IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DANIEL W. UHLFELDER,

Plaintiff-Appellant,

vs.

Case No.:1D20-1178
L.T. Case No.: 2020-CA-552

THE HONORABLE RON DESANTIS,
in his Official Capacity as Governor
of the State of Florida,

Defendant-Appellee.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

COME NOW Appellant Daniel W. Uhlfelder, together with undersigned counsel, and respectfully offer this response to the Court's Order To Show Cause of November 13, 2020, to show cause why sanctions should not be imposed on Mr. Uhlfelder or his counsel for bringing the appeal in this case.

PROCEDURAL BACKGROUND

On March 17, 2020, Governor DeSantis issued Executive Order 20-68 directing parties accessing public beaches to follow the CDC guidance to limit their gatherings to no more than 10 persons, distance themselves from other parties by 6 feet, and support beach closures, at the direction of local authorities. (R. 8). On March 20, 2020, Governor DeSantis issued Executive Order 20-70, directing, *inter*

alia, public beaches in Broward County and Palm Beach County to close due to the risk of community spread of COVID-19, but failing to direct beach closure in Walton County or statewide. (R. 8). Also, on March 20, 2020, Mr. Uhlfelder filed suit against Governor DeSantis for emergency injunctive relief, seeking temporary closure of all of Florida's beaches, after demands for that relief addressed to Governor DeSantis had proven unavailing. (R. 6-9).

On March 29, 2020, Mr. Uhlfelder filed an Amended Complaint against Governor DeSantis seeking two preliminary injunctions in order to stop the spread of COVID-19 directing Governor DeSantis to order: (i) a temporary statewide Beach Closure Order and (ii) a statewide Safer-at-Home Order. (R. 10-21). For weeks, Governor DeSantis had steadfastly refused to issue a statewide Safer-at-Home Order. (R. 172). After Mr. Uhlfelder filed his Amended Complaint on March 29, 2020 seeking a statewide Safer-at-Home Order, Governor DeSantis did issue Executive Order 20-91 on April 1, 2020, a statewide Safer-at-Home Order, only hours before the Case Management Conference on the case at bar. (R. 172). At that time, thirty-seven other states had already adopted statewide orders mandating people to stay at home. (R. 173).

On April 1, 2020, Governor DeSantis filed his Motion to Dismiss arguing that Mr. Uhlfelder lacked standing to bring his action, that the trial court lacked the

authority to grant the requested relief, and that Mr. Uhlfelder failed to satisfy the requirements for injunctive relief. (R. 22-36). On April 6, 2020, Appellant (plaintiff below) filed his Memorandum in Opposition to Motion to Dismiss. (R.164-176).

On April 3, 2020, Appellant filed his Witness List for the April 7, 2020 Temporary Emergency Injunction Hearing which included the name of a physician expert witness who planned to testify in support of the requested relief. (R. 44-45). On April 3, 2020, Appellant filed his Exhibit List for the April 7, 2020 Temporary Emergency Injunction Hearing which included hundreds of pages of pertinent documents. (R. 177-849).

During the April 7, 2020 hearing, in challenging Governor DeSantis' argument that Appellant lacked standing, Mr. Uhlfelder argued in part that:

> It's undisputed that COVID-19 is continuing to spread and kill more Floridians. It has been recently suggested that Florida could become the next virus hot spot.
>
> So it is difficult to imagine a more actual or imminent injury that the continued spread of a once-in-a generation pandemic, and the daily increasing likelihood that I, as a Floridian in Walton County, would contract the disease as a result of Governor DeSantis' failure to act.
>
> So I'm sure that Governor DeSantis is not suggesting that in order for me to have standing to sue him for failure to abide by his constitutional duties that I actually have to become infected with COVID-19 in order for me to have a significant injury. (R. Tr. 874:1 – 875:5).

Regarding the separation of powers issue, Mr. Uhlfelder argued in part as

follows:

> The next issue is the separation of powers. If Governor DeSantis suggests that you don't have the authority to grant the relief requested, it's our position that you're obligated to grant the relief requested.
>
> The Florida Constitution, under the Basic Rights section, Article I, Section 2, says that all natural persons have the inalienable rights, among which are the right to enjoy and to defend life and liberty.
>
> That's what this case is about. It's about life. It's about lives… It's about protecting my life, Florida citizen's life in a manner that the Constitution – there's Article I, Section 1 and then there's Article I, Section, Section 2. (R. Tr. 879:4 – 879-19).
>
> And the cases we cite say that the State of Florida is obligated to ensure the health and safety of its citizens… The state's interest in the preservation of life is compelling. That's what this is about.
>
> We have a once-in-a-hundreds year, however long, pandemic where the Governor is the Chief Executive. He's responsible. He's supposed to take care of everything. He's supposed to make sure people's lives are protected to the most degree possible. Not to do things that are – to choose certain counties or say we're going to let the county locals decide. (R. Tr. 880-12-19).
>
> And his inaction in the face of this is nothing short of a violation of his constitutional obligation . . . It's our position that you are an equal branch of government in the state of Florida. And when one branch decides that it's not going to take its constitutional obligation, as required, by protecting life, then it's the third – your branch and obligation to do that.
>
> His emphasis on Chapter 252, we disagree with that. That he is suggesting that we believe that we can do certain things. No. Our case is based on Governor DeSantis' abdication of his constitutional responsibility to take affirmative steps to protect the health and safety of Floridians, including myself, in the face of COVID-19 spread.

(R. Tr. 881:3-11).

> Section 20.02, Florida Statutes, say the judicial branch has the purpose of determining the constitutional propriety of the policy and programs of another branch. And if you look at the subsequent measures that were taken since this lawsuit was filed, in our opinion, even supports the need for intervention even more. (R. Tr. 883:13-19).
>
> I would contend that insofar as this Motion to Dismiss, that where the rub is -- and unfortunately it's going to be up to Your Honor, I don't envy you, is that what counsel for the Governor calls discretion, we contend is dereliction. You know, the Motion to Dismiss is supposed to be viewed in the light most favorable to the Plaintiff. The cases cited, Judge, if you look, Browning, the Supreme Court said the preservation of life generally is considered the most significant state interest, and that the state's interest in preservation of life is compelling.
>
> And as far as discretion goes, you know, counsel read a part of a statute that says "may," but if you read 252.36, 1 (a), it says, and I quote, "the Governor is responsible for meeting the dangers presented to the State and its people by emergency," and then further it says, "the Governor will meet the dangers presented to the state of Florida and its people by emergency. "Will," I don't think, is a discretionary thing. It's very akin to "shall."
>
> I would urge Your Honor -- certainly Your Honor has the right to rule and the courts do. That's why we have courts. If Your Honor is so inclined to grant the Motion to Dismiss, I would implore you to grant us leave to amend to cure any possible defects.
>
> And it may be helpful, Judge, and far be it for me to tell you how to preside, to reserve ruling on the Motion to Dismiss, have a hearing on the merits, and that may weigh into your decision on whether or not to grant the Motion to Dismiss. (R. Tr. 887:3-889:7).

After hearing argument, the trial court granted the Governor's Motion to Dismiss ruling that it "lacks authority to grant the relief requested due to the

separation of powers clause of the Florida Constitution. *See* Art. II, Section 3, Fla. Const." (R. 854-897).

During the hearing, the trial court declined to the reach the standing issue and made the following observation:

> THE COURT: All right. Well, on this part of the case, what I would like to observe is I'm not going to reach the standing issue, because, number one, I believe that Mr. Uhlfelder has an understandable concern that he has raised here, and I believe he has pursued this matter in good faith and is seeking what he believes to be an appropriate response to the COVID crisis. (R. Tr. 891:12-19).

Contrary to the language in the Order to Show Cause concerning the possibility of bad faith, the trial court specifically found that he believed **"he has pursued this matter in good faith and is seeking what he believes to be an appropriate response to the COVID crisis."** (emphasis supplied)(R.Tr. 891:17-19). Of course, the Order to Show Cause is concerned with the propriety of the appeal, not the proceedings in the trial court. But the trial court also discussed the appeal in a way that strongly suggested the trial court held the view that an appeal was entirely appropriate. The trial court announced:

> So I am going to dismiss and grant the Motion to Dismiss. My intent is to grant that with prejudice so that you can immediately take me to the First District. Because I do think this is a matter of importance, and I think it's a matter of time, and if the First District tells me that I'm wrong and I do have the authority, then I'm glad to address it and go from there. (R.Tr: 893:18-25).

In response Mr. Uhlfelder said "[w]ell, I appreciate your reading everything

and I know it's a difficult decision and we're not – you know, we're not going to give up, because it's not." (R. Tr. 894:5-8). In response the Court said "[a]nd I'm not telling you should. What I'm trying to do is give you the tool to take it up as quick as you can." (R. Tr. 894:9-11).

Not only did the trial court explicitly find that Mr. Uhlfelder was proceeding in good faith, but he also announced his intention to dismiss the case with prejudice to facilitate prompt consideration by this Court because of the importance of the question presented. The trial court explicitly recognized Mr. Uhlfelder's legitimate "concern for the people of the state of Florida." (R.Tr. 895:22-24).

While the learned trial judge did not explicitly direct Mr. Uhlfelder to take the appeal for which he and his lawyers now must show cause why they should not be sanctioned, the trial court plainly encouraged the appeal. Thus encouraged, Mr. Uhlfelder promptly instituted an appeal. On August 27, 2020, the trial court reduced its dismissal to judgment. After briefing, on November 13, 2020, this Honorable Court entered its order summarily affirming the trial court's Corrected Judgment of Dismissal with Prejudice, pursuant to Florida Rule of Appellate Procedure 9.315 (providing that " [a]fter service of the initial brief in appeals under rule 9.110, . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated.")

The order summarily affirming also directed appellant to "show cause within fifteen days why this court should not impose sanctions, including attorney fees and costs, on him and counsel for filing this appeal, the initial brief and the request for oral argument, which appear to be frivolous and/or filed in bad faith. *See* Fla.R.App. 9.410; *cf.* s. 57.105, Fla. Stat."

SUMMARY OF RESPONSE

The undersigned respondents acknowledge, as they must, that the Court has decided the merits of the appeal against them and do not, in their response, challenge the Court's summary affirmance on the merits. But most of the appeals the Court hears are determined to be unmeritorious and result in affirmance. Language in the Order to Show Cause raising the questions of bad faith or of a frivolous appeal must be understood as setting the parameters for response, not as findings or rulings handed down before the undersigned respondents could be heard on these issues.

The appeal in the present case, brought by appellant, who is himself a lawyer and is represented in this matter by two other members of the Bar, was pursued with the encouragement of the trial court judge, in a good faith effort to minimize suffering and death from the COVID-19 pandemic, and within the bounds permitted advocacy. While denying relief below, the trial court recognized the sincerity of appellant's undertaking and the gravity of the harm sought to be averted.

The appeal was not frivolous within the meaning of Florida case law. Similar litigation in other states in the face of COVID-19 has not been seen as frivolous. The gravamen of the ruling appealed was that the Governor's discretion in handling emergencies was not subject to judicial review. To argue otherwise on appeal was to present a substantial question for the Court's consideration and decision. There was no intention to trifle with, insult, or otherwise demean the Court. Whether or not the appeal was argued with the same skill as experienced appellate judges might muster, the issue presented was genuine and important, not contrived or frivolous. The fact that Appellant's initial brief was met with Appellee's 55-page answer brief underscores the substantial character of the appeal.

FLORIDA LAW

At issue, now that the Court has decided the appeal against them, is whether the undersigned respondents somehow abused the judicial process in appealing at all. The Florida Supreme Court in *Treat v. State ex rel. Mitton,* 121 Fla. 509, 163 So. 883 (Fla. 1935) outlined what a frivolous appeal is:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. (citation omitted). It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even

> though such question is unlikely to be decided other than as the lower court decided it, i. e., against appellant or plaintiff in error.

Assignments of error are now a thing of the past, but the principle that an appeal is frivolous only if "devoid of merit on the face of the record" endures. The question is not the likelihood of success, not the persuasiveness of any particular argument, not the skill of any particular advocate, but whether "a substantial justiciable question can be spelled out of" the record of lower court proceedings.

Here the record is clear that relief was denied below on broad separation of powers grounds that would by implication immunize gubernatorial discretion from judicial review in a wide swath of cases. But the Governor is subject to the Administrative Procedure Act and the APA's judicial review provisions when "acting pursuant to powers other than those derived from the constitution." § 120.52(1), Fla. Stat. (2020). An asserted basis for the Governor's discretionary authority in the present case is not constitutional but statutory. See §252.36(1)(a), Fla. Stat. (2020) (stating that the "Governor is responsible for meeting the dangers presented to this state and its people by emergencies").

Governor DeSantis did not raise exhaustion of remedies below and did not argue on appeal that Mr. Uhlfelder had failed to exhaust remedies. Nor does a constitutional grant of authority to an executive entity, whether to the Governor, the Public Service Commission, the Florida Fish & Wildlife Commission or the Parole

Commission insulate the exercise of executive power from judicial review. See, e.g., *Fla. Parole Comm'n v. Padovano*, 554 So. 2d 1200, 1201 (Fla. 1st DCA 1989) (ruling that judicial review was not an "encroachment of the judiciary upon the executive branch").

The Florida Constitution's Basic Rights section states that "[a]ll natural persons…have inalienable rights, among which *are the right to enjoy . . . life . . . .* [emphasis added]" Art. I, §2, Fla. Const. This case and this appeal sought to vindicate Floridians' constitutional rights in this regard. The Florida Supreme Court held in *Browning* that "[t]he state's interest in the preservation of life generally is considered the most significant state interest." *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990); *see also Burton v. State*, 49 So. 3d 263, 266 (Fla. 1st DCA 2010) (holding that the State's interest in the preservation of life is "compelling").

COVID-19 CASES ARE TESTING THE LAW ALL OVER THE COUNTRY UNDER SIMILAR THEORIES WHERE NO ONE HAS BEEN SANCTIONED.

COVID-19 has dramatically changed the lives of everyone including the practice of law. It has resulted in similar cases across the country testing the application of both statutory and constitutional law and all of the courts have treated the arguments as legitimate arguments.

While this Court does not agree that Mr. Uhlfelder's requested relief was

merited, the appeal, the initial brief and request for oral argument were not frivolous and were not filed in bad faith. From the beginning of this litigation and through the filing of this response, the world has been ravaged by the novel coronavirus and COVID-19. Citizens and attorneys across the country have sought relief in various courts with varying results to try to protect the health and well-being of individuals. As far as our research has revealed, no citizen or lawyer has been sanctioned for doing so.

In Washington state, five inmates serving criminal sentences at different state Department of Corrections facilities filed petitions for writ of mandamus seeking to compel Governor and Secretary of Department to release three categories of offenders to reduce prison populations due to danger COVID-19 posed to prison inmates, and, alternatively, sought leave to amend to file personal restraint petition. *Colvin v. Inslee,* 195 Wash.2d 879 (Wash. 2020). After a lengthy and thorough analysis of constitutional issues including the separation of powers, the Washington Supreme Court denied the relief sought. However, in denying the relief, it did not find the action filed in bad faith or frivolous.

In *Beshear v. Acree,* 2020 WL 6736090 (Ky. 2020), the Kentucky Supreme Court examined several challenges to the Kentucky Governor's executive orders on constitutional grounds including the separation of powers. It upheld the Governor's

actions as constitutional after a lengthy analysis. However, it did not find the action frivolous and/or in bad faith.

In *Wolf v. Corman,* 233 A.3d 679 (Penn. 2020), the Pennsylvania Supreme Court addressed a challenge to the Pennsylvania Governor's declaring a state of emergency with regard to COVID-19, and found it constitutional on separation of powers grounds. However, it did not find the challenge frivolous or in bad faith.

In *Libertas Classical Association v. Whitmer,* 2020 WL 6498761 (W.D. Michigan, November 3, 2020), the court denied a non-denominational Christian school's challenge to the Michigan Governor's COVID-19 mandates. In a lengthy opinion which addressed constitutional separation of power issues akin to this case, the Court denied the relief but did not find it frivolous or filed in bad faith.

In *In re Certified Question from United States District Court, Western District of Michigan, Southern Division,* 2020 WL 5877599 (Michigan, October 2, 2020), the Michigan Supreme Court heard a challenge by medical services providers against the Michigan Governor, Attorney General and Department of Health and Human Services regarding the Governor's Executive Order in response to COVID-19. In a lengthy opinion, the Michigan Supreme Court addressed several issues including separation of powers but did not find the issues frivolous and/or brought in bad faith.

Constitutional issues similar to those raised in this appeal regarding the authority of the executive during a deadly pandemic have been raised in the context of COVID-19 litigation and executive branch actions concerning COVID-19 in New York, New Jersey, California, Louisiana and Maryland among other jurisdictions. None of the numerous litigants involved was sanctioned as a result.

Only last Wednesday, the United States Supreme Court granted a temporary injunction pending judicial review of an executive order Governor Cuomo issued in New York in response to COVID-19. *Roman Catholic Diocese of Brooklyn, New York v. Andrew Cuomo, Governor of New York,* 592 U.S. _____ (2020). While the Court split 5-4 on whether the Executive Order passed constitutional muster, the Court unanimously, if implicitly, approved judicial review of the exercise of gubernatorial discretion in the COVID-19 context. *Id.*

GOVERNOR DESANTIS DID NOT SEEK SANCTIONS IN THIS CASE. INSTEAD, HE FILED A LENGTHY ANSWER BRIEF WHICH INDICATES THAT THE APPEAL WAS NOT DEVOID OF MERIT.

Governor DeSantis did not seek sanctions. In fact, he filed a 55-page answer brief which illustrates dramatically the substantiality of the legal issues the appeal raised. Summary affirmance under Fla.R.App. 9.315 is available after service of the initial brief even without consideration of the answer brief (unless a cross-appeal has been filed), so the Court was under no obligation to consider the appellee's 55-page

answer brief in affirming on the merits summarily. But the answer brief, which raised numerous complicated and sophisticated issues of fact and law in order to defeat Mr. Uhlfelder's appeal, should certainly be considered at this juncture. The filing of a 55-page answer brief belies the notion that the appeal was frivolous and or taken in bad faith.

Again, Governor DeSantis did not file a motion for sanctions when Mr. Uhlfelder went up on appeal but filed a 55-page answer brief on July 15, 2020 citing 52 cases, 13 Constitutional provisions, 7 statutory provisions, 55 legal authorities ranging from *The Spirit of Law* Books VI (1748) by Baron de Montesqieu, *Two Treatises of Government* (1869) by John Locke, *The Federalist Nos. 47, 48, 51 and 78,* and *A Matter of Interpretation* by Antonin Scalia to a May 1, 2020 article in FloridaPolitics. Nowhere in the Answer Brief does the appellee suggest that Appellant's appeal, initial brief or argument are frivolous or made in bad faith. Instead, the appellee goes to painstaking detail to cite to cases and authorities going back to the year 1689 in order to contradict appellant's position.

THE TRIAL COURT'S REMARKS SHOULD BE DEEMED FACT FINDINGS PRECLUDING SANCTIONS.

Not only did the trial court explicitly find that Mr. Uhlfelder was pursuing this matter in good faith, he dismissed the case with prejudice contemplating that the matter could and would be taken up promptly and heard by this Court because of its

importance. The trial court recognized Mr. Uhlfelder's--and by extension, his counsel's-- "concern for the people of the state of Florida" as genuine.

CONCLUSION

This Court has imposed sanctions largely in two circumstances which do not apply in this situation. One is when an Appellant or attorney has continuously filed frivolous appeals. The second is when the Appellant or attorney has ignored a Court order. The Court has traditionally not sanctioned an Attorney or Appellant because of the legal argument itself as that could result in the Court chilling vigorous advocacy or lawyering. *Builders Shoring and Scaffolding v. King,* 453 So.2d 534 (Fla. 5th DCA 1984)(Court "should not impose a penalty on a party who attempts to raise novel questions of law or who, in good faith, attempts to move the law in a slightly different direction").

The present case bears scant resemblance to cases in which the Court has imposed sanctions heretofore. In *Brown v. Crews,* 120 So.3d 1255, 1256 (Fla. 1st DCA 2013), this Court first ordered the appellant to show cause why the Court should not summarily affirm the order on review, why appellant should not be sanctioned for filing a frivolous appeal, and why such sanctions should not include a direction to the Clerk of the Court to reject any future filings unless he was represented by a member of the Florida Bar. The Court then imposed sanctions

because appellant had "fifteen previous appeals in this Court stemming from 1992 CF 002412 and 1993 CF 002290 (2d Jud. Cir., Leon County) and twelve appeals from civil actions or petitions for extraordinary relief." In the case now before the Court four members of the Florida Bar, if we count the trial judge, saw no impropriety in taking the appeal.

The case now before the Court is nothing like the situation in *In re A. T.H.,* 180 So.3d 1212, (Fla. 1st DCA 2015), where this Court sanctioned an attorney for filing a frivolous appeal on an issue already repeatedly decided against his client in the same case, after violating a Rule of Judicial Administration in order to be in a position to do so.

An appeal is not frivolous where a substantial justiciable question can be spelled out of it or from any part of it even though such question is unlikely to be decided other than as the lower court decided it. *Consultech Of Jacksonville, Inc. v. Department Of Health*, 876 So. 2d 731 (Fla. 1st DCA 2004); *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000); *T. I. E. Communications, Inc. v. Toyota Motors Center, Inc.*, 391 So. 2d 697 (Fla. 3d DCA 1980).

WHEREFORE, this Court should decline to impose sanctions on Appellant or counsel for filing this appeal, the initial brief and the request for oral argument; and should discharge the Court's Order to Show Cause of November 13, 2020.

Dated this 27th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was

furnished via the Florida Courts E-filing Portal to: **Joshua E. Pratt, Assistant General Counsel,** Executive Office of the Governor, The Capitol, PL-05, Tallahassee, Florida 32399-0001 [Primary e-mail: Joshua.Pratt@eog.myflorida.com] on this 27th day of November, 2020.

/s/ Daniel W. Uhlfelder
DANIEL W. UHLFELDER, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with the font requirements of Fla. R. App. P. 9.100.

/s/ Daniel W. Uhlfelder
DANIEL W. UHLFELDER, ESQ.