NO.: 4D20-1765
L.T. CASE NO.: 502020CA006920XXXXMB

IN THE FLORIDA DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

JOSIE MACHOVEC, et al.,
Appellants,

v.

PALM BEACH COUNTY,
***Appellee*.**

From the Circuit Court for the Fifteenth Judicial Circuit
Palm Beach County, Florida

APPELLEE PALM BEACH COUNTY'S ANSWER BRIEF

HELENE C. HVIZD
RACHEL FAHEY
Co-counsel for Appellee Palm Beach County
Assistant County Attorneys
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401
Florida Bar Numbers: 868442; 105734
Tel.: (561) 355-2582
Fax.: (561) 655-7054

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

Appellants challenge the trial court's thirteen (13) page non-final order denying their motion for injunction, which sought to enjoin the County's implementation of a County Emergency Order that requires individuals to wear face coverings under certain circumstances (hereinafter EO-12) in order to help slow the spread of COVID-19.

Appellants have abandoned all but one of the arguments raised below, and now argue only that EO-12 is unconstitutional because a face covering is a type of medical treatment, and EO-12 infringes on Appellants' federal and state constitutional rights to refuse medical treatment.

Appellants sole argument on appeal fails because the uncontradicted evidence before the trial court established that a face covering is not a type of medical treatment. No viable constitutional claim having been raised by Appellants' arguments, the trial court properly subjected Appellants' claim to rational basis review, which EO-12 easily passed. Appellants' request for a remand with directions to apply strict scrutiny should be denied.

Appellants, Josie Machovec, Carl Holme, Karen Holme, Rachel Eade, and Robert Spreitzer will be referred to as such or as Appellants.

Appellee, Palm Beach County, will be referred to as such or as the County.

Appellants' Appendix (App.) and Palm Beach County's Supplemental Appendix (PBC Supp. App.) will be cited as such.

STATEMENT OF THE CASE AND FACTS

The following evidence before the trial court is among the evidence not presented in Appellants' Initial Brief.

The County presented to the trial court the affidavits of two medical experts, both of whom opined that facial coverings do not constitute a medical treatment.

Dr. Bush is a Board Certified Infectious Disease Specialist who has specialized in infectious diseases for 32 years (PBC Supp. App. at 342). Dr. Bush is president of the Palm Beach County Medical Society (PBCMS), a non-profit entity dedicated in part to collaborating with others to improve the community's health (PBC Supp. App. at 342-43). Dr. Bush is also a member of the Infectious Diseases Society of America (IDSA), and the Florida Medical Association (FMA), is affiliated with two medical schools, is Chairman of the Board at JFK Medical Center in Palm Beach County, and is one of seven national authors of the Infectious Diseases section of the widely used Medical Knowledge Self-Assessment Program

(MKSAP) published by the American college of Physicians (PBC Supp. App. at 343).

Dr. Campazzi is Board Certified by the American Board of Preventative Medicine in Public Health and General Preventive Medicine, Occupational Medicine, Hospice & Palliative Care and Clinical Informatics, and he has a Master of Public Health Degree from Johns Hopkins (PBC Supp. App. at 337-38).

Dr. Bush noted the universally accepted fact that COVID-19 is an infectious disease easily spread from one person to the next via respiratory droplets from both symptomatic persons and infected asymptomatic persons (PBC Supp. App. at 343). Dr. Bush stated that with diseases that spread chiefly via respiratory droplets, the proven accepted medically effective methods needed to prevent the spread of the disease include: 1) utilizing facial coverings such as cloth masks that can obstruct many droplets from the mouth and nose that spread the virus, especially in enclosed spaces and in community settings; 2) social distancing; and 3) good hygiene (PBC Supp. App. at 344).

Dr. Bush described facial coverings as “KEY at preventing the spread of respiratory diseases such as COVID-19” and noted that facial coverings are “called for by over 13,000 Infectious Diseases specialist physician members of the IDSA,

the approximate 25,000 physician members of the FMA, and 1,500 physician members of the PBCMS (PBC Supp. App. at 344). Dr. Bush attested to the fact that in his expert opinion, "requiring the wearing of a facial covering when in public, except when there is a defined respiratory or other medical contraindication is necessary, prudent, and required to prevent the ongoing spread of COVID-19" (PBC Supp. App. at 344).

Dr. Bush opined that facial coverings are not medical treatment, because a medical treatment is recognized in the medical community as a treatment directed by a medical professional for a specific patient (PBC Supp. App. at 345). A facial covering is not a "medical treatment" because it does not "treat" a medical condition, nor, in the case of EO-12, does a medical professional direct it for the purpose of treating a specific patient (PBC Supp. App. at 345).

Dr. Campazzi similarly attested to the facts that COVID-19 is an infectious disease that easily spreads from one person to the next via community spread, and that requiring the wearing of a facial covering when in public, except when a medical condition makes it unsafe to wear a facial covering, is necessary, prudent, and reasonable to prevent the spread of COVID-19 (PBC Supp. App. at 338).

Like Dr. Bush, Dr. Campazzi opined that a facial covering is not a "medical treatment" because it does not "treat" any medical condition, nor does EO-12 amount to direction by a medical professional to a specific individual (PBC Supp. App. at 338).

SUMMARY OF ARGUMENT

As a preliminary matter, Appellants fail to challenge the trial court's conclusion that they failed to show the public interest is served by enjoining EO-12 (App. at 331). Having failed to challenge this independent basis for denying Appellants' motion for injunctive relief, the order on appeal must be affirmed.

As concerns the sole argument raised by Appellants on appeal, Appellants' entire argument has as its foundation the faulty premise that because a facial covering is effective in slowing the spread of a disease, a face covering is, by definition, a medical treatment. By extension, this misguided logic would create "medical treatments" out of such practices as avoiding crowded indoor places, coughing into one's sleeve, and washing one's hands, all of which are effective in slowing the spread of COVID-19. Such a conclusion is absurd.

The trial court properly denied Appellants' motion seeking injunctive relief because Appellants failed to show that the public interest is served by enjoining EO-12, and because a face covering is not a type of medical device, as the uncontradicted evidence below established. Because no constitutional claim was implicated by Appellants' motion, the trial court properly applied the rational basis test in determining that the requirement to wear a facial covering "has a clear rational basis based on the protection of public health" (App. at 327), such that Appellants were not likely to succeed on the merits of their claim, and their motion seeking injunctive relief should be denied.

The order here appealed should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR INJUNCTIVE RELIEF BECAUSE A FACE COVERING IS NOT A MEDICAL DEVICE AND THUS THE COUNTY IS NOT PROHIBITED FROM REQUIRING INDIVIDUALS TO WEAR FACIAL COVERINGS TO HELP LESSEN THE SPREAD OF COVID-19 (RESTATED COMBINED ISSUES ON APPEAL).

STANDARD OF REVIEW

As this Court recently noted in *Picture it Sold Photography, LLC v. Bunkelman*, 287 So. 3d 699 (Fla. 4th DCA 2020), the standard of review applicable to the denial of a temporary injunction is a hybrid: the trial court's factual findings are reviewed for abuse of discretion, and its legal conclusions are reviewed de novo. *Id*. at 702 (citing *Colucci v. Kar Kare Auto. Grp., Inc.*, 918 So. 2d 431, 436 (Fla. 4th DCA 2006)).

REQUIRED SHOWING TO BE GRANTED INJUNCTIVE RELIEF

To establish entitlement to a temporary injunction, Appellants were required to prove each of four required elements with competent, substantial evidence: a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (quoting *Reform Party of Fla. v. Black*, 885 So.2d 303, 305 (Fla. 2004). If a party fails to prove one of the requirements, the motion for injunction must be denied. *See State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236

So. 3d 466, 472 (Fla. 1st DCA 2018), *reh'g denied* (Feb. 21, 2018) (citations and internal quotation marks omitted).

MERITS

APPELLANTS FAIL TO CHALLENGE ONE OF THE FOUR INDEPENDENT BASES FOR DENYING INJUNCTIVE RELIEF

Initially, the order appealed must be affirmed because Appellants have failed to challenge the trial court's conclusion that they failed to show the public interest is served by enjoining EO-12 (App. at 331). No issue in Appellants' Initial Brief is addressed to this independent basis for denying injunctive relief, nor is any argument expressly made concerning this issue. Having failed to expressly challenge this independent basis for denying Appellants' motion for injunctive relief, the order on appeal must be affirmed.

A FACIAL COVERING IS NOT "MEDICAL TREATMENT"

Having abandoned all other arguments on appeal, Appellants' sole argument before this Court is that a facial covering is a type of "medical treatment" that they have a constitutional right to refuse. Appellants' argument lacks merit.

A facial covering is not "medical treatment." As noted in the Statement of the Case and Facts above, the uncontradicted evidence before the lower court from Dr. Bush and Dr. Campazzi supports the lower court's finding that facial coverings do not constitute "medical treatment".

Dr. Campazzi, who is Board Certified by the American Board of Preventative Medicine in Public Health and General Preventive Medicine, Occupational Medicine, Hospice & Palliative Care and Clinical Informatics, and who has a Master of Public Health Degree from Johns Hopkins; and Dr. Larry Bush, who is a Board Certified Infectious Disease Specialist with 32 years of experience, explained that a "medical treatment" is recognized in the medical community as a treatment directed by a medical professional to a specific patient to treat a medical condition. Given this understanding, a facial covering is not a "medical treatment" in the context of EO-12 because a facial covering does not treat a medical condition and its use is not being directed by a medical professional to a specific patient.

Appellants' entire argument has as its foundation the faulty premise that because a facial covering is effective in slowing the spread of a disease, a facial covering is, by definition, a medical treatment (Initial Brief at 15). By extension, this misguided logic would create "medical treatments" out of such practices as

avoiding crowded indoor places, coughing into one's sleeve, and washing one's hands, all of which are effective in slowing the spread of COVID-19. Such a conclusion is absurd.

The cases on which Appellants relied in advancing this unsupported "medical treatment" argument before the trial court concerned medical treatment involving a woman's right to make decisions regarding her pregnancy (*Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1244 (Fla. 2017); *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 615 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)) and an individual's right to terminate life support (*In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990)). Those cases are clearly distinguishable from the instant case. On appeal, Appellants have abandoned all but the last of these cases. Like the other cases, *Browning* provides no support for Appellants' argument.

Browning concerns an individual's right to make "all relevant decisions concerning one's health"; however, Appellants cite no authority to support a conclusion that they possess the "right" to make decisions that affect another's health. Facial coverings are intended to prevent individuals from infecting others.

Because Plaintiffs' privacy rights are not implicated by the requirement that they wear a facial covering to lessen the chance of infecting others, the trial court properly applied rational basis review in denying Appellants' motion for injunctive relief.

Franceschi v. American Motorists Ins. Co., 852 F.2d 1217 (9th Cir. 1988) (defining "medical treatment" in the context that most favors coverage under an insurance policy) and *Shanks v. Blue Cross and Blue Shield*, 979 F.2d 1232 (7th Cir. 1992) (same) are factually distinguishable and thus of no help to Appellant. While not directly on point, this Court's opinion in *Quiles v. City of Boynton Beach*, 802 So. 2d 397 (Fla. 4th DCA 2001) supports the trial court's conclusion upholding the County's exercise of its home rule authority.

Finally, a face covering can be a "medical device" without being a "medical treatment" from a physician. For example, medical professionals don "medical devices" such as PPE without the wearing of such equipment being considered "medical treatments" for the physician. Appellants do not dispute that the County has the police power to act in the interest of public health. The fact that the County acts in the interest of the public health does not convert its action into medical treatment.

CONCLUSION

The trial court's well-reasoned order denying injunctive relief should be affirmed. Appellants fail to challenge one of the four independent bases for affirming the order: that the public interest would not be served by enjoining EO-12. On this basis alone, the order should be affirmed.

Additionally, the uncontradicted evidence admitted below supports the trial court's conclusion that facial coverings in the context of EO-12 do not constitute "medical treatment." The trial court properly applied rational basis review in upholding EO-12 as against Appellants' meritless constitutional challenge. EO-12 "has a clear rational basis based on the protection of public health" (App. at 327)

Palm Beach County respectfully requests this Court affirm the trial court's order denying Appellants' motion for injunctive relief.

Respectfully submitted,

/s/ Helene C. Hvizd
HELENE C. HVIZD, ESQ.
Senior Assistant County Attorney
Florida Bar No. 868442

/s/ Rachel M. Fahey
RACHEL M. FAHEY
Assistant County Attorney

Florida Bar No. 105734

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished via the E-Filing Portal this 29th Day of October, 2020, to: Louis Leo IV, Esq., Joel Medgebow, Esq., Melissa Martz, Esq., and Cory C. Strolla, Esq., Florida Civil Rights Coalition, P.L.L.C., Counsel for Appellants, 4171 Hillsboro Blvd., Suite 9, Coconut Creek, FL 33073,louis@floridacivilrights.org, joel@medgebowlaw.com, melissamartzesq@gmail.com, strollalaw@yahoo.com, info@floridacivilrights.org; and Jared H. Beck, Esq., Elizabeth Lee Beck, Esq., and Victor Arca, Esq., Beck & Lee Trial Lawyers, Counsel for Appellants, 12485 SW 137th Ave., Suite 205, Miami, FL 33186, jared@beckandlee.com, elizabeth@beckandlee.com, victor@beckandlee.com.

Respectfully submitted,

/s/ Helene C. Hvizd
HELENE C. HVIZD
Senior Assistant County Attorney
Palm Beach County Attorney's Office
Co-Counsel for Appellee
Florida Bar No. 868442
301 North Olive Avenue, Suite 601

West Palm Beach, FL 33401
Tel: (561)355-2582; Fax: (561)656-7054
hhvizd@pbcgov.org

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is being filed in Times New Roman 14-point font.

/s/ Helene C. Hvizd
HELENE C. HVIZD, ESQ.
Assistant County Attorney