



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.	§	

OPINION

This is an original proceeding for a writ of injunction ancillary to a pending appeal, coupled with a motion for emergency relief. We will deny both the motion for emergency relief and the writ of injunction without prejudice to refiling.

I. BACKGROUND

A. The Ancillary Appeal

The Alamo Defenders Descendants Association and Lee White, Relators, are the Appellants in an appeal styled *Alamo Defenders Association and Lee White, Individually v. Texas Historical Commission et al.*, that is pending in this Court under Cause No. 08-20-00172-CV.¹

The lawsuit at the heart of the ancillary appeal concerns the Alamo historical site in

¹ We take judicial notice both of the case file for the ancillary appeal and of the public proceedings before the Texas Historical Commission. See *In re Estate of Hemsley*, 460 S.W.3d 629, 638 (Tex.App.--El Paso 2014, pet. denied).

San Antonio and an ongoing renovation and construction project taking place both within the Alamo site's outer walls and in the plaza adjacent to the Alamo. This project is known as The Alamo Plan. As is relevant to the ancillary appeal and this original proceeding, the Plan involves (1) bringing land down to a certain grade for construction purposes, and (2) moving a monument on Alamo grounds known as the Cenotaph to a separate nearby location. Real parties in interest--the Texas Historical Commission (and its executive director in his official capacity), the Texas General Land Office (and its commissioner in his official capacity), and the Alamo Trust, Inc. (and its CEO in his official capacity)--each either directly administer or otherwise regulate part of the Alamo Plan.

The Association is a nonprofit entity consisting of direct or lateral descendants of "Alamo defenders," a class of persons which includes the soldiers, couriers, scouts, and non-combatants who were present inside the Alamo during its 1836 siege . White is the president of the Association and is a direct lineal descendant of Gordon C. Jennings, who was present at the Battle of the Alamo. The Association and White² sued for injunctive and declaratory relief seeking to stop construction on the Project, contending generally that (1) the Defendants were violating provisions of the Texas Health & Safety Code because the grounds contain a historically documented mission cemetery predating the Alamo as well as the physical remains of the Association members' ancestors, and (2) the Cenotaph could not be moved from its current site because it was protected by the Antiquities Code of Texas.

The trial court granted a plea to the jurisdiction disposing of all parties and claims on April 22, 2020. After filing a motion for a new trial, the Association filed a notice of appeal on July 20, 2020. The appeal was originally docketed before the Third Court of Appeals in Austin

² We will refer to the plaintiffs/relators collectively as "the Association" unless context requires us to distinguish between them.

before being transferred to this Court under the Texas Supreme Court's docket equalization order. As of this date, the appeal remains pending.

B. Emergency Proceedings Before This Court

On September 22, 2020 at 8 a.m. Mountain Daylight Time/9 a.m. Central Daylight Time, the Texas Historical Commission began a lengthy meeting which included an agenda item to consider whether to issue a permit allowing the Cenotaph to be moved from its current location. That same day at 3:47 p.m. MDT/4:47 p.m. CDT, and prior to the Texas Historical Commission's vote on the agenda item, the Association filed a motion for emergency relief and a petition for a writ of injunction in this Court, which generated this original proceeding. In the joint motion/petition, the Association noted that in August 2019, human remains were found during activity on the Alamo site and argued that "allowing the human remains to be reburied, moved or destroyed and to allow the Cenotaph to be moved before resolution of the appeal would render the appeal moot."

The Texas Historical Commission, however, voted on September 22nd to reject the permit request to move the Cenotaph by a vote of 12-2. In response to this development, we asked all parties to address whether the THC's vote on the Cenotaph rendered this controversy moot. Relators conceded that the THC vote mooted their request for emergency and injunctive writ relief as to the Cenotaph. However, they contended that the controversy remained live as to the human remains issue and re-urged this Court to grant emergency relief pending a decision on the writ application to suspend construction activities for the duration of the ancillary appeal.

II. DISCUSSION

A. Applicable Law

There are several ways to either suspend the execution of a trial court judgment or order,

or else enjoin other actions by litigants, while a matter remains pending before the court of appeals. For example, if an order is subject to interlocutory appeal, this Court has the ability to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal” unless “the appellant’s rights would be adequately protected by supersedeas” *See* TEX.R.APP.P. 29.3. If the trial court has rendered a final judgment and a party wishes to suspend the execution of that judgment pending appeal, that party must follow the supersedeas rules set out in TEX.R.APP.P. 24.

The courts of appeals also possess limited injunctive powers. A writ of injunction is its own separate original proceeding that may only be brought ancillary to a matter already pending in the court of appeals. *See In re Olson*, 252 S.W.3d 747, 747 (Tex.App.--Houston [14th Dist.] 2008, orig. proceeding). As with any other original writ proceeding in the court of appeals, a party may request a stay or other temporary relief pending resolution of the writ petition on the merits under TEX.R.APP.P. 52.10(b). In the writ of injunction context, this setup is analogous, but not identical, to the similar procedure used in trial courts, where a trial judge may grant a temporary restraining order pending a merits ruling on a request for a temporary injunction seeking to enjoin actions pending trial. Likewise, a court of appeals may grant temporary relief pending a ruling on the writ of injunction application, which, if granted, would in turn serve to enjoin the actions of litigants in the ancillary appeal.

Unlike a writ of mandamus, which seeks to compel a certain action, a writ of injunction’s purpose is to restrain action or threatened action. *Campbell v. Wilder*, 487 S.W.3d 146, 153-54 (Tex. 2016). A court of appeals may issue a writ of injunction only if it is necessary to protect the Court’s jurisdiction over the subject matter of a pending appeal, or to prevent an unlawful interference with the enforcement of its judgments and decrees. *In re Fox*, No. 08-07-00251-CV, 2007 WL 2549566 (Tex.App.--El Paso Sept. 6, 2007, orig. proceeding) (mem. op.). “We do not

have jurisdiction to issue a writ of injunction to preserve the status quo or to prevent damage to one of the parties during the appeal.” *In re Brown*, No. 08-03-00092-CV, 2003 WL 1563987 (Tex.App.--El Paso Mar. 27, 2003, orig. proceeding) (mem. op.). “It is well settled that an appellate court is authorized to protect its jurisdiction by preserving the subject matter of the appeal in order to make its decrees effective.” *In re Teague*, No. 2-06-033-CV, 2006 WL 302123, at *2 (Tex.App.--Fort Worth Feb. 6, 2006, orig. proceeding) (mem. op.).

B. Analysis

The Fort Worth Court of Appeals in *In re Teague* held that injunctive relief preventing the demolition of a building was proper because demolition of the building, which was the subject of appeal, would render a pending appeal over the building’s status moot. *Id.* The Association argues that under *In re Teague*, the activities on the Alamo site will moot the subject matter of the appeal in Cause No. 08-20-00172-CV unless those activities are enjoined.

In our judgment, there are two main evidentiary problems apparent in connection with this application. First, the Association’s failure to bring the issue of the human remains to any court’s attention in the past undermines the claim that immediate action is required pending the appeal. Equity “aids the diligent and not those who slumber on their rights.” *Rivercenter Associates v. Rivera*, 858 S.W.2d 366 (Tex. 1993) (orig. proceeding). This lawsuit has been pending in the trial court since November 12, 2019, this appeal was filed in the Third Court of Appeals on July 21, 2020, and by virtue of the Texas Supreme Court’s transfer order, the appeal has been pending in this Court since August 13, 2020. The affidavit signed by Lee White attached to the writ of injunction action and attesting to the facts regarding the issue of human remains was signed on March 30, 2020. However, the Association never sought injunctive relief from the Third Court of Appeals prior to transfer, nor did the Association seek injunctive relief from this Court until

September 22, 2020, the day of the Texas Historical Commission's vote on the fate of the Cenotaph. It is apparent that the Association filed this writ of injunction application within hours of the Texas Historical Commission vote as a way to hedge against the possibility of an adverse decision from the THC on the Cenotaph, but that aspect of this controversy is now moot. That leaves only the issue of human remains found during on-site activities. Respondents state that archaeological activity at the site has been ongoing for months (and are within weeks of completion) and that the Association has not pressed for injunctive relief in the interim. The delay has not been adequately explained.

Further, the fact that archaeological activities are already occurring on-site leads us to the second evidentiary problem with this writ application: the Association has not shown how the current actions being undertaken will cause harm or otherwise moot their appeal under *In re Teague*. The affidavit of Lee White that is attached to the writ of injunction complains of construction activities germane to the moving of the Cenotaph, and in light of the THC's vote, it is unclear if those activities would even continue. According to a response from the Attorney General, current archaeological activities are taking place at the project site in accordance with a plan that was already approved by the THC, and any human remains found are either being left in situ or are being kept on-site in a sealed vault at the Alamo. 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. But there is no indication that there is an active threat to any human remains, and the Association has not explained how the current archaeological arrangement is improper or inadequate such that immediate injunctive relief or relief pending the duration of appeal is necessary.

We do not necessarily foreclose the possibility that an injunction to protect human remains

could be necessary under a given set of facts. However, the burden to demonstrate the specific reasons why the extraordinary writ of injunction is required under these circumstances lies with Relators. Based on the record before us, the Association has not met the standard necessary to obtain a writ of injunction.

JEFF ALLEY, Justice

February 23, 2021

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