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GRIFFIN INDUSTRIES V. 13TH COURT OF APPEALS

LAWYER: May it please the court. I represent Griffin Industries, as well as several individuals working for Griffin Industries, who were working as security officers, most of those individuals were off-duty Corpus Christi police officers. Griffin is in the grease recycling business. They collect used cooking oil from restaurants and then recycle it. It goes into products like dog food and ladies makeup.

This case arose as a result of Viegas(?) being arrested for grease theft of a Griffin container. A few months after the arrests, Mr. Viegas(?) died, charges were dropped against him, and ultimately the charges were dropped against his wife. This case then was brought by the plaintiffs as a malicious prosecution, false arrest type case. And on the 4th day of the jury trial at the close of plaintiff's evidence, the trial court directed a verdict in favor of the defendants. The plaintiff's counsel had been handling the case on a contingent fee basis, a 40% contract, and up until the end of trial had been advancing costs towards the litigation. After receiving a bad result, the plaintiff's counsel then attempted to use Rule 40 under the Appellate Rules to get a free statement of facts and transcript to appeal this case. The TC sustained our contest, and then of course the Corpus Christi CA issued its mandamus requiring that the court reporter actually produce a free statement of facts in this case.

This mandamus presents basically 2 issues for the court to consider. First what factors may be considered by the TC in a Rule 40 proceeding in determining whether a plaintiff is entitled to a free statement of facts, when the claims arise in a monetary damages kind of case (a personal injury, or tort type case)? Specifically is it appropriate for the TC to consider such things as the nature of litigation as well as the fee agreement between the parties? And this is similar to two other cases which are presently before the court: the Amigas Cannon case, as well as the Coor(?) case, another Corpus case. The second issue concerns whether mandamus should have been issued in this case. We believe that inherently in this case there was a fact finding, it was credibility issues, and that this was not an appropriate case for the court to issue its mandamus.

Turning to that first issue. What should the TC be able to review in a Rule 40 proceeding when it's a monetary damages claim? The 13th CA in essence adopted a test that placed blinders I think on the TC. It asked the TC to restrict its view and not to consider the nature of the claim or the relationship of the parties and their contingent fee agreement. This restricted view was neither fair nor I think consistent with public policy. It shifts the burden of responsibility for paying the cost of appeal from the plaintiff's attorney who has a substantial interest in the litigation, to the court reporter who has absolutely no interest in the litigation.

BAKER: Are you arguing for a blanket acceptance of that _____ regardless of the nature of the agreement between the litigant and the attorney?

LAWYER: No, I believe that ultimately you do have to consider the type of contingent fee arrangement and the contractual duties between the parties.

BAKER: So your argument is it ought to be part of the _____?

LAWYER: It is, that's right your honor.

GONZALEZ: That's a bottom line. Does it really not get to a policy question as to who's going to bear the burden of an appeal after a plaintiff loses a personal injury action?

LAWYER: It's a policy argument as well...

GONZALEZ: As to whether it will be the court reporter, or the plaintiff's lawyer?

LAWYER: That's right. To a large extent that's what it comes down to.

GONZALEZ: Because here there's no question that the party here was indigent?

LAWYER: I would disagree with that your honor.

GONZALEZ: She's on disability?

LAWYER: Yes, sir. We had a large contest concerning the issues of indigency...

GONZALEZ: So you do not concede that she's indigent?

LAWYER: I would say on the face of things she certainly looks very poor. But that is not the only test. The test is for such things as whether or not there is a willingness to work, or whether the person is...

GONZALEZ: Well here she had arthritis, she was ill, and she is on disability for an illness.

LAWYER: And we did contest that from the standpoint and put on evidence and discussions in the record about whether or not she in fact defrauded the government, whether she had made misstatements in order to get that disability, and in fact that type of evidence was presented. So we did contest it. But the bottom line I think on that aspect of it would be is more in terms of was there some willingness to work, or was she voluntarily not working? And Mr. Holgate I believe stated in the record in a hearing before the court, the bottom line reason why she didn't have a job, or wasn't going to get a job was that that would jeopardize her governmental benefits. And in fact we put on testimony that she had been going to school, had been retrained...

GONZALEZ: Isn't that usually the case under our system of welfare and disability payments if you get a job that the government taxes you or penalizes you for initiative?

LAWYER: That certainly can be the case. But we would hope that the TC is given the discretion to review all the facts beforehand and not just rely upon what some federal agency may have done some time in the past without all the information that we were able to develop concerning this lady's past history of lying to the government that she had admitted to in this...

GONZALEZ: In light of Walker v. Packer and the standard for mandamus generally, what would you have us write in this case?

LAWYER: I would state among other things that it would be appropriate for the TC to consider in contingent fee monetary damages types of cases that you may consider the relationship and the nature of the claims as well as whether or not there's a contingent fee interest and the history, and that could be one of the factors. I would also state that it is not appropriate for mandamus to issue in those cases where they are inherently fact faced findings and inherently based on credibility of the witnesses. And that's what was done in this case on the issue of indigency at least I think.

SPECTOR: If there would be evidence that the plaintiff has attempted to have her attorney pay the court reporter and the attorney says: No, I'm not going to - period, just as if you go to a bank and the bank says no, I am not going to loan you the money; what would you have the TC do in that situation?

LAWYER: Well I think the TC is not limited to the inquiry stopping there. I think the TC is allowed to look at the fee agreement, which is the contractual binding relationship between the parties, and see what the agreement was. What was the order standing of the parties? Because while an attorney can say: well I am not going to pay for it, he or she may have a contractual obligation to do so, and undertook this obligation. And so there may be a...it doesn't just stop as to what the lawyer says he's willing to do because the obligations of the parties are obviously contractual.

SPECTOR: But if there is no agreement that the attorney paid the fees would you have the TC then say it's an obligation of the attorney nevertheless?

LAWYER: I think to a large extent that you do have to look at the relationship between the parties, which is the contingent fee agreement. So if the contingent fee agreement said: Absolutely not, I'm not going to pay any expenses, I will withdraw from you your representation if you do not pay these expenses, then the obligation of the lawyer is to withdraw if the client is not filling their part of the bargain. But if the agreement is one like this where expenses are stated in the agreement that it says while the client's expected to pay those things in the event the client does not pay those things, then the lawyer will advance those expenses and charge 12% interest on that, and have a lien on the cause of action in essence, then we are in a different kind of category.

CORNYN: Isn't the nature of most contingent fee agreements basically that the lawyer agrees to finance the litigation and just take his or her cut out of the final judgment?

LAWYER: That's right, and our disciplinary rules allow us to do that unlike some states that don't allow that.

CORNYN: So why doesn't the determination here turn principally on the nature of the attorney's fee agreement the contingent fee agreement, that the lawyer takes on a case and agrees to finance the litigation, why doesn't that obligation continue assuming the attorney thinks the appeal might have some merit through the appellate process?

LAWYER: I think it would and I think that's what the judge thought below, because much of the focus the TC below and the discussion on the record was this contract and the obligations that were taken and the understandings at the beginning, that this client didn't have where with all the finances, the assets to pay costs, and he knew that when he took the case on and knew that the lawyer who represented her would have to pay those costs. There was focus there.

CORNYN: I guess I'm trying to understand your response to Judge Baker. You talked about credibility and things like that, but why doesn't it simply boil down to the nature of the agreement between the client and the lawyer?

LAWYER: I guess what I thought with regard to Judge Baker's question was that we give the TC a lot of discretion in terms of all factors to consider. I think you would have in a contingent fee case, this contract, that would be an issue that you are allowed to look at. I don't think you can stop there. I think you still have to consider whether the person qualifies as an indigent anyway. There are those factors as well.

CORNYN: I'm assuming that would be a preliminary determination that they are otherwise an indigent.

ENOCH: Should we take into consideration whether or not the court reporter is the official court reporter for the court paid by the county or their services or a freelance court reporter. Reference is made that she would be doing this after hours on her own time. But if she worked for the court, and had a salary from the court, should we consider the burdens on whether or not the state actually pays for this record not on a page per diem but actually permits her to have time during working hours to work on this. I mean should we take that as one of the mixes?

LAWYER: I would have to just take the record as it is, which is her affidavit, which I think said that she would have to do this after hours. And I'm not sure if that's because the load of the court in that particular court is just so that there isn't a lot of extra time during the day where she can be working on these kinds of transcripts and statement of facts during work hours. She would also have to..

ENOCH: But she does as a matter of law. If she's the reporter doesn't she have a duty to prepare these statement of facts? I mean isn't part of her work duty to prepare these statement of facts?

LAWYER: Certainly she has to do it in criminal cases and other civil cases and whatever she has to do.

ENOCH: So can we accept an affidavit that she would have to do it outside of work hours?

LAWYER: Well I certainly didn't prepare the affidavit and don't have personal knowledge about what her work situation is. But from my understanding of it I thought she said that it would mostly have to be done after hours. And I'm not sure if that's because of the work load.

ABBOTT: Would it matter if the attorney/client agreement provided for a contingency fee for trial purposes, but no contingency fee for any services provided by the attorney after that?

LAWYER: It might make an impact. But again it would I think depend on what kind of language is provided and expectations provided as to the expense side of the equation. And I think also whether or not the lawyer decides to undertake the appeal in terms of whether he thinks that that's something that's meritorious and something that should be pursued. I think all those factors have to be looked at.

SPECTOR: Isn't that a very difficult issue for an attorney who perhaps does not want to pursue the appeal?

LAWYER: Well there's always ethical concerns. And contracts can be written such that as I say that it only covers the trial, and the appeal is totally the discretion of the lawyer, and the lawyer is free to withdraw at the time at the end of the case if the lawyer doesn't believe that an appeal is appropriate. And of course ethically we shouldn't pursue frivolous appeals anyway. And so there is an opportunity to withdraw. The counsel in this case did not withdraw.

GONZALEZ: There are two extremes. A very good case where we have liability is established and we're talking about damages verses the frivolous. But in-between there's this gray area like this case where a jury may make an award but it's very iffy. Some people have to make

judgments as to whether or not they are going to continue to sink money in an iffy case, or bail out, or get another lawyer like was attempted in this case.

LAWYER: Of course this is a free will decision. This was a voluntary contract that was entered into. Nobody forced Mr. Holgate ever to take this case. He was a lawyer. He had the ability to assess and make a business decision. He was motivated by profit. This wasn't goodness out of your heart. This was a profit motivated case. And so if he writes a contract that both states things about trials, a second trial, an appeals, and jealously pursuing all of these things, he's made his own bed.

GONZALEZ: All of which are in this contract?

LAWYER: His contract mentions the possibility of a second trial or if there's an appeal by either party, and it has general language about pursing the claim in an adequate matter. And so a lawyer writes the contract generally, not the client, and the lawyer makes choices when he takes the cases. And certainly you can write different kinds of obligations and write different kinds of contracts in order to limit your liability.

BAKER: Does the record show who gets paid the $3,000 if the court reporter does the record? Does it go to her, or does it go to the state because she's an employee of the state?

LAWYER: Well I don't think anyone ever recovers the $3,000 if it's a rule 40 situation.

BAKER: I mean if you're paying the cost?

LAWYER: I believe it goes to the court reporter.

BAKER: She doesn't have to pay it back to the state even though she's a state employee?

LAWYER: I'm not 100% sure about that your honor.

BAKER: That's my understanding. So whether she's a state employee if she's doing it after hours it's her money.

LAWYER: That's how I understood worked.

BAKER: So she's directly involved, is that correct?

LAWYER: I believe so.

BAKER: On the other issue of the contingent fee situation, in this particular agreement it seems to indicate that the attorney agreed to loan the costs and charge 12% interest. Is this not the situation in this record but whether upon the hearing he says well I agreed to do that, but I don't have the money to loan or I'm unwilling to loan it because it's too speculative. That's still a factor to consider.

LAWYER: I think if he has a contractual obligation that says I'm going to loan the costs on this, then he has made his bed. And that he has to fulfill that contractual obligation or deal with the consequences. A lawyer certainly has an opportunity but perhaps...

BAKER: So are you arguing then that you're now going to have to say that the court

reporter is a third party beneficiary with that agreement and the transcript for preparation to go and so forth?

LAWYER: I wouldn't go so far as to say that.

BAKER: That's where you have to go to get there. It seems to me that one of the factors is that the alleged indigent has to show they have attempted to get bond, not that they can't, but they have attempted to and they've been...so I'm a little concerned about your argument that this is a factor requiring the attorney to actually put up the money whether he's unwilling to or not?

LAWYER: Well that goes back to his contractual duty and what he agreed that he was willing to do in this case when he took the cases.

BAKER: But we don't have the lawsuit to enforce the contract. We have a hearing under rule 40 to determine whether this litigant is indigent or not under that criteria.

LAWYER: But under the criteria we are looking to see whether or not that person has any resources and one of their resources is that potential claim against that attorney who's made an agreement to pay those fees.

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RESPONDENT

LAWYER: First of all I would like to start out on our first point of error and I think that the court should consider it. And the first point of error that we believe the TC committed was is that they did not specify the reasons why they sustained the contest to the plaintiff's affidavit of being indigent. All they did was they ruled in favor of the relators in this case, but they didn't state their reasons why.

Now if you go to the case law in this case _____ v. Troshi(?), the court stated that Rule 145 of the Civil Procedures said that the court should state its reasons. Now it's undisputed in this case that the trial judge did not state the reasons for sustaining the contest. But we have to be mindful of the fact here is that rule 145 is not appellate procedure, but it's civil procedure. And of course we're under the guidance under appellate or under rule 40 of appellate procedure. Now the courts have gone back and forth and interpreted 145 and Rule 40 and they look at both together and they try to come up with a conclusion as to how the law should be applied. I would suggest to the court that because Rule 145 and rule 40 have the same objective that both should be viewed together if needed. They shouldn't be viewed in a vacuum.

LAWYER: Counsel assuming your client is indigent, why should the risks of the litigation be shifted to the court reporter or to the taxpayer?

LAWYER: Number 1, you have the public policy that basically if you take a case like it was referred to before, there is no risks at all. You are going to have no problem obtaining an attorney not only to take the case but to pay the costs and to advance the costs. And then you get way down to the bottom where a case is absolutely frivolous no attorneys are going to take it and they most certainly are not going to take the case and pay the costs. Then you have the area in-between. And the real problem is is when are attorneys going to take the case and if they are going to be compelled to carry the costs, advance the costs, you are going to find that a lot of attorneys might not take the case on.

CORNYN: Presumably a lawyer would require the client to pay costs if they can. But the reality is the reason people enter into contingent fee agreements and the lawyers finance the costs is because the client doesn't have any money, and can't finance the litigation, the lawyer can, the lawyer's got a hope of eventual recovery when the case settles. So why hadn't the lawyer who accepts that risk accept the risk of the duration? Presumably the client wouldn't be able to get into the courthouse door in the first instance, but for the contingent fee contract.

LAWYER: That's the purpose of rule 40 is so that an indigent client 1) under rule 145 can get into the court, and 2) under rule 40 can go up on an appeal. And the fact of the matter is...

CORNYN: So that may pay costs in the case, won't pay for a lawyer?

LAWYER: But the attorney when he takes on a case on a contingent fee basis doesn't necessarily agree to advance the costs. If you look at my contract what my contract said, and I never agreed to pay the costs, what my contract says is basically if you don't advance the costs to me or reimburse me for the costs as I advance them, then I can charge you 12% on that, but I never agreed to advance the costs. And when it became apparent that this plaintiff could not reimburse me for costs, that's when we went out and obtained another attorney who agreed to advance the costs.

GONZALEZ: And then he bailed out?

LAWYER: He bailed out.

GONZALEZ: Because he said I'm not going to continue to put money on this case, which I consider to be very speculative, and actually it's borderline on being a dog.

LAWYER: I will put it this way: the reason he bailed out could be a lot of reasons. It could have been just as you said that he thought that it was too speculative. It could have been that he didn't like the idea of suing 4 police officers in the City of Corpus Christi.

BAKER: Is any of this in the record?

LAWYER: No.

BAKER: Is there anything from the lawyer Mr. Laithen?

LAWYER: No. And the trial judge when I did approach that question where basically it was approached, the trial judge didn't want to know why Mr. Laithon bailed out.

BAKER: Well he wasn't a witness was he?

LAWYER: No. But of course it got into possibly attorney/client relationships, it got into attorney work product, and things of this nature. And basically when it came close to where I would say why Mr. Latham wanted out - the judge didn't want to know.

GONZALEZ: Getting back to Justice Cornyn's question in terms of shifting the risks, why shouldn't you bear the risk if you want to proceed with this case, and not the court reporter?

LAWYER: I think you can look at it policy reasons is 1) what we have here is a case where 4 police officers lied, and they accused the plaintiffs...

GONZALEZ: Have you brought a cause of action on behalf of Ms. Diegas against the police officers?

LAWYER: Yes, the relators are the Griffin Industries, and 4 police officers that participated in the arrest. And we sued them and we established...

GONZALEZ: And you have so little faith in that lawsuit that you are not willing to fund the costs?

LAWYER: I basically testified in the trial court that I wasn't capable of advancing the costs on this lawsuit.

GONZALEZ: But you made fund costs on that other case where the prospects of recovery are a lot greater?

LAWYER: At this point in time no. But I think you are also becoming...you're getting into a danger where you are asking attorneys to come forward and before they take a case on, they have to be willing to front the costs if the plaintiff can't front the costs.

GONZALEZ: Isn't that the nature of the personal injury business?

LAWYER: Not necessarily, no. I don't think an attorney...I think the importance of getting an attorney is 1) you don't necessarily want _____ attorneys to represent plaintiffs, because lots of times the plaintiffs are represented by a lawyer that might not have the financial status. And I think an example is even if you look at her graph there where she's showing the interest. Here we have 4 police officers that caused the wrongful arrest of the plaintiffs. How many attorneys are willing to take that case that are wealthy, and how many attorneys are willing to advance the costs on that case.

ABBOTT: So if the attorneys aren't willing to do it, then that means that the costs falls on the court reporter, who doesn't even get to participate in the decision?

LAWYER: She doesn't get to participate in the decision, but she gets to contest it by filing her affidavit. Let's look at this court reporter. She wants the good, and she wants the bad. There is not an exodus of court reporters trying to get out of the court reporting business for a court because they have this. The fact of the matter is when she took this job on and it's a very good job, it's a lucrative job, it's in demand among court reporters, and what she wants to do is she wants to take the cases that she is being paid for and she has no doubt that she is going to be paid for, but she doesn't want to take the cases that she isn't going to be paid for, and that's in her job description.

CORNYN: Well that's kind of the decision you make isn't it? You want to take only the work that you are going to get paid for.

LAWYER: Yes, but she is being paid, except she isn't being paid directly. Because of her position as a court reporter she gets the opportunity of reporting all the other cases where she is going to be directly paid. It's an opportunity that court reporters really want.

BAKER: I'm not quite sure, did you say that that's in her job description that she's required to do statements of facts for indigents, litigants without paying?

LAWYER: Of course it would be in her job description.

BAKER: But is it, and is that in this record?

LAWYER: It's not in the record, but it is in the record. It is in the record because the rule of appellate procedure requires her to do it. And therefore, she has to be prepared to prepare the transcripts that not only she's going to get paid for, but the ones that the rules require her that she won't get paid for.

BAKER: If the litigant here can meet their burden to show they are indigent?

LAWYER: Correct.

CORNYN: If the prospects for recovery on appeal were excellent, wouldn't we have lawyers lining up to finance this appeal?

LAWYER: You know you don't hear this much in state courts, the likelihood of prevailing on the merits. My personal opinion on this case is, we are going to win it, and the relators and the judge knows that if we get a transcript and this goes up, we are going to win. And we are going to get a new trial. And what happens at that point is the court reporter will have a lien on any judgment and she will be paid if we win.

CORNYN: But I'm talking purely in terms of financial incentives. Lawyers will line up to take a case where they think they are going to succeed and obtain a judgment where they are going to get paid 40%, their contingent fee on the case.

LAWYER: Yes, and no. In the yes instance, I think you have to take into effect that 4 police officers are being sued. The second thing is you've got to take into the cause that Judge Pate basically said that this case was worthless, that he issued a directive verdict and would not even allow the plaintiff's case to go to the jury. Therefore, any attorney just like any lender that would look at this case, would say this case is worthless.

BAKER: That's another question: did any lender get the opportunity to look at this? Did your client go to a bank or a financial institution and ask for a loan?

LAWYER: No. I testified before the court that we decided it would be ridiculous to do so because the trial court had already said that this case was worthless. Now that brings us to another point of...

BAKER: But that was your decision as attorney for the plaintiff?

LAWYER: There's no way that a bank would lend a...

BAKER: I'm not asking you that.

LAWYER: That was our decision.

BAKER: You made a decision not to ever go to the bank or financial institution?

LAWYER: Yes.

BAKER: And the record shows she did not?

LAWYER: She did not.

ENOCH: Lending money aside for a second, couldn't the trial judge have concluded based on the record that she was voluntarily unemployed?

LAWYER: No. There was no evidence at all that was introduced in that because 1) she was on social security disability. The definition of social security disability is that she cannot engage in any meaningful or gainful activity. Once that is established that she is on disability the burden switches to the other side to prove that she isn't receiving disability. That they never introduced any evidence.

ENOCH: Do you have some authority that says that the court on an indigency hearing must accept as prima facie proof of indingency that they are on social security benefits?

LAWYER: I believe that case would be Godfrey v. Lowry(?).

BAKER: What about your testimony that she couldn't get the benefits if she worked, and that's why she didn't work?

LAWYER: Number 1, I didn't testify to that fact, and if it came out that way, that's not what I meant. What I was referring to the fact was is that she was going to school. And that the only way that she could maintain her benefits was to keep going to school. And the reason she had to go to school to maintain her benefits was is that the social security administration as part of the granting of the disability and the medicare and the medicaid, and food stamps, etc. demanded that she go to school. But the plaintiff has testified repeatedly that she hadn't worked since...

BAKER: Anybody on food stamps can't get them unless they go to school? Anybody that wants ADA for children, can't get them unless they go to school, that's what you just said?

LAWYER: I can't say ADA, but I can social security supplemental income, disability income, medicare and medicaid.

BAKER: You have to go to school to get medical...

LAWYER: If the social security administration thinks that you should.

BAKER: But it's not mandatory based on that last statement?

LAWYER: It would be discretionary with them because there might be instances where a person would be disabled and they wouldn't be able to go to school. One case that I think is important is the Walgreen case, and the Walgreen case is cited by the relators. And basically the Walgreen case said that the courts should look to see whether or not a loan was attempted to be made, or they applied to a bank. The Walgreen case is a 145 case. And what that means is is they asked the court to advance the costs for filing the petition and the citations and everything. And in that case the trial court had no way of determining whether or not the case had any value. And so the court said you've got to go to a bank and find out if they will advance money on that. In our case, the judge adjudicated that our case was worthless. There isn't a bank that you can bank on when you go into see them that would say: hey.

BAKER: Walgreen had one more thing. What about if you took her to the bank, said we need $3000; I will co-sign the note and they say that's just great? But we never know whether

that's going to happen or not because she didn't go. Doesn't that apply under rule 40 too?

LAWYER: I think it's safe to say that they wouldn't have granted her the loan. The question next would be is would they have granted the loan if I had said that in the event if she didn't pay it, I would pay it. I don't think according to the law in the case law that has been decided that the attorney is obliged to advance the costs and become liable for the costs. Under the case law, the HE Butts case, and other cases the courts have held that the attorney is not liable for advancing costs.

BAKER: I didn't ask you that question.

LAWYER: Would have they granted the loan if I had said I would pay it?

BAKER: That you would co-sign the note? We don't know the answer to that either because you didn't do it just like she didn't go to the bank either.

LAWYER: Your correct. I can tell you this, that they probably wouldn't have granted the loan if I co-signed it.

BAKER: Well we don't know that either. Now the other thing _____ characterized your fee agreement as one that would permit you and allow you to loan the funds and have her repay them back at 12%; do you agree with that?

LAWYER: It said if I advance the funds? Yes.

BAKER: In other words this agreement was an agreement to loan money?

LAWYER: But I wasn't required to advance.

BAKER: Okay.

LAWYER: And the reason I went to attorney Latham was to get someone involved in the case that is capable of making advances. The agreement didn't require me to so advance. In any event I think if you look at the first issue, I think the trial judge should be compelled or requested to put down his reasonings for sustaining an affidavit, he should put down the reasons why. And I think this case is a good reason why he should. The relators are advocating that there was fraud. Now we do not advocate that there was fraud of any kind and we will not concede that the plaintiff in this case committed any fraud or anything of any nature. But what the trial judge did in this case if you look at the record he said: I am not going to rule whether or not there is a fraud in this case. Because that's not in my place to do it. That should take place at the social security hearing. Yet we look at the record and we have no idea what he based his decision on. And the matter of fact is as to whether or not this lady was indigent and incapable of advancing the costs and things like this according to rule 145, we have no way of knowing.

ABBOTT: But again that argument applies only if rule 145 applies correct?

LAWYER: That would apply under rule 40, too.

ABBOTT: Under rule 40 it doesn't say that the court must put down its reasons?

LAWYER: Right. Rule 40 in and by itself wouldn't.

ABBOTT: And rule 145 says: that if the court shall at the first regular hearing in the course of the action that the party unable to pay the costs. It talks about at the very beginning of the filing of the cause of action. So would you agree then on the face of the rule 145, rule 145 doesn't apply because this indigency petition wasn't filed at the very beginning of this cause of action, but in fact at the very end of this cause of action?

LAWYER: That would be correct. And in this particular case Attorney Latham advanced the filing fees, the citation fees, and paid for about 4-5 depositions that were conducted during discovery.

What we're saying is the courts have viewed 145 and 40 together and it would be a good idea we feel that if the court needed to interpret one, in fact it would be better that they didn't examine the rules in a vacuum. But I think that would be a good decision for this court to make so that in the future everyone's going to know: do we view them in and by themselves did they stand alone.

BAKER: Let me ask you this. If we determine that rule 40 is the applicable ruling, doesn't this court also have the power to determine the factors that can be considered by a TC under rule 40 in this kind of hearing?

LAWYER: Yes.

BAKER: And they don't necessarily have to be the same as what they are under rule 145, but they could necessarily still be the same too?

LAWYER: They could be and I presume that they would be the same except for one main reason, the costs and things that are going to be under rule 145 are minimal when compared to what the costs would be under the appellate.

BAKER: What about depositions?

LAWYER: I don't believe 145 would call for the free depositions because those depositions are going to be taken by reporters that are not court reporters.

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REBUTTAL

LAWYER: I would just like to respond to a few of those arguments with regard to the issue of whether rule 145 or 40 applies. Obviously we are in the appellate rule, rule 40 is the applicable rule. The court provided a free record of the hearing on the motion to contest in order for the appellate courts to be able to review what happened below and to see his reasons. So we are simply not in a rule 145 situation. And there are different policy considerations at the beginning of the case verses at this point after someone's had their day in court and were at the appellate level.

With regard to a comment that I've heard frequently, which is these police officers lied, I would just like to say for the record, that we are not here on the merits, and there is no evidence in this record that those police officers did that. And I also take issue with counsel's footnote 2 of his reply where he starts making references to what happened in the hearing or the trial before, because there is no evidence of that trial in this case. And he has misstated that.

BAKER: What record did the TC take judicial knowledge of?

LAWYER: He took judicial notice of some of the matters that occurred during that 3-4 days in trial where he heard the testimony of Mrs. Viega's, the police officers, as well as all the other individuals who testified...

BAKER: So what happened in that trial in his part of the record...

LAWYER: Well it's not part of the written record, he did take judicial notice.

BAKER: _____ part of the TC record. It may not be here, so we don't know what it says.

LAWYER: We don't know and all I'm saying is that counsel is making inflammatory remarks about what the police officers did in this case, and there is a very large dispute about that.

With regard to making his comment that somehow we are limiting attorneys to take cases, that we are limiting lawyers of limited means. Obviously we have a system which says under our disciplinary rules: if we don't have the where with all, if we don't have the _____ or competency to take a case, we should tell that client to go elsewhere - refer it to somebody else. And there is plenty of access for poor people who have valid causes of action in tort cases to get perhaps the best lawyer in the state of Texas to represent them if they have a valuable claim. And that's what our contingent fee system does. It allows people to have that opportunity to get counsel who will of course provide expenses for litigants.

With regard to the court reporter having a lien. Now I read rule 53 of the appellate rules saying that if this rule 40 proceeding goes forward, then the court reporter is obligated to get a free statement of facts. There is nothing that says that that can then be assessed against the party who loses the appeal. Because it is by definition a free statement of the facts. So I don't see anything which would allow the court reporter or anyone to assess the charges. This is truly a windfall for the plaintiff's side if they are allowed to use rule 40 after they've gotten a bad trial result.

With regard to the not borrowing money. I think that's a very important issue. The Walgreen case is on 4 square: a quadriplegic with $200 in assets; he lost his case, and the court said (social security benefits that's what he's got) and they said but did you try to get a loan on your cause of action? He'd been poured out in the TC and the Dallas CA said did you try and get a loan and he said no. And they said that was sufficient. That was sufficient to uphold the TC's discretion. The CA in this case completely ignored that case. They made their own assessment.