

NO. WR-86,920-02

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IN THE  
COURT OF CRIMINAL APPEALS

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IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, *Realtor*

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ON STATE'S PETITION FOR WRIT OF MANDAMUS  
AGAINST THE FIFTH COURT OF APPEALS

IN CAUSE NOS. 416-81913-2015; 416-82148-2015; 416-82149-2015  
OF COLLIN COUNTY, TEXAS

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**AMICUS CURIAE BRIEF IN SUPPORT OF RELATORS**

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The County Judges and Commissioners Association of Texas file this Amici Curiae Brief and would respectfully show the Court the following:

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## I. IDENTITY OF THE PARTIES

Pursuant to Tex. R. App. P. 38.1(a), Amicus Curiae certifies that the following is a complete list of the parties, counsel, real parties in interest, and trial judge presiding below:

**Relators:**

Brian W. Wice, Kent Schaffer, Nicole DeBorde

**Counsel for Relator:**

Collin County Criminal District Attorney Pro Tem Brian Wice

**Respondent:**

Court of Appeals Fifth District of Texas at Dallas

**Real Party in Interest:**

Collin County Commissioners Court

**Counsel for Real Party in Interest:**

Bryan Burg & Clyde Siebman

**Real Party in Interest-Defendant:**

Warren Kenneth Paxton, Jr.

**Counsel for Real Party in Interest-Defendant:**

Dan Cogdell, Bill Mateja, Philip Hilder

**Trial Judge:**

Honorable George Gallagher  
416<sup>th</sup> Judicial District Court  
Collin County, Texas

Honorable Robert Johnson  
177<sup>th</sup> Criminal District Court  
Harris County, Texas

## **II. INTEREST OF AMICUS CURIAE**

The County Judges and Commissioners Association of Texas is a non-profit corporation with county judges and county commissioners from Texas commissioners courts as members. The County Judges and Commissioners Association of Texas provides a variety of services to its members, including supporting the interest of Texas counties and county officials in important litigation with statewide implications.

The county judges and county commissioners of the State of Texas will be directly and negatively impacted if the opinion of the court below is reversed. In addition, the State of Texas and its people will be adversely impacted if the judges of the 254 counties of Texas are allowed to award unfettered attorney's fees outside of the framework established by the Texas Legislature. The County Judges and Commissioners Association of Texas seeks to avoid the negative impact that will result from the district court decision. Accordingly, the County Judges and Commissioners Association of Texas has paid all fees and expenses associated with the preparation of this brief.

## **III. ISSUE PRESENTED**

- 1.) Did the Court of Appeals err in its conclusion that the criminal district judges of Collin County exceeded their authority under Texas Code of Criminal Procedure article 26.05?

#### **IV. STATEMENT OF FACTS**

The Court of Appeals correctly stated the facts and procedural history of this case.

#### **V. SUMMARY OF THE ARGUMENT**

The Court of Appeals correctly interpreted Article 26.05 of the Texas Code of Criminal Procedure. This Court should affirm the opinion below and remand the case to the trial court.

#### **VI. ARGUMENT**

This case concerns the proper interpretation of Texas Code of Criminal Procedure article 26.05 (article 26.05) and whether Collin County Local Rule 4.01(B) (Local Rule 4.01(B)) complies with the Code of Criminal Procedure. For the reasons stated below, the Court of Appeals correctly found that Local Rule 4.01(B) violated article 26.05 and is therefore invalid. This Court should affirm the Court of Appeals grant of the writ of mandamus and instruct the Collin County judges to adopt a fee schedule that complies with article 26.05 and provides for reasonable and necessary attorney fees.

It is a cardinal rule of statutory construction that the courts give effect to the intent of the legislature. *Fleming Foods of Tex. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). If language in a statute is unambiguous, a court must determine the legislative intent based on the plain and common meaning of the words used. *Monsanto Co. v.*

*Cornerstones Municipal Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). “In applying the plain and common meaning of the language in a statute, courts may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning; such implication is inappropriate when legislative intent may be gathered from a reasonable interpretation of the statute as it is written.” *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). Article 26.05 is not ambiguous and its plain meaning is clear.

Article 26.05 has seven main parts concerning the issue in this case:

1. An appointed attorney shall be paid reasonable attorney's fees for performing services based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel.
2. The judges shall adopt a fee schedule and send a copy to the commissioners court.
3. The fee schedule shall state reasonable minimum and maximum rates. The trial court may approve or disapprove any requested attorney fees.
4. If the trial court lowers the attorney's fees requested, the attorney may appeal the decision to the presiding judge of the judicial administrative region. The administrative judge may hold a hearing and will enter their own findings.
5. Within 45 days the commissioners court shall pay the fees approved by the administrative judge, in accordance with the fee schedule.

6. The appointed attorney shall recover expenses and expert costs.

7. All fees shall be paid from the county general fund.

*See* Tex. Code Crim. Proc. Ann. art. 26.05 (West 2016). The prolific use of the word “shall” throughout article 26.05 emphasizes the legislative intent that the code should be strictly followed. However, the courts of Collin County, in approving Local Rule 4.01(b), did not comply with article 26.05(c).

Article 26.05 does not dictate what amount constitutes “reasonable” attorney’s fees, and this appears to be by legislative design—to allow each county to adopt fees that are appropriate for that county. *See* Tab A at 6. Given the wide diversity of the 254 counties in Texas, it is logical that Harris County and Pecos County, for example, will have different local rates for attorneys. It makes sense for each county to adopt its own schedule based on local attorney fees and availability of counsel. Judges are given the authority to award reasonable attorney’s fees under a variety of statutes. *See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. §§ 16.034, 26.003, 30.021, 74.507 (West 2016); Tex. Agric. Code Ann. § 14.087 (West 2016); Tex. Estates Code Ann. § 124.018 (West 2016); Tex. Fam. Code Ann. § 6.708 (West 2016); Tex. Gov’t Code Ann. § 437.417 (West 2016). Therefore, the trial judges are in the best position to create the fee schedule under the procedures and limitations outlined in article 26.05.

Local Rule 4.01(b) does not comply with article 26.05 because it negates the



specific fees established by 4.01(a). 4.01(b) provides a catch-all provision that allows a trial judge to deviate from the schedule and, without limitation, award whatever they think is reasonable, rather than following the schedule defined by all of the judges in the county and required by article 26.05.

4.01(b) also does not provide adequate and fair notice—not only the local bar who will be paid under the schedule, but also to the commissioners court obligated to pay the rates set by the local judges. In order to adequately budget and set aside funds to pay for attorney fees in these cases, the commissioners court must be given notice and an opportunity to include these obligations in the county budget. Tex. Crim. Proc. Code art. 26.05(b) (“a copy of the schedule shall be sent to the commissioners court of the county”). Under Chapter 111, Local Government Code, county funds may not be expended except as provided in the county budget. Loc. Gov’t Code § 111.004. Therefore, it is not only the local attorneys who are protected by the set fee schedule required by article 26.05, but also the county commissioners courts and the taxpayers who fund the bill for these services. Article 26.05 requires transparency and defined limits of attorney’s fees. Local Rule 4.01(b) fails to meet that requirement.

It is clear from reading the fee schedule that the Collin County Judges did not anticipate the appointment of outside attorneys to prosecute an elected state official, such as the Texas Attorney General. However, the failure of the fee schedule found

in Local Rule 4.01(a) to anticipate such a unique and complex legal undertaking does not necessitate the open-ended fees allowed by Local Rule 4.01(b). The fee schedule established by Local Rule 4.01(a) is valid, even if it may be inadequate to address the particular issues that arose in this case. If the schedule is inadequate, it may be amended to provide for extraordinary cases without vesting an unfettered discretion in each individual trial judge in violation of the parameters of the statute.

By finding that 4.01(b) is invalid, the Court of Appeals left in place 4.01(a) and the specific fee schedule that provides for attorney's fees. Should the Collin County judges determine that the fee schedule under 4.01(a) is inadequate, they may create a new fee schedule that is both specific and contains a broader range of attorney's fees. What the judges may not do is create a limitless range of fees, as was done in 4.01(b).

## VII. CONCLUSION

By requiring a set fee schedule, article 26.05 requires transparency, clarity, and predictability for all of the parties involved. As the Court of Appeals decision correctly stated, "[t]he statute does not prevent the judges from taking into consideration the possibility of 'unusual circumstances' in setting the *range* of reasonable fees allowed. But the legislature intended each county to have an agreed framework that sets out the specific range of reasonable fees that could be paid." Tab A. at 6. While individual judges are in the best position to determine what fee

is “reasonable” within a set range, it is the responsibility of all of the judges in the county to set the range. Under the plain language of article 26.05 and considering the legislative intent that protects county taxpayers, this Court should affirm the holding of the Court of Appeals.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of this Amicus Curiae Brief in Support of Relators was served via certified mail, return receipt requested, facsimile, and/or electronically on this 25<sup>th</sup> day of October 2017, to the following:

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/s/James P. Allison  
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**CERTIFICATE OF COMPLIANCE**

I certify that this computer-generated Amicus Curiae Brief in Support of Relators contains 1,244 words and complies with TEX. R. APP. P. 9.4.

/s/ James P. Allison  
James P. Allison

NO. WR-86,920-02

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IN THE  
COURT OF CRIMINAL APPEALS

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IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, *Realtor*

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ON STATE'S PETITION FOR WRIT OF MANDAMUS  
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OF COLLIN COUNTY, TEXAS

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**APPENDIX OF AMICUS CURIAE BRIEF IN SUPPORT OF RELATORS**

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County Judges and Commissioners Association of Texas submits the following documents in support of its Amicus Curiae Brief in Support of Relators:

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**TAB A**

**VACATE Order, DISMISS and REMAND; and Opinion Filed June 9, 2017.**



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

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**No. 05-17-00094-CV**

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**JEFFORY BLACKARD, Appellant**

**V.**

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

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**On Appeal from the 380th Judicial District Court  
Collin County, Texas  
Trial Court Cause No. 380-00320-2017**

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**MEMORANDUM OPINION**

**Before Justices Francis, Brown, and Schenck  
Opinion by Justice Francis**

**We reinstate this appeal.**

Jeffory Blackard brought this suit challenging the legality of an order rendered by the 416th Judicial District Court that directed payment of attorney's fees by the Auditor of Collin County, following presentment to and approval by the Collin County Commissioners Court, to the attorneys pro tem in *State of Texas v. Warren Kenneth Paxton, Jr.*, Case Nos. 416-81913-2015, 416-82148-2015, 416-82149-2015 (the *Paxton* cases). Blackard asserted standing to bring the challenge as a taxpayer seeking to enjoin the illegal expenditure of public funds and filed an



application for a temporary restraining order in the trial court below. The court denied the application for temporary restraining order concluding it had no jurisdiction to grant the relief requested. In its conclusions of law, the court stated the denial was “with prejudice to Mr. Blackard seeking the same relief *via* an injunctive action.” The court did not, however, dismiss either Blackard’s claims for injunctive relief or his claims for declaratory relief.

On January 30, 2017, Blackard filed this interlocutory appeal, a petition for writ of injunction, and an emergency motion for temporary relief. That same day, at Blackard’s request, this Court issued an order staying the Collin County Commissioners Court from “any consideration or approval of the payment or payments subject to the district court’s Second Order on Payment of Attorney’s Fees to Attorneys Pro Tem.” Blackard requested this stay as necessary to prevent his challenge to the payment of attorney’s fees from becoming moot. *See Blackard v. Schaffer*, No. 05-16-00408-CV, 2017 WL 343597, \*6 (Tex. App.—Dallas Jan. 8, 2017, pet. filed) (*Blackard I*) (concluding challenge to fee order moot after fees paid). On February 10, we consolidated appellant’s request for a stay with this appeal and ordered the stay on the Commissioners Court remain in place. We further stayed “all efforts to enforce and/or execute on that order.”

On May 17, we lifted the stays previously imposed for the purpose of allowing the Commissioners Court to consider and act on the Second Order on Payment of Attorney’s Fees to Attorneys Pro Tem or, in the event the Commissioners Court did not act, for dismissal of this appeal for lack of jurisdiction. The appeal was abated for a period of thirty days or until we received a supplemental clerk’s record containing evidence of a Commissioners Court vote on the issue of payment.

On May 22, the Commissioners Court voted to reject the invoice payment and further voted to “authorize counsel to challenge” the Second Order on Payment of Attorney’s Fees to

Attorneys Pro Tem. A supplemental clerk's record was filed on June 2 containing the Commissioners Court's order reflecting its vote.

Blackard's suit alleges that the payment ordered by the district court was illegal because it failed to comply in both timing and amount with the Collin County Local Rules and the Texas Fair Defense Act. His standing, if any, was solely as a taxpayer seeking to enjoin the illegal expenditure of public funds. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000). Because the Commissioners Court has rejected the invoice and has authorized counsel to challenge the district court's order, no pending "illegal" expenditure of public funds currently exists for Blackard to seek to enjoin.

Blackard has moved this Court to continue to abate his suit indefinitely based on the possibility that the Commissioners Court may, at some point in the future, approve payment of a fee invoice at a time and in an amount that he contends is illegal. As we stated in our earlier opinion, for jurisdiction to exist, a matter must be ripe for resolution. *See Blackard*, 2017 WL 343597 at \*8. Although a claim need not be fully ripened at the time suit is filed, the facts must be sufficiently developed to determine that an injury has occurred or is likely to occur. *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011). At this point, Blackard's alleged injury is speculative. *See Scarborough v. Metro. Transit Auth. of Harris Cnty.*, 326 S.W.3d 324, 338 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Blackard has not shown, and this record does not indicate, when or in what amount the Commissioners Court is likely to approve a payment. Because Blackard's alleged injury depends on the occurrence of contingent future events that may not occur, there is no subject matter jurisdiction over his claims for injunctive relief. Although the trial court denied Blackard's request for injunctive relief, the proper disposition is to dismiss those claims for want of jurisdiction. *See Patterson v. Planned*

*Parenthood of Houston and Se. Tex., Inc.*, 971 S.W.2d 439, 444 (Tex. 1998) (claims not ripe for adjudication due to absence of imminent harm dismissed for want of jurisdiction).

Based on the foregoing, we order the stays imposed by our orders of January 30, 2017 and February 10, 2017 lifted in their entirety. We deny Blackard's motion to abate this appeal. We vacate the trial court's order denying Blackard's request for injunctive relief and dismiss the injunctive relief claims for want of jurisdiction. We express no opinion on the trial court's jurisdiction over the remaining claims for declaratory relief. *See Retta v. Mekonen*, 338 S.W.3d 72, 76 (Tex. App.—Dallas 2011, no pet.) (no authority to consider jurisdiction over other underlying causes of action on appeal from temporary injunction). We remand the cause to the trial court for further proceedings.

/Molly Francis/  
MOLLY FRANCIS  
JUSTICE

170094F.P05



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

**JUDGMENT**

JEFFORY BLACKARD, Appellant

No. 05-17-00094-CV      V.

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

On Appeal from the 380th Judicial District Court, Collin County, Texas

Trial Court Cause No. 380-00320-2017.

Opinion delivered by Justice Francis.

Justices Brown and Schenck participating.

In accordance with this Court's opinion of this date, we **VACATE** the trial court's order denying Jeffory Blackard's request for injunctive relief and **DISMISS** Jeffory Blackard's claims for injunctive relief for want of jurisdiction.

We **REMAND** this cause to the trial court for further proceedings.

It is **ORDERED** that appellees KENT A. SCHAFFER, IN HIS OFFICIAL CAPACITY, BRIAN W. WICE, IN HIS OFFICIAL CAPACITY, NICHOLE DEBORDE, IN HER OFFICIAL CAPACITY, COLLIN COUNTY JUDGE KEITH SELF, IN HIS OFFICIAL CAPACITY, COMMISSIONER SUSAN FLETCHER, IN HER OFFICIAL CAPACITY, COMMISSIONER CHERYL WILLIAMS, IN HER OFFICIAL CAPACITY, COMMISSIONER CHRIS HILL, IN HIS OFFICIAL CAPACITY, COMMISSIONER

**DUNCAN WEBB, IN HIS OFFICIAL CAPACITY, AND AUDITOR JEFF MAY, IN HIS OFFICIAL CAPACITY, recover their costs of this appeal from appellant JEFFORY BLACKARD.**

**Judgment entered this 9th day of June, 2017.**