulting policy or action which violates the Parents' Bill of Rights."

The Education Defendants appealed the injunction.[2] The appeal automatically stayed it. *See* Fla. R. App. P. 9.310(b)(2). The appellees moved to vacate the stay, and the trial court granted the request. The Education Defendants then asked this court to reinstate the stay. Because the matter was time sensitive, we issued a preliminary order that quashed the vacatur of the automatic stay and reinstated it pending full appellate review. We now explain the reasoning for our preliminary order.

"The purpose of the automatic stay provision . . . is to accord judicial deference to governmental decisions." *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018) (citation omitted). Thus, "[t]he party seeking to vacate an automatic stay has the burden of demonstrating that (1) the equities are 'overwhelmingly tilted' against maintaining the automatic stay, (2) it will suffer irreparable harm if the automatic stay is maintained, *and* (3) it is likely to prevail on the merits of the appeal." *Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc.*, 317 So. 3d 1168, 1170 (Fla. 1st DCA 2020) (emphasis added) (citations omitted). "Although a trial court may vacate an automatic stay during the pendency of an appeal, it may only do so 'under the most compelling circumstances.'" *People United*, 250 So. 3d at 828 (citations omitted).

We reinstated the stay because we concluded that the appellees failed to carry their burden of demonstrating that they are likely to prevail on the merits. Indeed, we had serious doubts about the appellees' standing to bring the underlying lawsuit and the trial court's authority to require the Education Defendants to follow (or "enforce") the executive order only insofar that doing so did not violate the statutory Parents' Bill of Rights.

Standing is a question of law that this court reviews de novo. *See DeSantis v. Fla. Educ. Ass'n*, 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020) (citing *McCall v. State*, 199 So. 3d 359, 364

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[2] The appellees have now filed a cross-appeal.

(Fla. 1st DCA 2016)). To determine whether a party has standing, courts must consider the following:

> [A] plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). . . . [A] plaintiff must [also] establish "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). [And], a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." [*Vermont Agency of Natural Res. v. Stevens* [529 U.S. 765, 771], 120 S. Ct. 1858, 146 L. Ed. 2d 836 [(2000)].

Id. (alterations in part in original) (citing *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004)).

Here, it is unlikely that the appellees can establish standing for at least three reasons. First, as to counts III and IV, the appellees challenged the alleged "usurpation" of authority from the local school boards and DOH. Those entities alone must advance their own institutional rights. *See Alterra Healthcare Corp. v. Est. of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (holding that "a litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties" (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991))). The appellees are a group of parents and public-school students who suffered no injury from any alleged "usurpation" of authority, so they did not appear to have established an injury in fact that could support standing. [3]

Second, the appellees likely lack standing because the executive order did not appear to take any state action against them. *See Fla. Educ. Ass'n*, 306 So. 3d at 1214. Rather, the order seemed to task state administrative actors with engaging in rulemaking pursuant to statutory authority provided by section 1003.22(3), Florida Statutes. The executive order did not even appear to take any action at all against local school boards themselves. Thus, enjoining the effectuation of the executive order in some part—and *not* the rule—could not give the appellees the relief they are seeking, because DOH adopts the rules on "the control of preventable communicable diseases," not the Education Defendants. §1003.22(3), Fla. Stat. "Because there is no causal link between the State's conduct in issuing the [Executive] Order and Appellees' alleged injuries, Appellees [have] failed to establish the causation element required to support standing." *See Fla. Educ. Ass'n*, 306 So. 3d at 1214.

Third, the appellees' stated purpose for bringing their suit was to safeguard the health and welfare of public-school students and the general public from the spread of the COVID-19 virus. But this allegation demonstrated a speculative injury that was not redressable by the trial court. *Id.* Accordingly, the appellees did not appear to have "demonstrated any concrete, palpable injury sufficient to confer standing." *Id.*

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[3] Along these lines, there is another likely jurisdictional problem. Counts III and IV sought a judicial declaration that the executive order violated the appellees' (or someone else's) right to due process. However, they nowhere identified the "life, liberty, or property" that they individually were being denied by the executive order. The appellees' failure to identify a bona fide dispute between the parties over a personal right, flowing from the constitution or a statute, pointed to the likely absence of a justiciable controversy. *Cf. MacNeil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 84345 (Fla. 1st DCA 2020).

In addition to our standing concern, we had a jurisdictional concern tied to the appellees' pleading. The appellees nowhere in their complaint claimed that the executive order or rule violated the Parents' Bill of Rights. While the Parents' Bill of Rights undoubtedly played a role in the governor's issuance of the executive order—and was even pleaded as an affirmative defense—the appellees *never* sought relief in their complaint based on an alleged violation of the Parents' Bill of Rights. They certainly never requested an injunction against a state administrative actor proceeding in some way in contravention of the Parents' Bill of Rights.

"Florida law . . . holds that a trial court lacks jurisdiction to hear and to determine *matters which are not the subject of proper pleading and notice*,' and '[t]o allow a court to rule on a matter without proper pleadings and notice *is violative of a party's due process rights*." *Pro-Art Dental Lab, Inc., v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1252 (Fla. 2008) (alteration in original) (citations omitted). Thus, "'[a] trial court is without jurisdiction to award relief that was not requested in the pleadings.'" *Taneja v. First St. & Fifth Ave., LLC,* 310 So. 3d 1275, 1276 (Fla. 2d DCA 2021) (quoting *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945 (Fla. 4th DCA 2015)). And "a judgment which grants relief wholly outside the pleadings is void." *Posti*, 166 So. 3d at 945 (quoting *Bank of N.Y. Mellon v. Reyes*, 126 So. 3d 304, 309 (Fla. 3d DCA 2013)).

Despite the absence of any allegation that a state administrative actor was breaching—or planning to breach—the Parents' Bill of Rights, the trial court still ordered the Education Defendants not to. That is, the trial court appeared to have awarded relief that was not requested, based on a theory that was not pleaded. It appeared to us, then, that the trial court issued an injunction that it did not have authority to issue, because the injunction was predicated on matters "'wholly outside'" the appellees' causes of action. *Posti*. 166 So. 3d at 945.

For these reasons, we concluded that the trial court abused its discretion by vacating the automatic stay in the face of some clear doubts about the appellees' ultimate success in this appeal. We in turn quashed the vacatur and reinstated the automatic stay.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

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Hon. John C. Cooper, Judge

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