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83 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JACOB DOYLE CORMAN, III, *et al.*,	:	
	:	**No.: 83 MAP 2021**
Appellees,	:	
	:	
v.	:	
	:	
ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
	:	
Appellant.	:	

APPELLEES' ANSWER TO EMERGENCY APPLICATION TO REINSTATE THE AUTOMATIC SUPERSEDEAS

AND NOW, come Appellees, by and through their attorneys, Dillon McCandless King Coulter & Graham, LLP, per Counsel of Record, to file the within Answer to Appellant's Emergency Application to Reinstate the Automatic Supersedeas, stating in support as follows:

1. On November 10, 2021 four judges of the Commonwealth Court of Pennsylvania joined in the Opinion and Order in the present matter granting the Appellees' Application for Summary Relief and Entry of Judgment and declaring the "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities," void *ab initio*.

The Commonwealth Court of Pennsylvania found that "… the Acting Secretary issued the Masking Order, which is a regulation, without complying with the mandatory rule making requirements of the Commonwealth Documents Law and the Regulatory Review Act." The Court further found that,

> [i]n so doing, the Acting Secretary attempted to issue her own emergency declaration about the dangers of COVID-19 and mutations thereof, including the Delta variant.

See Memorandum Opinion and Order Dated November 10, 2021, at 30.

Further, the Court found that,

> The purported authority cited by the Acting Secretary in the Masking Order does not convey the authority required to promulgate a new regulation without compliance with the formal rule making requirements of the Commonwealth Documents Law and the Regulatory Review Act. Therefore, because the Acting Secretary did not comply with the requirements of the Commonwealth Documents Law or the Regulatory Review Act in promulgating the Masking Order, the Masking Order is void *ab initio*.

Most importantly the Opinion states as follows,

> For this Court to rule otherwise would be tantamount to giving the Acting Secretary unbridled authority to issue Orders with the effect of regulations in the absence of either a gubernatorial proclamation of disaster emergency or compliance with the Commonwealth Documents Law and the Regulatory Review Act, as passed by the General Assembly. ***As this would be contrary to Pennsylvania's existing law, we decline to do so.***

Memorandum Opinion and Order Dated November 10, 2021, at 30 (emphasis added).

With respect to the assertions in Paragraph 1 and throughout Appellant's Application, the Appellant fails to cite to the record in this case, instead relying upon various anonymous, unsupported, and unattributed opinions, newspaper articles and other pronouncements not properly before this Court.

Similarly, the Appellant asserts that the Commonwealth Court failed to apply the correct standard pronounced by this Court in a variety of cases. This is simply not the case. Specifically, Judge Fizzano Cannon correctly identified the standard announced by this Court with respect to a Motion to Vacate and Automatic Supersedeas. *See* Memorandum Opinion and Order dated November 16, 2021, at 4.

Likewise, the Court addressed the same argument being made by Appellant in this Application wherein the Appellant asserts that the Commonwealth Court "conflated the supersedeas analysis with that of the Preliminary Injunction analysis." *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa 1989). The Court applied the same test required by this Honorable Court in determining whether to vacate the

automatic supersedeas. Appellant's arguments to the contrary are simply not accurate.

Appellant would have this Honorable Court reinstate the "status quo." Appellees respectfully suggest that to do so would be to reinstate an ill conceived and patently improper regulation or order contrary to Pennsylvania Law. Despite the numerous anonymous, unattributed, and undocumented opinions expressed by the Appellant throughout her Application, there is not a single reference to the record before this Court or previously before the Commonwealth Court of Pennsylvania. The conclusions reached by the Appellant are without factual basis in the record and are certainly the subject of great debate throughout this Commonwealth and indeed throughout the World. No mandate for the wearing of masks by school children was ever issued by the CDC or any other regulatory body.

Indeed, throughout the summer of 2021, as is evidenced in the record of this case, the Governor of Pennsylvania and the Secretary of Health repeatedly assured the residents of this Commonwealth that they would not impose a mask mandate upon the school children of Pennsylvania stating,

> I think the school districts in Pennsylvania have to decide what they're going to do. I think the CDC guideline is they strongly recommend that schools do that. They're not mandating [masks] and neither am I.

Brief of Petitioners, at 6; *citing* Chris Ullery, *If CDC won't mandate masks in schools, 'neither will I,' Gov. Wolf says*, Bucks County Courier Times, Published August 6, 2021.

The Appellant has failed for the past twenty-two months of the pandemic to initiate a rule or regulation in accordance with the requirements of Pennsylvania Law. She now seeks to have this Court impose such a rule or regulation by virtue of the reinstatement of the automatic supersedeas.

During the summer of 2021, the Governor of Pennsylvania in a letter to the Speaker of the House of Representatives and the President Pro Tempore of the Pennsylvania Senate requested the legislature to reconvene in order to give him the power now asserted in this case. *See* Brief of Petitioners, at 6; *citing Gov. Tom Wolf calls on state lawmakers to return to Harrisburg to pass school mask mandate*, WGAL 8, Published August 27, 2021, https://www.wgal.com/article/pennsylvania-gov-tom-wolf-asks-lawmakers-to-return-to-harrisburg-to-pass-school-mask-mandate/37397945. The Governor's call for legislative action belies the assertions now made by the Appellant that it all-along had the power to do those things which are the subject of this Application. The Speaker and President Pro Tempore declined the Governor's invitation to reconvene the

Legislature. Despite such declination, the Secretary entered the Order which is the subject of this proceeding.

The issue before this Honorable Court is whether or not the promulgation of an order may be made without compliance with the Regulatory Review Act and in contravention of the specific provisions of the Disease Control Act. The Appellant's arguments attempt to insert this Court into the legislative or regulatory process by appealing to a continuous discussion of the effects of COVID-19 and the arguments related to attempts to address the same.

The Commonwealth Court also correctly pointed to that section of the Regulatory Review Act which could have been utilized by the Appellant in this matter to seek an "emergency" order. The Court carefully and correctly provided the Secretary with sufficient time to take advantage of the emergency provisions if she chose to do so. Instead of doing so, the Secretary complains throughout her Application about the amount of work necessary to procure such an emergency order.

In summary, the Commonwealth Court used the proper and correct test to evaluate the Appellees' Application to Terminate the Supersedeas in this case. The Appellees met all of the obligations on their part related to

such tests. The Commonwealth Court did not "conflate" the requirements for a preliminary injunction with those required to terminate a supersedeas. In this remarkable case, the Appellant would have this Court act on an "emergency" which could have been prevented simply by the Appellant following the road map clearly announced by the majority in the Commonwealth Court.

The real issue in this case is strikingly similar to the issue addressed in the case of *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, -- S.Ct. --, 2021 WL 3783142 (2021), in the United States Supreme Court. The real issue in this case is whether or not the Secretary may exercise "a breathtaking amount of authority," in the absence of any legislative grant to her of such authority.

As the United States Supreme Court said in vacating the eviction moratorium which the CDC attempted to extend across this nation:

> Indeed, the Government's read of § 361(a) would give the CDC ***a breathtaking amount of authority***. *It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure 'necessary.'* 42 U.S.C. § 264(a); 42 C.F.R. § 70.2. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed

> Internet service to facilitate remote work? This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium. … Section 361(a) is a wafer-thin reed on which to rest such sweeping power.

Ala. Assoc. of Realtors, 2021 WL 3783142, at *4-5.

Judge Fizzano Cannon, joined by the majority in the underlying decision, correctly recited the real issue before this Honorable Court as follows:

> The Masking Order requires neither isolation nor quarantines. Therefore, the Acting Secretary by necessity relies on the "any other control measure" portion of this section of the Disease Control Law as authority for the Masking Order. However, the language of this section – particularly "a disease which is subject to isolation, quarantine, or any other disease control measure" and "shall carry out the appropriate control measures" – contemplates existing control measures for diseases already subject to those existing control measures. Additionally, the Acting Secretary's reading of Section 5 of the Disease Control Law does not account for the portion of the text that immediately follows the "any control measures" language that requires that any "other control measure" be carried out "in such manner and in such place as is provided by an existing rule or regulation." 35 P.S. § 521.5. As a result of this express limitation, while Section 5 of the Disease Control Law does grant the authority to "carry out the appropriate control measures" to control diseases, as [Appellant] suggests, ***it does not provide the Acting Secretary with the blanket authority to create new rules and regulations out of whole cloth, provided they are related in some way to the control of disease or can otherwise be characterized as disease control measures.***

Memorandum Opinion and Order dated November 10, 2021, at 24 (emphasis added).

Appellees' Answer to Paragraph 1 is incorporated into the following paragraphs by reference thereto as if more fully set forth therein.

2. Denied as stated. The Commonwealth Court did not acknowledge that the Department of Health possessed the authority to require masking in schools. Rather, the Commonwealth Court stated, "[t]he introductory statement outlines the Acting Secretary's *purported authority* to impose the Masking Order as follows." *See* Memorandum Opinion and Order Filed November 10, 2021, at 7-8. By further answer, the Court explicitly declared the Appellant's Order to be void *ab initio*. *See* Memorandum Opinion and Order Filed November 10, 2021, at 30.

3. Admitted in part, denied in part. It is admitted that the Commonwealth Court terminated the automatic supersedeas in the present matter as of December 4, 2021. The remaining allegations in this paragraph constitute an opinion for which no responsive pleading is deemed necessary.

4. Denied. The Appellant's interpretation of the Commonwealth Court's supersedeas analysis is denied as an incorrect interpretation and conclusion of law.

5. Denied. Paragraph 5 constitutes an opinion for which no responsive pleading is deemed necessary. By further answer, Appellant has had several opportunities to avail themselves to the provisions governing the publication of emergency regulations pursuant to 71 P.S. § 745.6(d), yet has failed to utilize the same to promulgate an emergency Masking Order.

6. Admitted.

7. Admitted in part, denied in part. It is admitted that the Pennsylvania House of Representatives Joint Committee on Documents determined that the Masking Order at issue was not a regulation subject to Pennsylvania's Regulatory Review Act. It is specifically denied that such determination was a correct application of Pennsylvania law and the provisions of Pennsylvania's Regulatory Review Act. And further, the Pennsylvania House Health Committee has appealed such determination to the Commonwealth Court at docket number 1184 CD 2021.

8. Admitted.

9. Admitted in part, denied in part. It is admitted that Judge Wojcik filed a separate dissenting opinion in the present case. However, four judges joined the majority opinion.

10. Denied as stated. Appellant filed the present appeal because she refused to utilize the mechanism for emergency rulemaking which would

have permitted the Appellant to address their concerns through an emergency regulation under 71 P.S. § 745.6(d).

11. Admitted in part, denied in part. It is admitted that Appellees filed an Application to Terminate the Supersedeas. To the extent that this Paragraph characterizes the positions of the Appellees as it relates to the efficacy of masking in schools, the same is denied. This case does not address the efficacy of the Acting Secretary of Health's Masking Order. Rather, this case addresses the Acting Secretary of Health's failure to promulgate her Masking Order pursuant to the requirements of Pennsylvania's Regulatory Review Act. By further answer, the Commonwealth Court has noted, in two separate opinions, that the Regulatory Review Act provides a mechanism for emergency rulemaking which Appellant has failed to utilize at any point since the issuance of the Masking Order. *See* Memorandum Opinion Filed November 16, 2021, at 8 n. 6; *see also* Memorandum Opinion Filed November 10, 2021, at 15 n. 20. Accordingly, any existing emergency relating to the Appellant's Masking Order was created by the Pennsylvania Department of State through their failure to promulgate the same as an emergency regulation pursuant to 71 P.S. § 745.6(d).

12. Admitted in part, denied in part. It is admitted that the Commonwealth Court entered an order terminating the automatic supersedeas as of December 4, 2021. The Appellant's interpretation of the Commonwealth Court's supersedeas analysis is denied as an incorrect interpretation and conclusion of law.

13. Admitted.

14. Admitted.

15. Denied. Paragraph 15 contains conclusions of law to which no responsive pleading is deemed necessary.

16. Admitted.

17. Admitted.

18. Denied. The Appellant's interpretation of the Commonwealth Court's supersedeas analysis is denied as an incorrect interpretation and conclusion of law.

19. Denied. To the extent that this Paragraph characterizes the positions of the Appellees as it relates to the efficacy of masking in schools, the same is denied. This case does not address the efficacy of the Acting Secretary of Health's Masking Order. Rather, this case addresses the Acting Secretary of Health's failure to promulgate her Masking Order pursuant to the requirements of Pennsylvania's Regulatory Review Act. By further

answer, the Regulatory Review Act provides a mechanism for emergency rulemaking which would have permitted the Appellant to address their concerns through an emergency regulation under 71 P.S. § 745.6(d). However, the Appellant has failed to utilize the above referenced mechanism at any point since the issuance of Appellant's Masking Order.

20. Denied. The sources cited by the Appellant speak for themselves. By further answer, to the extent that Appellant's interpretation of those sources is intended as a legal basis to reinstate the automatic supersedeas, the same is denied.

21. Denied. The comments of the Center for Disease Control (CDC) speak for themselves. By further answer, to the extent that Appellant's interpretation of those comments is intended as a legal basis to reinstate the automatic supersedeas, the same is denied.

22. Admitted in part. It is admitted only that the United States Food and Drug Administration authorized emergency use of the Pfizer-BioNTech COVID-19 vaccine for children 5 through 11 years of age on October 29, 2021.

23. Denied. By further answer, the Regulatory Review Act provides a mechanism for emergency rulemaking which would have permitted the Appellant to address their concerns through an emergency regulation under

71 P.S. § 745.6(d). However, the Appellant has failed to utilize the above referenced mechanism at any point since the issuance of Appellant's Masking Order.

24. Denied. Paragraph 24 constitutes an opinion for which no responsive pleading is deemed necessary.

25. Denied. To the extent that this Paragraph characterizes the positions of the Appellees as it relates to the efficacy of masking in schools, the same is denied. This case does not address the efficacy of the Acting Secretary of Health's Masking Order. Rather, this case addresses the Acting Secretary of Health's failure to promulgate her Masking Order pursuant to the requirements of Pennsylvania's Regulatory Review Act. By further answer, the public interest in the present matter will not be harmed by the termination of the automatic supersedeas as other expedited, rule-making procedures exist under the Regulatory Review Act to effectuate the Appellant's Masking Order in a manner complying with Pennsylvania law. Accordingly, any alleged emergency relating to the Appellant's Masking Order was created by the Pennsylvania Department of State through their failure to promulgate the same as an emergency regulation pursuant to 71 P.S. § 745.6(d). Further, during much of the pandemic, school districts individually dealt with the mask issue. No emergency existed then, and

nothing has changed to create one now. In addition thereto, there is no mask mandate applicable to the same children outside of their schools or homes.

26. Denied. The Appellant's interpretation of 71 P.S. § 745.7a; 45 Pa.C.S. §§ 503, 701, 1206 is denied as an incorrect interpretation and conclusion of law. By further answer, the public interest does not weigh in favor of maintaining the Appellant's Masking Order during the pendency of the present appeal because there can never be an appropriate supersedeas to allow for the continuance of an illegal order.

27. Denied. The Memorandum Opinion and Order of the Commonwealth Court dated November 10, 2021, speaks for itself. To the extent that Appellant alleges facts existing outside of the four corners of the Order or Record, the same is denied.

28. Denied. The Memorandum Opinion and Order of the Commonwealth Court dated November 10, 2021, speaks for itself. To the extent that Appellant alleges facts existing outside of the four corners of the Order or Record, the same is denied. By further answer, the Commonwealth Court did not simply, "dictate its own preferred actions to address the existing threat to the public health." Rather, the Commonwealth Court directed the Appellant to the legally correct avenue for the emergency promulgation of the Appellant's Masking Order in the absence of the Appellant's compliance

with the standard procedure for the promulgation of a regulation pursuant to Pennsylvania's Regulatory Review Act, should the Acting Secretary so desire.

29. Denied. Paragraph 29 contains conclusions of law to which no responsive pleading is deemed necessary.

30. Denied. Paragraph 30 contains conclusions of law to which no responsive pleading is deemed necessary.

31. Denied. Paragraph 31 contains conclusions of law to which no responsive pleading is deemed necessary.

32. Denied. The Appellant's interpretation of the Commonwealth Court's supersedeas analysis is denied as an incorrect interpretation and conclusion of law. By further answer, in issuing her Masking Order, Appellant was required to either comply with the standard procedures for the promulgation of a regulation under the Regulatory Review Act or was required to comply with the emergency procedures set forth in 71 P.S. § 745.6(d). The Appellant's failure to follow any of these procedures for the issuance of her Masking Order has subsequently resulted in the Order being declared void *ab initio* by the Commonwealth Court.

33. Denied. Paragraph 33 contains conclusions of law to which no responsive pleading is deemed necessary. By further answer, while the

Court in *SEIU Healthcare Pennsylvania v. Commonwealth*, 104 A.3d 495 (Pa. 2014) involved a request for a preliminary injunction, the Court's analysis as it relates to *per se* irreparable harm provided that the violation of a statute constitutes *per se* irreparable harm as the General Assembly has already balanced the equities in passing the legislation. *Id*. at 504. This principle is perfectly applicable to the present matter. Violation of those directives has already been determined by Pennsylvania's General Assembly to constitute irreparable harm, regardless of the context of such a violation. Moreover, while this Court's decision in *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199 (Pa. 1989) did indeed reverse the Commonwealth Court's termination of an automatic supersedeas, such a reversal was not premised on the Commonwealth Court's utilization of the *per se* irreparable harm doctrine set forth in *SEIU*. Rather, this Court reversed the Commonwealth Court as the Commonwealth Court utilized the wrong analysis all together. See *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989) (stating, "[t]he Commonwealth Court, on this issue, retreated from the requirements established for a stay, and by holding 'this Court perceived a greater harm in not lifting the automatic supersedeas,' improperly applied one of the five tests applicable when issuing a preliminary injunction: *will*

greater injury result by refusing the preliminary injunction than be granting it.") (emphasis added).

34. Admitted in part, denied in part. It is admitted that Appellant accurately cites an excerpt of *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). It is denied that such case is applicable to the Commonwealth Court's analysis regarding the termination of the supersedeas in the present case. By further answer, the Commonwealth Court in the present case utilized the doctrine of *per se* irreparable harm in determining whether the Appellees face irreparable harm should the automatic supersedeas remain in effect. This legal analysis was not at issue in *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). Rather, the Commonwealth Court in *Jubelirer* improperly applied the wrong test entirely, using the test: "will greater injury result by refusing the preliminary injunction than by granting it." Accordingly, Appellant's reliance upon *Jubelirer* is misplaced.

35. Admitted in part, denied in part. It is admitted that Appellant accurately cites an excerpt of *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). It is denied that such case is applicable to the Commonwealth Court's analysis regarding the termination of the supersedeas in the present case. By further answer, the

Commonwealth Court in the present case utilized the doctrine of *per se* irreparable harm in determining whether the Appellees face irreparable harm should the automatic supersedeas remain in effect. This legal analysis was not at issue in *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). Rather, the Commonwealth Court in *Jubelirer* improperly applied the wrong test entirely, using the test: "will greater injury result by refusing the preliminary injunction than by granting it." Accordingly, Appellant's reliance upon *Jubelirer* is misplaced.

36. Denied as stated. Appellant has ignored the remaining elements one must establish to vacate an automatic supersedeas. In addition to proving that the Appellee will suffer irreparable injury, an Appellee seeking to vacate an automatic supersedeas must additionally prove that they are likely to prevail on the merits and that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. *See Solano v. Pa. Bd. of Prob. & Parole*, 884 A.2d 943, 944 (Pa. Commw. 2005). Accordingly, an Appellee must establish additional elements other than irreparable harm prior to an automatic supersedeas being vacated.

37. Denied. Paragraph 37 contains conclusions of law to which no responsive pleading is deemed necessary.

38. Denied. Paragraph 38 contains conclusions of law to which no responsive pleading is deemed necessary.

39. Denied. Paragraph 39 contains conclusions of law to which no responsive pleading is deemed necessary. By further answer, Appellant misconstrues the narrow issue before the Commonwealth Court on the parties' cross-applications for summary relief. The issue before the Court was, "whether the Acting Secretary acted properly in issuing the Masking Order in the absence of either legislative oversight or a declaration of disaster emergency by the Governor." *See* Memorandum Opinion and Order dated November 10, 2021, at 3. Nothing in the Commonwealth Court's Opinion precludes Appellant from promulgating her Masking Order pursuant to the emergency provisions of Pennsylvania's Regulatory Review Act.

40. Denied. Paragraph 40 contains conclusions of law to which no responsive pleading is deemed necessary.

41. Denied. Paragraph 41 constitutes an opinion for which no responsive pleading is deemed necessary.

42. Denied. To the extent that the averments contained in Paragraph 42 are intended to set forth a legal basis for the Appellant's Emergency Application to Reinstate Automatic Supersedeas, the same are denied.

43. Denied. To the extent that the averments contained in Paragraph 43 are intended to set forth a legal basis for the Appellant's Emergency Application to Reinstate Automatic Supersedeas, the same are denied.

44. Denied. Paragraph 44 contains a prayer for relief to which no responsive pleading is deemed necessary.

WHEREFORE, Appellees respectfully request that this Honorable Court enter an Order denying Appellant's Emergency Application to Reinstate Automatic Supersedeas.

Respectfully submitted,

DILLON, McCANDLESS, KING, COULTER & GRAHAM, L.L.P.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania Care Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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