IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 16, 2023 Session

ALBERT FUQUA v. THE ROBERTSON COUNTY ELECTION COMMISSION ET AL.

Appeal from the Chancery Court for Robertson County
No. CH22CV-223 Louis W. Oliver, Chancellor

No. M2022-01126-COA-R3-CV

Appellant filed this action against his local election commission seeking to prevent a candidate from being placed on the ballot of the August 4, 2022 Robertson County election for circuit court clerk. We dismiss this appeal as moot.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN, and KENNY ARMSTRONG, JJ., joined.

James D.R. Roberts, Jr., Dickson, Tennessee, for the appellant, Albert Fuqua.

Blakeley D. Matthews, Nashville, Tennessee, and Clyde W. Richert, III, Springfield, Tennessee, for the appellee, Robertson County Election Commission.

MEMORANDUM OPINION[1]

I. FACTUAL AND PROCEDURAL HISTORY

[1] Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

This case was decided by motion to dismiss; as such, we take the relevant facts from the amended complaint. In December 2021, Kristy Chowning requested and received two nominating petitions from the Defendant/Appellee Robertson County Election Commission ("the Election Commission"). Prior to the February 17, 2022 filing deadline, Ms. Chowning returned a nominating petition to the Election Commission with the required number of signatures to qualify as a Republican Party Candidate for the Robertson County Circuit Court Clerk ("Circuit Court Clerk") position.

Ms. Chowning later withdrew her nominating petition and her candidacy in the Republican primary for the Circuit Court Clerk position. Prior to the deadline, Ms. Chowning then returned a second nominating petition qualifying her to run as an Independent candidate for Circuit Court Clerk.

As a result, on February 25, 2022, another candidate for the office of Circuit Court Clerk, Plaintiff/Appellant Albert Fuqua ("Appellant"), filed a complaint with the Election Commission asking to have Ms. Chowning's name removed from the ballot based on Tennessee Code Annotated section 2-5-101. A public hearing of the Election Commission occurred on March 8, 2022, but no action was taken by the Election Commission at that time, having determined that it had "no authority to vote on [Appellant's] Complaint."

Nearly sixty days later, Appellant filed a complaint and petition for writ of certiorari, seeking review of the Election Commission's inaction by the Robertson County Chancery Court ("the trial court").[2] Three days later, on May 9, 2022, Appellant filed an amended complaint seeking a writ of certiorari and other relief, including a temporary restraining order, injunction, and an order prohibiting Ms. Chowning's name from being placed on the August 4, 2022 ballot.[3] On the same day, the trial court issued an order granting the writ and directing the transcript and records from the March 8, 2022 hearing be filed with the trial court.

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[2] Appellant also named the State Election Coordinator as a party. He was voluntarily dismissed and is not at issue in this appeal.

[3] Specifically, Appellant's prayer for relief was as follows:

> 1. That this Court conduct a trial on this Complaint and Writ of Certiorari in the manner required under T.C.A. § 2-17-101 et seq.
>
> 2. That the Court enter an interim Order prohibiting placement of the Illegal Candidate's name on the August ballot until such time as the Court can rule on this issue.
>
> 3. That the court find the [Appellant's] civil rights have been violated by the [] Election Commission's failure to treat him equally under the election laws and that [Appellant] be awarded his reasonable attorney's fees for the violation of his civil rights by Robertson County and states failure to provide him equal protection under the law.
>
> 4. That [the] Election Commission should be barred pursuant to T.C.A. § 2-8-101(d) from compensating the election commission members until such time as the failure to fulfill their official duties is determined to be for good cause.
>
> 5. That [Appellant] be granted such other further and general relief as is just.

On May 16, 2022, Appellant filed an expedited motion to recuse the trial judge on the basis that Ms. Chowning was formerly an employee of the Robertson County Clerk and Master's Office. Appellant filed an amended motion on May 27, 2022. On May 31, 2022, trial court judge Laurence M. McMillan entered an order of recusal. Although the order stated that the presiding judge would assign a replacement, no replacement judge was immediately assigned.

On June 8, 2022, the Election Commission's counsel filed a motion seeking fifteen additional days to respond due to illness. The record from the Election Commission was filed with the trial court on June 10, 2022. Due to what Appellant perceived as a delay in appointing a replacement judge, Appellant filed a petition with the Tennessee Supreme Court on June 16, 2022, requesting that the Court step in and promptly appoint a judge to sit by interchange. On June 17, 2022, Appellant filed a motion for a default judgment against the Election Commission. The Election Commission responded in opposition on the same day. On June 20, 2022, the presiding judge of the judicial district designated Chancellor Louis W. Oliver of the Eighteenth Judicial District to preside over this case by interchange. The Tennessee Supreme Court thereafter denied Appellant's petition filed with that court as moot.

The Election Commission filed a motion to dismiss and to recover attorney's fees on June 21, 2022. Therein, the Election Commission argued that Ms. Chowning properly withdrew her nominating petition for the Republican primary before qualifying as an Independent candidate pursuant to Tennessee Code Annotated section 2-5-204(a) ("Each qualified candidate's name shall be placed on the ballot as it appears on the candidate's nominating petitions . . . unless the candidate requests in writing that the candidate's name not appear on the ballot[.]"), and ***State ex rel. Ozment v. Rand***, 567 S.W.2d 759, 760–61 (Tenn. 1978) ("Upon [the] filing [of a certificate of withdrawal,] Ozment ceased to be a candidate, and he was in precisely the same position as if he had not originally qualified."). The Election Commission further argued that the complaint should be dismissed for failure to name Ms. Chowning, a necessary party. Finally, the Election Commission argued that to the extent that Appellant was attempting to join other causes of action with his petition for a writ of certiorari, those claims must be dismissed as improperly joined with an appellate action. *See* ***Mandela v. Tenn. Dep't of Corr.***, No. W2019-01171-COA-R3-CV, 2021 WL 144233, at *5 (Tenn. Ct. App. Jan. 15, 2021) ("It is well settled that it is impermissible for a petitioner seeking appellate relief, such as a petition for writ of certiorari, to join the appellate action with an original action in the trial court."), *perm. appeal denied* (Tenn. July 12, 2021).

On June 28, 2022, Appellant responded in opposition to the Election Commission's motion to dismiss. In apparent response to the Election Commission's contention that Ms. Chowning was a necessary party, Appellant also filed a motion seeking leave to amend his complaint a second time to name Ms. Chowning as a defendant. The Election Commission responded in opposition the next day. Therein, the Election Commission argued that

Appellant's claims were now moot due to the fact that military and overseas ballots had already been dispatched.

A hearing on the motion to dismiss occurred on July 1, 2022. The trial court thereafter entered a written order dismissing Appellant's complaint on July 19, 2022. Therein, the trial court ruled as follows: (1) Ms. Chowning's actions did not violate section 2-5-101, and Appellant's complaint therefore failed to state a claim for which relief may be granted; (2) Ms. Chowning should have been named a party from the case's inception, but to add her at this point would be futile because the election process had already commenced and her actions in withdrawing her petition and submitting a different nominating petition were not violative of state law; and (3) the Election Commission would be awarded its fees should it file an affidavit detailing such within thirty days of the entry of the order.[4] Appellant thereafter appealed to this Court.

II. ANALYSIS

In this appeal, Appellant argues that the trial court erred in dismissing his complaint on the basis of Tennessee statutes and in denying his request to add Ms. Chowning as a party. The Election Commission asserts that the trial court was correct in its conclusions and that, in any event, this appeal should be dismissed as moot. We agree that this appeal is moot.

As the Tennessee Supreme Court explained:

> Tennessee courts follow self-imposed rules of judicial restraint so that they stay within their province "to decide, not advise, and to settle rights, not to give abstract opinions." ***Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.***, 301 S.W.3d 196, 203 (Tenn. 2009) (internal quotation marks omitted). The mootness doctrine is one such rule: a "case must remain justiciable (remain a legal controversy) from the time it is filed until the moment of final appellate disposition." ***Id.*** at 203–04. A moot case or issue

[4] The record does not reflect that the Election Commission ever filed the required affidavit or that the claim of attorney's fees was ever finally resolved. This Court has repeatedly held a matter is not final until a request for attorney's fees has been fully adjudicated. *See, e.g.*, ***City of Jackson v. Hersh***, No. W2008-02360-COA-R3-CV, 2009 WL 2601380, at *4 (Tenn. Ct. App. Aug. 25, 2009) ("This Court has concluded on several occasions that an order that fails to address an outstanding request for attorney's fees is not final."). *But see* ***New v. Dumitrache***, 604 S.W.3d 1, 20 (Tenn. 2020) ("[R]equests for attorney's fees are collateral and have a distinct and independent character from the underlying suit. Courts should view a request for attorney's fees as an independent proceeding supplemental to the original proceeding and not a request for modification of the original decree.") (internal citations and quotation marks omitted). Particularly in light of our determination, *infra*, that Appellant's request for relief is now moot, we exercise our discretion to consider this appeal notwithstanding the possible lack of finality. *See* ***Bayberry Assocs. v. Jones***, 783 S.W.2d 553, 559 (Tenn. 1990) (citing Tenn. R. App. P. 2) (allowing the suspension of the finality requirement for good cause shown).

> is one that has lost its justiciability for some reason occurring after commencement of the case. ***Id.*** at 204. A case, or an issue in a case, becomes moot when the parties no longer have a continuing, real, live, and substantial interest in the outcome. ***Id.*** at 210.

Hooker v. Haslam, 437 S.W.3d 409, 417 (Tenn. 2014). Thus, "[t]he central question in a mootness inquiry is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief." ***McIntyre v. Traughber***, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). When a case is rendered moot while an appeal is pending, it "should [be] dismiss[ed]", unless an exception is present. ***Hooker***, 437 S.W.3d at 433 (quoting ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 210). Whether a case has been rendered moot is a question of law that may be raised sua sponte by this Court. *See* ***id.*** at 433, Order Denying Petition to Rehear ("Even though neither of the parties raised the question of mootness, the Court was obligated independently to raise the question sua sponte since mootness goes to the Court's jurisdiction.").

Here, the election that was at the heart of the parties' dispute was scheduled to occur on August 4, 2022. Although no party has asked this Court to consider post-judgment facts concerning the election or its results, Appellant has essentially conceded in his filings with this Court that the election has already taken place.[5] Likewise, Appellant noted in his reply brief and at oral argument that the remedy he seeks is Ms. Chowning's removal from office, a remedy only necessary if Ms. Chowning was the successful candidate for the position of Circuit Court Clerk. Of course, these facts are not subject to reasonable dispute, and we may therefore take judicial notice of elections and their official results. *See* ***Hanover v. Boyd***, 173 Tenn. 426, 121 S.W.2d 120, 121 (1938) ("This election was held, and from the official returns of the Election Commissioners of Shelby County filed with the Secretary of State, we judicially notice that defendant Boyd received 39,234 votes and Tom Collier 5,092. Complainant Hanover was not a candidate in this election."). So then, for purposes of this appeal, it is without apparent dispute that the August 4, 2022 election occurred, and Ms. Chowning was the successful candidate.

This Court has previously held that an action to remove a candidate from a ballot was moot under very similar circumstances in ***Hatcher v. Chairman***, 341 S.W.3d 258 (Tenn. Ct. App. 2009). In ***Hatcher***, the plaintiff was a candidate for a city council position. The election for that position was scheduled for October 4, 2007. ***Id.*** at 260. He objected, however, to the inclusion of another candidate on the ballot, arguing that she was not a qualified candidate. He therefore filed a complaint for declaratory judgment and injunctive relief in August 2007, asking that the election commission be enjoined from placing the other candidate's name on the ballot. ***Id.*** After the plaintiff's request for a temporary injunction was denied, the election was held as scheduled, with the other candidate

[5] For example, in a motion seeking an extension on filing his brief, Appellant used the fact that the election has already occurred as evidence that no prejudice would result from the extension.

prevailing. ***Id.*** at 260–61. The trial court thereafter dismissed the plaintiff's complaint as moot, and he appealed to this Court. ***Id.*** at 261.

The Court of Appeals agreed with the trial court. First, it noted that the relief that the plaintiff sought in his complaint was a judgment declaring the other candidate invalid and an injunction prohibiting her from being placed on the ballot. But the Court noted that since the filing of the complaint, the election had occurred and the other candidate was successful. The Court then cited two cases in which actions were considered moot because the elections that they hoped to alter had occurred. ***Id.*** at 262 (citing ***Perry v. Banks***, 521 S.W.2d 549 (Tenn. 1975) (holding that a question of whether a candidate was qualified for an office was rendered moot by the fact that the candidate at issue was defeated in the election that took place); ***LaRouche v. Crowell***, 709 S.W.2d 585 (Tenn. Ct. App. 1985) (holding that the question of whether a candidate's name should have been placed on a ballot was rendered moot when the election occurred)). We therefore held that the fact that the August 2007 election had occurred rendered the plaintiff's request to ensure that the other candidate was not named on the ballot moot.

The same is true in this case. Here, the central relief that Appellant sought was to remove Ms. Chowning from the August 4, 2022 ballot.[6] The election at issue, however, occurred over nine months prior to oral argument in this cause. And despite Appellant's efforts, Ms. Chowning was placed on the ballot and was successful in her campaign for the Circuit Court Clerk position. As such, this Court is simply not able to provide Appellant with the relief that he seeks. His claim is therefore unquestionably moot.

Appellant responds, however, that two exceptions to the mootness doctrine are present: (1) the great public importance of the question presented; and (2) the "capable of repetition yet evading review" doctrine.[7] "Decisions concerning whether to take up cases that fit into one of the exceptions to the mootness doctrine are discretionary with the

[6] To the extent that Appellant sought other relief for original claims, the trial court correctly concluded that those claims could not be joined with an appellate action in the nature of a writ of certiorari. *See* ***Duracap Asphalt Paving Co. v. City of Oak Ridge***, 574 S.W.3d 859, 863 (Tenn. Ct. App. 2018) (holding that where a claim for damages is joined with a writ of certiorari, the dismissal of the damages claim is "unquestionably proper"); ***Watson v. City of LaVergne***, No. M2006-00351-COA-R3-CV, 2007 WL 1341767, at *4 (Tenn. Ct. App. May 7, 2007) ("An appellate cause of action (*i.e.*, a petition for common-law writ of certiorari) cannot be joined with an original cause of action."). Moreover, Appellant has not raised any claim regarding the dismissal of his claim for civil rights violations, attorney's fees, or to bar the members of the Election Commission from being compensated. As such, those claims are no longer at issue and not relevant for determining whether Appellant's claim is moot.

[7] As previously discussed, the question of the Election Commission's attorney's fees may have been abandoned, resolved, or still outstanding. Appellant does not argue that the award of fees creates an exception due to the collateral consequences doctrine. As such, we do not address that issue. *See* ***Cedarius M. v. State***, No. W2020-01594-COA-R3-JV, 2022 WL 2078018, at *3 (Tenn. Ct. App. June 9, 2022) (declining to address any mootness exception that was not argued by the appellant), *perm. appeal denied* (Tenn. Sept. 29, 2022).

appellate courts." ***McIntyre v. Traughber***, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994) (citing ***Dockery v. Dockery***, 559 S.W.2d 952, 954 (Tenn. Ct. App. 1977)). We will consider each of these exceptions in turn.

The Tennessee Supreme Court has held that we "may exercise [our] discretion to address even a moot issue in exceptional circumstances and if the issue is one of great importance to the public." ***Hooker***, 437 S.W.3d at 418 (citing ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 210). As the Court explained,

> Exercise of that discretion is guided, as a threshold matter, by the following considerations:
>
> > (1) the public interest exception should be invoked only with regard to issues of great importance to the public and the administration of justice;
> > (2) the public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties;
> > (3) the public interest exception should not be invoked if the issue is unlikely to arise in the future; and
> > (4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings.

Id. (internal quotation marks omitted) (quoting ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 210). Only if "these threshold considerations do not exclude invocation of the public interest exception," do we "balance the interests of the parties, the public, and the courts to determine whether the issue, albeit moot, should not be dismissed." ***Id.*** Factors that may be considered include, but are not limited to, the following:

> (1) the assistance that a decision on the merits will provide to public officials in the exercise of their duties;
> (2) the likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved;
> (3) the degree of urgency in resolving the issue;
> (4) the costs and difficulties in litigating the issue again; and
> (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent.

Id. (quoting ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 211).

Unfortunately for Appellant, this Court has previously held that a highly analogous situation did not qualify for this exception. ***Hatcher***, 341 S.W.3d at 262. Again, ***Hatcher***

also involved the question of whether a candidate was qualified to be placed on an election ballot. But we held that this question "is one primarily involving personal rights rather than rights of great public concern." ***Id.*** at 262; *see also* ***LaRouche***, 709 S.W.2d at 587–88 (rejecting the plaintiff's argument that the question was of great public concern). Thus, we cannot conclude that this case involves the type of exceptional circumstances that justify invoking this exception.

The second exception at issue involves whether the claim is capable of repetition yet evading review. As this Court has explained,

> The courts invoke the "capable of repetition yet evading review" exception to the mootness doctrine only in exceptional cases. Parties requesting a court to invoke the exception must demonstrate (1) a reasonable expectation that the official acts that provoked the litigation will occur again, (2) a risk that effective judicial remedies cannot be provided in the event that the official acts reoccur, and (3) that the same complaining party will be prejudiced by the official act when it reoccurs. A mere theoretical possibility that an act might reoccur is not sufficient to invoke the "capable of repetition yet evading review" exception. Rather, "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." ***Murphy v. Hunt***, 455 U.S. 478, 482, 102 S. Ct. 1181, 1184, 71 L. Ed. 2d 353 (1982); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 2.13, at 37 (3d ed. Supp. 2005).

All. for Native Am. Indian Rts. in Tenn., Inc. v. Nicely, 182 S.W.3d 333, 339–40 (Tenn. Ct. App. 2005) (footnote omitted).

Of particular note in this case is the second element of this test—that there be a risk that no effective judicial remedy can be provided. Although the ***Hatcher*** Court did not specifically address this exception, once again its analysis is helpful. In particular, this Court noted that the plaintiff had another avenue to challenge the election of the other candidate—an election contest action under Tennessee Code Annotated section 2-17-101 and 2-17-105. ***Hatcher***, 341 S.W.3d at 263. As we explained, this type of claim is filed following an election. ***Id.*** Indeed, section 2-17-101(b) specifically provides that "any candidate for the office may contest the outcome of an election for the office." Moreover, the Tennessee Supreme Court has held that a challenge to an elected party's qualifications may be made via an election contest. *See* ***Hatcher v. Bell***, 521 S.W.2d 799, 801–02 (Tenn. 1974) ("[A] contest challenging the validity of an election upon the constitutional disqualification of the candidate receiving the highest number of votes in the election under attack is contemplated and authorized."); *see also* ***Newman v. Shelby Cnty. Election Comm'n***, No. W2011-00550-COA-R3-CV, 2012 WL 432853, at *5 (Tenn. Ct. App. Feb. 13, 2012) ("Election contests are about the manner and form of the election itself or the qualifications of the winner to hold the office to which she or he has been elected." (citing

Bell, 521 S.W.2d at 802)); *cf.* ***Dehoff v. Att'y Gen.***, 564 S.W.2d 361, 363 (Tenn. 1978) (opining that the court has given the term "election contest" a "broad interpretation"). Here, Appellant seeks a declaration that Ms. Chowning was disqualified from running as an Independent candidate by virtue of her prior qualification for the Republican primary. As this question goes directly to Ms. Chowning qualifications for the office, it appears that it is an appropriate claim to raise in an election contest.[8]

Because Appellant could have pursued his claim as an election contest after Ms. Chowning's victory, it appears that Appellant had other effective judicial remedies to pursue his claim despite the mootness of his present action. In similar circumstances, this Court has held that such an alternative avenue of review prevented application of the "capable of repetition yet evading review" exception. *See* ***Consumer Advoc. Div. of the Off. of Atty. Gen. v. Tennessee Regul. Auth.***, No. M2004-01481-COA-R12-CV, 2006 WL 249511, at *11 (Tenn. Ct. App. Feb. 1, 2006) (declining to apply the exception where state regulatory authority no longer had jurisdiction over the present appeal because under a newly amended statute, "the [plaintiff] ha[d] an avenue for review" in "the federal arena"). As such, we decline to apply the "capable of repetition yet evading review" exception to this case. *But see* ***Perry***, 521 S.W.2d 550 (Henry, J., dissenting) (stating that he would have held that the question of whether a candidate qualified for an office demanded resolution "lest it become an issue 'capable of repetition, yet evading review'").[9]

In sum, Appellant's action to remove Ms. Chowning as a candidate for the office of Circuit Court Clerk in the August 2022 election is moot, as this Court cannot provide Appellant with the relief that he seeks. So any opinion that this Court would submit on this issue would be only advisory in nature. *See* ***State ex rel. Lewis v. State***, 208 Tenn. 534, 537–38, 347 S.W.2d 47, 48 (Tenn. 1961) (holding that "[t]he courts of this State have no right to render an advisory opinion"; thus, when "the major question has become moot [] we will not consider the question"). Moreover, we decline to apply any of the cited exceptions to the mootness doctrine in this particular case. This appeal is therefore dismissed. Appellant's argument that the trial court erred in denying his motion to amend his complaint to add Ms. Chowning is a party is pretermitted.

III. CONCLUSION

Based on the foregoing, this appeal is dismissed as moot. Costs of this appeal are

[8] We do not view Appellant's effort to add Ms. Chowning as a party as an effort to convert this case into an election contest. As we have previously explained, such an action cannot be combined with a writ of certiorari. *See* ***Duracap Asphalt Paving***, 574 S.W.3d at 863. And an election contest challenges the validity of an election, so it is necessarily filed following the occurrence of an election. *See* Tenn. Code Ann. § 2-17-105 ("The complaint contesting an election under § 2-17-101 shall be filed within five (5) days *after* certification of the election.") (emphasis added).

[9] As a reminder, the majority of Justices in ***Perry*** concluded that the case was moot and did not apply any exception. ***Perry***, 521 S.W.2d at 550.

taxed to Appellant, Albert Fuqua, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE