IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2023 Session

DUANE DOMINY ET AL. v. DAVIDSON COUNTY ELECTION COMMISSION

Appeal from the Chancery Court for Davidson County
No. 21-500-III Ellen Hobbs Lyle, Chancellor

No. M2022-00427-COA-R3-CV

Plaintiffs brought an action against the Davidson County Election Commission, asserting that the Election Commission violated the Tennessee Open Meetings Act and Metro Code 2.68.020. The chancery court granted judgment on the pleadings to the Election Commission, concluding no violation occurred and that even if there had been a violation it was cured by a subsequent public meeting. Plaintiffs appealed. Defending the chancery court's judgment, the Election Commission argues that the trial court's ruling was correct on the merits and that the Plaintiffs are also not entitled to relief because they lack standing and because the matter has become moot. Because the Election Commission presented a well-developed and well-supported argument in favor of mootness and because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission's mootness argument has been waived. Accordingly, we dismiss this appeal.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and CARMA DENNIS MCGEE, J., joined.

James D.R. Roberts, Jr., Dickson, Tennessee, for the appellants, Duane Dominy and Daniel Baron.

Junaid A. Odubeko, Edmund S. Sauer, and Richard W. F. Swor, Nashville, Tennessee, for the appellee, Davidson County Election Commission.

OPINION

I.

This appeal has its origins in a petition to amend the charter of the Metropolitan Government of Nashville and Davidson County ("Metro"). In August 2020, the group 4 Good Government filed a petition seeking to hold a referendum to amend the Metro Charter by repealing tax increases, putting a cap on the issuance of bonds, and limiting transfers of public lands. The petition included the requisite number of signatures, but concerns arose regarding the validity of the petition.[1]

Presented with a petition which raised questions regarding potential deficiencies and the responsibility of the Election Commission, the Election Commission participated in two meetings with the Department of Law of the Metropolitan Government of Nashville and Davidson County ("Metro Legal"). These meetings took place on September 18, 2020, and September 22, 2020. They were not open to the public.

The Plaintiffs allege that the Election Commission violated Metro Code 2.68.020[2] and the Open Meetings Act, found at Tennessee Code Annotated section 8-44-101 *et seq.*, by holding these meetings. The Election Commission subsequently held a public meeting on September 25, 2020. During this public meeting, there was an extensive discussion about whether the Election Commission should proceed with a referendum on the proposed amendments to the Metro Charter. The discussion, however, regarding the September 18 and 22 meetings was more limited in nature. After listening to public comments, the Election Commission voted to file for declaratory judgment to place before a court the question of the validity of the proposed charter amendment. The Election Commission also set a conditional date for the referendum.

The Plaintiffs subsequently filed a complaint alleging a violation of the Open Meetings Act and Metro Code 2.68.020, seeking declaratory judgment, an injunction, damages, attorney's fees, and costs.[3] The complaint alleged that the Election Commission

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[1] In a separate proceeding, the chancery court concluded that the proposed amendment to the charter was "defective in form, facially unconstitutional and under no set of circumstances could be valid." Order, *4 Good Government, et al., v. The Davidson County Election Comm'n*, No 20-1010-III (Nov. 3, 2020). The court concluded that the proposed amendment had no severability clause, did not cite which section of the Metro Charter it sought to amend, sought to legislate, sought to use a political process not recognized by Tennessee law, was unconstitutional as a retrospective law, and was defective as to form by seeking to include in the charter slogans such as "no giveaways," "failed promises," and "It is time for this nonsense to stop!" *Id.*

[2] Metro Code 2.68.020 provides that "[e]ach board or commission of the metropolitan government shall develop a policy, approved by the department of law, for providing adequate notice of all board or commission meeting dates, times, locations and agendas."

[3] The complaint was initially filed in May 2021 and named only Metro as a defendant and only Mr. Duane Dominy as a Plaintiff. After a motion to dismiss, Plaintiff added the Election Commission as a defendant and included a request for declaratory judgment and a claim for civil conspiracy. Plaintiff subsequently

conducted two secret, non-public meetings with Metro Legal, that Metro Legal was not actually the Election Commission's legal counsel because of its adverse interests, that third parties were present, that the Election Commission "began to engage in the formation of public policy and decisions" during the meetings, and that the substance of these meetings was not made public during the subsequent meeting held September 25, 2020. The Election Commission filed an answer in opposition and moved for judgment on the pleadings.

The chancery court granted judgment on the pleadings to the Election Commission, dismissing the complaint. The chancery court found that declaratory judgment was inappropriate because there was an adequate remedy under the Open Meetings Act.[4] The chancery court determined that the Plaintiffs had standing to challenge the proceedings as a violation of the Open Meetings Act,[5] that the pending litigation exception applied to render the meeting non-violative thereof,[6] and that the meeting on September 25, 2020, cured[7] any Open Meetings violation. The chancery court also found that the Metro Code merely provided logistics for implementing the Open Meetings Act but not a basis for a right of action. The Plaintiffs appealed.

II.

On appeal, the parties contest whether the chancery court erred in its judgment, with the Plaintiffs arguing that the Election Commission held secret meetings and that the pending litigation exception did not apply because of the presence of third parties, because of Metro Legal's adverse interests, and because the complaint alleged that policy was formulated at the meetings. The Plaintiffs further assert that any cure was ineffective because the substance of the discussions at the prior meetings was never revealed.

The Election Commission argues that the chancery court was correct in its substantive rulings. The Election Commission also asserts that the claims are not justiciable because the Plaintiffs do not have standing and because any claims for relief are

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voluntarily nonsuited Metro and filed a "Second Amended Complaint," which no longer included conspiracy claims. After another motion to dismiss, the Plaintiff moved to amend the complaint and add Mr. Daniel Baron as a Plaintiff. The Plaintiff filed a second pleading which was also styled "Second Amended Complaint," noting in a footnote that this was the second amendment to the complaint naming the Election Commission (presumably because the initial complaint named only Metro). This complaint — the later-filed "Second Amended Complaint" — is the operative complaint at issue in this appeal. The chancery court permitted the amendment and entered an agreed order adding Mr. Baron as a plaintiff.

[4] Citing *Highwoods Properties, Inc. v. City of Memphis*, 297 S.W.3d 695, 709 (Tenn. 2009).

[5] *See Fannon v. City of LaFollette*, 329 S.W.3d 418, 429 (Tenn. 2010) ("In our view, a threshold showing of an Open Meetings Act violation is sufficient to confer standing to any citizen.").

[6] Citing *Baltrip v. Norris*, 23 S.W.3d 336, 341-42 (Tenn. Ct. App. 2000).

[7] Citing *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436-37 (Tenn. Ct. App. 1990).

moot.

In advancing its mootness argument, the Election Commission notes that a case must remain justiciable until its disposition and that a moot case "has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 204 (Tenn. 2009); *see City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013) ("This Court must first consider questions pertaining to justiciability before proceeding to the merits of any remaining claims.").

The Election Commission cites to four cases in which this court dismissed claims alleging Open Meetings Act violations based upon mootness, arguing they mirror the circumstances of the present case. *See Turnbull Pres. Grp., L.L.C. v. Dickson Cnty.*, No. M2021-00542-COA-R3-CV, 2022 WL 1711706, at *1 (Tenn. Ct. App. May 27, 2022) (an action seeking to void the approval of a site for a fuel terminal due to a violation of Open Meetings Act was moot when the approval was subsequently overturned); *Person v. Bd. of Comm'rs of Shelby Cnty.*, No. W2007-01346-COA-R3-CV, 2009 WL 3074616, at *13-14. (Tenn. Ct. App. Sept. 28, 2009) (where the actions taken at a meeting held in violation of the Open Meetings Act were quickly rescinded, the issue was moot even though the plaintiff requested "additional remedies" other than invalidation of the governing body's act); *Cathey v. City of Dickson*, No. M2001-02425-COA-R3-CV, 2002 WL 970429 (Tenn. Ct. App. May 10, 2002) (when the plaintiff's statutory remedy would have been the repeal of an annexation ordinance allegedly made in violation of the Open Meetings Act, repeal of the ordinance operated to moot the appeal); *Hicks v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 86-49-II, 1986 WL 10885, at *1 (Tenn. Ct. App. Oct. 3, 1986) (any Open Meetings Act violation was moot when the governmental act challenged resulted in a lease which had already expired).

The Election Commission also notes that, after the challenged meetings, it held public discussion and debate and took public action on the petition, electing to set a conditional date for the referendum, voting to hire counsel, and obtaining a court decision regarding the validity of the petition. It further notes that 4 Good Government subsequently, in the spring of 2021, filed a second petition to amend the charter[8] and that the time limit set by statute for holding the election on the first petition has long expired. It argues that these facts have rendered any claim regarding a violation of the Open Meetings Act moot.

In their reply brief, Plaintiffs observe that the Election Commission has raised

[8] *See Metro. Gov't of Nashville & Davidson Cnty. v. Davidson Cnty. Election Comm'n*, No. M2021-00723-COA-R3-CV, 2022 WL 880477, at *1 (Tenn. Ct. App. Mar. 25, 2022), *perm. app. denied, designated not for citation* (Tenn. Sept. 29, 2022).

several issues, including the mootness argument.[9] The Plaintiffs designate the mootness argument with Roman numeral IV in the outline of their reply argument, but while they address other arguments raised by the Election Commission, the Plaintiffs note the Election Commission's mootness argument but do not provide any response thereto. The extent of the discussion of the mootness argument in the Plaintiffs' brief consists of the following statement: "Appellee claims its violation of the Open Meeting Act is moot be [sic] because ruling on Appellants' declaratory claims is 'meaningless and provides no tangible relief.' (Response at 9)." At oral argument, a concern that the reply brief referenced but did not respond to the mootness argument was noted in the questions from the court.[10] Having reviewed the Plaintiffs' appellate briefing, there is no argument therein addressing the mootness argument raised by the Election Commission or even an assertion that the Election Commission's argument is without validity.

The Tennessee Supreme Court has indicated that the role of the courts "is limited to deciding issues that qualify as justiciable, meaning issues that place some real interest in dispute." *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008)). Because courts "may not

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[9] The reply brief addresses the following issues, in the order presented here: "Appellee Br. I(A). Constitutional Standing"; "Appellee Br. II(A). Appellee Wrongly Argues a Pending Litigation or Controversy Existed"; "Appellee Br. III. Public Discussion"; "Appellee Br. II(C). Third Parties"; "Appellee Br. II(D). Appellants Dispute Metro Legal Was DCEC's Attorney"; "Appellee Br. III. DCEC 'Cured' its Violations"; and "Appellee Br. V. The Metropolitan Code § 2.68.020."

[10] Judge's Question: A justiciability related question I want to ask you here. . . . The Election Commission raises the argument that this case is not justiciable because it is moot. . . . I went back through your reply brief, and I did not see a response to the mootness issue. I know you flagged it. In terms of issues presented, it is roman numeral four mootness. And as I am reading through your brief, I see issue three and then on page twenty-six we seem to jump to issue five. And I did not see a response in your reply brief on the mootness argument. I may have missed it. I do not know if you want to address that.

Counsel's Response: So our response you mean?

Judge's Question: Yes. In your brief, I did not see a response to the Election Commission. The Election Commission says your case is moot. And I did not see a response to that argument in your reply brief.

Counsel's Response: Well. We tried to argue your honor, in the sense it is — because it is an Open Meetings Act issue . . . much like the standing issue you cannot have mootness apply to a violation of the Open Meetings Act because it would always be moot.

Judge's Question: Did you respond to mootness anywhere in your brief?

Counsel for Plaintiffs: I thought we did, your honor, quite honestly.

Judge's Question: Okay, I will look back through.

Counsel for Plaintiffs: I would not have have not done it.

render advisory opinions based on hypothetical facts," mootness is a "viable defense." *Colonial Pipeline Co.*, 263 S.W.3d at 838. A case becomes moot when it can no longer provide judicial redress to the prevailing party. *Norma Faye*, 301 S.W.3d at 204. Furthermore, the case must remain a legal controversy from its filing "until the moment of final appellate disposition." *Id.* In order to sustain an action, "a justiciable controversy must exist." *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007).

Waiver and concession in the context of issues related to justiciability function as a one-way ratchet. Where a case is non-justiciable, thus outside the bounds of the authority of Tennessee courts to adjudicate the matter, the parties cannot confer jurisdiction through waiver or by consent. *See Hooker v. Haslam*, 437 S.W.3d 409, 433 (Tenn. 2014) ("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."); *see also*, *e.g.*, *Wilcox v. Webster Ins*., *Inc*., 982 A.2d 1053, 1065 (Conn. 2009) (citations omitted) (noting that "[m]ootness . . . is a justiciability doctrine that implicates this court's subject matter jurisdiction; and, thus, cannot be waived and can be raised at any time"); *cf*. *Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, 645 S.W.3d 160, 167 (Tenn. 2022) (noting that "subject matter jurisdiction cannot be conferred by consent or waiver"). Alternatively, where a well-developed argument asserting a matter is non-justiciable has been properly advanced on appeal and is not addressed by the opposing party, this court has found waiver to be applicable. For example, in *In re LaPorsha S.*, despite the Department of Children's Services advancing "a well-supported argument" that the appeal was moot, the guardian ad litem failed to brief the mootness issue, and this court, accordingly, concluded that any argument opposing mootness was waived. No. W2010-02135-COA-R3-JV, 2011 WL 1364225, at *3 (Tenn. Ct. App. Apr. 12, 2011); *see Jane Doe v. John David Rosdeutscher, M.D.*, No. M2022-00834-COA-R3-CV, 2023 WL 3119472, at *10-12 (Tenn. Ct. App. Apr. 27, 2023) (concluding the issue was waived when the appellees properly raised a standing issue in their appellate brief and the appellant filed a reply brief which failed to address the standing issue); *see also*, *e.g.*, *Classic CAB v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 707 (D.C. 2021) (stating that "Classic Cab 'effectively conceded' mootness by failing to respond to DFHV's mootness argument in a reply brief"); *Brandon v. Blech*, No. CV 99-479-DLB-REW, 2013 WL 12363554, at *1 (E.D. Ky. Aug. 21, 2013) (indicating that "[b]ecause Plaintiff has . . . chosen not to address Defendant's position in his response, the Court can only assume that Plaintiff concedes this issue and therefore agrees that this case is moot"); *Matter of Guardianship of Goldberg*, No. 70295, 2018 WL 3603039, at *1 (Nev. App. 2018) (reasoning that "by failing to file a reply brief addressing respondent's mootness argument, [the petitioner] has waived any arguments that this appeal is not moot"); *Loc. 311 of Int'l Ass'n of Firefighters v. City of Sun Prairie*, Appeal No. 2017AP749, 2018 WL 2338870, ¶ 12 (Wis. Ct. App. May 24, 2018) (concluding "that the City has conceded the Union's mootness argument by failing to respond to that argument and, therefore, we deem the City's authority-to-reinstate argument moot").

Here, the Election Commission presented a well-developed argument regarding mootness and supported it with multiple relevant citations to legal authority. The Plaintiffs were on notice that a well-developed argument had been presented to the court, but they failed to respond. Additionally, the Plaintiffs were alerted at oral argument to concerns regarding their reply brief having noted but not having actually addressed the Election Commission's argument regarding mootness. Nevertheless, the Plaintiffs have not sought permission for supplemental briefing to address this matter. "It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her." *Sneed v. Bd. of Prof'l Responsibility of Sup. Ct*, 301 S.W.3d 603, 615 (Tenn. 2010). Accordingly, we conclude that the Plaintiffs have waived any challenge to the Election Commission's mootness argument, and we dismiss their appeal.

III.

Based on the foregoing, we dismiss the appeal, with costs taxed to the appellants, Duane Dominy and Daniel Baron, for which execution may issue if necessary.

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JEFFREY USMAN, JUDGE