



IN THE
TENTH COURT OF APPEALS

No. 10-16-00061-CV

MICHELLE MCMANUS,

Appellant

v.

SHEILA RICHEY, INDIVIDUALLY, AS
NEXT FRIEND OF T.R., A MINOR, AND
AS INDEPENDENT EXECUTRIX OF THE
ESTATE OF GEORGE RICHEY,

Appellee

From the 12th District Court
Madison County, Texas
Trial Court No. 15-14136-012-02

DISSENTING OPINION TO DENIAL OF
MOTION FOR REHEARING

On September 7, 2016, this Court issued its memorandum opinion on rehearing in this matter. *See generally* *McManus v. Richey*, No. 10-16-00061-CV, 2016 Tex. App. LEXIS 10047 (Tex. App.—Waco Sept. 7, 2016, no pet. h.) (mem. op.). In that memorandum opinion, a majority of the Court determined the preliminary questions—whether Chapter

27 of the Texas Civil Practice and Remedies Code applied and whether appellee, Sheila Richey is a limited-purpose public figure. *Id.* at **1-2. Ultimately, a majority of the Court concluded that Sheila is a limited-purpose public figure and that Chapter 27 applied. *Id.* at **15-16. Therefore, because the trial court had concluded to the contrary, the Court reversed the trial court’s judgment and remanded the case to the trial court for the trial court to proceed to the second step in the Chapter 27 analysis—whether Sheila established by clear and specific evidence the essential elements of her claims against McManus. *Id.* at *17. I dissented.

Subsequently, on September 22, 2016, counsel for both parties filed a “Joint Motion Pursuant to TEX. R. APP. P. 42.1(a)(2)(B)” based on a settlement agreement. *See* TEX. R. APP. P. 42.1(a)(2)(B). The parties also requested that we withdraw our September 7, 2016 memorandum opinion in this matter.

The joint motion of the parties is a motion for rehearing because it seeks a modification of this court’s judgment issued on September 7, 2016. In the motion, the parties specifically “move that the Court set aside the trial court’s judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement” of the parties. This is precisely the form of relief provided for by Texas Rule of Appellate Procedure 42.1(a)(2)(B) when the parties have settled their claim on appeal.

The Court impliedly denies this part of the joint motion. I do not understand why. In over 17 years on this Court, I do not recall a single instance in which we have denied a joint motion regarding settlement of a case, until now. I would grant this part of the motion for rehearing filed by the parties, thus setting aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of a judgment in accordance with the agreement of the parties.

The parties also request that we withdraw the Court's September 7, 2016 memorandum opinion on motion for rehearing. The parties are careful to note that their settlement agreement is not contingent upon the Court's decision to withdraw its opinion. This is in express compliance with the rule as it specifically provides that a motion under Texas Rule of Appellate Procedure 42.1(a)(2)(B) cannot be made contingent upon the withdrawal of the Court's previously issued opinion. The Court expressly denies this request. I would grant that part of the motion as well. This is not just because I dissented to the memorandum opinion on motion for rehearing. The problem is more fundamental in that because the parties have resolved their dispute by agreement there is no opportunity to obtain further review of this court's memorandum opinion, thus further impairing the precedential value thereof.

Thus, because the Court impliedly denies the first part of the motion, the motion for rehearing, and expressly denies the second part of the motion, the motion to withdraw the Court's opinion, and I would grant both, I respectfully dissent.¹

TOM GRAY
Chief Justice

Dissenting Opinion to Denial of Motion for Rehearing issued and filed October 5, 2016



¹ The prayer of the parties is somewhat inconsistent with the relief they expressly request in the motion. Their joint prayer for relief is: "The parties ask that the Court withdraw the Opinion, vacate its judgment, dismiss this appeal, and remand the case to the trial court for rendition of judgment." The text of the motion is more clear in what is requested because it tracks the language of the rule under which they are seeking relief. Moreover, if the Court were to dismiss the appeal, as prayed for, the Court cannot then remand the case as those remedies are inconsistent with each other. *See* TEX. R. APP. P. 43.2.