

DISMISS; and Opinion Filed January 18, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00408-CV

JEFFORY BLACKARD, Appellant

V.

**ATTORNEY PRO TEM KENT A. SCHAFFER, IN HIS OFFICIAL CAPACITY;
ATTORNEY PRO TEM BRIAN W. WICE, IN HIS OFFICIAL CAPACITY;
ATTORNEY PRO TEM NICHOLE DEBORDE, IN HER OFFICIAL CAPACITY;
COLLIN COUNTY JUDGE KEITH SELF, IN HIS OFFICIAL CAPACITY; COLLIN
COUNTY COMMISSIONER SUSAN FLETCHER, IN HER OFFICIAL CAPACITY;
COLLIN COUNTY COMMISSIONER CHERYL WILLIAMS, IN HER OFFICIAL
CAPACITY; COLLIN COUNTY COMMISSIONER CHRIS HILL, IN HIS OFFICIAL
CAPACITY; COLLIN COUNTY COMMISSIONER DUNCAN WEBB, IN HIS
OFFICIAL CAPACITY; AND, COLLIN COUNTY AUDITOR JEFF MAY, IN HIS
OFFICIAL CAPACITY, Appellees**

**On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-05246-2015**

MEMORANDUM OPINION

**Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Fillmore**

Appellant Jeffory Blackard appeals the trial court's order granting pleas to the jurisdiction of appellees Kent A. Schaffer, Brian W. Wice, and Nichole DeBorde, in their official capacities as Attorneys Pro Tem (collectively "Attorneys Pro Tem"); Collin County Judge Keith Self, in his official capacity as presiding officer of the Collin County Commissioners Court, and Collin County Commissioners Susan Fletcher, Cheryl Williams, Chris Hill, and Duncan Webb, in their official capacities (collectively "the Commissioners Court"); and Collin County Auditor,

Jeff May, in his official capacity (the Auditor). In three issues, Blackard contends: (1) the trial court erred in concluding his taxpayer claims are not justiciable because he has alleged Collin County is paying unlawful compensation to the court-appointed Attorneys Pro Tem, he is a taxpayer in the county, and the Attorneys Pro Tem continue to provide services for which they will seek interim compensation at the same unlawful rate; (2) the trial court erred in concluding it lacks jurisdiction over his County Purchasing Act claim because he has alleged the existence of a contract, he has alleged the contract was not procured in accordance with the County Purchasing Act, and the County Purchasing Act authorizes a civil lawsuit for declaratory and injunctive relief; and (3) he is not estopped from asserting standing in this proceeding based on this Court's opinion in *In re Jeffery Blackard*, Case No. 05-16-00478-CV, 2016 WL 1756786 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (mem. op.).

Because we determine Blackard's taxpayer claims are moot and not ripe, we dismiss this cause for lack of subject matter jurisdiction.

Background

The Collin County Criminal District Attorney recused his office from all matters involving the *State of Texas v. Warren Kenneth Paxton, Jr.*, Case Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015, 416th Judicial District Court, Collin County, Texas (the *Paxton* cases). In his capacity as the Local Administrative Judge of Collin County, Texas, Judge Scott J. Becker appointed Schaffer, Wice, and DeBorde to serve as Collin County criminal district attorneys pro tem in the *Paxton* cases. *See* TEX. CODE CRIM. PROC. ANN. art. 2.07(a) (West 2005) (whenever attorney for state is disqualified to act in case or proceeding, judge of court may appoint competent attorney to perform duties of office during disqualification of attorney for state); *Coleman v. State*, 246 S.W.3d 76, 82 (Tex. Crim. App. 2008) (attorney pro tem appointed to replace district attorney stands in place of regular attorney for state and

performs all duties state attorney would have performed under terms of appointment). According to our record, Judge Becker reached an oral agreement with the Attorneys Pro Tem that they would receive a fee of \$300 per hour for their professional services rendered as attorneys pro tem in the *Paxton* cases.

On December 11, 2015, the Attorneys Pro Tem submitted interim requests for compensation in the *Paxton* cases for professional services rendered and expenses incurred from April to early December 2015. The requested compensation totaled \$254,908.85, which included \$242,024.00 of attorneys' fees based on a rate of \$300.00 per hour. Blackard, an individual who pays property taxes in Collin County, filed an Original Petition and Application for Temporary Restraining Order in the civil matter underlying this appeal (the taxpayer civil suit) on December 30, 2015. In the taxpayer civil suit, Blackard sought to temporarily and permanently enjoin payment of fees of the Attorneys Pro Tem prior to disposition of the *Paxton* cases and a declaration that payment to the Attorneys Pro Tem must be made according to the "Fee Schedule for Indigent Defense Court Appointed Attorneys" (the Attorney Fee Schedule) contained in the "Collin [County] District Court Plan, Local Rules to Implement the Texas Fair Defense Act, 2015–16 Plan Standards and Procedures Related to Appointment of Counsel for Indigent Defendants in Felony Cases in Collin County" (the Local Rules). With regard to procedures for attorney compensation, the Local Rules provide:

4.01 Attorney Fee Schedule

A. The District Judges adopt, pursuant to Article 26.05 Tex. Code of Crim. Proc.,¹ a fee schedule for appointed attorneys, attached hereto as "Fee Schedule for Appointed Attorneys."

¹ Article 26.05 of the code of criminal procedure provides in part:

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

B. Payment can vary from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel.

4.02 Payment Request Form

In cases disposed of by a guilty plea or similar pre-trial disposition, Counsel shall submit their requests for payment on the auditor's approved Payment Request Form on the date of the disposition. If the case is disposed of by trial, the Payment Request Form shall be submitted within seven days of the date the trial is concluded. Payment requests not submitted within thirty days of the date of disposition shall not be approved by the Court, absent extenuating circumstances.

The Attorney Fee Schedule provides, in part, that, “[i]n all felony cases, except as hereafter provided, counsel shall be paid according to the . . . fee schedule, without exception,” at the hourly rate of \$150.00 for death penalty pleas, the hourly rate of \$100.00 for capital non-death penalty pleas, a fixed fee of \$1,000.00 for first degree felony pleas, a fixed fee of \$750.00 for second degree felony pleas, a fixed fee of \$500.00 for third degree and state fail felony pleas, a fixed fee of \$250.00 for pleas in other cases, a fixed fee of \$1,000.00 for pre-trial preparation, and a fixed fee of \$500.00 for each one-half day of trial. The Attorney Fee Schedule also provides for a discretionary adjustment not to exceed \$1,000.00 per case.

Judge Benjamin N. Smith, presiding judge of the 380th Judicial District Court of Collin County, recused himself from presiding over the taxpayer civil suit. Judge Mark Greenberg, the presiding judge of County Court at Law No. 5, Dallas County, Texas, was appointed by the

(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. . . .

TEX. CODE CRIM. PROC. ANN. art. 26.05(b) & (c) (West Supp. 2016). Article 2.07(c) of the code of criminal procedure provides that an appointed attorney pro tem “shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person.” *Id.* art. 2.07(c) (West 2005). The Court of Criminal Appeals has held that article 2.07(c) “incorporat[es] the provisions of article 26.05 that govern the amount and manner of compensation.” *Busby v. State*, 984 S.W.2d 627, 630 (Tex. Crim. App. 1998).

presiding judge of the First Administrative Judicial Region of Texas to preside over the taxpayer suit.

On December 30, 2015, Judge George Gallagher, presiding judge of the 369th Judicial District Court of Tarrant County, Texas, who had been appointed by the presiding judge of the First Administrative Judicial Region of Texas to preside over the *Paxton* cases, conducted a telephonic hearing to consider the interim requests for compensation filed by the Attorneys Pro Tem. On December 31, 2015, Blackard's counsel sent correspondence to Judge Gallagher requesting he forego or hold in abeyance for sixty days any order concerning the interim requests for compensation filed by the Attorneys Pro Tem.

On January 6, 2016, Judge Gallagher signed an order in the *Paxton* cases approving payment of the interim requests for compensation submitted by the Attorneys Pro Tem. The "Order on Payment of Attorney's Fees to Attorneys Pro Tem" (the order for payment of interim attorneys' fees) provides in part:

The Court finds that Article 2.07(c) of the Code of Criminal Procedure mandates that Attorney Pro Tem(s) shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person. The Court further finds that Section 4.01(b) of the Local Rules to Implement the Fair Defense Act of Collin County, Texas, mandates that payment can vary from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel.

It is, therefore, ORDERED, ADJUDGED AND DECREED that payment of attorneys['] fees to Attorneys Pro Tem in these causes shall deviate from the fee schedule and each attorney shall be paid the amount in the hourly rate ordered to be paid in the Appointed Counsel Request for Compensation as submitted by the respective Attorney Pro Tem and as approved by the Court.

It is ORDERED, ADJUDGED AND DECREED that Jeff May, Auditor of Collin County, Texas, shall present these claims for payment of services to the Commissioner's Court of Collin County, Texas in accordance with all applicable local rules of Collin County, Texas, and pursuant to the mandates set out in Government Code, Chapter 2251. It is further ORDERED, [AD]JUDGED AND

DECREED that these claims shall be paid within the time limits as required by Government Code, Chapter 2251.²

This Order shall be enforceable by all sanctions available to the Court for noncompliance with the terms of this Order by any person or entity.

On January 6, 2016, the Attorneys Pro Tem presented Judge Gallagher's order for payment of interim attorneys' fees to the Auditor who, in turn, submitted it to the Commissioners Court for payment. Blackard filed a supplemental application for temporary restraining order in the taxpayer civil suit on January 7, 2016. On January 8, 2016, Blackard's counsel wrote the Commissioners Court, requesting that, with regard to the payment of interim fees of the Attorneys Pro Tem, the Commissioners Court make use of the time and procedures for payment and payment challenges allowed by Chapter 2251 of the government code. Following a January 7, 2016 hearing, Judge Greenberg signed a January 8, 2016 order denying Blackard's application and supplemental application for temporary restraining order and forwarded correspondence to counsel advising that the denial of the application and supplemental application for temporary restraining order was without prejudice to Blackard requesting a hearing "on a temporary injunction once all parties ha[d] answered" the suit. At their January 11, 2016 meeting, the Commissioners Court considered payment of the interim fees of the Attorneys Pro Tem as ordered by Judge Gallagher. Blackard appeared at the meeting of the Commissioners Court and lodged his complaint regarding payment of the interim attorneys' fees. By a majority vote of three-to-two, the Commissioners Court decided to pay the interim fees of the Attorneys Pro Tem as ordered by Judge Gallagher.

² The Texas Prompt Payment Act "applies solely to contracts between a vendor and a governmental entity or a vendor 'who supplies goods or a service to a governmental entity [including a county] or another person directed by the entity' and its subcontractor." *Cty. of Galveston v. Triple B Servs., LLP*, 498 S.W.3d 176, 187 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (quoting TEX. GOV'T CODE ANN. § 2251.001(10) (West 2016)); see TEX. GOV'T CODE ANN. §§ 2251.001–.055 (West 2016). "The [Prompt Payment Act] provides that a government entity's payment is 'overdue on the 31st day after the later of' the date: (1) it 'receives the goods under the contract'; (2) 'performance of the service under the contract is completed'; or (3) it 'receives an invoice for the goods or service.'" *Triple B. Servs., LLP*, 498 S.W.3d at 187 (quoting TEX. GOV'T CODE ANN. § 2251.021(a)). Under section 2251.002(a), the presence of a "bona fide dispute" can suspend the deadline to make a timely payment under the Prompt Payment Act. See TEX. GOV'T CODE ANN. § 2251.021(a)(1); see also *Pelco Constr. Co. v. Chambers Cty.*, 495 S.W.3d 514, 527 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

On February 19, 2016, Blackard filed his Second Amended Original Petition, his live pleading in the taxpayer suit, wherein he seeks injunctive relief prohibiting the Attorneys Pro Tem from requesting and the Auditor and Commissioners Court from rendering payment of compensation for professional services in the *Paxton* cases in excess of the Attorney Fee Schedule and prior to disposition of the *Paxton* cases. Blackard also seeks declaratory relief in the form of findings that: (1) the hourly rate and amount of compensation of the Attorneys Pro Tem violate Local Rule 4.01 and section 26.05 of the code of criminal procedure “because compensation based on an hourly rate is inconsistent with the flat fee compensation permitted for a First Degree Felony case under the Attorney Fee Schedule”; (2) the hourly rate and amount of compensation of the Attorneys Pro Tem, pursuant to the oral agreement between Judge Becker and the Attorneys Pro Tem, violate the County Purchasing Act³ because the agreement was not the product of a “competitive selection process”; and (3) the “next sets of advance or interim payments of fees” of the Attorneys Pro Tem are not permitted by Local Rule 4.02 because the rule “only permits payment at the disposition of the case.” On February 26, 2016, Blackard filed a Motion for Temporary Injunction in the taxpayer civil suit seeking a temporary injunction foreclosing requests for compensation by the Attorneys Pro Tem and payment of compensation by the Commissioners Court prior to disposition of the *Paxton* cases or in an amount inconsistent with the Attorney Fee Schedule.

On March 4, 2016, appellees filed pleas to the jurisdiction in which they argued the trial court lacked subject matter jurisdiction because Blackard’s claims regarding the Attorneys Pro Tem interim requests for compensation are moot, since the Commissioners Court had voted to pay the interim invoices, and unripe as there are no outstanding Attorneys Pro Tem interim requests for compensation that are pending approval and payment. Appellees also asserted

³ See TEX. LOC. GOV’T CODE ANN. §§ 262.001–.037 (West 2016).

Blackard's taxpayer civil suit should be abated under the doctrine of dominant jurisdiction, Blackard was required to challenge Judge Gallagher's approval of interim requests for compensation submitted by the Attorneys Pro Tem by writ of mandamus, and Blackard's claim of violations of the County Purchasing Act failed as a matter of law.

Following a March 11, 2016 hearing, Judge Greenberg forwarded correspondence to the parties which provides that, because the trial court is without jurisdiction, it could not issue an advisory opinion on Blackard's request for a temporary injunction. On March 17, 2016, Judge Greenberg signed an order granting appellees' pleas to the jurisdiction and dismissing Blackard's taxpayer civil suit for want of jurisdiction, and Blackard filed this appeal of the trial court's order of dismissal.⁴

Subject Matter Jurisdiction

In his first issue, Blackard asserts the trial court erred in granting appellees' pleas to the jurisdiction because the Attorneys Pro Tem are being compensated based on an illegal hourly rate and in illegal interim payments and the Attorneys Pro Tem continue to provide legal representation in the *Paxton* cases for which they will seek illegal interim attorneys' fees at an illegal hourly rate. Appellees assert the trial court lacked subject matter jurisdiction over Blackard's claims in the taxpayer civil suit and this Court lacks subject matter jurisdiction over this appeal because Blackard's claims are moot and not ripe.

⁴ After this appeal was filed, Blackard filed an April 21, 2016 petition for writ of injunction and motion for temporary relief in this Court, requesting that this Court enjoin the Attorneys Pro Tem from submitting requests for compensation and the Commissioners Court from approving any payment of invoices for attorneys' fees during the pendency of this appeal of Judge Greenberg's order granting appellees' pleas to the jurisdiction. On April 22, 2016, Blackard filed petitions for writs of mandamus and prohibition and motions for temporary relief in this Court, requesting that this Court order Judge Gallagher to vacate his order for payment of interim attorneys' fees and prohibit Judge Gallagher from ordering the payment of any additional interim requests for compensation by the Attorneys Pro Tem that purportedly vary from the Attorney Fee Schedule. In April 29, 2016 opinions, we concluded that, based on the record, issuance of a writ of injunction was not necessary to preserve our jurisdiction to determine the issues raised in Blackard's appeal of Judge Greenberg's dismissal of the taxpayer civil suit, and we denied Blackard's petition for writ of injunction, *In re Jeffery Blackard*, No. 05-16-00470-CV, 2016 WL 1756843, at *1 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (mem. op.) (*In re Jeffery Blackard I*), and dismissed Blackard's petitions for writ of mandamus because he lacks standing to challenge Judge Gallagher's order in the *Paxton* cases to which he is not a party. *In re Jeffery Blackard*, Case No. 05-16-00478-CV, 2016 WL 1756786, at *1 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (*In re Jeffery Blackard II*). We specifically noted in *In re Jeffery Blackard II* that the question of whether Blackard possesses standing to challenge payment of compensation to the Attorneys Pro Tem in a civil suit was not before this Court in the original proceeding. *Id.* at *1 n.1.

“A party may challenge the trial court’s subject matter jurisdiction by filing a plea to the jurisdiction.” *City of Dallas v. Heard*, 252 S.W.3d 98, 102 (Tex. App.—Dallas 2008, pet. denied) (citing *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004)). Whether a court has subject matter jurisdiction is a legal question that is reviewed de novo. *Trulock v. City of Duncanville*, 277 S.W.3d 920, 923 (Tex. App.—Dallas 2009, no pet.); *see also Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149–50 (Tex. 2012) (standing, ripeness, and mootness are questions of law that are reviewed de novo).

Mootness and ripeness are threshold issues that implicate subject matter jurisdiction. *Gertner v. HQZ Partners, L.P.*, No. 05-15-00422-CV, 2016 WL 4436444, at *4 (Tex. App.—Dallas Aug. 22, 2016, pets. filed) (mem. op.); *City of Helotes v. Miller*, 243 S.W.3d 704, 708 (Tex. App.—San Antonio 2007, no pet.); *see also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) (ripeness is element of subject matter jurisdiction). An appellate court is prohibited from deciding a moot controversy, *Trulock*, 277 S.W.3d at 923, and “[a] court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe.” *Public Util. Comm’n v. Houston Lighting & Power Co.*, 748 S.W.2d 439, 442 (Tex. 1987). The foundation of the doctrines of mootness and ripeness lies in the prohibition against courts rendering advisory opinions and the consequent requirement that there exist a justiciable controversy. *See Gertner*, 2016 WL 4436444, at *4; *City of Helotes*, 243 S.W.3d at 708.

Mootness

Generally, a personal stake in the outcome of a controversy must exist at the beginning of litigation and continue throughout the lawsuit’s existence. *See S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 514–16 (1911); *see also U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 394, 398, 404 (1980). A case becomes moot if a controversy no longer exists or if the parties lack a legally cognizable interest in the outcome. *Allstate Ins. Co. v. Hallman*, 159

S.W.3d 640, 642 (Tex. 2005); *Gernter*, 2016 WL 4436444, at *4; *City of Helotes*, 243 S.W.3d at 708. An appeal generally is moot when the court’s action on the merits cannot affect the rights of the parties. *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (per curiam); *see also Trulock*, 277 S.W.3d at 924 (case on appeal is moot if there are no live controversies between parties and any decision rendered by appellate court would constitute advisory opinion). When a case becomes moot, the parties lose standing to maintain their claims. *City of McAllen v. McAllen Police Officers Union*, 221 S.W.3d 885, 895–96 (Tex. App.—Corpus Christi 2007, pet. denied) (citing *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)).

Taxpayers normally do not have a right to bring suit to contest government decision-making because “governments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official’s public acts under judicial review.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) (quoting *Osborne v Keith*, 142 Tex. 262, 177 S.W.2d 198, 200 (1944)). But in Texas law there is a long-standing exception to this general rule: certain categories of taxpayers have standing to enjoin the illegal expenditure of public funds without demonstrating a particularized injury. *Lara*, 52 S.W.3d at 179–80. Implicit in this exception are two requirements: (1) that the plaintiff is a taxpayer; and (2) that public funds are expended on an allegedly illegal activity. *Id.* at 179. The Texas Supreme Court has limited the applicability of this exception by narrowly defining the type of action a taxpayer may maintain. *Id.* Under this narrow exception, a taxpayer may maintain an action solely to challenge proposed illegal expenditures, but may not sue to recover funds previously expended or challenge expenditures that are merely “unwise or indiscreet.” *Id.* at 180; *see also Hoffman v. Davis*, 128 Tex. 503, 100 S.W.2d 94, 96 (1937) (when taxpayer brings action to restrain illegal expenditure by commissioners’ court of tax money, he sues for himself; but when money has already been spent, action for its recovery is for

county and cause of action belongs to it alone); *S.W. Prop. Tr. v. Dallas Cty. Flood Control Dist. No. 1*, 136 S.W.3d 1, 9 n.2 (Tex. App.—Dallas 2001, no pet.) (taxpayer may seek to enjoin unlawful expenditures *before* they are made; after unlawful expenditures made, public officer may file suit to recoup the funds) (citing *Hoffman*, 100 S.W.2d at 95–96).

In his response to appellees’ pleas to the jurisdiction, Blackard stated he “cannot, and do[es] not here, challenge” the interim requests for compensation submitted by the Attorneys Pro Tem to Judge Gallagher on December 11, 2015, for professional services rendered from April to early December 2015, and Blackard acknowledged the Commissioners Court had voted to pay these interim attorneys’ fees as approved by Judge Gallagher in his January 6, 2016 order. In his brief on appeal, Blackard states the appellees correctly assert that his challenges to the initial requests by the Attorneys Pro Tem for interim attorneys’ fees “are moot because those requests have since been paid.”

Assuming Blackard had standing to initially bring the taxpayer civil suit, his challenge to the December 11, 2015 interim requests for compensation of the Attorneys Pro Tem, as approved by Judge Gallagher and the Commissioners Court, seeks relief related to sums of money previously expended. *See Lara*, 52 S.W.3d at 180 (taxpayer may maintain action solely to challenge proposed illegal expenditures; taxpayer may not sue to recover funds previously expended); *see also Kordus v. City of Garland*, 561 S.W.2d 260, 262 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.) (taxpayer has standing to enjoin illegal expenditure of public funds but cannot seek recovery of public funds already expended). We conclude any complaint by Blackard regarding the interim requests for compensation of the Attorneys Pro Tem already approved for payment by the Commissioners Court is moot and there is no live controversy between Blackard and appellees regarding those interim requests for compensation.

There are two exceptions to the mootness doctrine that confer jurisdiction regardless of mootness: (1) the “capable of repetition, yet evading review” exception; and, (2) the collateral consequences exception. *Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990); *Trulock*, 277 S.W.3d at 924. Blackard contends “the capable of repetition, yet evading review” exception to the mootness doctrine applies to his claims in the taxpayer civil suit.⁵

The “capable of repetition, yet evading review” exception applies only in rare circumstances. *See Lara*, 52 S.W.3d at 184; *Trulock*, 277 S.W.3d at 924. It is limited to situations where the following circumstances are simultaneously present: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, or the party cannot obtain review before the issue becomes moot; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Lara*, 52 S.W.3d at 184; *Trulock*, 277 S.W.3d at 924. There must be a “reasonable expectation” or a “demonstrated probability” that the same controversy will recur involving the same complaining party. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Trulock*, 277 S.W.3d at 924. The mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test. *See Hunt*, 455 U.S. at 482; *Trulock*, 277 S.W.3d at 924–25. This exception to the mootness doctrine has only been used to challenge unconstitutional acts performed by the government. *See OXY U.S.A., Inc.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.—Dallas 2010, no pet.); *see In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.—El Paso 2012, orig. proceeding).

⁵ “The collateral consequences exception to the mootness doctrine is invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment.” *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006). “Such narrow circumstances exist when, as a result of the judgment’s entry, (1) concrete disadvantages or disabilities have in fact occurred, are imminently threatened to occur, or are imposed as a matter of law; and (2) the concrete disadvantages and disabilities will persist even after the judgment is vacated.” *Id.* Blackard does not assert this exception to the mootness doctrine applies to his claims in the taxpayer civil suit.

In response to appellees' pleas to the jurisdiction, Blackard argued there is a reasonable expectation he will be subjected to the same action again. Blackard posited that the Attorneys Pro Tem continue working on the *Paxton* cases pursuant to the oral agreement with Judge Becker at the hourly rate of \$300 per hour. Blackard cites to the stipulation of fact at the hearing on appellees' pleas to the jurisdiction by attorneys pro tem Wice and Schaffer that "they anticipate that at some point in time they will submit another invoice" for attorneys' fees for professional services rendered in the *Paxton* cases.

However, that stipulation of fact by two of the three Attorneys Pro Tem does not compel a conclusion that the issue evades review. Even assuming Blackard would be subjected to the same action again, consisting of a future interim request for compensation by the Attorneys Pro Tem, an order of Judge Gallagher approving the requested compensation for payment, a recommendation of payment by the Auditor, and authorization of payment by vote of the Commissioners Court, Blackard must establish such challenged actions by the Attorneys Pro Tem, Auditor, and Commissioners Court would be too short in duration to be reviewed by the judiciary before the issue became moot. *See Lara*, 52 S.W.3d at 184; *Trulock*, 277 S.W.3d at 924.

According to the Local Rules, the Attorneys Pro Tem must submit a Payment Request Form in order to receive compensation for professional services rendered. A Payment Request Form must be approved by Judge Gallagher as the presiding judge of the criminal district court. If approved, Judge Gallagher will issue an order requiring payment of the requested compensation. Upon presentment of the order, the Auditor certifies the payment obligation and the Commissioners Court then considers and votes on payment of compensation for the Attorneys Pro Tem in the course of its business. At the hearing of appellees' pleas to the jurisdiction, Blackard's counsel acknowledged that the Commissioners Court "ha[s] the space to

not pay [a request for payment] and have the question litigated.” See TEX. ATT’Y GEN. OP. No. H-499 (1975) (“If the County believes it can sustain its burden of showing here that the fees are unreasonable it can institute a declaratory judgment or decline to pay and be subject to a mandamus or other proceeding.”); see also TEX. ATT’Y GEN. OP. No. JM-803, at *2 (1987) (“In disputes about the amount of compensation due, the burden rests with a commissioners court resisting payment to show that a judicial determination of a ‘reasonable’ fee in a particular case is so arbitrary, unreasonable, and capricious as to amount to an abuse of discretion.”) (citing TEX. ATT’Y GEN. OP. No. H-499); see also *Comm’rs Court of Lubbock Cty. v. Martin*, 471 S.W.2d 100, 109 (Tex. App.—Amarillo 1971, writ ref’d n.r.e.) (commissioners court may challenge salaries of probation personnel ordered by district judge under an abuse of discretion standard).

Although Blackard argues he cannot obtain judicial review of the timing and amount of compensation for professional services rendered by the Attorneys Pro Tem before the matter becomes moot, the process and the record in this case belie that argument. Should an issue arise in the future regarding the legality of an expenditure for compensation of the Attorneys Pro Tem based on the timing or amount of the payment, there are a number of steps that must occur in the process: obtaining approval of the request by the presiding judge of the criminal district court; certification of payment if an order approving payment by the presiding judge is presented to the Auditor; and consideration of and voting on payment in the course of the business of the Commissioners Court. Here, during the period prior to the Commissioners Court vote to approve payment of the interim requests for compensation of the Attorneys Pro Tem, Blackard communicated with Judge Gallagher, instituted the taxpayer civil suit and filed a number of pleadings in that suit, communicated with the Commissioners Court, and appeared before the Commissioners Court.

To establish the “capable of repetition, yet evading review” exception to the mootness doctrine, Blackard must show the challenged action was too short in duration to be fully litigated prior to its cessation or expiration, or he cannot obtain review before the issue becomes moot. *See Lara*, 52 S.W.3d at 184; *Trulock*, 277 S.W.3d at 924, 928. Even assuming the issue in Blackard’s taxpayer civil suit is capable of repetition, we conclude the record does not establish that the issue would become moot before Blackard would have the opportunity to obtain judicial review. Accordingly, an exception to the doctrine of mootness does not apply here.

Ripeness

Blackard asserts the “threat of future payments is sufficiently certain” that the taxpayer civil suit is not premature and is ripe for resolution. Blackard contends the trial court erred “in finding that [his] claims are not justiciable such that its decision would merely be advisory.”

A case is not ripe if its resolution depends on contingent or hypothetical facts or upon events that have not yet come to pass. *Gertner*, 2016 WL 4436444, at *4; *City of Helotes*, 243 S.W.3d at 708. Ripeness focuses on when an action may be brought. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). Advisory opinions or adjudications based on contingent or hypothetical facts are properly precluded by dismissal of claims that are not ripe. *See id.* at 851–52. If a plaintiff’s claim is not ripe, the court should dismiss the suit for want of jurisdiction. *Id.* at 853; *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 440, 444 (Tex. 1998). The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes. *Mayhew*, 964 S.W.2d at 928.

According to Blackard’s live pleading, the Attorneys Pro Tem will continue to submit requests for compensation for their professional services in the *Paxton* cases pursuant to the oral agreement with Judge Becker. While attorneys pro tem Wice and Schaffer stipulated that “they

anticipate that at some point in time they will submit another invoice” for attorneys’ fees for legal work performed in the *Paxton* cases, there is no stipulation that “another invoice” for attorneys’ fees will be submitted requesting a fee of \$300 per hour or that “another invoice” will be submitted prior to disposition of the *Paxton* cases.

The record reveals no live controversy concerning a threatened request for payment of attorneys’ fees by the Attorneys Pro Tem allegedly illegal in its timing, hourly rate, or total amount. On this record, there is no pending order by Judge Gallagher awarding additional compensation to the Attorneys Pro Tem for professional services rendered in the *Paxton* cases, or a threatened payment of such compensation by the Commissioners Court. The timing of future requests for compensation by the Attorneys Pro Tem, the hourly rate that may be requested by the Attorneys Pro Tem for professional services rendered, the future amount Judge Gallagher would approve as reasonable compensation for the Attorneys Pro Tem, the action the Auditor would take in response to an order of Judge Gallagher approving a future request for compensation of the Attorneys Pro Tem, and the action the Commissioners Court would take with regard to approval and payment of compensation of the Attorneys Pro Tem ordered by Judge Gallagher are all purely hypothetical and speculative at this time. The scenarios set out in Blackard’s pleadings regarding future requests for compensation by the Attorneys Pro Tem in the *Paxton* cases have not occurred and are hypothetical. *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) (although claim need not be fully ripened at time suit is filed, facts must be sufficiently developed to determine that an injury has occurred or is likely to occur, rather than being contingent or remote).

Because Blackard has not demonstrated a live controversy between him and appellees, any decision rendered on the merits by this Court would be an advisory opinion. *See Perry v. Del Rio*, 66 S.W.3d 239, 249 (Tex. 2001) (ripeness doctrine prohibits suits involving “uncertain

or contingent future events that may not occur as anticipated, or indeed may not occur at all”; even in instances where claim might eventually ripen based on subsequent events, trial court must dismiss claim if, at time of adjudication, it is not ripe); *Gibson*, 22 S.W.3d at 852 (“A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass.”). Blackard’s taxpayer civil suit is not ripe for adjudication.

Conclusion

We conclude the trial court did not err by dismissing Blackard’s taxpayer civil suit for lack of jurisdiction. Because we conclude Blackard’s claims are moot and not ripe, we dismiss this case for lack of jurisdiction.

Motion to Dismiss Appeal Filed by Attorneys Pro Tem

On May 27, 2016, the Attorneys Pro Tem filed a motion to dismiss this appeal pursuant to the doctrine of collateral estoppel based on this Court’s decision in *In re Jeffery Blackard*, Case No. 05-16-00478-CV, 2016 WL 1756786, at *1 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding). Having concluded this Court lacks subject matter jurisdiction, we deny the motion to dismiss this appeal as moot.

Conclusion

We dismiss this case for lack of subject matter jurisdiction. We deny as moot the motion to dismiss this appeal filed by the Attorneys Pro Tem.

/Robert M. Fillmore/

ROBERT M. FILLMORE
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JEFFORY BLACKARD, Appellant

No. 05-16-00408-CV V.

ATTORNEY PRO TEM KENT A.
SCHAFER, IN HIS OFFICIAL
CAPACITY; ATTORNEY PRO TEM
BRIAN W. WICE, IN HIS OFFICIAL
CAPACITY; ATTORNEY PRO TEM
NICHOLE DEBORDE, IN HER OFFICIAL
CAPACITY; COLLIN COUNTY JUDGE
KEITH SELF, IN HIS OFFICIAL
CAPACITY; COLLIN COUNTY
COMMISSIONER SUSAN FLETCHER, IN
HER OFFICIAL CAPACITY; COLLIN
COUNTY COMMISSIONER CHERYL
WILLIAMS, IN HER OFFICIAL
CAPACITY; COLLIN COUNTY
COMMISSIONER CHRIS HILL, IN HIS
OFFICIAL CAPACITY; COLLIN
COUNTY COMMISSIONER DUNCAN
WEBB, IN HIS OFFICIAL CAPACITY;
AND, COLLIN COUNTY AUDITOR JEFF
MAY, IN HIS OFFICIAL CAPACITY,
Appellees

On Appeal from the 380th Judicial District
Court, Collin County, Texas,
Trial Court Cause No. 380-05246-2015.
Opinion delivered by Justice Fillmore,
Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, the cause is **DISMISSED** for lack of subject matter jurisdiction.

It is **ORDERED** that appellees Attorney Pro Tem Kent A. Schaffer, Attorney Pro Tem Brian W. Wice, Attorney Pro Tem Nichole DeBorde, Collin County Judge Keith Self, Collin

County Commissioner Susan Fletcher, Collin County Commissioner Cheryl Williams, Collin County Commissioner Chris Hill, Collin County Commissioner Duncan Webb, and Collin County Auditor Jeff May recover their costs of this appeal from appellant Jeffory Blackard.

Judgment entered this 18th day of January, 2017.