No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA "TAMI" CRAFT

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas Cause No. 2022-79328
The Honorable David Peeples, sitting by special assignment.

APPELLANT ERIN ELIZABETH LUNCEFORD'S RESPONSE TO APPELLEE TAMIKA CRAFT'S MOTION TO DISMISS APPEAL

TO THE HONORABLE JUDGE OF THIS COURT:

Appellant Erin Elizabeth Lunceford hereby files this Response to Appellee Tamika Craft's Motion to Dismiss Appeal, and, as such, would show unto the Court the following:

1. This is an appeal from an adverse final judgment rendered against Appellant in an election contest of her countywide race for the 189th Civil District Court in Harris County, Texas.

2. The election in question was held in Harris County, Texas on November 8, 2022.

3. The Trial Court entered its final judgment on November 9, 2023.

4. Appellant Lunceford timely requested Findings of Fact and Conclusions of November 29, 2023.

5. The Trial Court issued its Findings of Fact and Conclusions of Law on December 9, 2023.

6. Appellant filed her Notice of Appeal on December 11, 2023.

7. Appellant paid her appellate fee of $205.00 on February 6, 2024.

8. As will be explained below, Appellee's Motion to Dismiss Appeal is not well taken and should be denied, for at least three (3) reasons:

> (i) Appellee misinterprets the type of appeal pending before this Court;
>
> (ii) Appellee misconstrues both the case law as well as the Texas Election Code provisions relating to this appeal; and
>
> (iii) Appellee ultimately reaches the flawed conclusion that Appellant's appeal should be dismissed because she allegedly failed to appeal within twenty (20) days of the Trial Court's entry of Final Judgment.

As will be shown below, Appellee's Motion to Dismiss Appeal should be denied.

ARGUMENT AND AUTHORTIES

9. First, Appellant's appeal does not arise from a Primary election. Nor does it come from a Measure election. Further, it does constitute an appeal from a Special election. To the contrary, this appeal arises from the November 8, 2022

General election. Understanding this distinction makes a difference, as shown below, because Appellee's reliance on a Dallas Court of Appeals' decision in *Launius v. Flores*[1], 640 S.W. 3d 631 (Tex. App.—Dallas 2022, pet. denied), dealt with a Measure election, not a General election (after acknowledging that a general election is governed by Chapter 232, Dallas court held bond election was governed by Chapter 233).

10. In *Launius*, cited above, the Dallas Court of Appeals noted that Section 232.015's permissive and discretionary authorization for either a trial or an appellate court to accelerate an appeal--if requested to do so--is not applicable to a bond election, otherwise known as a "Measure" election. For a bond election, the Dallas Court held that Section 233 of the Texas Election Code applies, rather than Section 232. That being the case, the Court took note of the fact there is no parallel statute in Section 233 that exists in Section 232, and held that the permissive "may" language was not applicable for a bond election. Accordingly, where, as here, Appellant Lunceford's appeal arises from the November 8, 2022 **General** election,

[1] *Launius* is a case of first impression, and neither this Court of Appeals nor the Fourteenth Court of Appeals has weighed in on this issue before. Appellant asserts that *Launius* was wrongly decided, even in the context of a bond election. The statutory language contained in Section 231.009 ("[a]n election contest has precedence in the appellate courts and shall be disposed of as expeditiously as practicable"), is not specifying that the appeal is an accelerated appeal. Rather, this language suggests that the appellate court should give an appeal of an election contest "precedence" and should decide the case as "expeditiously" as practicable. However, because the instant appeal involves a General election, not a bond election, this Court need not decide whether *Launius* was wrongly decided, but may simply follow the *Perez v. Trevino* opinion, cited and discussed in Paragraph 11, supra.

which is undisputed, reliance on Section 231.009 of the Texas Election Code is misplaced. Instead, Section 232.015 of the Texas Election Code is the applicable statute for determining whether an appeal from an election contest arising out of a General election is supposed to be governed by the ordinary or accelerated timetables for appeal. *See Launius* at 635, n. 2.

11. Although not cited by Appellee Craft, the above-referenced distinction can also be found in the case of *Perez v. Trevino*, No. 13-17-00087-CV, 2017 WL 2705477 (Tex. App.—Corpus Christi-Edinburg June 23, 2017, no pet.)(mem. op.). In *Perez*, the Court of Appeals interpreted Section 231.009 as simply expressing a legislative directive that an appeal of an election contest shall be decided as "expeditiously as practicable," rather than legislating that all appeals from all election contests must be treated as accelerated appeals.

12. Appellate deadlines begin on the date that the trial court signs the judgment or other appealable order. *See id*. R. 26.1(a)-(c); *Farmer v. Ben E. Keith Co*., 907 S.W.2d 495, 496 (Tex. 1995). The notice of appeal must be filed within a certain number of days after the judgment or order is signed: (i) twenty (20) days for an accelerated appeal, regardless of whether or not there are post-judgment motions; (ii) thirty (30) days for a regular appeal with none of the requisite post judgment motions; or (iii) ninety (90) days for a regular appeal with specified post judgment

motions, or six months for a restricted appeal. *See* TEX. R. APP. P. 26.1; *see also Perez v. Trevino, at *7.*

13. In a regular appeal—such as the appeal filed by Appellant Lunceford—a notice of appeal must be filed within thirty days after the judgment is signed. *Id*. However, a notice of appeal may be filed within ninety (90) days after the judgment is signed if any party timely files either: (1) a motion for new trial; (2) motion to modify the judgment; (3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or (4) a request for findings of fact and conclusions of law if findings and conclusions are required by the rules of civil procedure or if not required, could properly be considered by the appellate court. *See id*.; *see also Lane Bank Equip. Co. v. Smith S. Equip., Inc*., 10 S.W.3d 308, 310 (Tex. 2000) (holding that any post-judgment motion, no matter what it is called, will extend plenary power if it seeks a substantive change in the judgment and is filed within the time limits for a motion for new trial). *See Perez v. Trevino, at *7-8.*

14. There are two categories of appeals with regard to when an appeal must be perfected by an appellant in an election contest. In the first category, an appellant who seeks to appeal the contest of a primary election shall file his bond, affidavit, or cash deposit for costs of appeal not later than the fifth day after the date the district court's judgment in the contest is signed. *See* TEX. ELEC. CODE ANN. § 232.014(b). If the appellant is not required to give security for the costs of appeal,

the notice of appeal must be filed by the same deadline. *Id*. In the second category, an appellant in a contest of a general or special election may accelerate the appeal in a manner consistent with the procedures prescribed by section 232.014 of the election code. *See* TEX. ELEC. CODE ANN. § 232.015; *see also* *Perez v. Trevino, at *9.*

15. Because the November 8, 2022 election was a General election, section 232.015 controls the nature of the appeal. Section 232.015 states that a party *may* accelerate the appeal in a manner consistent with the procedures outlined in primary election contests. The Code Construction Act states that a statute's use of the word "may," creates a discretionary authority or grants permission or a power; whereas the use of the word "shall" imposes a duty. *See* TEX. GOV'T CODE ANN. § 311.016.

16. Neither Appellant Lunceford nor Appellee Craft asked either the Trial Court or this Court of Appeals to accelerate this regular appeal pursuant to Section 232.015 of the Texas Election Code. Accordingly, Appellant Lunceford's timeframe to appeal was thirty (30) days from the date the Final Judgment was entered. In addition, because Appellant timely requested Findings of Fact and Conclusions of Law, the timeframe for appeal was extended from thirty (30) to ninety (90) days. Regardless, Appellant did not wait the full ninety (90) days to appeal, but instead filed her Notice of Appeal on December 11, 2023, which was within two (2) days of

the Trial Court's entry of its Findings of Fact and Conclusions of Law (which were entered on December 9, 2023). Because Section 232.015 does not create an automatic or mandatory acceleration of this appeal, and because Appellant Lunceford's appeal was initiated within the original thirty (30) day window to file a regular appeal (because December 9 was the first Monday following the weekend, and December 7 fell on a Saturday), Appellant Lunceford's appeal was timely and Appellee's Motion to Dismiss Appeal should be denied.

17. Unrelated to the above, Appellee Craft also asks to dismiss this appeal because Appellant did not file her $205 cost associated with her appeal until February 6, 2024. According to Appellee, a notice from this Court of Appeals was issued on January 5, 2024, informing the Appellant that the cost of appeal must be filed by February 5, 2024. For reasons unknown, that notice was not received by Appellant's counsel, either by email or by regular mail. Accordingly, the undersigned was not aware of the February deadline. Opposing counsel obviously was aware of the deadline, as they waited until the deadline passed to confer with the undersigned counsel on their anticipated motion to dismiss. As soon as the undersigned was made aware by opposing counsel of the deadline, the appellate fee was paid the same day. Because the filing of the appellate fee is not jurisdictional, payment of the fee one day late is justified and constitutes good cause to accept such fee when and as paid.

WHEREFORE, PREMISES CONSIDERED, Appellant Erin Elizabeth Lunceford asks the Court to deny Appellee Craft's Motion to Dismiss Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on February 19, 2024.

/s/ Andy Taylor
Andy Taylor

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