

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MD 2022

DAVE McCORMICK FOR U.S. SENATE and DAVID H. McCORMICK,

Petitioners,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF
THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

**DOCTOR OZ FOR SENATE & DR. MEHMET OZ'S
APPLICATION TO VACATE MEMORANDUM OPINION AND ORDER
OF JUNE 2, 2022**

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And Dr. Mehmet Oz*

Intervenor-Respondents Doctor Oz for Senate and Dr. Mehmet Oz support and seek to uphold the will of Pennsylvania’s voters, Pennsylvania’s free and fair elections, and the General Assembly’s duly enacted laws governing those elections.

For that reason, Doctor Oz for Senate and Dr. Oz respectfully request that this Court vacate its Memorandum Opinion and Order of June 2, 2022 (the “Opinion and Order”). *First*, the Court’s order is void due to Petitioners’ failure to join indispensable parties, namely 7 of the county boards of election who are tasked with administering elections. *Second*, due Petitioner David H. McCormick’s concession on June 3, 2022, the issues raised in the Petition for Review are moot.

I. The Opinion and Order Should Be Vacated Because It Is Void For Failure To Join Indispensable Parties

1. The Opinion and Order should be deemed void because Petitioners failed to join indispensable parties.

2. Petitioners named only 60 of the 67 county boards of elections as respondents in this action, despite seeking a declaration that would affect each county’s administration of this and all future elections.

3. Accordingly, the Opinion and Order should be vacated.

4. “[T]he failure to join an indispensable party deprives the court of subject matter jurisdiction.” *Church of the Lord Jesus Christ of the Apostolic Faith v. Shelton*, 740 A.2d 751, 755 (Pa. Commw. 1998).

5. “In the interest of justice, Pennsylvania law allows this objection to be raised at any time during the proceedings, even on appeal.” *Id.* (citing Pa.R.C.P. No. 1032; *DeCoatsworth v. Jones*, 639 A.2d 792 (1994)).

6. Thus, “[i]f all necessary and indispensable parties are not parties to an action in equity, the court is powerless to grant relief.” *Id.* at 756 (quoting *Huston v. Campanini*, 346 A.2d 258, 259 (Pa. 1975)).

7. “An order of the court rendered in the absence of an indispensable party is null and void.” *Id.* (citing *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788 (1975)).

8. “Such a judgment is entitled to no authority or respect, and is subject to impeachment in collateral proceedings at any time by one whose rights it purports to affect.” *Id.* (quoting *Moskowitz’s Registration Case*, 196 A. 498, 502 (Pa. 1938)).

9. In *Orman v. Mortgage I.T.*, 118 A.3d 403 (Pa. Super. 2015), a property owner sought to reform a mortgage and note and to quiet title. But the property owner failed to join her husband, who was listed on the disputed mortgage. After finding that the property owner failed to join an indispensable party, the trial court granted the defendants’ motion for summary judgment. On appeal, the Superior Court held that the failure to include an indispensable party meant the trial court lacked subject matter jurisdiction to enter judgment in favor or against *any party*. *Id.* at 407. Thus, the Superior Court held that proper remedy was to dismiss the

complaint without prejudice, rather than to enter any form of judgment. Accordingly, the Superior Court vacated the trial court's judgment and orders and remanded the case to the trial court with instructions for the trial court to dismiss the complaint without prejudice. *Id.* at 408.

10. Pennsylvania courts have routinely held similarly. *See, e.g., Davis v. Palmisani*, 237 A.3d 464 (Pa. Super. 2019) (in action for prescriptive easement, failure to join indispensable party rendered judgment following bench trial void, even though the defense was not raised via preliminary objections or new matter); *Kunkle v. Poydence*, 216 A.3d 381 (Pa. Super. 2018) (vacating trial court order granting summary judgment because indispensable parties were not joined).

11. The posture of this case requires the same result. Petitioners sought declaratory relief to affect this election and all future elections with respect to the validity of undated absentee and mail-in ballots. But they named only 60 of the 67 county boards of elections.

12. Even after this defect was brought to the Petitioners' attention during the hearing on May 31, 2022, Petitioners made no effort to join the remaining 7 county boards of election.

13. It is plain that all of the county boards of election are indispensable parties. Under the Pennsylvania Declaratory Judgment Act:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration,

and no declaration shall prejudice the rights of persons not parties to the proceeding.

42 Pa.C.S. § 7540(a).

14. Failure to include indispensable parties to a declaratory judgment action deprives a court of subject matter jurisdiction. *Vale Chemical Co. v. Hartford Accident & Indemnity Co.*, 516 Pa. A.2d 684, 685 (Pa. 1986).

15. Here, Petitioners sought a declaration regarding the constitutionality and application of a provision of the Election Code but included less than 90% of Pennsylvania's county boards of election to the action.

16. Most glaringly, Petitioners left off Philadelphia County, the largest county in the Commonwealth.

17. Petitioners' "belief that those [omitted] boards are already providing the relief sought by Petitioners in this matter," *see* Mem. Op. at 3 n.1, is immaterial.

18. It is plain that *all* county boards of elections have an "interest which would be affected by the declaration," are indispensable, and that the absence of some of these county boards deprives the court of subject matter jurisdiction.

19. Accordingly, the Opinion and Order are "null and void," and should be vacated. *See Church of the Lord Jesus Christ*, 740 A.2d at 755.

II. The Opinion and Order Should Be Vacated Because This Action is Moot.

20. On June 3, 2022, Petitioner David H. McCormick conceded the election of the Republican nominee for the United States Senate was over. *See Application for Withdrawal of Proceedings*, 301 MD 2022, attached as Ex. 1.

21. Accordingly, the Opinion and Order have been rendered moot.

22. Thus, the Opinion and Order should be vacated.

23. “The mootness doctrine requires that there is an actual case or controversy at all stages of review.” *Selective Way Ins. Co. v. Hospitality Grp. Servs.*, 119 A.3d 1035 (Pa. Super. 2015) (citing *Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 964 (Pa. 2014)).

24. “It is well established in this jurisdiction that this Court will not decide moot questions.” *In re Gross*, 382 A.2d 116, 119 (Pa. 1978) (citing *Wortex Mills v. Textile Workers*, 85 A.2d 851 (1952)).

25. Courts have applied the mootness doctrine to cases involving elections. *See, e.g., Bognet v. Degraffenreid*, 141 S. Ct. 2508 (U.S., No. 20-740, Apr. 19, 2021) (“The Petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss the case as moot. *See United States v. Munsingwear, Inc.*, 340 U.S., 71 S. Ct. 104, 95 L. Ed. 36 (1950).”).

26. Because the outcome of the primary election for the Republican nomination for the United States Senate will not be affected by the Court's decision, the claims raised in the Petition for Review are moot.

27. Accordingly, this Court should follow the lead of the United States Supreme Court in *Bognet* and *Munsingwear* and vacate the Opinion and Order.

WHEREFORE, Doctor Oz for Senate and Dr. Mehmet Oz respectfully request that this Honorable Court vacate its Memorandum Opinion and Order of June 2, 2022.

Dated: June 6, 2022

Respectfully submitted,

/s/ Kathleen A. Gallagher

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**Appearing pro hac vice*

VERIFICATION

I, Casey Contres, hereby aver that I am the campaign manager of Doctor Oz for Senate and that the statements of fact contained in the attached Application to Vacate Memorandum Opinion and Order of June 2, 2022 are true and correct to the best of my knowledge and belief, and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: 6/6/2022

By: Casey Contres
Casey Contres

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher

Counsel for Intervenor-Respondents
Doctor Oz for Senate and Dr. Mehmet Oz

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2022, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Intervenor-Respondents

Doctor Oz for Senate and Dr. Mehmet Oz

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ORDER OF COURT

AND NOW, this ____ day of _____, 2022, upon consideration of the Application to Vacate Memorandum Opinion and Order of June 2, 2022 filed by Intervenor-Respondents Doctor Oz for Senate and Dr. Mehmet C. Oz, and finding that good cause exists, it is hereby ORDERED, ADJUDGED, and DECREED that said Application is GRANTED.

This Court's Memorandum Opinion and Order are hereby VACATED.

BY THE COURT:

_____, J.