No. 03-13-00753-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

SUSAN COMBS, IN HER OFFICIAL CAPACITY AS TEXAS COMPTROLLER, AND GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL
Appellants,

v.

TEXAS SMALL TOBACCO COALITION AND GLOBAL TOBACCO, INC.,
Appellees.

On Appeal from the
98th District Court, Travis County

APPELLANTS' RESPONSE TO APPELLEES' MOTION FOR REVIEW OF SUPERSEDEAS ORDER

TO THE HONORABLE THIRD COURT OF APPEALS:

Plaintiffs concede that Texas Tax Code section 112.057(a) requires payment of any taxes that become due during the pendency of the State's appeal of the trial court's judgment declaring unconstitutional the cigarette tax imposed under House Bill 3536.[1] *See* Pls.' Mot. for Rev. of Supersedeas Order ("Motion") at 4. Plaintiffs nonetheless ask the Court to ignore that statutory obligation, invoking Tax Code section 112.108 and

1. HB 3536 imposes on certain cigarettes and other tobacco products a "fee" that is paid by distributors of those products. *See* TEX. HEALTH & SAFETY CODE §§ 161.603, .605(b). Neither Plaintiff itself pays that fee; Plaintiff Texas Small Tobacco Coalition is a trade association, and Plaintiff Global Tobacco is a manufacturer. CR.948. For purposes of this response, however, Defendants will adopt Plaintiffs' presumptions that HB 3536 imposes a tax that Plaintiffs are required to pay.

Texas Rule of Appellate Procedure 24. *Id.* at 2. Neither provision empowers the Court to grant the relief Plaintiffs seek, nor are Plaintiffs entitled to that relief in any event.

Section 112.108, which allows a trial court to exempt an indigent plaintiff from payment of a tax—a prerequisite to challenging the tax under Chapter 112—does not authorize a court to grant indigence exemptions after its plenary power expires. And Rule 24, which governs supersedeas, does not authorize review of a trial court's determination that it lacked jurisdiction to grant an untimely request for an indigence exception under section 112.108. Indeed, Plaintiffs have no basis for invoking Rule 24. Plaintiffs' motion purports to seek review of a "supersedeas order," but the trial court signed no such order. Plaintiffs below sought an indigence exemption under section 112.108, not supersedeas, and the trial court ruled only that it lacked jurisdiction to address Plaintiffs' untimely motion. Pls.' Mot. App. F, Order on Pls.' Mot. for Hardship Exemption (Feb. 11, 2014).[2]

Rule 24.2(a)(3) likewise provides Plaintiffs no help. Rule 24.2(a)(3) authorizes a trial court, with respect to certain non-money judgments, to "decline to permit the judgment to be superseded" if the appellee posts a bond sufficient to compensate the appellant, if the appellant ultimately prevails, for any losses or damages will accrue, pursuant to the judgment, during the appeal. TEX. R. APP. P. 24.2(a)(3). But Plaintiffs did not ask the trial court to set such a bond. Plaintiffs cannot save their untimely request

2. As the supplemental record that Plaintiffs requested is not yet available, *see* Pls.' Mot. at 4 n.3, Defendants likewise will cite the relevant items by reference to the appendices to Plaintiffs' motion.

for a section 112.108 indigence exception by invoking a supersedeas bond that Plaintiffs did not request in the trial court and this Court cannot set in the first instance.

Section 112.057(a) requires payment of taxes that accrue during an appeal, even when the State loses in the trial court. Plaintiffs' motion is a thinly-veiled request for the Court to delete that provision from Chapter 112. The Court should deny the motion.

I. THIS COURT CANNOT GRANT PLAINTIFFS A SECTION 112.108 INDIGENCE EXEMPTION THEY FAILED TO TIMELY SEEK BELOW.

A. Section 112.108 Authorizes Tax Plaintiffs To Seek an Indigence Exemption from Chapter 112's Prepayment Requirements.

In order to challenge a tax imposed by Chapter 112 or collected by the Comptroller under any law, a plaintiff must pay under protest all taxes due at the time suit is filed. TEX. TAX CODE § 112.051. The plaintiff must also pay any taxes that become due after filing but before trial, *id.* § 112.056, as well as those that accrue during any appeal, *id.* § 112.057(a). The obligation to pay taxes that accrue on appeal remains fixed even if the taxpayer prevailed below. *See id.* ("If the state . . . appeals the judgment of a trial court in a suit authorized by this subchapter, the person who brought the suit shall continue to pay additional taxes under protest as the taxes become due during the appeal.").

But section 112.108 exempts indigent plaintiffs from this payment requirement:

> [A]fter filing an oath of inability to pay the tax, penalties, and interest due, a party may be excused from the requirement of prepayment of tax as a prerequisite to appeal [to the district court] if the court, after notice and hearing, finds that such prepayment would constitute an unreasonable restraint on the party's right of access to the courts. The court may grant such relief as may be reasonably required by the circumstances.

TEX. TAX CODE § 112.108. The word "appeal," as used in the phrase "prerequisite to appeal," does not refer to an appeal to this Court, but is instead an anachronistic reference to the trial de novo in the district court. *See id.* § 112.054 ("The trial of the issues in a suit under this subchapter is de novo."); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 303 (Tex. App.—Austin 2000, pet. denied) (adding the bracketed phrase "to the district court," in the manner shown above, when quoting section 112.108). The Legislature added the indigence exemption in 1995 in response to the Texas Supreme Court's decision in *R Communications, Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994), which had declared the prior version of section 112.108 unconstitutional under the Open Courts provision. *See Bandag*, 18 S.W.3d at 303; TEX. CONST. art. I, §13; *see also In re Nestle USA, Inc. (Nestle I)*, 359 S.W.3d 207, 211 n.38 (Tex. 2012) ("Section 112.108 has since been amended to preclude an Open Courts violation.") (citing 1995 amendment).

B. Plaintiffs Waited Until After the Trial Court's Plenary Power Expired Before Seeking an Indigence Exemption.

The trial court granted Plaintiffs summary judgment on November 15, 2013. CR.1358. That judgment was expressly made "final and appealable" because it"fully and finally resolve[d] all claims made by all parties." *Id.*; *see Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). The State filed an amended notice of appeal that same day, CR.1363, and no party timely filed any pleadings extending plenary power, CR.3.[3] *See*

3. The State filed its original notice of appeal on November 4, 2013, after the trial court indicated that it would grant summary judgment for Plaintiffs. CR.1353; *see* TEX. R. APP. P. 27.1(a).

TEX. R. APP. P. 26.1(a). Accordingly, the trial court's plenary power expired 30 days later, on December 16, 2013.[4] *See* TEX. R. CIV. P. 329b(d). Plaintiffs do not argue otherwise.

At any time before December 16, the trial court could have exempted Plaintiffs from paying the taxes that will accrue during the pendency of the State's appeal, had it found Plaintiffs to be indigent under section 112.108. But Plaintiffs did not seek an indigence exemption until January 9, 2014—nearly a month after the trial court's plenary power had expired. *See* Pls.' Mot. App. B, Pls.' Mot. for Hardship Exemption (Jan. 9, 2014). The trial court accordingly dismissed Plaintiffs' motion for want of jurisdiction, explaining that it "would have post-plenary power jurisdiction over only a properly pled Rule 24 motion." Pls.' Mot. App. E, Ltr. Ruling of Judge Yelenosky at 2 (Feb. 7, 2014).

C. The Trial Court Correctly Recognized That It Lacked Jurisdiction To Consider Plaintiffs' Motion After Plenary Power Expired.

Rule 24 authorizes a trial court, after its plenary power has expired, only to "(1) order the amount and type of security and decide the sufficiency of sureties; and (2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution." TEX. R. APP. P. 24.3. A request for a hardship exemption under section 112.108 fits neither category. Giving a plaintiff an opportunity to prove indigence in a Chapter 112 suit, in order to exempt the plaintiff from the requirement of paying taxes under protest, is not at all the same thing as determining the

4. Because the thirtieth day after November 15 was Sunday, December 15, the trial court's plenary power expired the following day. *See* TEX. R. CIV. P. 4, 329b(d).

type and amount of security an appellant must post to suspend execution of judgment. They serve different functions, entail different procedures, and provide different relief.

The distinction between an indigence exemption and supersedeas is particularly significant in this case because—as Plaintiffs acknowledge—the State "automatically supersede[s]" a judgment under Civil Practice and Remedies Code section 6.001 "simply by filing a notice of appeal." Pls.' Mot. 6; *see, e.g.*., *In re State Bd. for Educator Certification*, No. 03-13-00376-CV, 2013 WL 3462811, at *4 (Tex. App.—Austin July 3, 2013, orig. proceeding) (Jones, C.J., concurring) (recognizing that "the filing of a notice of appeal by a governmental entity serves to automatically suspend or supersede a final judgment"). Because the State did not need to post security to supersede the judgment below, there was no security for the trial court to decide or modify under Rule 24.3. And because Rule 24.3 did not authorize the trial court to address Plaintiffs' motion after plenary power expired, it properly dismissed the motion as untimely. Pls.' Mot. App. F, Order at 1.

D. Section 112.108 Does Not Authorize This Court To Consider Plaintiffs' Request for an Indigence Exemption.

Plaintiffs cannot cure their untimely filing below by asking this Court to decide, in the first instance, whether they are indigent under section 112.108. As discussed below, Plaintiffs cannot establish indigence with conclusory affidavits stating that the tax is reducing their sales in Texas. *See infra* Part III. But even assuming they could, the district court is the proper venue to litigate indigence exemptions under section 112.108.

Section 112.108 provides that "the court, after notice and hearing," may exempt a plaintiff from the prepayment requirement upon determining that prepayment of the tax would constitute an unreasonable restraint on the party's right of access to the courts, due to the party's "inability to pay the tax, penalties, and interest due." TEX. TAX CODE § 112.108. As used throughout Chapter 112, "the court" clearly means a Travis County district court, not an appellate court. *See id.* §§ 112.053(c), .056(a), .101(b), .1011(b), .105(a)-(d), .108, .151(d); *see also id.* § 112.001 (giving Travis County district courts "exclusive, original jurisdiction of a taxpayer suit brought under this chapter"). Plaintiffs conceded as much below. *See* Pls.' Mot. App. D, Pls.' Reply at 8. The term "the court" should not be given a meaning in section 112.108 that is different from its meaning in the rest of Chapter 112. *See, e.g.*, *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) (terms should be interpreted consistently throughout a statute).

Reading "the court" to mean the *district* court is further buttressed by the provision contemplating that whether a plaintiff merits an indigence exemption will be determined after "a hearing," where the witnesses may be cross-examined and the trial judge can evaluate their credibility firsthand. TEX. TAX CODE § 112.108. Trial courts "are much better situated than appellate courts to make determinations of credibility and historical facts." *Delafuente v. State*, 414 S.W.3d 173, 178 (Tex. Crim. App. 2013); *see also* TEX. R. APP. P. 20.1(h)(4) (authorizing appellate court to refer contested indigence claims to the trial court for evidentiary hearings). Indeed, Plaintiffs acknowledge that "appellate courts

are ill-equipped to conduct . . . evidentiary hearings." Pls.' Mot. 14 (quoting *Cano v. State*, 369 S.W.3d 532, 534 (Tex. App.—Amarillo 2012, pet. ref'd)); *see* Pls.' Mot. App. D, Pls.' Reply at 8 ("This Court, and not the court of appeals, is the proper forum for considering [Plaintiffs'] Motion"). Nothing in Chapter 112 invites this Court to hold an indigence hearing in the first instance when Plaintiffs failed to timely request one below.

II. RULE 24 DOES NOT AUTHORIZE REVIEW OF THE TRIAL COURT'S ORDER DISMISSING PLAINTIFFS' MOTION FOR WANT OF JURISDICTION.

Implicitly recognizing that this Court cannot grant them a section 112.108 indigence exception that they failed to timely request below, Plaintiffs purport to "invoke" Rule of Appellate Procedure 24, which governs the suspension of enforcement of judgment pending appeal. Rule 24.4 authorizes an appellate court to review:

> (1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);
>
> (2) the sureties on any bond;
>
> (3) the type of security;
>
> (4) the determination whether to permit suspension of enforcement; and
>
> (5) the trial court's exercise of discretion under Rule 24.3(a).

TEX. R. APP. P. 24.4(a). The trial court's order dismissing Plaintiffs' motion for a section 112.108 indigence exemption for want of jurisdiction fits none of the above categories, largely for the same reason that Rule 24.3 is inapplicable: section 112.108's indigence exemption is not a supersedeas provision. Because the State automatically suspended

execution of judgment without posting security, the provisions of Rule 24.4(a) authorizing this Court to review the sufficiency and type of security, the sureties on a bond, or the determination of whether to permit suspension of enforcement are plainly inapplicable. *Id.* Nor did the trial court exercise any discretion under Rule 24.3(a), which likewise pertains to the amount and type of security an appellant must post. *Id.* R. 24.3(a). Plaintiffs cannot "invoke" this Court's appellate jurisdiction under Rule 24.4 when the order they challenge falls beyond the scope of that rule.

Nor can Plaintiffs legitimately invoke Rule 24.2(a)(3). Rule 24.2(a)(3) authorizes a trial court to "decline to permit the judgment to be superseded" if the appellee posts a bond sufficient to protect the appellant, if he ultimately prevails, from any losses or damages that the judgment will cause to accrue during the appeal. *Id.* R. 24.2(a)(3). But even assuming *arguendo* that Rule 24.2(a)(3) authorizes a trial court to override a governmental appellant's statutory right of supersedeas, Plaintiffs' invocation of that rule is unavailing because they did not ask the trial court to set a bond under Rule 24.2(a)(3).[5]

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5. Plaintiffs spend several pages defending the proposition that Rule 24.2(a)(3) authorizes a trial court to supersede a state appellant's automatic, statutory suspension of judgment. Pls.' Mot. 12-14. But Judge Yelenosky dismissed Plaintiffs' motion below *despite* his belief that Rule 24.2(a)(3) is applicable against the State. Pls.' Mot. App. E, Letter Ruling at 2. Because Plaintiffs did not ask the trial court to set a bond under that rule, this Court need not address Rule 24.2(a)(3)'s applicability in order to dispose of Plaintiffs' motion. Moreover, Plaintiffs' lead case in support of their Rule 24.2(a)(3) argument, this Court's decision in *In re State Board for Educator Certification*, has been called into question by the Texas Supreme Court's order granting oral argument in the Board's mandamus petition challenging that decision. *See In re State Bd. for Educator Certification*, No. 13-0537, Order (Tex. Feb. 14, 2014) (argument date pending). Another mandamus proceeding involving the same issue remains pending in the Supreme Court, seven months after that court stayed the trial court's order that had invoked Rule 24.2(a)(3) to deny the state appellants' statutory supersedeas rights. *See In re Tex. Alcoholic Bev. Comm'n*, No. 13-0513, Order (Tex. Aug. 9, 2013). Defendants call these events to the Court's attention simply to note that the applicability of Rule 24.2(a)(3) is hardly the settled issue that Plaintiffs suggest it to be.

Instead, Plaintiffs asked the trial court for the same relief they ask of this Court: a hardship exemption from the bond requirement under section 112.108. *See* Pls.' Mot. App. B, Pls.' Mot. for Hardship Exemption at 1, 4-5; Pls.' Mot. App. D, Pls.' Reply at 2. As the trial court explained, however:

> Under Rule 24, a party contending it has the resources to cover state's costs or there is little or no cost to the state must be given an opportunity in an evidentiary hearing to prove it. Here, however, Texas Small Tobacco does not contend either of those things; it contends hardship should excuse the bond and on-going payment of the tax. There is no hardship exemption under Rule 24; inability to post security to overcome the state's supersedeas is no basis for reducing the bond. The court would have post-plenary power jurisdiction over only a properly pled Rule 24 motion. This motion pleads itself out of jurisdiction by arguing a basis that cannot be considered and requesting relief the court cannot grant.

Pls.' Mot. App. E, Letter Ruling at 2. Because Plaintiffs did not ask the trial court to set a counter-supersedeas bond under Rule 24.2(a)(3) and the court did not exercise any discretion under that rule, Plaintiffs' invocation of Rule 24 does not empower this Court to award relief that Plaintiffs failed to timely request below.[6]

Plaintiffs are essentially attempting to use Rule 24 as a procedural gateway to the substantive relief they seek: an indigence exemption from the statutory requirement that

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6. Plaintiffs argue that "this Court undisputedly now has jurisdiction to review the trial court's order" under Rule 24.4, citing Defendants' response to Plaintiffs' Section 112.108 motion below. Pls.' Mot. 14. They are wrong. First, Defendants did not concede that this Court would have jurisdiction under Rule 24.4; instead, they argued only that the Court would, in appropriate circumstances, have the power to act in order to protect its own jurisdiction. Pls' Mot. App. D, Defs.' Resp. to Pls.' Mot. for Hardship Exemption at 6-7 (citing *Ammex Warehouse v. Archer*, 381 S.W.2d 478 (Tex. 1964)). And even if Defendants had conceded jurisdiction under Rule 24.4, as Plaintiffs erroneously suggest, jurisdiction cannot be conferred by consent. *E.g.*, *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). Nor can an assistant attorney general's admission prejudice the rights of the State. TEX. GOV'T CODE § 402.004.

they pay taxes that accrue during the pendency State's appeal. But Rule 24 and section 112.108 are not interchangeable procedures. Thus, even assuming both (1) that Rule 24.2(a)(3) authorizes a trial courts to set a bond suspending a state appellant's statutory right of supersedeas, and (2) that Plaintiffs had asked the trial court to set such a bond, Plaintiffs cannot invoke Rule 24.2(a)(3) to obtain an indigence exemption they failed to timely request under section 112.108.

Plaintiffs' contrary assumption appears to rest on the basis that blocking the State's automatic supersedeas would allow the district court's injunction to take effect, thereby relieving them of Chapter 112's payment obligation as effectively as if they had obtained an indigence exemption under section 112.108. *See* Pls.' Mot. at 2 n.2 (arguing that Plaintiffs' motion "directly implicates this Court's authority to review a supersedeas order" because the "very purpose of [Plaintiffs'] motion is to avoid the State's supersedeas," and that "[t]he Court should read Section 112.108 in conjunction with Rule 24.2(a)(3)"). But just because two different procedures provide similar relief does not allow a party to invent a third, hybrid procedure consisting of favorable elements cherry-picked from the other two. For example, an incarcerated felon may gain his freedom either by persuading an appellate court that the evidence is legally insufficient to support his conviction or by receiving a pardon from the Governor. The fact that either procedure can result in the inmate's release does not mean that he can obtain a pardon from an appellate court or use the pardon process to obtain an appellate acquittal.

Similarly, Plaintiffs cannot invoke the limited and specific appellate review authorized by Rule 24 to obtain relief they failed to timely request under section 112.108.

III. PLAINTIFFS ARE NOT ENTITLED TO AN INDIGENCE EXEMPTION.

A. Plaintiffs' Conclusory Affidavits Do Not Establish Indigence.

Even assuming that the Court could consider Plaintiffs' motion, Plaintiffs would not be entitled to relief. The affidavits attached to the motion assert that Plaintiffs have seen their sales in Texas decline significantly following the imposition of the cigarette tax. *See* Pls.' Mot. App. B, Pls.' Mot. for Hardship Exemption at Apps. A-D. The affiants further aver that, if their sales continue to decline during the lengthy period they anticipate that it will take to adjudicate the State's appeal, Plaintiffs may be forced to withdraw from the Texas market at some point in the future. *See id.* These statements are insufficient to establish entitlement to an indigence exemption under section 112.108.

As an initial matter, because Plaintiffs did not timely move for an indigence exemption in the trial court, Defendants have had no opportunity to take discovery, cross-examine the affiants, or otherwise test the factual grounds on which Plaintiffs' motion rests. Defendants conditionally sought this opportunity below, but the trial court's jurisdictional ruling obviated the need for discovery or a hearing. *See* Pls' Mot. App. C, Defs.' Resp. to Pls.' Mot. for Hardship Exemption at 1 n.1 (Jan. 22, 2014). Moreover, as Plaintiffs concede, it would be ill-advised for this Court to attempt to

resolve, in the first instance, the fact issues inherent in whether Plaintiffs have the ability to pay the tax pending appeal. *See supra* Part I.D; Pls.' Mot. at 14.

In any event, the vague and conclusory allegations contained in Plaintiffs' affidavits are insufficient to establish indigence as a matter of law. For example, Plaintiffs "believe" that the tax will permanently reduce their market share in Texas; they "anticipate" withdrawing from the Texas market at some unspecified point if they are required to pay the tax; and they "believe" that an indigence exemption is the only way they can remain in business throughout the duration of the State's appeal. Pls.' Mot App. B, Darilek Aff. ¶¶ 9 &12 (App. A); Norris Aff. ¶¶ 9 & 12 (App. B); Nader Aff. ¶¶ 9 & 12 (App. C); Denney Aff. ¶¶ 9 & 12 (App. D). These speculative predictions fail to establish that Plaintiffs are currently *unable* to pay the taxes, as section 112.108 requires for an exemption. *See* TEX. TAX CODE § 112.108 (requiring proof of "inability to pay the tax"). For example, the affiants do not declare that Plaintiffs lack the financial resources to pay the taxes, either with existing resources or by obtaining credit.

Instead, they suggest that Plaintiffs may voluntarily withdraw from the Texas cigarette market, at some point, if sales continue to decline. But if a national company elects to withdraw from a particular state market because its profits have decreased in that market, that is a business decision—not proof of inability to pay. At most, the affidavits reflect that the cigarette tax is causing the prices of Plaintiffs' products to increase, a result that is both the natural consequence of any tax and one expressly contemplated by HB

3536. *See* TEX. HEALTH & SAFETY CODE § 161.601(2). That Plaintiffs would prefer not to pay the tax pending appeal, or that they would be more profitable in the interim if they could avoid paying it, does not entitle them to avoid making the payments required under section 112.057(a).[7]

B. Plaintiffs' Motion Invokes No Legitimate Constitutional Concerns.

Nor does requiring Plaintiffs to pay the disputed tax pending appeal violate the Open Courts provision, as Plaintiffs suggest. Pls.' Mot. at 10-11. Plaintiffs' success in the trial court belies any notion that they lack access to the courts. Moreover, it is Defendants, not Plaintiffs, that have challenged the trial court's decision and are now seeking judicial relief on appeal. Requiring Plaintiffs to continue paying under protest the same tax that they paid below does not prevent them from defending the trial court's judgment on appeal. Judge Yelenosky expressly recognized as much in explaining why Plaintiffs' purported inability to pay does not present an Open Courts concern. Pls.' Mot. App. E, Letter Ruling at 3.

In any event, Plaintiffs cannot complain that their indigent status renders unconstitutional the application of section 112.057(a)'s payment requirement, because

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7. Plaintiffs' passing reference to the Court's writ power to preserve the subject matter of the appeal, Pls.' Mot. 11 n.5, is similarly unavailing. Even if one or more members of the Small Tobacco Coalition eventually withdrew from the Texas market, the subject matter of the litigation would remain intact, and the appeal would not become moot, unless *all* of the Plaintiffs were *forced* out. Plaintiffs have not come close to making such a showing. *Cf., e.g.*, *Ammex Warehouse*, 381 S.W.2d at 484 ("Should [relators] be required for a while to operate in accordance with state law, the subject matter of the litigation would not be destroyed. At most, a fact issue is raised which this Court cannot decide and we cannot say that the Court of Civil Appeals is under a mandatory duty to issue the writ as asserted by relators."). Tellingly, Plaintiffs do not actually urge the Court to exercise that writ power.

they did not timely request an indigence exemption from that requirement as authorized under section 112.108. One who fails to comply with the procedural requirements for establishing indigence will not be heard to complain that the court's failure to accord him indigent status is unconstitutional or unfair. *See Kindle v. United Servs. Auto. Ass'n*, 357 S.W.3d 377, 380 (Tex. App.—Texarkana 2011, pet. denied) (trial court does not abuse its discretion in refusing to find indigent a party who failed to timely file an affidavit of indigence); *Few v. Few*, 271 S.W.3d 341, 346 (Tex. App.—El Paso 2008, pet. denied) (same); *In re J.B.*, No. 12-03-00033-CV, 2003 WL 1922835 (Tex. App.—Tyler April 23, 2003, orig. proceeding) (per curiam) (dismissing mother's appeal of judgment terminating her parental rights when she failed to timely file affidavit of indigence); *Mikkilineni v. City of Houston*, 4 S.W.3d 298, 299 (Tex. App.—Houston [1st Dist.] 1999) (per curiam) (denying motion to extend time to file affidavit of indigence), *appeal dismissed*, No. 01-98-01029-CV, 2000 WL 19641 (Tex. App.—Houston [1st Dist.] Jan. 13, 2000, pet. denied) (per curiam), *cert. denied*, 531 U.S. 882 (2000). This well-established proposition is related to the general rule that most rights, including constitutional rights, can be waived if not timely asserted. *See, e.g.*, *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001). Having forgone their opportunity to seek an indigence exemption from the trial court under section 112.108, Plaintiffs cannot now complain that it would be unconstitutional to enforce section 112.057(a)'s payment requirement against them.

PRAYER

The Court should deny Plaintiffs' motion.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

/s/ Joseph D. Hughes
JOSEPH D. HUGHES
Assistant Solicitor General
State Bar No. 24007410
jody.hughes@texasattorneygeneral.gov

ARTHUR C. D'ANDREA
Assistant Solicitor General
State Bar No. 24050471
arthur.dandrea@texasattorneygeneral.gov

ERIKA KANE
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1729
[Fax] (512) 474-2697

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that on March 13, 2014, a copy of this response was served upon counsel for Appellees shown below via email and/or File&ServeXpress:

Craig T. Enoch
cenoch@enochkever.com
Melissa A. Lorber
mlorber@enochkever.com
Amy Leila Saberian
asaberian@enochkever.com
Shelby O'Brien
sobrien@enochkever.com
ENOCH KEVER PLLC.
600 Congress Avenue, Suite 2800
Austin, Texas 78701

COUNSEL FOR PLAINTIFFS/APPELLEES

/s/ Joseph D. Hughes
Joseph D. Hughes