TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00360-CV

George Allibone M.D., Appellant

v.

Mari Robinson J.D., in her Official Capacity as Executive Director of the Texas Medical Board; Juanita Garner, Investigator of the Texas Medical Board; Michael Arambula M.D., Pharm. D., in his Official Capacity as member of the Texas Medical Board; Julie K. Attebury, in her Official Capacity as member of the Texas Medical Board; David Baucom, in his Official Capacity as member of the Texas Medical Board; Frank Denton, in his Official Capacity as member of the Texas Medical Board; John Ellis Jr., J.D., in his Official Capacity as member of the Texas Medical Board; Carlos L. Gallardo, in his Official Capacity as member of the Texas Medical Board; Manuel Guajardo M.D., in his Official Capacity as member of the Texas Medical Board; John Guerra D.O., in his Official Capacity as member of the Texas Medical Board; Scott Holiday D.O., in his Official Capacity as member of the Texas Medical Board; Margaret McNeese M.D., in her Official Capacity as member of the Texas Medical Board; Allan Shulkin M.D., in his Official Capacity as member of the Texas Medical Board; Robert D. Simonson D.O., in his Official Capacity as member of the Texas Medical Board; Wayne M. Snoots M.D., in his Official Capacity as member of the Texas Medical Board; Karl Swann M.D., in his Official Capacity as member of the Texas Medical Board; Paulette Barker Southard, in her Official Capacity as member of the Texas Medical Board; Surendra K. Varma M.D., in his Official Capacity as member of the Texas Medical Board; Stanley Wang M.D., in his Official Capacity as member of the Texas Medical Board; Timothy Webb J.D., in his Official Capacity as member of the Texas Medical Board; and George Willeford III, in his Official Capacity as member of the Texas Medical Board, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-16-002970, HONORABLE DARLENE BYRNE, JUDGE PRESIDING

MEMORANDUM OPINION AND ORDER

PER CURIAM

Appellant George Allibone M.D. has filed a motion pursuant to Texas Rule of Appellate Procedure 24.4(a) seeking this Court's review and reversal of the trial court's order denying his motion to supersede or stay enforcement of the trial court's order and judgment that is the subject of the underlying appeal. *See* Tex. R. App. P. 24.4(a) (authorizing appellate review of trial court's ruling on rule 24 motion seeking to suspend enforcement of judgment). For the following reasons, we reverse the trial court's order denying Allibone's rule 24 motion and remand the case to the trial court for further proceedings consistent with this opinion.

Background

In the underlying proceeding, Allibone sought declaratory and injunctive relief concerning a subpoena duces tecum issued by the Texas Medical Board. The subpoena required Allibone to produce "all medical and billing records" of one of his patients. The Board subpoenaed the records as part of its administrative investigation related to a complaint that had been made against Allibone.[1] In its order and judgment signed on May 15, 2017, the trial court denied Allibone's petition for declaratory and injunctive relief and ordered appellant to "fully comply with all subpoenas at issue in this case no later than 5:00 p.m., May 30, 2017."[2] Allibone thereafter filed a notice of appeal from the trial court's May 15 order and judgment and a motion with the trial court

[1] According to Allibone, the complaint was filed by a disgruntled former employee.

[2] The trial court also considered a subpoena duces tecum relating to two other patients. That subpoena is the subject of a separate proceeding and appeal, which also is pending before this Court and assigned appellate cause number 03-17-00357-CV.

seeking to stay or supersede enforcement of the May 15 order and judgment pursuant to rule 24 during the pendency of the appeal. *See* Tex. R. App. P. 24.

Appellees filed a response to Allibone's rule 24 motion opposing the motion. They argued that harm to the public would occur if the trial court granted the motion and allowed enforcement to be stayed because the investigation related to multiple complaints against Allibone "[had] been delayed far too long" and Allibone would be allowed to continue his practice "during which time [the Board] would be unable to protect patient safety." Appellees focused on evidence that the trial court heard and reviewed in denying Allibone's petition for declaratory and injunctive relief, including the trial court's review of pending complaints and the patient's records *in camera*, and due process protections that would be afforded to Allibone if the Board's staff ultimately made a finding of a violation. *See Rea v. State*, 297 S.W.3d 379, 384–85 (Tex. App.—Austin 2009, no pet.) (generally describing administrative process for disciplinary action by Texas Medical Board).

On June 9, 2017, the trial court denied Allibone's rule 24 motion without stating its reasons for doing so, and appellant then filed his motion pursuant to rule 24.4 seeking this Court's review of the trial court's order. Appellees have filed a response opposing his motion.

Standard of Review and Applicable Law

Texas Rule of Appellate Procedure 24 sets out the procedures for suspending the enforcement of judgments pending appeal in civil cases. *See* Tex. R. App. P. 24. Rule 24.2 addresses the amount of bond, deposit, or security that may be required to suspend enforcement of a judgment, and subsection (a)(5) specifically sets forth the relevant considerations for the trial court when the judgment is in favor of a governmental entity in its governmental capacity and the

governmental entity has no pecuniary interest. In that situation, the trial court is instructed as follows:

> When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.

See Tex. R. App. P. 24.2(a)(5).

We review trial court rulings pursuant to Texas Rule of Appellate Procedure 24.4 under an abuse of discretion standard. *See EnviroPower, L.L.C. v. Bear, Stearns & Co.*, 265 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see also* Devine v. Devine, No. 07-15-00126-CV, 2015 Tex. App. LEXIS 5173, at *4–5 (Tex. App.—Amarillo May 20, 2015, order). A trial court's discretion, however, "does not extend to denying a party any appeal whatsoever." *See In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 359–60 (Tex. 1998) (addressing predecessor rule to rule 24.2 and observing in the context of the Texas Public Information Act: "To allow a trial court discretion to refuse to supersede a judgment requiring production of information under the Act is to give that court the power to deny the governmental body any effective appeal, for once the requested information is produced, an appeal is moot. The rule does not permit such a result."). "If the trial court's refusal to permit the judgment to be superseded causes the appeal to become moot, the appellant has been denied an effective appeal and an abuse of discretion is

shown." *See Mossman v. Banatex, L.L.C.*, 440 S.W.3d 835, 839 (Tex. App.—El Paso 2013, no pet.) (citing *In re Dallas Area Rapid Transit*, 967 S.W.2d at 360).

Analysis

Among his arguments, Allibone contends that the trial court abused its discretion by denying his rule 24 motion because the effect of the ruling is that he will be denied any appeal—his appeal will become moot once he complies with the subpoena. *See Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (noting that "a controversy must exist between the parties at every stage of the legal proceeding, including the appeal" for a plaintiff to have standing and that, if a controversy ceases to exist, the case becomes moot); *Texas Alcoholic Beverage Comm'n v. Carlin*, 477 S.W.2d 271, 273-74 (Tex. 1972) (affirming court of appeals's dismissal of cause seeking to set aside an administrative order suspending a permit and license and concluding that appeal was moot based upon subsequent actions of parties and that "particular controversy that gave rise to this suit, i.e. the dispute over the suspension of . . . permit and . . . license, has become simply an academic question"). "A case becomes moot when: (1) it appears that one seeks to obtain a judgment on some controversy, when in reality none exists; or (2) when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy." *Texas Health Care Info. Council v. Seton Health Plan Inc.*, 94 S.W.3d 841, 846-47 (Tex. App.—Austin 2002, pet. denied).

In their response, appellees contend that this appeal will not become moot if Allibone complies with the subpoena during the pendency of this appeal and produces the patient's records because Allibone sought declarations that certain Board rules and portions of the Texas Medical

Practice Act were unconstitutional. The central controversy in the underlying proceeding, however, was whether Allibone was required to comply with the subpoena and produce his patient's records and the ultimate relief he was seeking was protection from having to comply with the subpoena. In this context, once Allibone complies with the subpoena and produces the records, any judgment concerning the subpoena would not have a practical legal effect on a then-existing controversy. Thus, his appeal would be moot. *See Johnson v. State*, No. 03-08-00667-CV, 2009 WL 2195585, at *2–3 (Tex. App.—Austin July 24, 2009, no pet.) (mem. op.) (concluding that doctor's claims regarding subpoenas compelling him to produce medical records were moot because doctor "has already acquiesced in producing the records"). On this basis, we conclude that the trial court abused its discretion in denying Allibone's rule 24 motion. *See In re Dallas Area Rapid Transit*, 967 S.W.2d at 360.

Conclusion and Order

The record does not contain sufficient evidence to establish the appropriate type and amount of security to supersede and stay enforcement of the May 15 order and judgment. Thus, we remand the case to the trial court and direct the trial court on an expedited basis to determine the type and amount of security necessary to preserve the status quo during the pendency of this appeal and to enter an appropriate order pertaining to the security that Allibone must post. See Tex. R. App. P. 24.4(d) (authorizing appellate court to remand to trial court for taking of evidence); Devine, 2015 Tex. App. LEXIS 5173, at *9–10 (remanding to trial court for proceedings to determine type and amount of security during pendency of appeal and to enter appropriate order when there was insufficient evidence to determine appropriate supersedeas bond). The trial court further is

directed on an expedited basis to file a clerk's record with its order pertaining to the security that must be posted.

We also stay the enforcement of the trial court's May 15 order and judgment to the extent that it requires Allibone to produce his patient's records pending further order of this Court. *See* Tex. R. App. P. 24.4(c) (authorizing appellant court to issue temporary orders necessary to preserve parties' rights). We further direct the Clerk of this Court upon reinstatement of this appeal to designate this case accelerated and expedited because of the public interest involved and to set briefing deadlines accordingly. *See* Tex. R. App. P. 2 (allowing appellate court to suspend rules to expedite decision).

Before Justices Puryear, Pemberton, and Goodwin

Abated and Remanded

Filed: June 29, 2017