COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE OF TEXAS, PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,	§	No. 08-20-00226-CV
	§	On Appeal from the
	§	34th District Court
	§	El Paso County, Texas
	§	Cause No. 2016DCV0573
Appellants,		
V.	§	
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY, TEXAS,	§	
Appellants.	§	

ORDER ON EMERGENCY MOTION FOR TEMPORARY RELIEF

Appellants below challenged a Stay at Home/Stay Safe Order issued by El Paso County Judge Samaniego, which was enacted as County Emergency Order No. 13 ("the County's Order"). The County's Order by its own terms expired on Wednesday, November 11, 2020, at 11:59 p.m. *See* order no. 13, https://www.epcounty.com/documents/Order-No-13.pdf (last visited Nov. 12, 2020). But we take note that Judge Samaniego has now effectively extended the order until

December 1, 2020, by enacting County Emergency Order No. 14. *See* order no. 14, https://www.epcounty.com/documents/Order-No-14.pdf (last visited November 12, 2020).[1] Appellants' central thesis is that core provisions of the County's Order conflict with provisions of GA-32, a previous COVID-19-related executive order enacted by Governor Greg Abbott on October 7, 2020 ("the Governor's Order"). Appellants contend that, pursuant to the division of emergency powers set forth by the Texas Legislature in the Texas Disaster Act of 1975, which is an act upon which both orders rely, the Governor's Order controls over the County's Order to the extent the two are in conflict. *See generally* TEX.GOV'T CODE ANN. ch. 418.

On November 6, 2020, the trial court below denied Appellants' request for injunctive relief to enjoin enforcement of the County's Order. That same day, Appellants noticed their appeal from the trial court's denial of a temporary injunction and further sought emergency relief from this Court under TEX.R.APP.P. 29.3, along with a request to expedite the appeal. As for emergency relief, Appellants requested that we issue an order protecting the status quo while this Court determines whether the trial court abused its discretion by denying the temporary relief requested below. Opposing such relief, County Judge Samaniego and the County of El Paso argue that emergency relief is not warranted.

[1] Both orders contain a findings section that explains the judge's rationale, followed by sections one through six that contain the core prohibitions that give rise to this dispute (a stay at home order, a cease operation for "non-essential businesses," a prohibited activities section, and a travel restriction). The balance of the orders contains definitional sections and provisions related to posting, enforcement, and application. County Emergency Order 14 contains updated data and additional recitations in its findings section. The core prohibitions in County Emergency Order 13 and 14 are identical with one exception. The newest order contains a stair-step formula wherein affected businesses might resume limited operation based on defined hospital data. Because this new provision still materially differs from provisions of the Governor's Order, the change would not affect the core dispute raised in this appeal. We view it as immaterial to our resolution of the case, and we treat County Emergency Order 13 and 14 as the functional equivalent of each other for the purposes of this order. We agree with the parties' assessment that because the controversy is capable of repetition but evading review during the ongoing pandemic, the justiciable controversy remains and was not mooted by the expiration of Order 13 and later issuance of Order 14. *See Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist*., 484 S.W.3d 416, 418 (Tex. 2016) (explaining that cessation of challenged conduct does not deprive a court of the power to hear or determine claims for prospective relief; otherwise, this would defeat the public interest in having the legality of the challenged conduct settled).

Rule 29.3 of the Texas Rules of Appellate Procedure allows this Court to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal[.]" TEX.R.APP.P. 29.3; *In re Geomet Recycling LLC*, 578 S.W.3d 82, 90 (Tex. 2019) (noting wide discretion in issuing temporary orders pending appeal). Courts often exercise that discretion to protect the status quo. The status quo has long been defined as "the last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Transp. Co. of Texas v. Robertson Transps., Inc.*, 261 S.W.2d 549, 553-54 (Tex. 1953) (internal quotations omitted). "If an act of one party alters the relationship between that party and another, and the latter contests the action, the status quo cannot be the relationship as it exists *after* the action." *Benavides Indep. Sch. Dist. v. Guerra*, 681 S.W.2d 246, 249 (Tex.App.-San Antonio 1984, writ ref'd n.r.e.). In the present case, the parties agree that the County's Order is more restrictive than the Governor's Order. Yet, the parties disagree as to whether the orders legally conflict.

Here, the parties' arguments raise important and difficult issues that have not been resolved by a trial on the merits. At trial, those issues would include the proper interplay of governmental powers at the local and state level when responding to the needs of the public during a global pandemic. Those issues center on the proper construction of certain provisions of the Texas Disaster Act of 1975 when an executive order of a local governmental unit falls into conflict with a prevailing order issued by the governor of the state. We exercise our discretion to preserve the status quo as it existed just prior to the issuance of the County's later, more restrictive Stay-at-Home Order.[2] Accordingly, El Paso County and Ricardo A. Samaniego in his official capacity as

[2] Responding to the dissent, its reliance on Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring) is misguided. Setting aside that the concurrence was joined by no other member of the Court, that it turns on principles for extraordinary relief in the United States Supreme Court and not those under TEX. R. APP. P. 29.3, and that it never uses the term "balance the equities", as the dissent suggests,

County Judge for El Paso County are hereby permitted to enforce the Governor's Order but enjoined from enforcing Sections One, Three, Four, Five, Six, Eight, and Sixteen from Emergency Order No. 13, and the like provisions in the same sections as found in Emergency Order 14, until such time as a final judgment and mandate of this Court issue in the above styled appeal.

IT IS SO ORDERED this 12th day of November 2020.

JEFF ALLEY, Chief Justice

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

DISSENT TO TEMPORARY ORDER

I, respectfully, dissent to the grant of emergency relief suspending the operation of El Paso County Emergency Order No. 14 pending resolution of the appeal in Cause No. 08-20-00226-CV.

We have continuing jurisdiction over the controversy regarding whether El Paso County Emergency Order No. 13 violated the Governor's Executive Order GA-32 because although Emergency Order No. 13 has expired, the central question in this appeal—one that we will finally and definitively answer very shortly—is capable of repetition but evading review.

However, we lack jurisdiction over the County Judge's new Emergency Order 14. The trial court's grant or denial of each temporary injunction decision is a separately appealable event. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(a)(4). When a temporary injunction order is appealed, the courts of appeals are limited to addressing the narrow question of whether the specific order

it is simply inapplicable. The question in *Newsom* was a binary choice of whether a COVID-19 regulation applied at all, or whether the applicant was free to do as it pleased. The question here is whether the people of El Paso County should follow one set of rules from the governor, or another set of rules from a county judge, when those rules say different things. In an ordered civilized society, it is intolerable that the public would be subject to conflicting pronouncements from their elected officials, especially when both contain criminal penalties of differing monetary amounts. It is our duty to resolve that conundrum, even if for one day.

that was appealed was valid at that moment in the litigation when it was rendered, and on interlocutory review, we must consider only the specific record relating to the specific order that is being appealed in making that determination. *Murphy v. McDaniel*, 20 S.W.3d 873, 877 (Tex.App.—Dallas 2000, no pet.); *see also Fuentes v. Union de Pasteurizadores de Juarez, S.A. de C.V.*, 527 S.W.3d 492, 502 (Tex.App.—El Paso 2017, no pet.)(refusing to consider brief attachments that detailed post-appeal trial court proceedings). This is especially true, because Emergency Order No. 14 is a completely new order issued under vastly different circumstances than those Judge Moody considered at the hearing on November 4, 2020, the basis of his injunction decision on November 6, 2020, regarding Emergency Order No. 13.

Further, requests for temporary injunctions are usually presented to the trial court first, especially since the trial the State and the Restaurants are demanding is still pending. *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020)(applicants seeking relief from local emergency orders could not proceed immediately to the Texas Supreme Court; orderly process required them to first present an application to a district court and proceed to the Texas Supreme Court only as a court of last resort). The substantial differences in time, public health circumstances and the provisions of Emergency Order 14 from Emergency Order 13 mandate the Attorney General begin anew in the trial court. The very fact Emergency Order 14 takes effect November 12, 2020 at 12:00 a.m. M.D.T., coupled with the different factors the order relies upon and additional new provisions leave little doubt this is a separate stand-alone Executive Order. The majority's position that their temporary orders enjoins the County Judge from: "[E]nforcing Sections One, Three, Four, Five, and Six from Emergency Order No. 13, and the like provisions in the same sections as found in Emergency Order 14," does not cure our lack of jurisdiction of Emergency Order 14. Their efforts to bootstrap Emergency Order 14 into Order 13 cannot and

should not confer jurisdiction if the parties have yet to obtain a ruling in the trial court. It especially begs the question when we anticipate issuing our merits opinion in the next 24 hours or less.

However, our jurisdiction over this interlocutory appeal of Emergency Order 13 is not threatened but is now largely just an academic exercise. But separate and apart from that academic discussion, we must consider the equities here. In a shadow docket order denying an application for an injunction to suspend enforcement of a COVID-19 public health order pending action on a certiorari petition, United States Supreme Court Chief Justice John Roberts, in a similar posture as this very Court, voted to deny the request and said in a concurrence that when an applicant who is unsuccessful in persuading the trial court to enjoin a COVID-19 public health order asks an appellate court to enjoin enforcement of the health order until further appellate action can be taken, the applicant must present a "significantly higher justification" for obtaining relief than it would be in obtaining a stay because, unlike with a stay, the applicant requesting suspension of a COVID-19 public health order is not seeking to "simply suspend judicial alteration of the status quo" but is requesting affirmative "judicial intervention that has been withheld by lower courts." *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020)(Roberts, C.J., concurring in denial of application for injunctive relief)(citing *Respect Maine PAC v. McKee*, 562 U.S. 996, 131 S.Ct. 445, 178 L.Ed.2d 346 (2010)).

Chief Justice Roberts' well-reasoned concurrence recognizes that in considering interim affirmative emergency relief generally, a court should determine whether the applicant has a probable right to relief and balance the equities related to harm and party rights. However, in calibrating that delicate balance between those factors in the COVID-19 context, his view is the suspension of COVID-19 health orders pending appeal when injunctive relief was denied in the trial court should only be done when "the legal rights at issue are indisputably clear and, even then,

sparingly and only in the most critical and exigent circumstances." *Id*. (*citing* in-chambers and separately written opinions on the topic of affirmative injunctive relief pending further Supreme Court action as contained in Stephen M. Shapiro, et al., SUPREME COURT PRACTICE § 17.4, p. 17-9 & 17-10 (11th ed. 2019)). Under Chief Justice Roberts' view as applied to this case, the State and the Restaurants lodge their request under a framework that is calibrated against granting an emergency injunction suspending the County's COVID-19 order, even if the State's right to relief is "indisputably clear."

I believe Chief Justice Roberts' approach appropriately calibrates the test for emergency discretionary relief from an appellate court pending further appellate review of a trial court's interlocutory order declining to enjoin a COVID-19 health order, especially given that the State's right to recovery here is not indisputably clear.

Today is Thursday. We have promised to get the parties an opinion on the merits by Friday at the latest. The Attorney General and the Restaurants argue the law is simple. It is not. The Texas Disaster Act is a sprawling, detailed continuity-of-government plan that allocates power among multiple actors at multiple levels of government and sets discrete chains of command for different situations. We need time to thoughtfully, thoroughly consider the merits of this case as the parties deserve and demand.

This Court is not just a speed bump in the process to be bypassed on the road to somewhere else. *See In re Salon a La Mode*, 2020 WL 2125844, at *2 (applicants seeking relief from local emergency orders could not proceed immediately to the Texas Supreme Court; orderly process required them to first present an application to a district court and proceed to the Texas Supreme Court only as a court of last resort). We have a responsibility not just to decide this case, but to get it right. The stakes are too high to make a snap decision giving the Attorney General the relief he

seeks without having decided if the Attorney General has actually proven the merits of his case. That's why I voted to expedite this appeal, since presumably, the Attorney General and the Restaurants don't just want temporary relief, they also want a final answer as to whether the County's order or the Governor's order controls.

We have the right to exercise our discretion in granting temporary relief in the manner in which we did,[3] and the five Texas Supreme Court justices who denied the Attorney General's emergency motion filed last night have given us some breathing room to do the job we were elected to do and provide them with a first-line read of this situation. On behalf of the Court, we appreciate that.

We must weigh the equities in not suspending County Judge Samaniego's Order for a scant 24 hours against the speculative harm the State alleges it may suffer. As we work through the answer to this important legal question that has implications not just for El Paso County, but for 254 county judges and more than 12,000 mayors across this State; bodies continue to stack up in refrigerated trucks here in El Paso because our morgues are full and the Medical Examiner has a backlog of corpses. Every other patient in our hospitals is a COVID-19 patient. The County's order, right or wrong (I cannot say just yet) is an attempt to stem a rising tide. On the other side of the equation, the harm the Governor cites is that his dignity as the State's top law enforcement officer will be offended until we answer the question he has placed in this Court for emergency decision (that question being, of course, not only whether County Judge Samaniego had the authority to do what he did, but also whether the Governor did as well).

[3] *See In re Tex. Nat. Res. Conservation Comm'n,* 85 S.W.3d 201, 210 (Tex. 2002)(Baker, J., dissenting)(noting that if concerns about decisional timeliness are an issue, the temporary relief rules, in addition to permitting stays pending merits review, allow for briefing timelines to be expedited to address the merits of the case directly).

I, remain, unconvinced the Governor and the Restaurants cannot wait less than 24 hours for our final decision.

I respectfully dissent from my esteemed colleagues' decision on this motion.