



**IN THE
TENTH COURT OF APPEALS**

No. 10-08-00395-CV

JEROLD KLUG,

Appellant

v.

JOHN RESTIVO AND CATHY RESTIVO,

Appellees

**From the 170th District Court
McLennan County, Texas
Trial Court No. 2008-840-4**

MEMORANDUM OPINION

This is an interlocutory appeal from the denial of a motion to dismiss filed by Jerold Klug, a licensed professional engineer, in which Klug asserted the Certificate of Merit required by Texas Civil Practice and Remedies Code section 150.002 was inadequate. We initially questioned our jurisdiction because the notice of appeal was untimely in relation to the trial court's order ruling on the motion.

Klug responded to our question and asserted that he had filed a second motion which was in effect a grant of a motion for rehearing, and after a full hearing on the merits, was also denied. He asserted that it was from this second denial that he brought

this interlocutory appeal. The question regarding our jurisdiction thus remained, but had shifted from the timing of the filing of the notice of appeal to the nature of the second motion, hearing, and ruling thereon.

While we have been attempting to determine if we have jurisdiction, Klug has proceeded to brief the merits of the appeal. In an Order issued on October 21, 2009, we granted John and Cathy Restivo's motion for extension of time to file their brief and requested briefing, from any party desiring to brief the issue, regarding the changed focus of the jurisdictional issues. In response to that Order, the Restivos filed a motion to dismiss arguing that the appeal is moot because, while this appeal has been pending, both the Restivos and Klug non-suited their claims against each other. The trial court's order of non-suit is attached to the motion.

If no controversy continues to exist between the parties, the appeal is moot and this court must dismiss the appeal. *See General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990); *see also Carter v. Stevens Transp., Inc.*, 225 S.W.3d 607, 608 (Tex. App.—El Paso 2006, no pet.). The trial court's order recites that "all claims and causes of action of Plaintiffs John Restivo and Cathy Restivo" against Klug are "dismissed in their entirety." The court's order also recites that "all claims and causes of action of Jerold W. Klug, P.E. are hereby dismissed in their entirety." Because all the claims by the parties to this appeal have been dismissed, there is no longer a controversy upon which any ruling we make can have an impact; thus, the appeal is moot.

Accordingly, the Restivos' motion to dismiss is granted.

This appeal is dismissed.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Reyna, and
Judge Berchermann¹

Motion granted

Appeal dismissed

Opinion delivered and filed November 18, 2009

[CV06]

¹ David Berchermann, Jr., Judge of the 37th District Court of Bexar County, sitting by assignment of the Chief Justice of the Texas Supreme Court pursuant to section 74.003(h) of the Government Code. *See* TEX. GOV'T CODE ANN. § 74.003(h) (Vernon 2005).