TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00925-CV

Jill R. Davis, Appellant

v.

Hays County, Appellee

FROM THE 274TH DISTRICT COURT OF HAYS COUNTY
NO. 16-1511, THE HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Jill R. Davis filed a declaratory-judgment action against Hays County challenging a traffic regulation and a contract the County executed with a third party to process violations of the regulation. The trial court granted the County's plea to the jurisdiction, and Davis appeals. For the reasons explained below, we will reverse the trial court's order granting the County's plea to the jurisdiction and remand for further proceedings.

BACKGROUND

In her live petition, Davis alleges that in March 2016 she and her husband received a "Notice of Violation" (Notice) in the mail from "Hays County, Texas School Zone Safety Program." The Notice, on paper imprinted with a Hays County seal, states that the Davises violated "Hays County Regulation, Art. 3.1" (the Regulation) by speeding in a school zone and that "based on inspection of the recorded images produced by a traffic control photographic system," a named Hays County constable "charges the defendant and informs the

court that the above facts are true and punishable by a fine of $150.00." The Notice, indicating that it was "not a criminal charge," included options either to pay the civil fine or contest the violation by completing an affidavit of non-liability or requesting civil adjudication in the Hays County Justice Court.

Davis sent written notice contesting the violation and received a letter setting a hearing date for a few months later and then a second letter resetting the hearing for a few months after that. Meanwhile, Davis filed suit against the County and American Traffic Solutions, Inc. (ATSI), the private company with which the County contracted for "professional services related to traffic enforcement in school zones." Davis later amended her petition to add as defendants several county commissioners and the county judge.[1]

In her live petition, Davis alleges that the Regulation "was purportedly adopted at the February 17, 2015 meeting of Commissioners Court" even though the agenda for the meeting "made no mention of discussion or possible action on a new county regulation." Rather, the agenda noted "discussion and possible action to authorize the County Judge to execute a Professional Services Agreement between Hays County and [ATSI]." That agreement (the Contract), which the County Commissioners authorized the County Judge to execute, and which he did execute, included several exhibits, one of which was "a proposed new county regulation," i.e., the Regulation at issue in this case. Davis alleges that the County Commissioners and County Judge "adopt[ed] [the R]egulation as an executive act rather than debating and passing [it] as a legislative act" and that, in any event, the County has no statutory authority to create such traffic regulations.

[1] This appeal involves Davis's claims against only the County.

Davis further contends that her hearing date was rescheduled to provide the County and ATSI time to "rig" the outcome of any hearings or violations already "in the pipeline" in order to "ensure profits for ATSI and whomever it chose to share them with." As evidence of such "rigging," she attached "before" and "after" photos of the traffic signage at the location where she allegedly violated the Regulation. She alleges that, after she received her citation, the County added a small plaque indicating a range of hours to the bottom of a "when flashing" school-zone sign. Such signage alteration, she contends, is not compliant with applicable laws and serves to "make the parents of schoolchildren defenseless 'soft targets' for the financial gain of ATSI and as-yet unknown others."

Davis alleges four "counts" against the County:[2]

> Count 1—Declaratory Judgment: Contract and Regulation Are Void Due to Constitutional Lack of Authority
>
> Count 4—Violation of Texas Open Meetings Act Concerning Contract & Regulation
>
> Count 5—Violation of Texas Open Meetings Act Concerning Alteration of School Zone Signage
>
> Count 6—Declaratory Judgment (In the Alternative to Count 5): Changed School Zone Signage is Unlawful

In her prayer for relief, Davis seeks various declaratory judgments, including that (1) the Regulation and Contract are "void due to constitutional lack of authority," (2) the County violated the Texas Open Meetings Act (TOMA) with respect to the Contract and Regulation and alteration of the school zone signage, and (3) the County's alteration of the school zone signage is "illegal" because it is "not compliant with statutory requirements . . . for school zone signs."

[2] Some counts Davis alleges against other parties in addition to the County, and counts 2 and 3, omitted here, are asserted against only other parties.

She also seeks permanent injunctive relief, including an order enjoining the County from "operating an automated speed camera traffic enforcement system anywhere in Hays County," an order requiring "removal of the bottom plaque of the signage [at issue] . . . as well as any other signs similarly altered" by the County, and attorney's fees and costs.

In its plea to the jurisdiction, the County asserted that (1) Davis's claims are moot because the County has since rescinded the Regulation and terminated the Contract, (2) Davis's claims seeking "additional declaratory relief" are not ripe, (3) Davis does not have standing under the Uniform Declaratory Judgments Act (UDJA) because she has not alleged a particularized injury traceable to the County, and (4) Davis's suit is barred by governmental immunity. The trial court granted the plea without stating the basis for its determination; therefore, we will affirm the order if any of the grounds that the County asserted is meritorious. *See Combined Specialty Ins. v. Deese*, 266 S.W.3d 653, 657 (Tex. App.—Dallas 2008, no pet.). On appeal, Davis challenges each of the grounds the County raised in its plea.

DISCUSSION

A plea to the jurisdiction challenges a court's authority over the subject matter of a claim. *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015) (per curiam). Whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Id.* We construe the pleadings liberally and in light of the pleader's intent to determine if the plaintiff has alleged facts affirmatively demonstrating the trial court's jurisdiction to hear the claim. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 486 (Tex. 2018).

Standing

Standing requires (1) a real controversy between the parties that (2) will be actually determined by the judicial declaration sought. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). Without standing, a court lacks subject-matter jurisdiction to hear the case. *Id.* A determination of standing focuses on whether a party has a "justiciable interest" in the outcome of the lawsuit, such as when it is personally aggrieved or has an enforceable right or interest. *Id.* Further, to challenge government action, a party must demonstrate that it has suffered a particularized injury distinct from that suffered by the general public. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556–57 (Tex. 2000). Lastly, the plaintiff's injury must be "fairly traceable" to the defendant's conduct and not the result of the independent action of a third party not before the court. *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012).

Davis pleaded that her rights were affected by the Regulation and Contract because, when she filed suit, she had received notification from the County that she was "liable" for a civil penalty for violating the Regulation by speeding in a school zone. She requested a hearing to contest her liability, which was scheduled at the Hays County Justice Court and had not yet occurred when she filed suit. We conclude that she sufficiently pleaded a particularized injury by virtue of her receipt of the Notice and the impending hearing on her civil liability and a real controversy with the County that would be resolved by the judicial declarations she sought. Further, we conclude that her particularized injury is fairly traceable to the County due to its adoption of the Regulation and delegation of the processing of alleged violations to ATSI. Therefore, to the extent that the trial court granted the County's plea based on the County's standing arguments, the trial court erred.

Ripeness

Ripeness emphasizes the requirement of a concrete injury in order to present a justiciable claim. *City of Waco v. Texas Nat. Res. Conservation Comm'n*, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied). "Ripeness is concerned with when an action can be brought and seeks to conserve judicial time and resources for real and current controversies rather than hypothetical or remote disputes." *Id.* (citing *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998)). A suit for a declaratory judgment presents a court with a ripe controversy when the declaration sought will actually resolve the controversy. *Southwestern Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685 (Tex. 2020).

The County does not dispute the ripeness of Davis's request for declarations that the Regulation and Contract are void, as the County's actions in adopting and attempting to enforce them against her have already occurred. *See Patterson*, 971 S.W.2d at 442 (explaining that ripeness inquiry asks whether facts have sufficiently developed such that injury has already occurred or is likely to occur). However, the County challenges as unripe what it labels as various "additional declarations" Davis seeks pertaining to allegedly hypothetical prospective conduct. Those "additional declarations" are that the County (1) "lacks authority to adopt general ordinances or regulations," (2) "lacks the authority to expand the jurisdiction of the Justice of the Peace Courts beyond the jurisdiction permitted by the Texas Constitution and statute," and (3) "cannot contract with third parties . . . to usurp the duties . . . of county officials." However, these so-called "additional declarations" do not relate to hypothetical conduct but seek to resolve Davis's challenge to the County's authority to enter into the Contract and adopt and enforce the Regulation. Each of the "additional" declarations she seeks is not based on a

hypothetical or remote question but is instead based on the County's past conduct and constitutes a real controversy among the parties about the parameters of the County's authority. Accordingly, we reject the County's argument that in seeking specific declarations about the County's authority as it relates to its conduct in adopting the Regulation and executing the Contract, Davis is asking the court to "pass upon hypothetical or contingent situations." *See Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 846 (Tex. App.—Austin 2002, pet. denied). To the extent that the trial court granted the County's plea based on Davis's claims being unripe, the trial court erred.

Mootness

The County asserted in its plea to the jurisdiction that because it terminated the Contract and rescinded the Regulation after Davis filed suit, Davis's claims are moot and the trial court, therefore, lacked jurisdiction over them. *See Matthews, on Behalf of M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) (explaining that mootness doctrine applies to cases in which justiciable controversy exists between parties at time case arises, but live controversy ceases because of subsequent events, and noting that appellate courts review application of mootness doctrine de novo). However, there is an applicable exception for when a defendant voluntarily ceases the challenged conduct but the conduct might reasonably be expected to recur, and the defendant has not admitted that the conduct was unlawful. *See id.* at 417, 420.

"A defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief." *Id.* at 418. If it were otherwise, a defendant could control the jurisdiction of courts with "protestations of repentance and reform,

while remaining free to return to their old ways" and defeat the public interest in having the legality of the challenged conduct settled. *Id.* However, both the United States Supreme Court and the Texas Supreme Court have recognized that if a defendant can meet the "heavy" burden of persuading a court that the challenged conduct "could not reasonably be expected to recur," then dismissal on the basis of mootness is appropriate. *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

However, when the defendant has ceased the challenged conduct but has not admitted that the conduct was unlawful, such "stance is a significant factor in the mootness analysis, and one which prevents its mootness argument from carrying much weight." *Id.* at 419. "[W]hile there are cases where the defendant's voluntary conduct yielded mootness in the absence of an admission by the defendant that the challenged conduct was illegal, those cases generally involved conduct that could not be easily undone, and thus foreclosed a reasonable chance of recurrence." *Id.* (citing *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (finding claims moot after defendant expunged plaintiff's personnel file of complained-of material); *Fowler v. Bryan Indep. Sch. Dist.*, No. 01-97-01001-CV, 1998 WL 350488, at *6–7 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication) (finding claim moot after defendant adopted peer-sexual-harassment policies and training sought by plaintiff)).

Here, because the County could easily adopt and execute similar allegedly unlawful regulations and contracts in the future, the alleged facts are analogous to those in *Matthews* and other cases from this Court. *See id.* at 420 (holding that cheerleaders' challenge to school district's prohibition of religious messages on banners displayed at school events was not mooted by district's subsequent resolution abandoning policy while retaining discretion to

restrict content of banners); *Texas Health Care Info. Council*, 94 S.W.3d at 844–45 (concluding that plaintiff's claims challenging State's interpretation of statute in assessing civil penalties were not mooted by State's later withdrawal of penalty demand without other action providing assurance that State would not adopt previous statutory interpretation in future disputes with plaintiff); *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex. App.—Austin 2008, no pet.) (holding plaintiff's claims were not moot where defendant had not admitted unconstitutionality of challenged policy); *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no. pet.) (finding plaintiff's claims against water district were not moot where district had not admitted it was acting outside of its enabling act); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App.—Austin 1993, writ denied) (holding challenge to at-large election scheme was not moot "[w]ithout a declaration by the court or an admission by [the defendant] that the at-large system was unconstitutional"); *see also City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469–70 (Tex. App.—Dallas 2007, no pet.) (holding that city's repeal of ordinance allegedly promulgated in violation of TOMA did not moot plaintiff's claims because court could grant prospective relief such as requiring city to comply with TOMA in future).

Here, the County has neither conceded the illegality of its conduct nor proffered a persuasive argument that its conduct is unlikely to recur; rather, it merely argues that its "extrajudicial" action of rescinding the Regulation prevents recurrence of the challenged conduct. *Cf. Texas Health Care Info. Council*, 94 S.W.3d at 849 (holding that validity of civil penalty was not mooted by agency's extrajudicial action in later withdrawal letter because such letter did not "effectively prevent" agency from threatening such penalty in future). If the Regulation and Contract were in fact adopted and executed as perfunctorily as Davis alleges in her petition—

which we must assume for purposes of our review—and a court does not adjudge the validity of such conduct, there is a reasonable chance that the County would proceed similarly again in the future. We conclude that Davis's claims fall under the exception to the mootness doctrine outlined in *Matthews*. *See* 484 S.W.3d at 420. To the extent that the trial court based its ruling on the County's plea on the argument that Davis's claims are moot, the trial court erred.

Governmental immunity

In its plea to the jurisdiction and appellee's brief, the County concedes that it does not enjoy governmental immunity as to Davis's UDJA and TOMA claims, contending only that "to the extent" Davis brings "any other cause of action" against it, such claims are barred by governmental immunity. *See* Tex. Civ. Prac. & Rem. Code § 37.004 (providing that person whose rights, status, or other legal relations are affected by statute, ordinance, contract, or franchise may have determined any question of validity or construction arising thereunder); Tex. Gov't Code §§ 551.141–.142 (providing that interested person may bring mandamus or injunction action against governmental body to stop, prevent, or reverse TOMA violation because such violations are voidable); *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633–35 (Tex. 2010) (noting that UDJA provides limited waiver of sovereign immunity for challenges to validity of ordinance or statute). Our review of Davis's live petition leads us to conclude that she does not assert other such claims against the County. Accordingly, to the extent that the trial court granted the County's plea based on governmental immunity, the trial court erred.

CONCLUSION

We reverse the trial court's order granting the County's plea to the jurisdiction and remand this cause for further proceedings.

Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Reversed and Remanded

Filed: November 6, 2020