ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

RNYC CORP. d/b/a REDNECK YACHT CLUB, an Oklahoma Corporation; STATMAX LLC d/b/a THE FRIENDLY TAVERN, an Oklahoma Limited Liability Company; DOUG'S WATERIN' HOLE, LLC d/b/a DOUG'S WATERIN' HOLE, an Oklahoma Limited Liability Company; DAVIS MANAGEMENT, LLC d/b/a GOLD SPUR BAR, an Oklahoma Limited Liability Company; PJ'S PUB & GRILL LLC d/b/a PJ'S PUB & GRILL, an Oklahoma Limited Liability Company; and VENOM 64, INC. d/b/a WESTERN NIGHTS, an Oklahoma Corporation,

Plaintiffs/Appellants,

vs.

KEVIN STITT, in his official capacity as Governor of the State of Oklahoma; and ALCOHOLIC BEVERAGE LAWS ENFORCEMENT COMMISSION,

Defendants/Appellees.

Case No. 119,805

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN STALLINGS, TRIAL JUDGE

AFFIRMED

Frank A. Urbanic
THE URBANIC LAW FIRM, PLLC
Oklahoma City, Oklahoma For Plaintiffs/Appellants

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Plaintiffs RNYC Corp. d/b/a Redneck Yacht Club, Statmax LLC d/b/a The Friendly Tavern, Doug's Waterin' Hole, LLC d/b/a Doug's Waterin' Hole, Davis Management, LLC d/b/a Gold Spur Bar, PJ's Pub & Grill LLC d/b/a PJ's Pub & Grill, and Venom 64, Inc. d/b/a Western Nights appeal from a trial court order dismissing this case without prejudice on the basis of mootness. We consider this appeal without appellate briefing pursuant to Supreme Court Rule 1.36, 12 O.S. Supp. 2020, ch. 15, app. 1. After review, we affirm the trial court's decision.[1]

FACTS AND PROCEDURAL BACKGROUND

In response to the COVID-19 pandemic, Governor Kevin Stitt issued several executive orders, two of which are at issue here: the November 16, 2020 and December 14, 2020 executive orders. In particular, the provision in question involves the prohibition against selling food or beverages for on-premises consumption after 11:00 p.m. The November 2020 Executive Order specifically states:

> 26. Effective November 19, 2020, food or beverages of any kind shall not be sold, dispensed, or served for on-premises consumption by any license holder authorized

[1] Plaintiffs' motion for leave to submit appellate briefs is denied.

> to make such sales or services after 11:00 P.M. CST daily. The sale and service of food and non-alcoholic beverages for on-premises consumption may resume at 5:00 A.M. CST daily. The sale and service of alcoholic beverages for on-premises consumption may resume at 8:00 A.M. CST daily.

The December 2020 Executive Order contains an identical provision.

Plaintiffs filed this action against Governor Stitt and the Alcoholic Beverage Laws Enforcement Commission challenging this requirement and requesting injunctive and declaratory relief. Plaintiffs complain that neither the Governor nor the ABLE Commission has the authority to enforce the orders, and they note the absence of any punishment delineated in the Executive Orders for violations of the Order. Plaintiffs seek a declaration that the orders applying to restaurants, bars, and nightclubs are only recommendations and seek a temporary restraining order prefatory to a temporary and permanent injunction prohibiting the enforcement of the Orders.

In their amended petition, Plaintiffs allege procedural due process violations because the "authority to issue and enforce the Orders is unclear, the punishment for violating the Orders is unknown, and the Orders are void for vagueness." They state that being able to sell alcohol pursuant to a liquor license issued by ABLE "is a property right that must be afforded due process." Plaintiffs also seek a declaration that the Orders violate substantive due process because they "have a protected liberty interest in the right to live without arbitrary governmental

interference with their liberty and property interests" and seek an injunction against any further violations of their rights.

Plaintiffs next allege Defendants have violated the takings clause of the Oklahoma Constitution because they seized "Plaintiffs' real and personal property by forcing material limitations on their businesses" without adequate and just compensation. Plaintiffs also assert violations of the separation of powers provision and the Commander-in-Chief of the Militia provision of the Oklahoma Constitution. Their last claim is Defendants' violation of the Oklahoma Administrative Procedures Act.

In their prayer for relief, Plaintiffs asked the trial court to (1) hold that enforcement of the Orders violates the Oklahoma Constitution's due process clause, (2) determine the Orders are "unenforceable recommendations," (3) determine that the citations issued are null and void, and (4) enjoin Defendants' enforcement of the Orders. In conjunction with the filing of the original petition, Plaintiffs filed a motion for temporary restraining order and/or temporary injunction with brief in support to stop the enforcement of these two Executive Orders.

On December 18, 2020, the trial court granted Plaintiffs a temporary order restraining enforcement of the November and December 2020 Executive Orders.

After an evidentiary hearing, the trial court issued a second order dated January 12, 2021, continuing the TRO until a review in July 2021.

On March 25, 2021, Defendants filed a suggestion of mootness because the December 2020 Executive Order had expired on or about January 13, 2021, and the Governor had not extended the "11 p.m. rule." Defendants argued that Plaintiffs' case is now moot because "there remains no live controversy between the parties that could result in meaningful relief." Defendants say that without a live controversy, the trial court lacks jurisdiction to consider the claims and because no exceptions to the mootness doctrine apply, the trial court should dismiss the case.

In refuting Defendants' arguments for dismissal, Plaintiffs responded that Defendants had failed to meet the high burden required for a motion to dismiss and dismissal was not appropriate because both exceptions to the mootness doctrine applied.

At the conclusion of the hearing on the motion to dismiss, the trial court stated that "with the lifting of the state of emergency in the [S]tate of Oklahoma [] there's no longer a live case of [*sic*] controversy. I find this case is moot and I'm dismissing it." In its order memorializing its ruling, the trial court dismissed the case without prejudice finding that "due to the withdrawal of the state of emergency the case is moot."

Plaintiffs appeal.[2]

STANDARD OF REVIEW

Citing 12 O.S. § 2012(F)(3), Defendants urged the trial court to dismiss the case for lack of subject matter jurisdiction. This provision states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." 12 O.S.2011 § 2012(F)(3).

"The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo." *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 12, 258 P.3d 516. The propriety of a dismissal for lack of subject matter jurisdiction is a question of law requiring *de novo* review. *Southon v. Oklahoma Tire Recyclers, LLC*, 2019 OK 37, ¶ 4, 443 P.3d 566.

ANALYSIS

Plaintiffs assert error in dismissing this case pursuant to the mootness doctrine and in failing to apply the exceptions to the mootness doctrine.

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[2] Defendants/Appellees have not entered an appearance in this appeal or responded to the petition in error. As stated by the Supreme Court in its order issued on August 23, 2021, "Appellees may file a response, and any Supplement to Record on Accelerated Appeal in compliance with Rule 1.36 (d) and (e), not later than 20 days after the date of the filing of the certified Record on Accelerated Appeal." This case is considered on the filings to date as no response was filed within the time specified pursuant to Oklahoma Supreme Court Rule 1.36(e), 12 O.S. Supp. 2020, ch. 15, app. 1. "Failure to respond does not result in automatic reversal." *Allen v. Castillejo*, 2019 OK CIV APP 51, n. 1, 449 P.3d 1287. The appellant shoulders the burden to produce applicable law and a sufficient record to demonstrate error requiring reversal. *Been v. Been*, 2007 OK CIV APP 31, ¶ 11, 158 P.3d 491 (citing *Pracht v. Oklahoma State Bank*, 1979 OK 43, ¶ 5, 592 P.2d 976).

"[M]ootness exists when circumstances occur such that the court is unable to grant effective relief and any opinion in the controversy would possess characteristics of an advisory or hypothetical opinion." *Beach v. Oklahoma Dep't of Pub. Safety*, 2017 OK 40, ¶ 16, 398 P.3d 1. "The mootness doctrine applies to both original jurisdiction and appellate proceedings." *Id.* The appellate court "is the final arbiter of whether the mootness doctrine applies." *Id.* As stated in *State ex rel. Oklahoma Firefighters Pension and Retirement System v. City of Spencer*, 2009 OK 73, ¶ 4, 237 P.3d 125:

> Mootness is a state or condition which prevents the appellate court from rendering relief. . . . A viable controversy must continue at all stages of review—both on appeal and certiorari. It is a long-established rule that this court will not consume its time by deciding "abstract propositions of law" or moot issues. The court may not reach these questions.

(Footnotes omitted.)

"A case is moot when the issue sought to be resolved is no longer part of a lively 'case or controversy' between antagonistic demands." *Id.* at n. 13. Generally, the expiration of an order "renders the controversy moot, and therefore, nonjusticiable, unless it comes within an exception to the mootness doctrine." *Marquette v. Marquette*, 1984 OK CIV APP 25, ¶ 4, 686 P.2d 990 (superseded by statute on other grounds as recognized by *O'Brien v. Berry*, 2016 OK CIV APP 28, ¶ 10, 370 P.3d 836). In *South Wind Women's Center LLC v. Stitt*, 823 Fed. App'x.

677 (10th Cir. 2020), the appellate court dismissed the appeal as moot because the relevant portions at issue in the executive order had expired. "We conclude that deciding the merits of this appeal now would have no real-world effect because Oklahoma no longer seeks to do what the injunction prohibits." *Id.* at 680. "Because the appeal is moot, we lack jurisdiction over the merits and must dismiss." *Id.* "Cases typically become moot once the challenged law expires or is repealed." *Snider v. Cain*, 2020 WL 6262192, at *2 (N.D. Tex. 2020). "Put simply, a law's automatic expiration moots the case." *Id.*

Similarly, in a case involving COVID-19-related restrictions, the Fifth Circuit held that "a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed." *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020). "Once the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do." *Id.*

We must determine the justiciability of this appeal and the parties' antithetical views regarding its mootness. The Governor's Executive Orders began in November and December 2020 and each expired after 30 days. Thus the December 14, 2020 order expired on January 13, 2021, the day after the TRO was extended. After its expiration, the Governor's next three executive orders did not

contain requirements relating to selling alcoholic beverages after 11:00 p.m.[3] And on May 4, 2021, Executive Order 2021-11 withdrew and rescinded Second Amended Executive Order 2021-7, in effect determining that a state of emergency no longer existed concerning COVID-19 threatening "the people of this State and the public's peace, health, and safety." *See* Second Amended Executive Order 2021-07 filed April 11, 2021.

Plaintiffs challenged the 11 p.m. rule of the Executive Orders seeking to enjoin their enforcement, but this provision expired the day after the TRO was extended, and subsequent executive orders did not encompass or re-instate this rule. Although the Executive Order expired after the trial court extended the TRO, Plaintiffs argue their issues are not moot and even if they were, both exceptions to the mootness doctrine apply.

We conclude that because the December Executive Order expired by its own terms and the Governor took no further action to extend the 11 p.m. rule, there is no longer a live controversy. The trial court properly determined it no longer had jurisdiction and dismissed the action.

[3] *See* Ninth Amended Executive Order 2020-20 filed January 13, 2021; Executive Order 2021-7 filed February 12, 2021; and First Amended Executive Order 2021-7 filed March 12, 2021. These Executive Orders can be found at https://sos.ok.gov/gov/execorders.aspx.

A. Likelihood-of-Reoccurrence Exception

Plaintiffs assert that even if their claims are moot, the trial court should have applied the two exceptions to the mootness doctrine.

Oklahoma law "recognizes two exceptions to the mootness doctrine: (1) when the appeal presents a question of broad public interest and (2) when the challenged event is 'capable of repetition, yet evading review.'" *Spencer*, 2009 OK 73, ¶ 4; *see also In re I.T.S.*, 2021 OK 38, ¶ 26, 490 P.3d 127. "However, application of exceptions to the mootness doctrine depend[s] on the facts presented and policy considerations." *Beach*, 2017 OK 40, ¶ 17. We "will only apply those exceptions when the practical considerations indicate that doing so would avoid confusion, not prolong it." *Id.*

"A two-prong test delineates when the second exception—capable of repetition yet evading review—is applicable." *Spencer*, 2009 OK 73, n. 18. "A case is not mooted when '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349, 46 L. Ed. 2d 350 (1975)). The second "reasonable expectation" prong of this test requires a "'demonstrated probability' that the same controversy will recur dealing

with the same complaining party." *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1184, 71 L. Ed. 2d 353 (1982)).

In a recent case, the Fifth Circuit addressed the question of whether the plaintiffs had established one of the mootness exceptions—"capable of repetition, yet evading review," and the Court determined they had not because there was no indication the Governor of Louisiana would reimpose another COVID-19 restriction:

> Even if the first requirement (duration) is satisfied for the stay-at-home orders, the plaintiffs fail to establish that the Governor might reimpose another gathering restriction on places of worship. The trend in Louisiana has been to reopen the state, not to close it down. To be sure, no one knows what the future of COVID-19 holds. But it is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one.

Spell v. Edwards, 962 F.3d 175, 180 (5th Cir. 2020). In a similar case, a federal district court in Massachusetts held: "Although it remains possible that Massachusetts will experience a resurgence of rapid COVID-19 cases, it cannot be said that there is a 'demonstrated probability' that one will occur and, if one does occur, that the Governor will execute the same orders." *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426, 431 (D. Mass. 2020). A Kentucky federal district court also found this exception inapplicable to a mooted claim challenging an expired COVID-19 travel order restriction, in part because it seemed "unlikely that the [t]ravel [o]rders [would] be reissued." *Cameron v. Beshear*, 2020 WL 2573463, at

*2 (E.D. Ky. 2020). And the Western District of Oklahoma determined that "[a]ny assertions by [plaintiff] that he might face these same restrictions in the future are too speculative or hypothetical, which is insufficient to support the 'narrow' application of this exception, which is reserved for 'exceptional situations.'" *Wright v. Ziriax*, 499 F. Supp. 3d 1080, 1089 (W.D. Okla. 2020).

Plaintiffs have not shown a reasonable expectation that the 11 p.m. rule will reoccur, particularly in light of the expanding scientific understanding of COVID-19, its treatment, testing, and vaccine effectiveness. This militates against the likelihood of the controversy's recurrence as to Plaintiffs. The self-executing "sunset" provisions of these COVID-19 restrictions do not raise evasion concerns under mootness. We decline to speculate to the contrary.

B. Public Interest Exception

The second exception to the mootness doctrine is the public interest exception applicable when an appeal "presents a question of broad public interest." *Spencer*, 2009 OK 73, ¶ 4. According to Plaintiffs, "the question of whether the Governor can use the OEMA[4] to shut down businesses at the snap of a finger—which touches every aspect of the Oklahoma economy—[constitutes] a valid public interest exception to the mootness doctrine." In *Spencer*, for example, the

[4] This refers to the Oklahoma Emergency Management Act found at 63 O.S.2011 & Supp. 2020 §§ 683.1-683.24.

Supreme Court determined that "dealing with the enforcement or violation of a statute—clearly presents an important question of public interest." *Id.* ¶ 5. It also held that "[a]ll aspects of the firefighter's pension and his participation in the retirement system, including eligibility for participation in the system, are of substantial interest to the state." *Id.*

But not every government agency decision affects a vital public interest. *Westinghouse Elec. Corp. v. Grand River Dam Auth.*, 1986 OK 20, ¶ 21, 720 P.2d 713 (holding although violations of statutes can affect public interest, not every "violation is sufficient in magnitude to preserve the controversy for review."). And, "[w]e will only apply those exceptions when the practical considerations indicate that doing so would avoid, rather than prolong, confusion." *In re Guardianship of Doornbos*, 2006 OK 94, ¶ 4, 151 P.3d 126. In their amended petition, Plaintiffs define their legal controversy as the issuance and enforcement of the 11 p.m. rule. Because the 11 p.m. provision in the Executive Orders has expired, is "off the books" and unlikely to reoccur, it does not invoke a question of broad public interest calling for an urgent solution.

CONCLUSION

The trial court's dismissal without prejudice is affirmed.

AFFIRMED.

RAPP, J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

As I believe this case satisfies Oklahoma's public-interest exception to the mootness doctrine, I must respectfully dissent. Although the appellees would characterize the relevant interests narrowly—noting that "[r]evenue from alcohol sales is important only to local bars"—the relevant question is whether the governor had any basis in law for the challenged orders. The public has a great interest in a resolution to this question, regardless of whether the answer is "yes" or "no." Application of the exception, founded solely in state law,[1] requires no more. *See, e.g., State ex rel. Oklahoma Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶ 5, 237 P.3d 125, 129 (applying the exception because "dealing with the enforcement or violation of a statute . . . clearly presents an important question of public interest").

Nor would resolution violate any prohibition against deciding abstract or hypothetical questions. Both the governor's orders and his claimed constitutional and statutory bases for those orders were before the court below and appear to

[1] The appellees rely heavily on federal cases, but they have no relevance here. At least forty-three states have recognized some form of the public-interest exception to mootness. Lauren Waite, *The Public Interest Exception to Mootness: A Moot Point in Texas?*, 41 Tex. Tech L. Rev. 681, 690 (2009). Federal courts, however, have never recognized any such exception, *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 715 (6th Cir. 2011), nor could they, given the limitations of the federal constitution. *See* U.S. Const. art. III, § 2, cl. 1.

present a pure question of law: does the governor have the claimed authority or not?

The question of whether the orders were lawfully derived is not hypothetical and is a matter of great public interest. Accordingly, I would reverse the order dismissing the case as moot and remand for further proceedings.

April 6, 2022