

NO. 02-22-00380-CV

IN THE COURT OF APPEALS FOR
THE SECOND JUDICIAL DISTRICT OF TEXAS

ALISON MAGUIRE, *et al.*,

Appellants,

v.

ROSA RIOS, in her Official Capacity as
City Secretary of the City of Denton, Texas, *et al.*,

Appellees

ON APPEAL FROM THE 431st JUDICIAL
DISTRICT COURT, DENTON COUNTY, TEXAS
THE HONORABLE JIM JOHNSON, J., PRESIDING

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE
SECOND COURT OF APPEALS:

COME NOW Alison Maguire, Keri Caruthers, Tracy Runnels and
Emily Meisner, Appellants in the above-captioned and numbered cause, and,
pursuant to Rule 49.1 of the Texas Rules of Appellate Procedure, file this
Motion for Rehearing and in this connection would respectfully show unto
the Court as follows:

I.

ISSUE PRESENTED ON REHEARING

Whether the Court of Appeals erred when it merely dismissed the appeal and did not vacate the District Court's orders and judgment as well under Rule 43.2(e) of the Texas Rules of Appellate Procedure, as required by "long-standing" prior decisional law of the Supreme Court of Texas?

II.

COURT OF APPEALS' JUDGMENT AND ORDER

DISMISSING THIS APPEAL

On December 11, 2022, Appellants' timely submitted a response to the Court of Appeals' suggestion of mootness, and in their response Appellants contended this appeal is not moot. On December 22, 2022, the Court of Appeals rendered a memorandum opinion, order and judgment wherein it concluded Appellants' response had not "shown grounds for continuing this appeal." Accordingly, the Court "dismiss[ed] this appeal as moot."¹

Significantly, for purposes of this motion for rehearing, neither the Court of Appeals' memorandum opinion, nor its order or judgment,

¹ *Maguire v. Rios*, No. 02-22-00380-CV, at 4 (Tex. App. – Fort Worth Dec. 22, 2022) (per curiam) (mem. op., not designated for publication). A copy of the Court of Appeals' memorandum opinion and judgment is appended hereto as Appellants' Exhibit A.

expressly “vacated” the District Court’s orders of judgment. For this reason, without waiving their right to seek rehearing *en banc* in the Court of Appeals² or their right to petition for review in the Supreme Court of Texas³ (concerning the Court of Appeals’ finding of “mootness”), Appellants respectfully contend the panel of the Court of Appeals on this appeal has erred by failing to “vacate” the District Court’s prior orders and judgment in this case.

III.

APPLICABLE LAW

As recently as last month the Supreme Court of Texas found it necessary to again reiterate its “long-standing rule” which provides that “[i]f a case is or becomes moot, the court [of appeals] *must vacate* any order or judgment previously issued and dismiss the case for want of jurisdiction.” *Alsobrook v. MTGLQ Investors LP*, No. 22-0079, 2022 WL 17072341, at *1 (Tex. Nov. 18, 2022) (per curiam) (mem. op., not designated for publication) (emphasis added), quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012). This rule, as stated in *Heckman*, has been recognized under Texas decisional law since at least 1878;⁴ the rule has been adhered to in

² Tex. R. App. P. 49.7

³ Tex. R. App. P. 53.1

⁴ *Carillo v. State*, 480 S.W.2d 612, 619 (Tex. 1972 (Calvert, C.J. concurring)) (citing cases consistently adhering to the *Heckman* rule since 1878)

several more recent decisions of the Second Court of Appeals;⁵ the rule has been acknowledged as “binding precedent” by the Second Court of Appeals;⁶ and the Supreme Court has vacated judgments entered by Courts of Appeals due to their lack of fidelity to this rule.⁷

In their response to the Court of Appeals’ suggestion of mootness, Appellants expressly requested that:

“[I]n the event the Court of Appeals determines this appeal has become moot, Appellants pray the Court will vacate the District Court’s judgment in its entirety, and that the Court of Appeals will do so in a manner that manifests the Court’s clear intention that the ‘issue preclusion’ doctrine would not apply to foreclose Appellants’ election contest.”⁸

⁵ *Fulbright v. Bradley*, No. 02-15-00308-CV, 2016 WL 4474344, at *1 (Tex. App. – Fort Worth Aug. 25, 2016) (mem. op., not designated for publication) (“If an appeal has become moot, we must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction”); *Crestor Glob. Invest. Delaware LLC v. Wilmington Trust Assoc.*, No. 02-18-00109-CV, 2018 WL 4782167, at *2 (Tex. App. – Fort Worth Oct. 4, 2018) (mem. op., not designated for publication) (same); *Lamosi v. Mang*, No. 02-18-00218-CV, 2019 WL 1284910, at *1 (Tex. App. – Fort Worth March 21, 2019) (mem. op., not designated for publication) (“When a case becomes moot on appeal, we must vacate the trial court’s judgment and dismiss the appeal.”); *Oak Point Bd. of Adjustment v. Houle*, No. 02-19-00068-CV, 2019 WL 6767801, at *2 (Tex. App. – Fort Worth Dec. 12, 2019) (mem. op., not designated for publication) (“If a case is or becomes moot, we must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.”).

⁶ *Martinez v. HD Texas Invest. LLC*, No. 02-21-00178-CV, 2021 WL 4319709, at *1 n. 3 (Tex. App. – Fort Worth Sept. 23, 2021) (mem. op., not designated for publication) (“We follow this binding precedent.”).

⁷ *Marshall v. Hous. Auth. of the City of San Antonio*, 198 S.W.3d 782, 785 (Tex. 2006) (“the court of appeals erred in dismissing only the appeal and leaving the trial court’s judgment in place.”).

⁸ *Appellants’ Response Concerning Mootness on Appeal Following Certification of Recall Election Results*, 20 (filed Dec. 11, 2022).

With regard to the matter of “issue preclusion,” Appellants in their response to the Court of Appeals’ suggestion of mootness also advised the Court that, “if necessary,” they “intend[ed] to timely file an election contest” predicated on the instant controversy.⁹ Thereafter, due to the approaching statutory deadline for filing such a cause of action; on December 20, 2022, an “election contest” concerning the recall election was timely filed in the 393rd District Court of Denton County, Texas, by Appellants Alison Maguire and Keri Caruthers, and by a new plaintiff, Olivia Jeffers.¹⁰

The Supreme Court has explained that “[o]ne purpose of vacating the underlying judgment if a case becomes moot during appeal is to prevent prejudice to the rights of parties when appellate review of a judgment on its merits is precluded.” *Marshall v. Hous. Auth. of the City of San Antonio*, *supra*, 198 S.W.3d at 788. The Appellants respectfully submit the Court of Appeals’ decision to deny Appellants’ request that the District Court’s orders and judgment be vacated, in addition to being an unauthorized departure from “binding precedent,” would directly operate to defy the

⁹ *Id.*, at 19. As Appellants noted in their response, *id.* at 19, an “Election Contest” does not accrue “earlier than the day after election day.” Tex. Elec. Code Ann. § 221.006(a).

¹⁰ *Maguire v. Hudspeth*, No. 22-10794-393 (filed Dec. 20, 2022).

primary purpose of the *Heckman* rule in light of Appellants’ pending Election Contest.¹¹

IV.

PRIOR ORDERS AND JUDGMENT OF THE DISTRICT COURT THAT MUST BE VACATED

This appeal on the merits would have been confined to two issues that involved: 1) whether the District Court erred when it ruled the “plain meaning” of Article IV, § 4.13(a) of the Denton City Charter authorized Appellees to conduct a recall election on the basis of a recall petition signed by electors who were ineligible to vote for or against Appellant Maguire at the “last preceding general municipal election” on May 1, 2021;¹² and, 2) whether the District Court erred when it granted, presumably on the same basis, Appellee Frank Phillips’ plea to jurisdiction that asserted derivative governmental immunity.¹³

¹¹ The Appellants recognize that were their “election contest” assigned to the same District Judge in Denton County that entered the orders and judgment below, their pending “election contest” would presumably lead merely to re-entry of the same orders and judgment, in the election contest, that were entered below: a potential exercise in futility. However, Appellants would note that, unlike their pre-election challenge in the instant appeal, the Texas Election Code provides “[t]he judge of a judicial district that includes any territory covered by a contested election that is less than statewide is disqualified to preside in the contest.” Tex. Elec. Code Ann. § 221.004.

¹² District Court Reporter’s Record, 59 (Sept. 27, 2022); District Clerk’s Record, 748-749 (order granting Municipal Appellees’ “Rule 91a” motion to dismiss).

¹³ District Court Reporter’s Record, 58-59 (Sept. 27, 2022); District Clerk’s Record, 746-747 (order granting Appellant Phillips’ plea to jurisdiction).

PRAYER

The Appellants pray the Court of Appeals will vacate the prior orders and judgment entered by the District Court in this case in accordance with Rule 43.2(e) and the decisional law cited herein.

Respectfully submitted,

/s/Richard Gladden

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CERTIFICATE OF COMPLIANCE

This is to certify, pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, this response was computer-generated; that it contains less than 1,086 words; and, that it complies with the 4,500 word limitation stated in Rule 9.4 (i) (2) (D) of the Texas Rules of Appellate Procedure.

/s/Richard Gladden

CERTIFICATE OF SERVICE

This is to certify that on this 28th day of December, 2022, a true copy of this document was served on the Matt Shovlin, Attorney of Record for Appellant Frank Phillips; and on David Overcash, Attorney of Record for

Appellant Rosa Rios; Appellant City of Denton, Texas; and for Appellants Gerard Hudspeth, Vicki Byrd, Brian Beck, Jesse Davis, Brandon Chase-McGee and Chris Watts; using their respective email addresses registered on the E-File Texas electronic filing system.

/s/Richard Gladden

[APPELLANTS' EXHIBIT A]



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-22-00380-CV

ALISON MAGUIRE, KERI CARUTHERS, TRACY RUNNELS, AND EMILY
MEISNER, Appellants

V.

ROSA RIOS, IN HER OFFICIAL CAPACITY AS CITY SECRETARY OF THE CITY
OF DENTON, TEXAS; THE CITY OF DENTON, TEXAS; GERARD
HUDSPETH, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY COUNCIL
OF THE CITY OF DENTON, TEXAS; VICKI BYRD, BRIAN BECK, JESSE
DAVIS, BRANDON CHASE-McGEE AND CHRIS WATTS, IN THEIR OFFICIAL
CAPACITIES AS CITY COUNCILMEMBERS OF THE CITY OF DENTON,
TEXAS; AND FRANK PHILLIPS, IN HIS OFFICIAL CAPACITY AS DENTON
COUNTY ELECTIONS ADMINISTRATOR, Appellees

On Appeal from the 431st District Court
Denton County, Texas
Trial Court No. 22-4543-431

Before Kerr, Bassel, and Wallach, JJ.
Per Curiam Memorandum Opinion

MEMORANDUM OPINION

Appellants Alison Maguire, Keri Caruthers, Tracy Runnels, and Emily Meisner sued Appellees Rosa Rios, in her official capacity as City Secretary of The City of Denton, Texas; The City of Denton, Texas (the City); Gerard Hudspeth, in his official capacity as Mayor of the City Council of the City of Denton, Texas, and Vicki Byrd, Brian Beck, Jesse Davis, Brandon Chase-McGee, and Chris Watts, in their official capacities as City Councilmembers of the City of Denton, Texas (the Councilmember defendants); and Frank Phillips, in his official capacity as Denton County Elections Administrator.¹ Appellants' petition for injunctive and declaratory relief turned on their interpretation of Section 4.13 of the Denton City Charter in attempting to avoid Maguire's recall in the then-upcoming November 8, 2022 election.

The City, Rios, the Councilmember defendants, and Phillips each filed pleas to the jurisdiction. Rios, the City, and the Councilmember defendants also filed a joint Rule 91a motion to dismiss, a response opposing Appellants' request for a temporary injunction, and a motion to strike Appellants' pleading exhibits.

On September 27, 2022, the trial court held a hearing on the Rule 91a motion and Phillips's plea to the jurisdiction. In two separate written orders signed on September 28, 2022, the trial court granted both. In the order granting the Rule 91a

¹Appellants also sued Donald Duff, in his official capacity as representative of a committee of electors in the City of Denton, Texas. On September 7, 2022, after Appellants and Duff filed a joint motion to nonsuit Duff with prejudice, the trial court granted the nonsuit.

motion, the trial court ordered that “all plaintiffs’ claims against [The City, Rios, and the Councilmember defendants, hereinafter City-affiliated defendants] are now dismissed” with prejudice, and it “fully released and dismissed” these defendants from the proceedings. In the order granting Phillips’s plea to the jurisdiction, it ordered that “each and every claim of Plaintiffs” against Phillips “be DISMISSED with prejudice.” Appellants appealed.

Maguire was recalled in the November 8, 2022 election, and the Denton City Council certified that recall on November 22, 2022.

On November 30, 2022, we informed the parties that it appeared that the relief sought by Appellants had been rendered moot because the November 8, 2022 election had taken place. *See Kolsti v. Guest*, 576 S.W.2d 892, 894 (Tex. App.—Tyler 1979, no writ) (explaining, in electoral context, that the case had become moot because of intervening events); *see also Matthews ex rel. M.M. v. Kountze ISD*, 484 S.W.3d 416, 418 (Tex. 2016) (“The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events.”). We asked Appellants (or any party desiring to continue the appeal) to file a response showing grounds for continuing the appeal within ten days, or we would dismiss the appeal as moot. *See* Tex. R. App. P. 42.3(a), (c), 44.3.

Appellants have filed a response, but it does not show grounds for continuing the appeal. Accordingly, we dismiss this appeal as moot. *See Kolsti*, 576 S.W.2d at 894;

see also Abbott v. Mexican Am. Legis. Caucus, 647 S.W.3d 681, 689 (Tex. 2022) (explaining that a court lacks jurisdiction to issue an opinion on a moot controversy).²

Per Curiam

Delivered: December 22, 2022

²Before the election, the City-affiliated defendants filed a motion to dismiss this appeal for lack of a final judgment. Because we dismiss the appeal for mootness, we do not reach the merits of the City-affiliated defendants' motion. *See* Tex. R. App. P. 47.1.



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-22-00380-CV

ALISON MAGUIRE, KERI CARUTHERS, § On Appeal from the 431st District Court
TRACY RUNNELS, AND EMILY
MEISNER, Appellants

V.

ROSA RIOS, IN HER OFFICIAL
CAPACITY AS CITY SECRETARY OF THE § of Denton County (22-4543-431)
CITY OF DENTON, TEXAS; THE CITY
OF DENTON, TEXAS; GERARD
HUDSPETH, IN HIS OFFICIAL CAPACITY
AS MAYOR OF THE CITY COUNCIL OF
THE CITY OF DENTON, TEXAS; VICKI

BYRD, BRIAN BECK, JESSE DAVIS,
BRANDON CHASE-MCGEE AND CHRIS § December 22, 2022

WATTS, IN THEIR OFFICIAL
CAPACITIES AS CITY
COUNCILMEMBERS OF THE CITY OF
DENTON, TEXAS; AND FRANK
PHILLIPS, IN HIS OFFICIAL CAPACITY
AS DENTON COUNTY ELECTIONS
ADMINISTRATOR, Appellees

§ Per Curiam Memorandum Opinion

JUDGMENT

This court has considered the record on appeal in this case and holds that the appeal should be dismissed. It is ordered that the appeal is dismissed as moot.

SECOND DISTRICT COURT OF APPEALS

PER CURIAM