



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE	§	No. 08-20-00188-CV
ALAMO DEFENDERS DESCENDANTS ASSOCIATION and LEE WHITE, Individually,	§	AN ORIGINAL PROCEEDING
	§	FOR INJUNCTION
Relators.	§	

DISSENTING OPINION

I, respectfully, dissent. I would grant the motion for emergency relief pending a full briefing on the merits for a writ of injunction and/or the resolution of their pending appeal. The crux of the issue is the preservation of the human remains and to ensure the appropriate protocols pursuant to the American Archaeology Association are being followed. The grant of emergency relief is necessary to maintain the status quo, avoid irreparable injury to the ADDA and enjoin Appellees from reburying, moving the remains and to allow for future testing of the DNA.

On or about August 14, 2019, human remains were found at the site. Almost two months later, Appellees ultimately released their discovery of those remains through a news release. According to Appellants, the public release followed a public information request to the Texas Historical Commission.

On November 12, 2019, Appellants filed their petition, application for a temporary restraining order and temporary injunction. At that time, the parties agreed to hear the plea to the jurisdiction with the temporary injunction and other pending requests for relief. Appellants' former counsel attended a hearing on January 7, 2020 on the plea to the jurisdiction, however the court did not hear argument on the temporary orders. Appellants' present counsel was rehired on March 2, 2020.¹ The pending matters, including the temporary injunction, was set for a hearing on April 13, 2020. On April 2, 2020, Appellants filed an emergency motion for a hearing on a Temporary Restraining Order. However, on April 22, 2020, the trial court granted the plea to the jurisdiction, which is the order Appellants are presently appealing. On July 21, 2020, the accompanying appeal was filed. The motion for emergency relief was filed on September 22, 2020.

On March 13, 2020, the Texas Supreme Court entered its First Emergency Order, which ordered:

2. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:

a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted;

First Emergency Order Regarding COVID-19 State of Disaster, 596 S.W.3d 265, 265 (Tex. 2020).

On March 19, 2020, the Texas Supreme Court ordered:

3. Courts must not conduct non-essential proceedings in person contrary to local, state, or national directives, whichever is most restrictive, regarding maximum group size.

¹ Appellants' counsel, the Martinez De Vara Law Firm, represented Appellants from the lawsuit's inception to December 4, 2019, when another law firm was retained. On February 10th, Martinez De Vara was rehired, which was reflected in the court's order of March 2, 2020.

Third Emergency Order Regarding COVID-19 State of Disaster, 596 S.W.3d 266, 267 (Tex. 2020). Further, the order “expire[d] May 8, 2020, unless extended by the Chief Justice of the Supreme Court.” *Id.* In the Fifth Emergency Order, on March 20, 2020, the Texas Supreme Court declared:

- 1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic.**
- 2. This Order supplements and does not replace or amend prior Emergency Orders Regarding the COVID-19 State of Disaster.**
- 3. All deadlines, whether prescribed by statute, rule, or order, related to attorney professional disciplinary and disability proceedings are tolled while this Order remains in effect.**
- 4. The order is retroactive to March 13, 2020, and expires May 8, 2020, unless extended by the Chief Justice of the Supreme Court.**

Fifth Emergency Order Regarding COVID-19 State of Disaster, 596 S.W.3d 789, 789 (Tex. 2020).

On April 1, 2020, in its Eighth Emergency Order, the Texas Supreme Court ordered:

- 3. Any deadline for the filing or service of any civil case is tolled from March 13, 2020, until June 1, 2020, unless extended by the Chief Justice of the Supreme Court. This does not include deadlines for perfecting appeal or for other appellate proceedings, requests for relief from which should be directed to the court involved and should be generously granted.**

Eighth Emergency Order Regarding COVID-19 State of Disaster, 597 S.W.3d 844, 844 (Tex. 2020). On April 27th, the Twelfth Emergency Order instructed:

The following Emergency Orders are renewed as clarified and amended: the First Emergency Order (Misc. Dkt. No. 20-9042 and Court of Criminal Appeals of Texas Misc. Dkt. No. 20-007), as amended by the Third Emergency Order (Misc. Dkt. No. 20-9044 and Court of Criminal Appeals of Texas Misc. Dkt. No. 20-008) and the Eighth Emergency Order (Misc. Dkt. No. 20-9051); the Second Emergency Order (Misc. Dkt. No. 20-9043); the Fifth Emergency Order (Misc. Dkt. No. 20-9046); the Seventh Emergency Order (Misc. Dkt. No. 20-9050); the Ninth Emergency Order (Misc. Dkt. No. 20-9052); and the Eleventh Emergency Order (Misc. Dkt. No. 20-9055).

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, specifically including those in Section 263.401 of the Family Code and in all proceedings under Subtitle E, Title 5, of the Family Code, for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted;

Twelfth Emergency Order Regarding COVID-19 State of Disaster, No. 20-9059, 2020 WL 6390519 (Tex. Apr. 27, 2020). On May 26, 2020, the Seventeenth Emergency Order stated:

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;

and further provided:

4. Courts must not conduct in-person proceedings contrary to guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions. Prior to holding any in-person proceedings on or after June 1, 2020, a court must submit an operating plan that is consistent with the requirements set forth by the Office of Court Administration’s Guidance for All Court Proceedings During COVID-19 Pandemic issued on May 4, 2020. Courts must continue to use all reasonable efforts to conduct proceedings remotely.

Seventeenth Emergency Order Regarding COVID-19 State of Disaster, 609 S.W.3d 119 (Tex. 2020). The Eighteenth Emergency Order of June 29, 2020 ordered:

2. The Seventeenth Emergency Order Regarding the COVID-19 State of Disaster (Misc. Dkt. No. 20-9071) issued May 26, 2020, paragraphs 3-12, are renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public— without a participant’s consent:

- a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;**

Eighteenth Emergency Order Regarding COVID-19 State of Disaster, 609 S.W.3d 122, at *1 (Tex. 2020).

Beginning March 3, 2020 through September 30, 2020, the Texas Supreme Court ordered Texas courts may “[m]odify or suspend any and all deadlines and procedures . . .” *First Emergency Order Regarding COVID-19 State of Disaster*, 596 S.W.3d 265 (Tex. 2020); *Eighteenth Emergency Order Regarding COVID-19 State of Disaster*, 609 S.W.3d 122, at *1 (Tex. 2020). The parties agreed to hear the requested temporary orders on January 7th—two months after the lawsuit was filed. The two-month lag between January 7th and March 3rd hardly classifies as insufficiently diligent, especially when on February 10th, Appellants switched counsel just prior to the First Emergency Order. Further, Appellants were led to believe at the April 13th hearing the trial court would hear the requested temporary restraining order and filed an emergency hearing request on April 2nd as construction was in “full progress.” However, once the trial court ruled it had no jurisdiction on April 22nd, the TRO and temporary orders request became moot. Given the unprecedented situation we find ourselves *vis-à-vis* the COVID-19 pandemic, coupled with the Texas Supreme Court’s Emergency Orders, I am loath to find the Appellants slept on their rights.

The majority relies on *Rivercenter* to find Appellants have waived their rights to emergency relief. However, *Rivercenter* denied mandamus because “Rivercenter waited over four months after the filing of the Defendants’ jury demand before asserting any rights it may have had under the jury waiver provisions. The record reveals no justification for this delay. Under these circumstances, Rivercenter has not shown diligent pursuit of any right to a non-jury trial.”

Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993). To the contrary, the parties here have offered detailed procedural explanations. These explanations, accompanied by the Governor’s Declaration of Disaster across Texas and the Texas Supreme Court’s Emergency Orders, provide ample justification for the delay.

The appeal was filed July 21st and on September 22nd the request for emergency relief was made, which constituted about a two-month delay. That two-month delay is, I believe, governed by the Texas Supreme Court’s admonition that Texas courts should “*modify or suspend any and all deadlines and procedures . . .*” In the midst of a global pandemic, the majority will brook no delay if one is seeking emergency relief. Further, this two-month delay, in the majority’s view, is fatal. Perhaps in a pre-pandemic world I may have been persuaded, but not today.

Next, the majority asserts Appellants have failed to meet their “burden” to “demonstrate specific reasons” to obtain a writ of injunction. The law is clear Texas Appellate courts are authorized to grant emergency relief or a writ of injunction to protect their jurisdiction. *City of El Paso v. Caples Land Co., LLC*, 408 S.W.3d 26, 36 (Tex.App.—El Paso 2013, pet. denied)(“A court of appeals is authorized to issue writs necessary to protect its jurisdiction.”)(citing TEX.CONST. art. V, § 6; TEX.GOV’T CODE ANN. § 22.221). Additionally, pursuant to our authority under Rule 29.3 of the Texas Rules of Appellate Procedure, this Court may “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal . . .” TEX.R.APP.P. 29.3. Appellate courts enjoy wide discretion to issue temporary orders pending appeal. *In re Geomet Recycling L.L.C.*, 578 S.W.3d 82, 90 (Tex. 2019). Under our authority pursuant to Rule 29.3, a court abuses its discretion if the court acts without reference. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986); *In re*

Geomet, 578 S.W.3d at 90; *Heinrich v. Calderazzo*, 569 S.W.3d 247, 254 (Tex.App.—El Paso 2018, no pet.).

The majority asserts Appellants have failed to show how “current actions . . . will cause harm or . . . moot their appeal” Further, they maintain the March 2020 affidavit does not account for a subsequent permit addressing the human remains protocol. Third, the Texas Attorney General, Appellees’ counsel, has assured us the “archaeological activities” are being conducted in accordance with a THC approved plan with any human remains “left in situ” or on-site in a sealed vault. However, the majority finds “White’s affidavit only states that the Alamo Trust, Inc. ‘has also taken steps to reintern human remains’ and that the Association has made requests to conduct DNA testing of the remains.” The main complaint from the majority’s perspective is the lack of any active threat to the human remains and the failure to show how the current procedures are improper or inadequate. Further, the majority correctly notes Appellants’ objection to Appellees’ abrupt cessation without explanation of Appellees’ weekly archeological reports.

However, a more complete recitation of the allegations is necessary. Appellant White, in April 2019, submitted an application for unverified cemetery in accordance with Texas Health and Safety Code § 711.0111.² On May 10, 2019, the Texas Historical Commission recognized the

² (a) A person who discovers an unverified cemetery shall file notice and evidence of the discovery with the Texas Historical Commission on a form provided by the Texas Historical Commission, and shall concurrently provide a copy of the notice to the landowner on record in the county appraisal district on whose land the unverified cemetery is located.

(b) The landowner described by Subsection (a) may send a response or comments to the Texas Historical Commission concerning the notice not later than the 30th day after the date the notice is filed.

(c) The Texas Historical Commission shall evaluate the notice of the unverified cemetery, the evidence submitted with the notice, and the response of the landowner, if any, and shall determine whether there is sufficient evidence of the existence of a cemetery.

(d) If the Texas Historical Commission determines sufficient evidence supports the existence of a cemetery, the Texas Historical Commission shall inform the landowner and may file notice of the existence of the cemetery under Section 711.011.

(e) If the Texas Historical Commission determines sufficient evidence supports a determination that a cemetery does not exist, the Texas Historical Commission shall notify the landowner on record in the appraisal district of its determination, amend the notice to include the commission's determination, and ensure any notice filed with a county clerk under Section 711.011 is corrected. TEX.HEALTH & SAFETY CODE ANN. § 711.0111.

existence of the cemetery at the Alamo. The designation, according to Appellants, contained an important stipulation:

This designation is not intended to affect the allowed uses of this property and does not constitute the designation of an Unknown or Abandoned Cemetery under the Health and Safety Code. It is an acknowledgement that, based on archival information only and in the absence of any visible evidence on the surface or any evidence of intact human remains outside of the perimeter of the Alamo Chapel, the area described is deemed worthy of recognition as a Historic Texas Cemetery under Commission Rule 22.6.

Appellee, Alamo Trust, in June 2019, wrote the THC opposing the designation of the unverified cemetery, stating:

First, the ADDA has not included sufficient evidence to establish the precise location or current existence of any burial sites or remains as required for cemetery designation under the Texas Health and Safety Code. Second, the Commission’s designation of the Alamo Complex, Alamo Plaza, or surrounding properties (“Subject Properties”) as cemeteries could constitute an unconstitutional taking

Appellee, the Texas General Land Office, opposing the designation, also wrote in its June 2019 letter:

. . . the GLO supports denial of this application because (a) the Texas Historical Commission (THC) lacks authority to review and approve the application relating to Alamo complex properties, (b) sufficient evidence has not been presented by applicants to support the existence of a “cemetery” under Texas law, and (c) the determination of the existence of a cemetery on the properties at issue would likely delay or obstruct Alamo preservation efforts.

Further, the Texas General Land Office, pointed out:

If the THC opts to exercise authority over the Alamo Complex contrary to statute and decide the former fortress is an unverified cemetery, preservation efforts being undertaken by the GLO for the benefit of the State’s most important landmark would be significantly impeded, and possibly halted altogether.

In late August 2019, human remains were found at the site, according to Appellants. Activity summarizations on the Alamo Project have not been readily available to the public; rather, the public must request activity reports under the Texas Public Information Act (“PIA”), which according to Appellants, is in violation of standard archeological practice reports. The process

requires a PIA request, then the THC and the Alamo Trust release an archaeology report produced by the contractors working onsite—the report summarizes activities and discoveries on a weekly basis. It was by this means the public was informed of the human remains via a news release. However, prior to the news release and after reports on social media of the discovery of human remains, Appellants submitted their routine public information request to the THC, but for the first time, Appellees objected to the release of the archaeology weekly report. According to Appellants, the report would have revealed discovery of the human remains, but instead, Appellants “sat on the findings of the human remains just shy of two months” The lack of transparency regarding discoveries on the Alamo Project is concerning to Appellants and is relevant to the issue of whether an active threat to the human remains exists.

Appellees claim a Human Remains Protocol is being utilized and characterize it as “the most comprehensive human remains protocols ever utilized at the Alamo and one of the most comprehensive protocols ever utilized in the State of Texas.” We do not have the actual Human Remains Protocol in our record to review. All we have to rely on is Appellees’ description. The Human Remains Protocol, according to Appellees, is:

. . . fourteen pages long, and provides detailed guidance on a myriad of potential issues, such as the types of tools that can be used when excavating any human remains, the storage and security protocols that must be followed for any discoveries, the types of analysis that can be conducted on any discoveries, and the reburial protocol that must be followed.

The majority recognizes current archeological activities are taking place in accordance with THC approved protocols and concludes Appellants have not shown how the current actions will cause harm or moot their appeal. However, the lack of evidence offered by Appellees to support the alleged “strict protocol” in place for the physical handling of the remains leaves me unsatisfied. The ambiguity and the lack of transparency from Appellees casts doubt and concern regarding the

handling of the remains, which relates to the issues of harm and mootness. Severe damage and/or destruction to the remains would render this Court’s jurisdiction moot. While Appellees assure the remains are being handled with the “utmost respect[.]” we cannot confirm this and we are essentially required to take their word that no harm is resulting from the handling of the remains.

Abuse of discretion may arise when a court acts without reference to any guiding principles—such as the lack of evidence offered by Appellees ensuring no harm is resulting from the handling of the remains. *See In re Geomet*, 578 S.W.3d at 90. It is necessary to emphasize, any handling of the remains causing severe damage or destruction would render this Court’s jurisdiction moot. *See Caples Land Co., LLC*, 408 S.W.3d at 37 (“a writ of injunction may be granted if a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual.”); *see* TEX.CIV.PRAC. & REM.CODE ANN. § 65.011(2). Further, Rule 29.3’s scope plainly extends well beyond the power to protect this Court’s jurisdiction. *See In re Geomet*, 578 S.W.3d at 90. Thus, pursuant to our broad authority under Rule 29.3, a temporary order would preserve Appellants’ rights until disposition of the appeal. *See id.*

In light of the foregoing and to protect this Court’s jurisdiction, I would grant a temporary emergency order enjoining Appellees regarding the removal, moving, or reburying of human remains until a full briefing and a decision regarding the writ of injunction can be considered by the Court.

YVONNE T. RODRIGUEZ, Chief Justice

February 23, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.