

# No. 11-0073

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IN THE SUPREME COURT OF TEXAS

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BARBARA J. DAVIS  
Petitioner

v.

TARRANT COUNTY (Self-Insured) and  
TARRANT COUNTY DISTRICT CLERK'S OFFICE  
Respondents

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-  
**TARRANT COUNTY DISTRICT CLERK'S OFFICE'S RESPONSE TO  
BARBARA DAVIS'S PETITION FOR REVIEW**

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-  
Respectfully submitted,

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CLERK'S OFFICE

## **IDENTITY OF PARTIES AND COUNSEL**

The “Identity of Parties and Counsel” is substantially correct, but Petitioner misidentifies the nature of the parties. Tarrant County (Self-Insured Governmental Entity), represented by Carolyn Mitchell, and Tarrant County District Clerk’s Office, represented by the undersigned, are both Respondents in this action, and not “real parties in interest.”

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**I.**  
**STATEMENT OF THE CASE**

*Nature of the Case:* This appeal arises from a Bill of Review filed four years after a workers' compensation case was tried on the merits.

*Trial Court:* The Honorable Melody Wilkinson, Presiding Judge, 17<sup>th</sup> Judicial District Court of Tarrant County, Texas.

*Trial Court  
Disposition:* On October 1, 2010, the trial court sustained the contests to Barbara Davis's affidavit of indigence to pursue her appeal without the payment of costs. The trial court found the appeal to be frivolous and denied Davis's request for a free record on appeal, pursuant to § 13.003 of the Texas Civil Practice & Remedies Code. (Petitioner's Tab C)

*Parties in Court  
of Appeals:* Appellant: Barbara Davis  
Appellee: Tarrant County (Self-Insured)  
Tarrant County District Clerk's Office

*Court of Appeals:* Second Court of Appeals at Fort Worth; Justices Livingston, Walker and Meier. The opinion was *per curiam*. See *Davis v. Tarrant County*, No. 02-10-00331-CV, 2010 WL 5187732 (Tex. App.—Fort Worth December 23, 2010, pet. filed).

*Appellate Disposition:* On December 23, 2010, the court of appeals issued its decision affirming the trial court's order sustaining the contest to Petitioner Davis's attempt to pursue appeal without the payment of costs. (Petitioner's Tab B)

**II.**  
**ISSUE PRESENTED**

1) When a party seeks to appeal a trial court's judgment without the payment of costs, is the trial court required to make a finding on the issue of indigence where the trial court has already found that the appeal is frivolous under § 13.003 of the Civil Practice & Remedies Code?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent Tarrant County District Clerk's Office submits this Response to the Petition for Review filed by Petitioner Barbara Davis. Specifically, Davis seeks the reversal of the Fort Worth Court of Appeals' holding that the trial court did not abuse its discretion when it found that Davis's appeal was frivolous and withheld from ruling on the issue of indigence.

**III.**  
**STATEMENT OF FACTS**

On April 16, 2010, Barbara Davis filed an Original Petition for Bill of Review seeking to set aside a judgment entered against her in a workers' compensation suit filed by her against Tarrant County. Davis named Tarrant County (Self-Insured Governmental Entity) and the Tarrant County District Clerk's Office as defendants in the bill of review proceeding. Davis filed an affidavit of indigence pursuant to Texas Rule of Civil Procedure 145 and sought to avoid the payment of costs; both defendants filed contests to Davis's affidavit. In addition, Tarrant County (Self-Insured) filed a motion to dismiss in accordance with Chapter 13 of the Texas Civil Practice and Remedies Code.

The contests to Davis's pauper's affidavit and the Chapter 13 dismissal motion were called for hearing on August 18, 2010. At that hearing,



following the consideration of evidence and argument, the trial court sustained the contests to Davis's affidavit of indigence, and, further found Davis's Bill of Review to be frivolous, and, accordingly, dismissed the suit with prejudice.

On September 20, 2010, Davis filed a notice of appeal and an Affidavit of Inability to Pay Costs associated with the appeal pursuant to Texas Rule of Appellate Procedure 20.1. Again, both defendants submitted contests to Davis's pauper's affidavit, and on October 1, 2010, the trial court conducted a hearing on the contests. Following the hearing, the trial court issued an order finding that Davis's appeal was frivolous, but withheld any ruling on Davis's indigence. (Petitioner's Tab C)

After receipt of the trial court's October 1, 2010, order, the Fort Worth Court of Appeals ordered that Davis submit the filing fee and arrange for payment of both the clerk's record and the reporter's record, or risk dismissal of her appeal. On October 25, 2010, Davis filed a Petition for Writ of Mandamus in the cause number already established for her appeal. Viewing this mandamus as a request to have the trial court's decision to deny Davis status as a pauper, the court of appeals ordered that the court reporter prepare and file the portions of the record from the October 1 hearing that would be necessary to review the trial court's finding. (Respondent's Tab A) The court reporter complied.

On December 2, 2010, the court of appeals affirmed, in a *per curiam* opinion, the decision of the trial court to deny Davis the right to proceed without the payment of costs, and instructed Davis to pay the appellate filing fee or risk having her appeal dismissed. (Petitioner's Tab A) Davis did not make the required payment and the court of appeals dismissed her appeal on December 23, 2010. (Petitioner's Tab B) This petition followed.

#### **IV. SUMMARY OF THE ARGUMENT**

Issue No. 1: When a party seeks to appeal a trial court's judgment without the payment of costs, is the trial court required to make a finding on the issue of indigence where the trial court has already found that the appeal is frivolous under § 13.003 of the Civil Practice & Remedies Code?

In order to avoid the payment of costs in the pursuit of an appeal, the appellant must comply with the provisions of Rule 20.1 of the Rules of Appellate Procedure and § 13.003 of the Civil Practice and Remedies Code. The failure to meet those requirements precludes pauper's status on appeal. Because Davis did not obtain a finding that her appeal was not frivolous, her alleged inability to pay was no longer of any consequence and the trial court's failure to rule was not error. Because the trial court and court of appeals acted consistent with the procedure prescribed by this Court in *In re Arroyo*, 988 S.W.2d 737 (Tex. 1998), granting review in this case is unnecessary.

**V.**  
**ARGUMENT**

**A. Requirements to Appeal as a Pauper**

Texas Rule of Appellate Procedure 20.1 sets forth the procedure for an appellant to prosecute an appeal without the payment of costs. It requires that an appellant submit an affidavit that includes specific information about their financial condition. TEX. R. APP. P. 20.1 (b). If the affidavit is not challenged, then the facts in the affidavit are deemed as true and the appellant may proceed without the payment of costs. TEX. R. APP. P. 20.1 (i) (4). If, however, a contest to the affidavit is filed, then the applicant must prove by a preponderance of the evidence that they are indigent. *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684, 686 (Tex. 2008). The test to determine indigence is clear: "Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefore, if he really wanted to and made a good-faith effort to do so?" *Pinchback v. Hockless*, 139 Tex. 536, 164 S.W.2d 19, 19-20 (1942).

In addition to the requirements of Rule 20.1, an appellant that seeks a free clerk's record and reporter's record must comply with § 13.003 of the Texas Civil Practice and Remedies Code. *Schlapper v. Forest*, 272 S.W.3d

676 (Tex. App.—Austin 2008, pet. denied); *Rhodes v. Honda*, 246 S.W.3d 353 (Tex. App.—Texarkana 2008, no pet.). This statute requires the appellant obtain an affirmative finding from the trial court that their appeal is not frivolous and that the records are necessary for the appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 13.003 (Vernon 2002). Compliance with both Rule 20.1 and § 13.003 are necessary for an appellant to prosecute their appeal without the payment of costs. Even with satisfaction of one, the absence of the other will result in the denial of a pauper's status. *Baughman v. Baughman*, 65 S.W.3d 309, 314-15 (Tex. App.—Waco 2001, pet. denied) (holding that a decision on the frivolousness of appeal was unnecessary when appellant found not to be indigent).

**B. Davis's Appeal is Frivolous**

At the hearing on Tarrant County and Tarrant County District Clerk's Office's contests to Davis's affidavit of indigency, the trial court held that Davis's appeal was frivolous, but specifically withheld from ruling on whether Davis was indigent. (Petitioner's Tab C) The trial court's refusal to rule is precisely what Davis seeks to be reviewed by this Court. (Petitioner's Petition for Review, p. v, no. 4)

After Davis's pauper's status was refused because her appeal was found to be frivolous, Davis sought to have that decision reviewed by the court of appeals. Her original appeal was already filed under Cause No. 02-

10-00331-CV, and within that case Davis filed a petition for writ of mandamus. The court of appeals viewed that mandamus petition as a request to have the trial court's October 1, 2010, decision reconsidered.

The court of appeals agreed to review Davis's claim and requested a limited record to review the trial court's decision, a process outlined in this Court's decision in *In re Arroyo*, 988 S.W.2d 737 (Tex. 1998). (Respondent's Tab A) In *In re Arroyo*, this Court articulated the process by which a party could have the court of appeals review the trial court's decision on the party's claims of indigence. To review an indigence-contest order, like the one signed in this case, the appellate court "can and should obtain portions of the record necessary to review [it]." *In the interest of G.C.*, 22 S.W.3d 932, 933 (Tex. 2000), *citing to Arroyo*, 988 S.W.2d at 739. This will give a "record of sufficient completeness to enable [appellant] to attempt to make a showing [of reversible error]' as a matter of the due process and equal protection guarantees of the United States Constitution." *De la Vega v. Taco Cabana, Inc.*, 974 S.W.2d 152, 154 (Tex. App.—San Antonio 1998, no pet.), *citing to Coppedge v. United States*, 369 U.S. 438, 446-448, 82 S.Ct. 917, 921-23, 8 L.Ed.2d 21 (1962).

The court of appeals in the present case afforded Davis all of the due process to which she was entitled by acting in a manner consistent with *In re Arroyo* and *In the interest of G.C.* On November 15, 2010, the court of

appeals ordered that the court reporter prepare and file the relevant portions of the record from the trial court's October 1 hearing. (Respondent Tab A) On December 2, 2010, after reviewing the record, the court of appeals found that the trial court did not abuse its discretion and affirmed the trial court's order that Davis must pay the costs associated with her appeal. (Petitioner's Tab A) Accordingly, the court of appeals ordered Davis to pay the filing fee for her appeal by December 13, 2010, or risk having her case dismissed. On December 23, 2010, the court of appeals dismissed Davis's appeal for the non-payment of costs. (Petitioner's Tab B)

**C. Once Appeal Deemed Frivolous Nothing More Is Needed**

Davis takes no issue with the trial court's finding that her appeal is frivolous. Her sole point of error is that the court went no further after finding the appeal to be frivolous. The ability to prosecute an appeal without the payment of costs is a two-prong procedure. The appellant must comply with Rule 20.1 and obtain a finding that the appeal is not frivolous. "[P]arties who establish their indigency **and** have a potentially meritorious appeal are entitled to a free record for the appeal and to have their appellate costs waived." *In re C.H.C.*, 331 S.W.3d 426, 429 (Tex. 2011) (emphasis added). If both are required, then both must be satisfied or the appellant's claims fail.

**VI.**  
**CONCLUSION AND PRAYER**

Because the decision by the Fort Worth Court of Appeals in this case, to affirm the trial court's finding that Petitioner Barbara Davis was not entitled to prosecute her appeal without the payment of costs, does not rise to the level of those issues appropriate for Supreme Court review under Rule 56.1 (a) of the Texas Rules of Appellate Procedure, it is requested that Petitioner Barbara Davis's Petition for Review be denied. Tarrant County District Clerk's Office also requests such other and further relief to which it may be entitled.

Respectfully submitted,

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CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS

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ATTORNEY FOR RESPONDENT  
TARRANT COUNTY DISTRICT  
CLERK'S OFFICE

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document was served via electronic mail and U.S. Regular Mail on the following people:

Ms. Barbara J. Davis  
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Fort Worth, Texas 76140

barbaradavis20@yahoo.com  
*and U.S. Regular Mail*

Ms. Carolyn Mitchell  
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Fort Worth, Texas 76109

mitchell\_carolyn@sbcglobal.net  
*and U.S. Regular Mail*

Signed on this 1<sup>st</sup> day of July, 2011.

/s/ CHRISTOPHER W. PONDER  
CHRISTOPHER W. PONDER



No. 11-0073

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BARBARA DAVIS

Petitioner

v.

TARRANT COUNTY (SELF-INSURED GOVERNMENTAL ENTITY) and  
TARRANT COUNTY DISTRICT CLERK'S OFFICE

Respondents

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**APPENDIX IN SUPPORT OF TARRANT COUNTY DISTRICT  
CLERK'S OFFICE'S RESPONSE TO  
BARBARA DAVIS'S PETITION FOR REVIEW**

---

Respectfully submitted,

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**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-10-00331-CV**

BARBARA J. DAVIS

APPELLANT

V.

TARRANT COUNTY (SELF-INSURED) AND TARRANT COUNTY DISTRICT CLERK'S OFFICE

APPELLEES

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FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY  
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**ORDER**  
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Appellant has appealed the trial court's order sustaining the contests to appellant's affidavit of inability to pay costs. Therefore, on this court's motion, we order the court reporter to prepare and file the portions of the record necessary to review the trial court's order sustaining the contest to appellant's affidavit of indigency on or before **Monday, November 29, 2010**. See Tex. R. App. P.



34.5(c)(1), 34.6(d). It is further ordered that all fees under rule 5 shall be deferred until this court determines whether appellant is entitled to proceed without payment of appellate costs. Tex. R. App. P. 5.

The clerk of this court is ordered to transmit a copy of this order to the appellant, the attorneys of record for the appellees, the trial court judge, the trial court clerk, and the court reporter.

DATED November 15, 2010.

PER CURIAM