23 CV 3140

Case No. 127,124

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Hodes & Nauser, MDs PA, On Behalf of Itself, Its Patients, Physicians, and Staff; Traci Lynn Nauser, M.D.; Tristan Fowler, D.O., and Comprehensive Health of Planned Parenthood Great Plains, on Behalf of Itself, Its Patients, Physicians, and Staff,
Plaintiffs-Appellees,
v.
Kris Kobach, in His Official Capacity as Attorney General of the State of Kansas; Stephen M. Howe, in His Official Capacity as District Attorney for Johnson County; Marc Bennett, in His Official Capacity as District Attorney for Sedgwick County; MarkA. Dupree, Sr., in His Official Capacity as District Attorney for Wyandotte County,
Defendants-Appellants,
Susan Gile, in Her Official Capacity as Executive Director of The Kansas Board of Health Arts; and Jerry Degrado, D.C., in His Official Capacity as President of The Kansas Board of Healing Arts, and Janet Stanek, in Her Official Capacity as Secretary of The Kansas Department of Health and Environment,
Defendants.

ORDER DISMISSING APPEAL AS MOOT

In this appeal, Kansas Attorney General Kris Kobach and the other defendants, all sued in their official capacities, have challenged the Johnson County District Court's temporary injunction precluding the enforcement of K.S.A. 65-6709, K.S.A. 65-6710(a)(3) and (a)(4), K.S.A. 65-6712, and K.S.A. 65-6716 (referred to in the injunction as H.B. 2264). The plaintiffs contend those statutes violate the Kansas Constitution and ultimately want a permanent injunction barring their enforcement. The district court has neither held a trial on the merits of plaintiffs' claims nor issued a final judgment. A party may appeal a district court order granting a temporary injunction. K.S.A. 60-2102(a)(2).

During oral argument on this interlocutory appeal, a lawyer for the plaintiffs referred to a stipulation the parties entered in the district court agreeing that the challenged statutes would not be enforced until the district court issues a final decision on a permanent injunction. The comment sparked a discussion among the panel members and the lawyers for both sides about the stipulation and whether it might render this appeal moot.

Given that discussion and after reviewing the appellate record, we issued a show cause order directing the parties to brief why this appeal should not be dismissed as moot. The parties have duly filed briefs addressing mootness.

The record shows that on November 28, 2023, about a month after the temporary injunction was granted, the parties submitted to the district court what they have characterized as a "join stipulation and order" to suspended discovery and all case management deadlines in this action until after the defendants had "fully briefed" this appeal of the temporary injunction. The stipulation functionally amounts to a joint motion asking the district court to suspend discovery and various pretrial deadlines combined with the terms of an agreed-upon order and a signature block for the district court.

The stipulation and order includes eight "whereas" paragraphs reciting the procedural posture of the case, several agreements of the parties, and their representation "good cause . . . exists" to "temporarily adjourn discovery and case management deadlines, including trial." Relevant here, one of those paragraphs states: "WHEREAS, Defendants agree they are bound by the District Court's temporary injunction and shall not seek to enforce the provisions of the Women's Right to Know Act, specifically K.S.A. §§ 65-6709, 65-6710(a)(3)-(4), 65-6712, and H.B. 2264, until the District Court renders a final judgment in this matter[.]" The balance of the stipulation and order consists of three numbered paragraphs suspending discovery and the case management deadlines and an agreed-upon directive to submit new suggested deadlines within 10 days after the briefing

of this appeal. The district court signed the stipulation and order on November 30, 2023, giving legal effect to the parties' requested alterations of the litigation schedule.

A legal controversy becomes moot when judicial resolution of the controlling issue would no longer affect the legal rights or change the legal relationship of the parties. *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020); *State v. Montgomery*, 295 Kan. 837, 840-41, 286 P.3d 866 (2012). Courts typically refrain from addressing controversies that have become moot precisely because any decision would amount to an advisory ruling created for its own sake rather than as a mechanism for resolving a concrete dispute between litigants. See *Roat*, 311 Kan. at 590; *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896-97, 179 P.3d 366 (2008). In *Roat*, however, the court cautioned against hastily dismissing an appeal as moot when doing so might compromise the rights of a party in the name of judicial efficiency. 311 Kan. at 591.

On its face, the agreement in the stipulation and order not to enforce the statutes covered in the temporary injunction until the district court issues a ruling on a permanent injunction would appear to make this appeal moot. That is, the language of agreement independently replicates the relief the district court granted in the temporary injunction. Accordingly, we fail to see that the temporary injunction now serves some distinct legal purpose and appears to have become legally superfluous as of November 30, 2023. In short, the dispute over the temporary injunction—this appeal—is moot because the defendants have otherwise agreed not to do what the temporary injunction prohibits them from doing.

The defendants have offered two arguments against mootness: (1) The whereas clauses in the stipulation and order do not create legally enforceable rights; and (2) the plaintiffs waited too long to raise the issue of mootness. We find neither persuasive as a reason we should now decide an appeal that has turned into an academic dispute over the legal sufficiency of the district court's findings supporting the temporary injunction.

Again, even if we were to find fault with how the district court went about issuing the temporary injunction, the parties' agreement that the defendants will not enforce the challenged statutes until the district court issues a final judgment would preserve the present legal landscape.

To support their first point, the defendants cite a rule of law that whereas clauses in a contract do not themselves create enforceable rights but may be considered to resolve ambiguities in the operative terms of the agreement. See *Centerplan Construction Company v. City of Hartford*, 343 Conn. 368, 391-92, 274 A.3d 51 (2022); 17A C.J.S. Contracts § 420. We do not quarrel with that statement as a general proposition governing contracts. The defendants then contend the agreement not to enforce the statutes is legally meaningless because it appears in a clause beginning with the word "whereas," and we should effectively ignore it. The defendants' contention is either remarkably myopic or strikingly brash.

First, of course, this is not a contract dispute, and we are not construing a contract. We *are* determining the legal import of specific representations made to the district court to secure a ruling from that court materially affecting the course of the litigation and all of the litigants. With an order putting the brakes on the district court proceedings while they briefed this appeal, the defendants obtained an obvious benefit at least in part based on their agreement not to enforce the challenged statutes until there is a final judgment. In that posture, the defendants cannot now tell us their agreement doesn't count for anything—so we should decide an appeal that otherwise would be moot. The courts need not and typically do not credit that sort of situational shapeshifting. Judicial estoppel gives doctrinal force to a litigant's obligation to maintain a consistent position in seeking sequential rulings in a case.

We have described judicial estoppel as a rule precluding a party from taking one position in a case to induce a court to act in a certain way and then taking a conflicting

position in the same or a related proceeding to obtain another favorable court ruling. *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 262-63, 261 P.3d 943 (2011); see *Martin v. Mid-Kansas Wound Specialists, P.A.*, 63 Kan. App. 2d 509, 515, 532 P.3d 814 (2023) (acknowledging doctrine). The United States Supreme Court has recognized that judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)532 U.S. at 749 (quoting *Pegram v. Herdrich*, 530 U.S. 221, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d. 164 [2000]). The circumstances here present a hornbook example for invoking judicial estoppel. The defendants cannot represent to the district court that they will not enforce the challenged statutes to secure a favorable ruling extending various litigation deadlines and then tell us the representation has no legal force when it comes to preserving their interlocutory appeal.

As to the defendants' second point, we agree that the plaintiffs almost certainly should have raised the possible mootness of this appeal well before oral argument. But when or how the issue came to light does not preclude us from addressing it. Kansas courts have a duty to avoid issuing rulings in legal controversies that have become moot. See *Sierra Club v. Stanek*, 317 Kan. 358, 361, 529 P.3d 1271 (2023). And while mootness is a prudential consideration rather than a jurisdictional bar, we have an independent obligation to examine whether a case has become moot. In doing so, we commonly issue show-cause orders asking the parties to address mootness even if they have not raised the issue. See, e.g., *State v. Johnson*, 39 Kan. App. 2d 438, 440-41, 180 P.3d 1084 (2008); *D.G. v. M.G.*, No. 123,342, 2021 WL 5990152, at *1 (Kan. App. 2021); *State v. Teters*, No. 121,632, 2020 WL 5265570, at *1 (Kan. App. 2020). Were the rule otherwise, we would be obligated to render opinions in moot cases absent notice or objection from one of the parties. The plaintiffs' late and rather oblique reference to mootness does not somehow prevent us from examining the point.

Because mootness is not a jurisdictional bar, appellate courts have recognized limited exceptions that may warrant review of a moot issue. Those exceptions typically entail a court either resolving an issue of substantial public importance or deciding what amounts to a recurrent legal question that effectively evades review because the cases in which it arises become moot before appellate review can be completed. See *State v. DuMars*, 37 Kan. App. 2d 600, 605, 154 P.3d 1120 (2007); *Kelly v. Cline*, No. 124,210, 2022 WL 2112625, at *2 (Kan. App. 2022) (unpublished opinion). The defendants have not argued this appeal falls within an exception to the mootness doctrine. We have considered the exceptions and see no basis in them for retaining this appeal.

The underlying legal dispute about the constitutionality of the challenged statutes is a matter of public importance. But the question is not before us in this appeal. The district court will address that issue in a final judgment following a trial on the merits. In issuing the temporary injunction, the district court found the plaintiffs had demonstrated a likelihood of success on the merits based on a record consisting of competing declarations from expert witnesses. That ruling is far removed from a final determination on a full evidentiary record and does not demand review in an otherwise moot appeal. Likewise, whether the district court made sufficiently detailed factual findings in issuing the temporary injunction does not implicate an issue of broad public importance or concern. This litigation does not present an issue capable of repetition but evading review. Indeed, the controlling question—the constitutionality of the statutes—will be decided in due course.

This interlocutory appeal became moot when the defendants agreed not to enforce the challenged statutes until the district court issues a final judgment.

Appeal dismissed as moot.

DATED: November 14, 2024

FOR THE COURT

/s/ G. Gordon Atcheson
Presiding Judge