VACATE and DISMISS and Opinion Filed July 27, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01063-CV

DOUBLE DIAMOND-DELAWARE, INC., DOUBLE DIAMOND, INC., WHITE BLUFF CLUB CORP., UNITED EQUITABLE MORTGAGE CO., NATIONAL RESORT MANAGEMENT CO., R. MICHAEL WARD, FRED CURRAN, AND WHITE BLUFF PROPERTY OWNERS ASSOCIATION, INC., Appellants
V.
JEANETTE ALFONSO, EUGENIO CORPUS, FE HUEVOS, ELEZAR NUIQUE, EDITHA PEPITO, REYNALDO PEPITO, SIMONETTE PEPITO, JULITO PEPITO, CHERRY SOMOSOT, AND NELIA VINCENTE, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-16333

MEMORANDUM OPINION
Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Osborne

This appeal presents a narrow issue—construction of documents governing a property owners' association's assessment of fees—on which the trial court granted summary judgment. No claims for liability or damages were resolved by the trial court, and none are presented for appellate review here. As we explain in this opinion, because the requested construction of the documents cannot have any

practical effect on the parties' controversy in this "bellwether" case, we vacate the trial court's judgment and dismiss the appeal as moot.

BACKGROUND

Appellees Jeanette Alfonso, Eugenio Corpus, Fe Huevos, Elezar Nuique, Editha Pepito, Reynaldo Pepito, Simonette Pepito, Julito Pepito, Cherry Somosot, and Nelia Vincente are current or former owners of property in the White Bluff Resort in Hill County, Texas. They sued appellants Double Diamond-Delaware, Inc., Double Diamond, Inc., White Bluff Club Corp., United Equitable Mortgage Co., National Resort Management Co., R. Michael Ward, Fred Curran, and White Bluff Property Owners Association, Inc. ("WBPOA")—the developers of the resort, the homeowners' association, and other related entities and individuals (collectively, "Double Diamond")—alleging they were charged fees and assessments that were not authorized under Double Diamond's governing documents. Relying on WBPOA's articles of incorporation, its bylaws, the declaration establishing it, and the covenants and restrictions for the subdivision, appellees brought suit contending that the WBPOA was improperly assessing and collecting fees from homeowners to maintain property it did not own. Specifically, appellees challenged fees relating to a food and beverage program and the maintenance of two golf courses. The trial court agreed that the assessments were not authorized by the relevant governing documents, granted summary judgment for appellees, and denied appellants' competing motions.

The issue presented in the summary judgment motions—a request that the trial court construe the governing documents to determine the propriety of the fees—was a narrowly-crafted subset of a much larger, protracted dispute between Double Diamond and hundreds of White Bluff property owners that has been pending for almost a decade. Because the parties are well-versed in this history, we do not recount it here. *See* TEX. R. APP. P. 47.4 (memorandum opinions); *see also Double Diamond-Delaware, Inc. v. Alfonso*, 487 S.W.3d 265, 267–69 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (previous appeal in this suit). We note only that the ten appellees here were designated as "trial plaintiffs," and the discrete summary judgment issues they asserted were severed from a larger, still-pending case filed by approximately 100 White Bluff property owners in 2011 seeking damages for fraud, breach of fiduciary duty, deceptive trade practices, fraud in a real estate transaction, and negligent misrepresentation, among other claims. *See id.* at 268. Initially filed in Hidalgo County, the larger case was transferred to Dallas County in 2016, assigned cause number DC-16-13816-J, and is currently abated.

The trial court's judgment in this case includes six declarations and three paragraphs granting injunctive or equitable relief. The first two declarations are that the defendants were not authorized under the White Bluff covenants and restrictions or under the WBPOA's declaration, bylaws, or articles of incorporation "to assess, bill, collect, or deposit any fees or funds that relate to" the food and beverage program or the golf courses. The declarations in paragraphs three through six

provide additional reasons why the disputed assessments were unauthorized. In paragraphs three and four, the trial court declared that a 2010 amendment to the WBPOA bylaws relating to maintenance of the golf courses was "an unauthorized exercise of board authority" that was "not lawfully enacted" and "therefore void and of no legal effect." In paragraph 5, the trial court declared that the disputed assessments "violate[ ] the WBPOA's non-profit status." And in paragraph 6, the trial court declared that "[n]o development period was ever created" during which Double Diamond could "exercise special unilateral rights to impact the Plaintiffs or the WBPOA."

In three separate paragraphs, the judgment awards "equitable relief" including (1) prohibiting future assessments for assets the WBPOA does not own, (2) prohibiting further assessments for food and beverage or hospitality programs, and (3) disgorging stipulated amounts to each of the ten plaintiffs for amounts they had paid for golf course maintenance or the food and beverage program. There are no actual damages awarded; the amounts awarded to plaintiffs are designated as equitable disgorgement. The Double Diamond defendants and the WBPOA now appeal this judgment.

In 2018, however, before the trial court rendered its summary judgment, the WBPOA purchased the golf courses and amenities that were the basis of appellees' complaints. Double Diamond first argued in its reply brief on appeal that this purchase rendered this dispute moot. Appellees replied, and the parties further ably

addressed the mootness question and provided additional authorities both at oral argument and in their post-submission letter briefs. Appellants also provided evidence that five of the ten appellees[1] no longer own property at White Bluff, and they argued that the prospective relief granted in the trial court judgment was moot as to those appellees for that additional reason.

APPLICABLE LAW AND STANDARD OF REVIEW

"The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events." *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). "Appellate courts are prohibited from deciding moot controversies." *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). The mootness doctrine prevents the rendition of advisory opinions. *See First Ovilla v. Primm*, No. 05-19-00042-CV, 2020 WL 1983360, at *3 (Tex. App.—Dallas April 27, 2020, no pet.) (mem. op.).

When a judgment "cannot have a practical effect on an existing controversy, the case is moot and any opinion issued on the merits in the appeal would constitute an impermissible advisory opinion." *Reule v. RLZ Invs.*, 411 S.W.3d 31, 32 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also Empower Texans, Inc. v. Tex.*

[1] Appellees Alfonso, Corpus, Nuique, Somosot, and Vicente no longer own property at White Bluff. Although evidence of their relinquishment of their White Bluff property was not included in the appellate record, appellants supplied it after oral argument in accordance with their duty to supply "facts that may raise a question of mootness." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997).

Ethics Comm'n, No. 03-16-00872-CV, 2018 WL 3678005, at *3 (Tex. App.—Austin Aug. 3, 2018, no pet.) (mem. op.) ("If a case becomes moot, the court loses jurisdiction because any decision rendered at that point would be an advisory opinion."). "An opinion is advisory when it neither constitutes specific relief to a litigant nor affects legal relations." *In re Smith County*, 521 S.W.3d 447, 453 (Tex. App.—Tyler 2017, no pet.). To establish mootness, the proponent bears a "heavy burden" of showing that its subsequent actions made it "absolutely clear" that the challenged conduct could not reasonably be expected to recur. *Empower Texans, Inc.*, 2018 WL 3678005, at *3.[2]

A claim of mootness presents a question of law we review de novo. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149–50 (Tex. 2012).

DISCUSSION

In their motion for summary judgment, appellees specified the relief they sought: "Plaintiffs are entitled to a declaration that assessments paid to the Double

[2] There are two exceptions that confer jurisdiction regardless of mootness: (1) the issue is capable of repetition, yet evading review, and (2) the collateral consequences doctrine. *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.—Dallas 2010, no pet.). The first exception has been used to challenge acts by the government and is limited to situations where the challenged action is too short in duration to be fully litigated prior to cessation or expiration and there is a reasonable expectation that the same party would be subjected to the same action again. *Anderton v. City of Cedar Hill*, 583 S.W.3d 188, 193 (Tex. App.—Dallas 2018, no pet.). The collateral consequences doctrine "applies to the narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment." *Id.* (citing *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006)). We conclude that neither applies here, and appellees do not argue otherwise. As we discuss below, appellees urge that the appeal is not moot because appellants may charge other assessments in the future that are not authorized by the WBPOA's governing documents. We address this contention below.

Diamond Defendants . . . related to golf course maintenance and a 'food and beverage' program were unauthorized and improper, as a matter of law. Plaintiffs are also entitled to a declaration that the Double Diamond Defendants never created any development period for their property that would have otherwise given the Double Diamond Defendants any other special rights, like the ones they took at the expense of the Plaintiffs."

Appellees concluded:

> For all of these reasons, this Court should declare these fees to be improper and unauthorized, declare that there was never any development period established by the governing documents that would have given the Double Diamond Defendants such authority, order the disgorgement of all fees paid to the Double Diamond Defendants so far, and enjoin any future use of the fees for such purposes.

Appellees argue that although appellants have ceased charging fees to maintain the golf courses and to support the food and beverage program, this conduct "might reasonably be expected to recur" now or in the future. *See Matthews*, 484 S.W.3d at 417. They contend that under the asset purchase agreement's terms,[3] it is possible that title to the assets could revert back to one of the Double Diamond entities. In addition, certain real property in and around the subdivision was not

[3] The parties supplemented the record after submission with a sealed record containing the asset purchase agreement. We make "every effort to preserve the confidentiality of the information the parties have designated as confidential," *see MasterGuard L.P. v. Eco Technologies Int'l, LLC*, 441 S.W.3d 367, 371 (Tex. App.—Dallas 2013, no pet.), consistent with our obligation to hand down a public opinion explaining our decisions based on the record. *See Kartsotis v. Bloch*, 503 S.W.3d 506, 510 (Tex. App.—Dallas 2016, pet. denied) (citing TEX. R. APP. P. 47.1, 47.3 and TEX. GOV'T CODE § 552.022(a)(12) for proposition that opinions are public information).

included in the sale. They argue that given these aspects of the agreement, appellants cannot meet their "heavy burden" to show it is "absolutely clear" that "the challenged conduct cannot reasonably be expected to recur." *See Matthews*, 484 S.W.3d at 418 (internal quotation omitted).

Both parties rely on the supreme court's opinion in *Matthews* to support their arguments. In *Matthews*, middle school and high school cheerleaders were prohibited by their school district from displaying banners containing religious signs or messages at school-sponsored events. *Id.* at 417. The district subsequently adopted a resolution that it is "not required to prohibit messages on school banners . . . that display fleeting expressions of community sentiment solely because the source or origin of such message is religious," but "retains the right to restrict the content of school banners." *Id.* The district then asserted mootness in its plea to the jurisdiction. *Id.* Although the trial court denied the plea, the court of appeals reversed, holding that the district's voluntary discontinuance of its policy rendered the controversy moot. *See id.* The supreme court reversed, explaining that "[a] defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief." *Id.* at 418. The court continued, "[i]f it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while remaining free to return to their old ways. This would obviously defeat the public interest in having the legality of the challenged conduct settled." *Id.* (citations omitted). The court emphasized that "the

District's voluntary abandonment here provides no assurance" (*id.* at 420) that it would not resume the challenged conduct in the future:

> The District no longer prohibits the cheerleaders from displaying religious signs or messages on banners at school-sponsored events. But that change hardly makes "absolutely clear" that the District will not reverse itself after this litigation is concluded, without the cheerleaders' requested declaratory and injunctive relief. Throughout this litigation, the District has continually defended not only the constitutionality of that prohibition, but also its unfettered authority to restrict the content of the cheerleaders' banners—including the apparent authority to do so based solely on their religious content. In fact, while the District has indicated it does not have any current "intent" or "plan" to reinstate that prohibition, the District has never expressed the position that it could not, and unconditionally would not, reinstate it.

Id. at 418–19. The court explained that "[t]he District's stance is a significant factor in the mootness analysis, and one which prevents its mootness argument from carrying much weight." *Id.* at 419.

Here, although appellants have "continually defended" their construction of the governing documents in this litigation, they have also shown more than an "intent" or "plan" to cease the disputed assessments—the fees relating to assets the WBPOA does not own—by selling the assets in question to the WBPOA in addition to ceasing the assessments. Consequently, construing the governing documents to permit or prohibit fees for assets the WBPOA does not own does not resolve any live controversy between the parties.

The parties' controversy about "future assessment" of the disputed fees—addressed in the trial court's award of injunctive relief—is also moot. Although as

appellees point out, when seeking an injunction to enforce a restrictive covenant, the movant is not required to show proof of an irreparable injury, the movant must show "that the defendant intends to do an act that would breach the covenant." *Marcus v. Whispering Springs Homeowners Ass'n, Inc.*, 153 S.W.3d 702, 707 (Tex. App.—Dallas 2005, no pet.). Where appellants not only have ceased the disputed assessments but also have sold the property giving rise to appellees' complaint, the requested declarations cannot have any practical effect. *See Reule*, 411 S.W.3d at 32 (case is moot where judgment cannot have practical effect on existing controversy).

Appellees sought only declaratory and injunctive relief in their summary judgment motion, not damages resulting from appellants' past actions. They requested only a construction of the governing documents. They argue this is a bellwether case that will determine the rights of all White Bluff homeowners who were charged the challenged fees and assessments. But when the challenged conduct has ceased and cannot "reasonably be expected to recur," construction of the documents does not provide specific relief or affect the parties' legal relations. *See Matthews*, 484 S.W.3d at 418; *Smith County*, 521 S.W.3d at 453. Further, as to the five appellees who have relinquished their ownership interest in their White Bluff property, construction of the documents to permit or proscribe future charges can

have no effect because their legal relations with appellants have already ceased.[4] *See Matthews*, 484 S.W.3d at 418; *Smith County*, 521 S.W.3d at 453.

The trial court's award to appellees of disgorgement of assessments from all of the appellants except the WBPOA does not alter our conclusion that the case is moot. Equitable disgorgement is a remedy for breach of trust in a fiduciary relationship. *See Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 729 (Tex. 2016). The supreme court has noted that "we have not expressly limited the remedy to fiduciary relationships nor foreclosed equitable relief for breach of trust in other types of confidential relationships." *Id.* But in the bellwether motion at issue, requesting only declarations of the meaning of contractual provisions, there were no requests to declare that fiduciary or confidential relationships existed between appellees and any of the appellants from whom disgorgement was ordered. In their motion for summary judgment, appellees argued only that "[i]f Defendants had no authority to use the maintenance assessments as they did, there can be no question here that the Defendants were not entitled to the stipulated fees collected." They do not cite any authority for the proposition that the remedy of equitable disgorgement may be applied where no fiduciary or confidential relationship has been proved. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 875, 881–82 (Tex. 2010) (purpose of disgorgement remedy is to protect relationships of trust). And although

[4] We express no opinion on appellants' liability to these appellees for past damages because that issue is not before us in this appeal.

an award of attorney's fees may preclude a case from becoming moot, *see, e.g., State ex rel. Best v. Harper*, 562 S.W.3d 1, 7 (Tex. 2018) (claim for attorney's fees may "breathe life" into otherwise moot case), none were sought by or awarded to appellees here.[5]

We have concluded that the specific controversy that was the subject of the trial court's judgment was mooted by the appellants' sale of the assets in question in June 2018. Consequently, we must vacate the trial court's judgment as well as dismiss this appeal. *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010, no pet.) ("If a case is moot, the appellate court is required to vacate any judgment or order in the trial court and dismiss the case.").

Given our conclusion that the case is moot, we pretermit discussion of appellants' issues challenging the merits of the trial court's summary judgment order and final judgment of December 18, 2018.

CONCLUSION

We vacate the trial court's judgment and dismiss the appeal.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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[5] In the May 6, 2014 "Order of Severance and Abatement" creating this bellwether case, the district court explicitly declined to sever plaintiffs' claims for attorney's fees, finding that the disposition of plaintiffs' non-severed claims could warrant additional fee awards. The court found it would "promote justice and avoid prejudice" for the court "to resolve all potential attorney's fees issues at one time." Accordingly, appellees' motion for summary judgment did not include a request for attorney's fees.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DOUBLE DIAMOND-DELAWARE, INC., DOUBLE DIAMOND, INC., WHITE BLUFF CLUB CORP., UNITED EQUITABLE MORTGAGE CO., NATIONAL RESORT MANAGEMENT CO., R. MICHAEL WARD, FRED CURRAN, AND WHITE BLUFF PROPERTY OWNERS ASSOCIATION, Appellants

No. 05-18-01063-CV V.

JEANETTE ALFONSO, EUGENIO CORPUS, FE HUEVOS, ELEZAR NUIQUE, EDITHA PEPITO, REYNALDO PEPITO, SIMONETTE PEPITO, JULITO PEPITO, CHERRY SOMOSOT, AND NELIA VINCENTE, Appellees

On Appeal from the 191st Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-16-16333. Opinion delivered by Justice Osborne. Justices Schenck and Reichek participating.

In accordance with this Court's opinion of this date, we **VACATE** the trial court's December 18, 2018 judgment and **DISMISS** the appeal.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered July 27, 2020