

CAUSE NO. 23-2326

THE STATE OF TEXAS
EX REL. AVREY J. ANDERSON

Plaintiff,

v.

KELLY HIGGINS, IN HIS OFFICIAL
CAPACITY AS CRIMINAL DISTRICT
ATTORNEY OF HAYS COUNTY,
TEXAS

Defendant.

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IN THE DISTRICT COURT

274TH JUDICIAL DISTRICT

HAYS COUNTY, TEXAS

**DISTRICT ATTORNEY KELLY HIGGINS’
RESPONSE TO PLAINTIFF’S NOTICE OF NONSUIT**

TO THE HONORABLE DIBRELL WALDRIP:

Defendant Kelly Higgins, in his Official Capacity as Criminal District Attorney of Hays County, Texas (“D.A. Higgins”) files this Response to Plaintiff/Counter-Defendant Avrey J. Anderson’s (“Anderson”) Notice of Nonsuit and would respectfully show the Court as follows:

1. Yesterday, September 21, 2023, D.A. Higgins filed his answer to Anderson’s claim that he has violated Chapter 87 of the Texas Local Government Code. In the same pleading, D.A. Higgins, acting as Counter-Plaintiff, brought Counterclaims against Anderson for declaratory relief under Chapter 37 of the Texas Civil Practices & Remedies Code. Specifically, D.A. Higgins seeks declarations that:

- a. Any public statements made by D.A. Higgins prior to his assumption of office on January 1, 2023 cannot serve the basis of an action to remove him under Texas Local Government Code § 87.012(a)(2);
- b. Any statements posted on D.A. Higgins’ campaign website, cannot serve the basis of an action to remove him under Texas Local Government Code § 87.012(a)(2);

- c. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute drug possession offenses;
- d. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute cannabis possession offenses;
- e. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute criminal offenses related to medical treatment of transgender persons; and
- f. As of September 15, 2023, D.A. Higgins has not implemented and/or executed a policy or policies of refusing to prosecute criminal offenses related to medical providers performing abortions.

2. Because Anderson filed the suit (and amended his pleadings multiple times), Anderson had appeared in this case for all purposes. Therefore, no service of process was required on Anderson in connection with the D.A. Higgins' Counterclaims.

3. Now, less than a day after D.A. Higgins filed his answer and Counterclaims, Anderson filed a Notice of Non-Suit advising that he "no longer wishes to prosecute" the case against D.A. Higgins. In addition, Anderson has submitted a proposed order seeking to dismiss the *entire* case, which would necessarily include D.A. Higgins' Counterclaims. The non-suit is especially surprising because Anderson's swore under oath that D.A. Higgins was in violation of Chapter 87 of Texas Local Government Code.

4. In any event, while Plaintiff is entitled to non-suit *his* claims against D.A. Higgins, he cannot seek a dismissal of D.A. Higgins' counterclaim under Rule 162. *See* TEX. R. CIV. P. 162; *see also Klein v. Dooley*, 949 S.W.2d 307, 307 (Tex. 1997) (voluntary nonsuit by a plaintiff does not affect defendant's counterclaim); *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840-41 (Tex. 1990) (holding nonsuit cannot affect non-movant's counterclaim for affirmative relief); *Severs v. Mira Vista Homeowners' Ass'n*, 559 S.W.3d 684, (Tex. App.—Fort Worth 2018, pet. denied) ("It is blackletter law in Texas that although a plaintiff may nonsuit his claims at any time

before introducing all of his evidence other than rebuttal evidence, a nonsuit is not effective with regard to a defendant's pending claims for affirmative relief."); *Marsh v. United Servs. Auto. Ass'n*, No. 05-17-00338-CV, 2017 Tex. App. LEXIS 5508, at *3 (Tex. App.—Dallas June 15, 2017, no pet.) (same); *Poston v. Wachovia Mort. Corp.*, No. 14-11-00485-CV, 2012 Tex. App. LEXIS 3608, at *4 (Tex. App.—Houston [14th Dist.] May 8, 2012, pet. denied) (same).

5. Moreover, it would be inequitable for Anderson to now be able to terminate this entire litigation by his notice of nonsuit. After filing his suit (which he now abandons) Anderson repeatedly ran to the press to talk about his allegations against D.A. Higgins. Anderson had no problem alleging and talking about how D.A. Higgins had violated the law; but suddenly wants to avoid having a trial in which he will be forced to testify.¹

For all these reasons, D.A. Higgins moves the Court to dismiss Plaintiff's claims but not dismiss the lawsuit because of the pendency of D.A. Higgins' claims for declaratory relief and attorney's fees.

¹ In a recent interview with The Austin Chronicle, Anderson stated he filed the suit against D.A. Higgins because "I want to get rid of him because he's an impolite person. He's a jackass. He's disrespectful and rude to everyone." See Brant Bingamon, Teen Files "Rogue Prosecutor" Lawsuit Against Hays Co. Prosecutor, The Austin Chronicle, Sept. 22, 2023, <https://www.austinchronicle.com/news/2023-09-22/teen-files-rogue-prosecutor-lawsuit-against-hays-co-prosecutor/>

Respectfully submitted,

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*Attorneys for Defendant Kelly Higgins,
in his Official Capacity as the Criminal
District Attorney of Hays County, Texas*

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that the foregoing pleadings was served on all parties and counsel of record on this the 21st day of September 2023.

Avrey J. Anderson
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Dripping Springs, Texas 78620
(936) 730-5122
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/s/ Michael Shaunessy

MICHAEL SHAUNESSY

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Filing Description: District Attorney Higgins' Response to Plaintiff's Notice of Nonsuit

Status as of 9/21/2023 4:43 PM CST

Associated Case Party: Kelly Higgins

Name	BarNumber	Email	TimestampSubmitted	Status
Michael Shaunessy		mshaunessy@mcginnislaw.com	9/21/2023 1:42:54 PM	SENT
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Associated Case Party: AvreyJamesAnderson

Name	BarNumber	Email	TimestampSubmitted	Status
Avrey J. Anderson		inventor0520@gmail.com	9/21/2023 1:42:54 PM	SENT