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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

Case No. 23-0656

IN THE SUPREME COURT OF TEXAS

OFFICE OF THE ATTORNEY GENERAL OF TEXAS, ET AL.,
Appellants,

v.

HARRIS COUNTY, TEXAS, ***Appellee/ Cross-Defendant,***

v.

CLIFFORD TATUM,
Appellee/Cross-Claimant,

v.

HARRIS COUNTY REPUBLICAN PARTY,
Intervenor.

On Direct Appeal from the
345th Judicial District Court, Travis County, Texas
No. D-1-GN-23-003523

APPELLEE CLIFFORD TATUM'S AMENDED PARTIALLY OPPOSED RULE 56.2 MOTION TO DISMISS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Before this Court are appeals from multiple rulings made by the district court. One of those appeals, the interlocutory appeal regarding the validity of the temporary injunction granted in favor of Clifford Tatum, is now moot. That injunction was superseded, and the acts sought to be prohibited have now occurred. As this Court has long held, in such circumstances an appeal is moot because "[i]t would be a vain thing for this court to reinstate the injunction when the act sought to be prohibited has already occurred." *Poole v. Giles*, 248 S.W.2d 464, 465 (Tex. 1958); *Serv. Fin. Corp. v. Grote*, 131 S.W.2d 93, 94 (Tex. 1939). When an appeal becomes moot, this Court has no option—it must dismiss for want of jurisdiction. *Texas Dept. of Family and Protective Services v. N.J.*, 644 S.W.3d 189, 192 (Tex. 2022). As will be detailed below, Appellee Clifford Tatum asks this Court to dismiss as moot the appeal of the temporary injunction granted in his favor and remand that case to the district court for trial on the merits once the appeal of the Plea to the Jurisdiction is resolved.

PROCEDURAL HISTORY AND CURRENT POSTURE OF THE CASE

This case arises out of the enactment of a bill during the last regular legislative session, SB 1750, which added a new provision (section 31.050) to the Texas Election Code. Before passage of this legislation, Harris County, along with half the other counties in Texas, had elected to create the non-partisan position of county election administrator to manage voter registration and run elections, as authorized by TEX. ELEC. CODE §31.031. SB 1750, as passed, transferred "all powers and duties of the elections administrator of [Harris County] . . . to the county tax assessor-collector and county clerk," and commanded that all "employees, property, and records" of the county elections administrator be transferred to those elected officials.

Before SB 1750 became effective (on September 1, 2023), Harris County had filed suit against Appellants, the State of Texas and various state office holders and executive positions,[1] seeking a declaratory

[1] Harris County sued the State of Texas, the Office of the Attorney General of Texas, Angela Colmenero in her Official Capacity as Interim Attorney General of the State of Texas, the Office of the Texas Secretary of State and Jane Nelson in her Official Capacity as Secretary of State of the State of Texas. These parties will be referred to collectively as the "State Defendants".

judgment that SB 1750 violated Article III, Section 56 of the Texas Constitution and asking the trial court to grant temporary and permanent injunctive relief to prevent the State Defendants from enforcing SB 1750 against Harris County. (Tab A).

Appellee Clifford Tatum both intervened in Harris County's lawsuit and filed a crossclaim against Harris County only, himself seeking a declaratory judgment that SB 1750 is unconstitutional and asking the trial court to grant temporary and permanent injunctive relief to him **to prevent Harris County, his employer,** from terminating his employment as Harris County Elections Administrator and transferring the duties of that office to the Harris County Clerk and Harris County Tax Assessor-Collector, based solely on, and as ostensibly required by, SB 1750. (Tab B). The Attorney General of Texas intervened in Clifford Tatum's cross-action (Tab C), as it had a statutory right to do, Tex. Civ. Prac. & Rem. Code § 37.006(b), to defend SB 1750 from Tatum's constitutional attack. In that intervention, the Attorney General asked the district court to render judgment that SB 1750 does not violate the Constitution of Texas.

On August 8, 2023, the trial court held a hearing on Appellants' Plea to the Jurisdiction with respect to Harris County's action,[2] and on Appellees Harris County's and Clifford Tatum's separate requests for temporary injunctions to preserve the *status quo ante* pending resolution of the merits disputes. On August 14, 2023, the trial court issued orders granting in part and denying in part Appellants' Plea to the Jurisdiction with respect to Harris County's claim (Tab D), and granting, separately, both Harris County's (Tab E) and Clifford Tatum's (Tab F) requests for Temporary Injunction, effectively preserving the *status quo ante* by enjoining implementation and enforcement of SB 1750 pending trial on the merits, which the Court set for January 29, 2024.

Specifically, with respect to the Order granting Appellee Clifford Tatum's request for a temporary injunction, the district court mandated that until final judgment in this case, Harris County (and others working in concert with the County) were temporarily restrained from (a) enforcing SB 1750 (and Tex. Elec. Code § 31.050, which it added) to the extent it requires transfer of the duties and responsibilities of the Harris

[2] No hearing was held on Appellants' Plea to the Jurisdiction with respect to Clifford Tatum's crossclaim, as the Plea was not timely filed and the required notice was not given.

County election administrator to the offices of the Harris County Tax Assessor-Collector and/or the Harris County Clerk and (b) terminating Appellee Clifford Tatum's employment as county elections administrator on account of or in reliance on SB 1750 or Tex. Elec. Code § 31.050. (Tab E, p. 12).

The next day, the Appellants (State Defendants) filed an Amended Notice of Accelerated Interlocutory Appeal, appealing these three rulings (the one overruling, in part, the Plea to the Jurisdiction, the one granting Harris County's Motion for Temporary Injunction, and the one granting Clifford Tatum's Motion for Temporary Injunction) directly to this Court. (Tab G). This Motion concerns only one of the Orders appealed by the State Defendants -- the Order granting the temporary injunction in favor of Clifford Tatum and against Harris County.[3] (Tab G, p. 1-2).

The filing of the Amended Notice of Accelerated Interlocutory Appeal had the effect, as a matter of law, of automatically superseding

[3] For some reason, the Clerk of this Court has docketed Clifford Tatum as an intervenor in this appeal. In fact, he is properly designated as an Appellee, as State Defendants have consistently and correctly styled him throughout their pleadings in this Court. In fact, Tatum should be granted time to be heard during the oral argument scheduled for November 28, 2023, because his case presents issues distinct from those raised by Appellee Harris County in its case (mainly relating to standing).

the Temporary Injunction issued by the district court in Tatum's favor. Tex. R. App. P. 29.1(b); Tex. Civ. Prac. & Rem. Code § 6.001(b); *In re Abbott*, 645 S.W.3d 276, 280, 282 (Tex. 2022).

Accordingly, SB 1750 went into effect on September 1, 2023, notwithstanding the trial court's temporary injunction seeking to prevent that result.[4]

SUBSEQUENT DEVELOPMENTS

Once the temporary injunctions granted by the district court were automatically superseded by the State Defendants having filed their Amended Notice of Accelerated Interlocutory Appeal, and it was inevitable that SB 1750 would go into effect on September 1, 2023, the Harris County Commissioners Court, on August 29, 2023, adopted an Order transferring all 170 employees, budget, employees, and equipment of the Elections Administrator's office (except for that of the administrator himself) to other departments: 131 positions, employees,

[4] Tatum sought to invoke this Court's authority to provide the same relief the trial court's Temporary Injunction would have furnished had it not been superseded by the State Defendants' Notice of Accelerated Appeal. He filed an Emergency Motion for Rule 29.3 Order (Miscellaneous Motion, filed Aug. 16, 2023, Case No. 23-0656). But on August 22, 2023, the Court denied that motion without opinion or formal order. See, Case Events, Case No. 23-0656, Aug. 22, 2023).

budget and equipment were transferred from the Elections Administrator Department to the Harris County Clerk, and the remaining 39 positions, employees, budget, and equipment were transferred to the Harris County Tax Assessor-Collector. The Order recites that these actions were taken "to comply with SB 1750." (Tab H).

Then September 1, 2023, Tatum lost his job as county election administrator.

In short, Harris County complied. All powers and responsibilities, employees, property, and records of the county elections administrator have been transferred to the tax assessor-collector (with regard to voter registration functions) and to the county clerk (with regard to conducting elections). And Clifford Tatum's employment as county elections administrator has been terminated, as have all other emoluments of that office.

Everything the Temporary Injunction would have prevented from taking place, had that decree remained in effect, happened; everything the TI sought to enjoin was accomplished. This leaves the Court in the procedural posture of being asked to decide an appeal about the propriety of a temporary injunction issued in favor of Appellee Clifford Tatum

which is inoperative by law and fact, because all the acts, events, and actions sought to be enjoined have occurred. Regardless of the outcome of this appeal, there is nothing restoring the temporary injunction to effect could accomplish.

LEGAL EFFECT OF THESE DEVELOPMENTS ON THE STATE'S APPEAL

As this Court has held for almost 90 years, once a temporary injunction loses it operative effectiveness (becomes moot,[5]) appellate courts must dismiss appeals regarding the propriety of the interim order. *Serv. Fin. Corp. v. Grote*, 131 S.W.2d 93, 94 (Tex. 1939) (holding appeal from dissolution of temporary injunction must be dismissed as moot where trial court's temporary injunction prohibiting the sale of certain automobiles was dissolved by the court of appeals and the cars were sold before the Supreme Court could decide the appeal).

[5] This does not, of course, mean that Tatum's underlying lawsuit is moot – only the *pendente lite* appeal of the Temporary Injunction is. At least two substantive issues remain to be resolved at trial: (1) whether the statute is unconstitutional, rendering the termination of Tatum's position by operation of the statute unlawful, a holding which would entitle him to money damages for the unlawful deprivation of his statutorily protected right to continue in the role of election administrator, and restoration to his former position, and (2) whether Harris County can (or must) re-establish the position of county election administrator and whether it can (or must) reappoint Tatum to that post. These issues are both "live" controversies precluding dismissal of the underlying lawsuit on grounds of mootness.

For example, in *Poole v. Giles*, 248 S.W.2d 464 (Tex. 1958), plaintiffs obtained a temporary injunction prohibiting the School Land Board of Texas from accepting bids and executing oil and gas leases on certain lands. *Id.* at 465. The injunction was dissolved by the court of appeals and the School Land Board immediately accepted bids and executed leases on the properties. The plaintiffs appealed to this Court from the court of appeals' dissolution of the injunction. This Court held that since the leases had already been executed, the appeal of the order dissolving the temporary injunction was moot and the case had to be dismissed. *Id.* *See also, Guajardo v. Alamo Lumber Co.*, 317 S.W.2d 725 (Tex. 1958) (appeal of dissolved temporary injunction prohibiting sale of land dismissed by Court as moot when plaintiffs, under protest, tendered sufficient amount of money to discharge debt and prevent sale); *Cameron v. Saathoff*, 345 S.W.2d 281 (Tex.1961) (dismissing as moot plaintiffs' appeal from district court's refusal to enjoin defendants from dispossessing plaintiffs from farm where plaintiffs vacated the farm and defendants took possession after the denial of the temporary injunction and before resolution on the appeal); *City of Corpus Christi v. Public Utility Commission*, 569 S.W.2d 494 (Tex. 1978) (dismissing appeal by

City seeking to reinstate a temporary injunction issued by the district court prohibiting enforcement of an interim rate order because it would be "impossible to grant the relief sought" since the interim rate order had expired); *Isuani v. Manske-Sheffield Radiology Group, P.A.*, 802 S.W.2d 235 (Tex.1991) (dismissing appeal from the grant of a temporary injunction as moot because a final judgment had been issued while the case was on appeal, ending the operation of the temporary injunction).

The instant case is indistinguishable from those prior opinions, and others issued by this Court and courts of appeals around the state. SB 1750 became operative on September 1, 2023, mandating relocation of its powers, duties, and employees. In the absence of an injunction, Harris County complied. The very things the district court's temporary injunction sought to prevent from happening occurred.

At this point, restoring the Temporary Injunction to its original operative status would accomplish nothing. Everything originally prohibited by the Temporary Injunction has taken place. It is a *fait accompli*.[6] Since the injunction is no longer capable of producing any

[6] Of course, the district court may undo the current situation by a remedial order after trial on the merits if the court finds the statute unconstitutional.

results, it is, simply, inoperative, even if it were returned to being in effect.

Once the mandates of a temporary order are no longer effective to accomplish anything, the temporary injunction is moot and "any opinion regarding whether the trial court erred in granting the temporary injunction would be advisory and without any practical legal effect." *Kohoe v. R. Yates Properties, II, Ltd.*, No. 04-11-00274-CV, 2011 WL 4383620 (Tex. App.–San Antonio, Sept. 21, 2011, no pet. h.). *See also, Correa v. First Court of Appeals*, 795 S.W.2d 704 (Tex. 1990) (dismissing appeal where plaintiff obtained writ of mandamus requiring his name to be included on ballot, but subsequently lost election, because issue of constitutionality of Election Code provision regarding access to ballot was moot and opinion would be advisory only). "When a temporary injunction becomes inoperative due to a change in status of the parties or the passage of time, the issue of its validity is also moot." *National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). *See, Parr v. Stockwell*, 322 S.W.2d 615, 616 (1959); *Texas Educ. Agency v. Dallas Indep. Sch. Dist.*, 797 S.W.2d 367, 369 (Tex. App.—Austin 1990, no writ).

This Court has repeatedly held, when a temporary injunction becomes moot while on appeal, all orders pertaining to that temporary injunction must be set aside. *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 248 S.W.2d 460, 461 (1952); *Isuani v. Manske-Shefield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991), as an appellate court decision about a temporary injunction's validity under such circumstances would constitute an impermissible advisory opinion. *National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83 (Tex. 1999).

The fact that the merits of the case are still pending, as they are here, does not save an appeal of the temporary injunction from being dismissed (and the order vacated) on grounds of mootness. The rules which require dismissal of an appeal involving a temporary injunction which becomes moot "are necessary to prevent premature review of the merits of the case." *See, Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex.1981) (ruling on temporary injunction by appellate court may not be used to obtain advance ruling on merits of case concerning permanent injunction); *Brooks v. Expo Chem. Co.*, 576 S.W.2d 369, 370 (Tex.1979) (it will not be assumed that evidence taken at

preliminary hearing on temporary injunction will be same as evidence developed at trial on merits); *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex.1978) (effect of premature review of merits is to deny opposing party right to trial by jury); *Isuani v. Manske-Shefield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991). Thus, the fact that the trial court will ultimately have to make a *final* determination of the constitutionality of SB 1750, after a full trial on the merits, does not change the mootness bar, as far as assessment of the validity of the temporary injunction is concerned.

WHERE THAT LEAVES THINGS – WHAT THIS COURT SHOULD DO

In these circumstances, the Court should dismiss as moot the State Defendants' appeal of the Temporary Injunction rendered in Appellee Tatum's favor in his cross-action against Harris County, without reaching the merits of the arguments presented by the Appellants concerning the validity of that temporary injunction,[7] and remand that part of this appeal (the trial court's ruling on the temporary injunction in

[7] While Appellee Tatum opposes the State Defendants' position in their appeal from the trial court's ruling on the Plea to the Jurisdiction, as will be set out in his appellate brief, he takes no position on the validity of the temporary injunction issued in favor of Harris County in its lawsuit against the State Defendants. The instant Motion relates only to the temporary injunction issued in connection with Tatum's cross-action.

Tatum's favor in connection with his cross-action against Harris County) to the district court with instructions that the Order Granting Temporary Injunction in his cross-action be vacated. The remainder of the cross-appeal will remain pending on the district court's trial docket (where it is currently set for January 29, 2024), as no other part of the cross-action, or ruling in that part of the case, has been appealed. Rendering a decision on the merits of the appeal from the Temporary Injunction would constitute an advisory opinion (which would be doubly inappropriate in this case, since trial on the merits has not yet occurred). Of course, no proceedings could occur in the trial court, pending resolution of the Plea to the Jurisdiction currently pending before this Court, as all proceedings in that court have been stayed, by operation of law, by the filing of the Appellants' notice of appeal from the lower court's ruling on its Plea to the Jurisdiction in the case brought against the State Defendants by Harris County.

That would still, of course, leave pending before this Court the State Defendant's appeal from the district court's order overruling its Plea to the Jurisdiction in the (initial) case where Harris County sued various State Defendants over the constitutionality of SB 1750 and the State

Defendants' appeal from the temporary injunction issued in favor of Harris County. Appellee Tatum intervened in that lawsuit in which those decisions were issued (in addition to filing his cross-action against the County). Tatum intends to file a brief on the merits in the appeal of the Order granting in part and denying in part the State Defendants' Plea to the Jurisdiction, and requests oral argument, as the issues he raises (primarily relating to standing) in response to the Plea to the Jurisdiction are quite distinct from those presented by the county appellee.

CONCLUSION

For the foregoing reasons, Appellee Clifford Tatum acknowledges that the Temporary Injunction issued by the district court in his favor on his cross-action must be vacated on mootness grounds and asks the Court to dismiss the State Defendants' appeal of the Temporary Injunction issued in his favor as moot, without reaching the merits of the propriety of the issuance of the Temporary Injunction in the first place, and remand the case to the district court, where it will remain on the docket for trial on the merits, but stayed pending resolution of the appeal concerning the State Defendants' Plea to the Jurisdiction, which is currently pending before this Court.

Respectfully submitted,

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Certificate of Conference

As required by Texas Rule of Appellate Procedure 10.1(a)(5), I certify that I, or my co-counsel, Richard Schechter, have conferred, or made a reasonable attempt to confer, with all other parties—which are listed below—about the merits of this motion with the following results:

Lanora C. Pettit, Appellant's attorney, opposes the motion;

Jonathan Fombonne, Counsel for Appellee, Harris County, does not oppose the motion.

/s/ Gerald M. Birnberg
GERALD M. BIRNBERG

Certificate of Service

On September 27, 2023, this document was served on Lenora C. Pettit, Principal Deputy Solicitor General, and counsel for Appellants via Lanora.Pettit@oag.texas.gov and on Wallace B. Jefferson, lead counsel for Harris County, via wjefferson@adjtlaw.com.

/s/ Gerald M. Birnberg
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