

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS
CHRISTI–EDINBURG

**Texas Honeycomb Partners, LLC, Kathleen McCarthy, David
McCarthy, David McCarthy as Successor-In-Interest to Shannon
McCarthy, David McCarthy as Successor-In-Interest to Ryan
McCarthy, and David McCarthy as Successor-In-Interest to Kevin
McCarthy v. Alan Johnson and Compass Bank**

Texas Honeycomb Partners, LLC v. Johnson, No. 13-14-00699-CV (Tex. App.—Corpus Christi–Edinburg July
1, 2015) · No. No. 13-14-00699-CV · Decided July 2, 2015

SUMMARY

The Texas Thirteenth Court of Appeals addresses whether appellants may proceed on appeal without advance payment of costs and whether the court reporter must prepare the reporter’s record. The court concludes that the contest to the appellants’ affidavits of indigence was untimely, the affidavits’ allegations were deemed true, and the reporter’s record must be prepared without payment of costs.

CASE DETAILS

COURT	Court of Appeals of Texas, Thirteenth District, Corpus Christi–Edinburg
WRITING FOR THE COURT	Justice Garza; Justice Benavides; Justice Longoria
JURISDICTION	Texas
DECIDED	July 2, 2015
DOCKET	No. 13-14-00699-CV
DISPOSITION	other
PROCEDURAL POSTURE	Interlocutory appellate order addressing appellants' indigency status and preparation of the reporter's record after a bench-trial judgment.
STANDARD OF REVIEW	A trial court's indigency determination is reviewed for abuse of discretion. The court examines the record as a whole to determine whether the applicant would be unable to pay appellate costs, or give security for them, if the applicant made a good-faith effort to do so.
PRECEDENTIAL VALUE	Published Texas intermediate-appellate order; no reporter citation appears in the source.

PARTIES

Texas Honeycomb Partners, LLC, Kathleen McCarthy, David McCarthy, David McCarthy as Successor-In-Interest to Shannon McCarthy, David McCarthy as Successor-In-Interest to Ryan McCarthy, David McCarthy as Successor-In-Interest to Kevin McCarthy v. Alan Johnson, Compass Bank

TOPICS

appellate procedure costs civil procedure motion for reconsideration

PRACTICE AREAS

appellate procedure civil procedure commercial litigation

QUESTIONS PRESENTED

1. Whether the court reporter's lack of actual notice of appellants' affidavits of indigence constituted good cause to permit a late contest.
2. Whether appellants were entitled to proceed without advance payment of appellate costs when their affidavits were uncontested because the contest was untimely.
3. Whether appellants' contingent-fee arrangement with counsel established a source of funds requiring them to pay appellate costs.
4. Whether the court reporter's motion for reconsideration concerning preparation and payment of the reporter's record should be granted.

HOLDINGS

1. Lack of actual notice to the court reporter of the filing of affidavits of indigence is not good cause for failing to timely file a contest under Texas Rule of Appellate Procedure 20.1.
2. Because the contest was untimely, appellants' affidavit allegations were deemed true and appellants were entitled to proceed on appeal without advance payment of costs.
3. An indigent appellant with a contingent-fee agreement is not required to show that counsel is unable or unwilling to pay appellate costs when the facts establish that counsel will not or cannot pay them.

KEY QUOTATIONS

“lack of actual notice to a court reporter of the filing of an affidavit of indigence is not good cause for failing to timely file a contest.” (6)

“the party is “absolutely entitled to the exemption from costs” and “the trial court lacks the authority to affect the party's entitlement.”” (7)

“The right of the indigent to pursue an appeal should not turn on whether an attorney abides by an agreement to pay or to advance costs.” (8)

FACTUAL BACKGROUND

After judgment was entered, appellants filed affidavits of indigence on December 3, 2014. Court reporter Corina E. Lozano filed a contest on January 21, 2015, but the trial court determined that the contest was untimely and therefore held no hearing; the allegations in the affidavits were deemed true. The trial court later found that appellants lacked sufficient financial resources to travel to Texas for the indigency hearing, that the affidavits substantially complied with Rule 20.1, and that counsel's contingent-fee arrangement did not defeat appellants' indigent status.

PROCEDURAL HISTORY

The trial court entered a take-nothing judgment against appellants on September 8, 2014, while awarding Compass Bank \$557,257.86 on its counterclaim against David McCarthy. Appellants filed affidavits of indigence and sought to proceed without advance payment of appellate costs. The court reporter filed a contest to the affidavits, but the trial court determined that the contest was untimely because it was filed more than ten days after the affidavits and declined to hold a contest hearing. The court of appeals abated and remanded for findings concerning indigency, then reinstated the appeal and denied the court reporter's motion for reconsideration, ordering preparation of the reporter's record.

DISPOSITION

other

REMAND INSTRUCTIONS

The court reporter was ordered to prepare and file the reporter's record as soon as practicable, and no later than sixty days from the date of the order.

CASES CITED

- *Benge v. Harris*, No. 07-13-0064-CV, 2013 WL 1182096, at *1 (Tex. App.—Amarillo Mar. 19, 2013) (per curiam)
- *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979)
- *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684, 685–89 (Tex. 2008)
- *Burgess v. Feghhi*, 191 S.W.3d 411, 413–15 (Tex. App.—Tyler 2006, no pet.)
- *Rodgers v. Mitchell*, 83 S.W.3d 815 (Tex. App.—Texarkana 2002, no pet.)
- *Arevalo v. Millan*, 983 S.W.2d 803, 804, 808 (Tex. App.—Houston [1st Dist.] 1998, no pet.)
- *Morris v. Aguilar*, 369 S.W.3d 168, 170–72 (Tex. 2012) (per curiam)
- *Rios v. Calhoon*, 889 S.W.2d 257, 258–59 (Tex. 1994) (orig. proceeding) (per curiam)
- *In re B.A.C.*, 4 S.W.3d 322, 323 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd)
- *Allred v. Lowry*, 597 S.W.2d 353, 355 (Tex. 1980)
- *Goffney v. Lowry*, 554 S.W.2d 157, 160 (Tex. 1977)
- *Griffin Industries, Inc. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 352–54 (Tex. 1996)

- Pinchback v. Hockless, 164 S.W.2d 19, 20 (Tex. 1942)
- In re Sosa, 980 S.W.2d 814, 815 (Tex. App.—San Antonio 1998, orig. proceeding)
- Grimaldo v. Lewis, 915 S.W.2d 222, 223–24 (Tex. App.—Corpus Christi 1996, orig. proceeding)
- Scoresby v. Santillan, 346 S.W.3d 546, 556 (Tex. 2011)

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