DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

JUSTIN GREEN,

Appellant,

vs.

ALACHUA COUNTY, a political subdivision of the State of Florida,

Appellee.

CASE NO.: 1D20-1661

L.T. Case No.: 01-2020-CA-1249

APPELLEE, ALACHUA COUNTY'S, MOTION FOR PANEL REHEARING; AND, IN THE ALTERNATIVE, MOTION FOR REHEARING EN BANC

I. INTRODUCTION

A. Appellee requests the panel rehear this matter because the majority overlooked the very recent amendment to section 252.38, Florida Statutes (ch. 2021-8, § 12, Laws of Fla.) which prevents this issue from arising again and makes a constitutional decision unnecessary.

B. As an alternative, Appellee requests a rehearing en banc because such a rehearing is necessary to maintain uniformity

of the Court that "[c]onstitutional questions will be decided by a court only when it is necessary to the disposition of the case." *Fla. High Sch. Activities Ass'n, Inc. v. Temple Baptist Church, Inc.*, 509 So. 2d 1381, 1383 (Fla. 1st DCA 1987).

II. MOTION FOR PANEL REHEARING

In holding the appeal is not moot because the issue raised is capable of repetition yet evading review, the majority has overlooked the recent legislative amendment to section 252.38, Florida Statutes (ch. 2021-8, § 12, Laws of Fla.). The panel understandably did not consider this very recent legislative amendment, that was signed by the Governor on May 3 and takes effect on July 1[1]. In it, the Legislature adopted a requirement that "an emergency order issued by a political subdivision must be narrowly tailored to serve a compelling public health or safety purpose." Ch. 2021-8, § 12, Laws of Fla.

Thus, shortly before the panel's opinions were issued, the Legislature dealt with the issue raised in this appeal. Since the

[1] There is not sufficient time before the effective date of the statute for the County Commission to consider and adopt another emergency ordinance.

issue has been dealt with legislatively, the panel should grant rehearing and dismiss the appeal as moot because "[c]onstitutional questions will be decided by a court only when it is necessary to the disposition of the case." *Fla. High Sch. Activities Ass'n, Inc. v. Temple Baptist Church, Inc.*, 509 So. 2d 1381, 1383 (Fla. 1st DCA 1987).

In addition, the panel has overlooked the facts that the appeal is also moot because (1) the emergency order challenged on appeal has expired and (2) Executive Order 21-102 "eliminates and supersedes all local COVID-19 restrictions and mandates on individuals and businesses." Fla. Exec. Order 21-102 § 1 (May 3, 2021). *See*, *e.g.*, *Roe v. Dep't of Health*, 312 So. 3d 175, 177 (Fla. 1st DCA 2021) ("It is not this Court's function to . . . 'give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.'") (quoting *Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985)); *Curless v. Clay Cty.*, 395 So. 2d 255, 258 (Fla. 1st DCA 1981) ("Ordinarily, when a challenged statute or ordinance has

been repealed, the question of its validity becomes moot because nothing can be accomplished by ruling unconstitutional a statute or ordinance which is no longer in effect.").

Moreover, contrary to the majority's conclusion "that this case fits within the exception to the mootness doctrine, which is 'for controversies that are capable of repetition, yet evading review,'" Slip Opin. at 3 n.2, if Appellee enacts a new ordinance on the subject in the future, there would be nothing to prevent Appellant from challenging that ordinance. However, if such a challenge were brought, it would be brought under the amended statute which establishes the same burden imposed by the majority opinion. Therefore, the constitutional issue on which the majority ruled cannot arise again.

Accordingly, Appellee requests that the panel vacate the opinions issued on June 11 and dismiss the appeal as moot.

III. ALTERNATIVE MOTION FOR REHEARING EN BANC

If the panel declines to vacate their opinions and dismiss the appeal as moot, Appellee requests the full Court rehear the issue en

banc on the ground that such review "is necessary to maintain uniformity in the [C]ourt's decisions," pursuant to Florida Rule of Appellate Procedure 9.331(d)(1).

Rehearing en banc is necessary to maintain uniformity in the Court's decisions that "[c]onstitutional questions will be decided by a court only when it is necessary to the disposition of the case." *Fla. High Sch. Activities Ass'n*, 509 So. 2d at 1383; *accord Overstreet v. Overstreet*, 244 So. 3d 1182, 1184 (Fla. 1st DCA 2018); *D.P. v. C.L.G.*, 37 So. 3d 897, 899 (Fla. 1st DCA 2010); *Buckhalt v. McGhee*, 632 So. 2d 120, 121 (Fla. 1st DCA 1994).

It was not necessary for the panel majority to reach the issue presented in this appeal because, as Appellant suggested, the issue was moot as the emergency order challenged on appeal had expired. *See* Slip Opin. at 3 n.2. Nor could the constitutional issue arise again. Any future imposition of a mask requirement will be statutorily subject to the strict scrutiny standard because of the Legislature's amendment this past session to section 252.38, Florida Statutes. *See* ch. 2021-8, § 12, Laws of Fla. (adopting,

effective July 1, 2021, a requirement that "an emergency order issued by a political subdivision must be narrowly tailored to serve a compelling public health or safety purpose").

The panel majority's opinion also conflicts with this Court's decisions holding that an appeal should be dismissed when the issue presented has become moot. *See*, *e.g.*, *Towe as Trustee of Towe Neely Paul 2008 Trust v. Fish & Wildlife Conservation Comm'n*, 2021 WL 1685630, at *1 (Fla. 1st DCA Apr. 29, 2021); *Roe v. Dep't of Health*, 312 So. 3d 175, 177 (Fla. 1st DCA 2021) ("It is not this Court's function to . . . 'give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.'") (quoting *Montgomery v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985)); *Kendall Healthcare Group, Ltd. v. Pub. Health Trust of Miami Dade Cty.*, 296 So. 3d 533, 535 (Fla. 1st DCA 2020); *NAACP, Inc. v. Fla. Bd. Of Regents*, 876 So. 2d 636, 641 (Fla. 1st DCA 2004); *Curless*, 395 So. 2d at 258 ("Ordinarily, when a challenged statute or ordinance has been repealed, the question of its validity becomes moot because nothing

can be accomplished by ruling unconstitutional a statute or ordinance which is no longer in effect.").

Contrary to the panel majority's conclusion "that this case fits within the exception to the mootness doctrine, which is 'for controversies that are capable of repetition, yet evading review,'" Slip Opin. at 3 n.2, if Appellee enacts a new ordinance on the subject in the future, there would be nothing to prevent Appellant from challenging that ordinance, just as he did here. Again, however, that challenge would be on statutory, not constitutional, grounds.

Accordingly, if the panel declines to withdraw the opinions and dismiss this appeal as moot, Appellee requests the Court to grant rehearing en banc, vacate and set aside the panel opinions, and dismiss the appeal as moot, thereby maintaining uniformity in the Court's decisions.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the

following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court:

1. *Fla. High Sch. Activities Ass'n, Inc. v. Temple Baptist Church, Inc.*, 509 So. 2d 1381, 1383 (Fla. 1st DCA 1987);
2. *Overstreet v. Overstreet*, 244 So. 3d 1182, 1184 (Fla. 1st DCA 2018);
3. *Towe as Trustee of Towe Neely Paul 2008 Trust v. Fish & Wildlife Conservation Comm'n*, 2021 WL 1685630, at *1 (Fla. 1st DCA Apr. 29, 2021);
4. *Roe v. Dep't of Health*, 312 So. 3d 175, 177 (Fla. 1st DCA 2021).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document is being served on all parties in the manner described in the attached Service List on this 24 day of June, 2021.

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