In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00076-CV

KELLY COPLIN, Appellant

V.

GRANT MANN AND JENNIFER MANN, Appellees

On Appeal from the County Court at Law
Lamar County, Texas
Trial Court No. C-11268

Before Morriss, C.J., Burgess and Stevens, JJ.
Opinion by Justice Burgess

O P I N I O N

Kelly Coplin appeals a judgment in favor of Grant and Jennifer Mann on his claim of breach of contract and on the Manns' counterclaims for violation of the Texas Deceptive Trade Practices Act. On appeal, Coplin contends that he is entitled to a new trial because a significant portion of the court reporter's record necessary to the resolution of the appeal has been lost. Because we agree, we reverse the trial court's judgment and remand for a new trial.

I. Background

After having ordered and received the reporter's record of the trial, Coplin filed a motion for new trial in this Court pursuant to Rule 34.6(f) of the Texas Rules of Appellate Procedure, claiming that a portion of Coplin's trial testimony was missing from the record. *See* TEX. R. APP. P. 34.6(f). We abated this case to the trial court to conduct an evidentiary hearing pursuant to Rules 34.5(e) and 34.6, subsections (e) and (f), of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 34.5(e), 34.6(e), (f). The case has returned to our jurisdiction, and Coplin's motion for new trial is ripe for decision.

At the abatement hearing, Christine Marie Young, the court reporter for the County Court at Law of Lamar County, testified that she was not present at the trial and that the proceedings were not recorded by a court reporter. Instead, the proceedings were audio recorded. According to Young, the recording system is activated by a button located on the west wall of the courtroom near the judge's chambers and court staff.[1]

[1]Young has never observed parties to court proceedings operating the recording system.

When Young received Coplin's record request, she retrieved the SD card on which the trial was recorded from the recording system. Young inserted the SD card into her laptop computer and viewed the three files stored on the card. She then contacted Jason Garrett—the operator of the recording system on the day of trial—to verify that she had all of the audio files from the trial. After Young verified that she was in possession of all the audio files from the trial, she listened to them to be sure that the recordings were audible.

Although the recordings were audible, Young noticed that the first recording began in "mid-examination" of the plaintiff, Kelly Coplin. There was nothing on the SD card prior to Coplin's testimony. Young noted on page 8 of her transcription of the record that "Plaintiff's Exhibit[s] Nos. 1 through 9 were admitted into evidence before Recording No. 1 began per the Court." Line 5 of page 8 then indicated that that point marked the "Beginning of Recording No. 1." Young transcribed 252 pages of trial testimony, 63 of which contained Coplin's testimony. Young testified that the portion of the record before the audio recording began was missing, and the trial court took judicial notice of the fact that the proceedings did not begin in the middle of Coplin's testimony. Young could not replicate the proceedings prior to the point the recording began.

Although the record accurately and fully reflected all the recorded testimony, Young did not know how long Coplin had been testifying before the recording began. None of Coplin's testimony to which Young had access was missing from the record, and nothing in the transcription created from the recording had been lost or destroyed. Likewise, none of the files on the SD card were lost or destroyed.

In light of this testimony, the trial court found, among other things, that

> [p]ortions of the trial proceedings in this cause—that being any opening statements and a portion of Appellant's direct testimony—were never electronically audio recorded and occurred off the record due to a malfunction in the courtroom audio recording equipment. Neither party had any control over the operation of this recording system.

The court further found that "[a] verbatim reconstruction of any opening statement and that portion of Appellant's direct testimony that is missing cannot be made" and that the stenographic transcription of the trial began where the electronic audio recording of the trial began. In accordance with Young's testimony, the trial court found that no audio recordings from the trial were lost or destroyed and that no trial exhibits were lost or destroyed. Based on those findings, among others,[2] the trial court's recommendation to this Court was to deny Coplin's request for a new trial. Despite that recommendation, we conclude that Coplin is entitled to a new trial.

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[2]The trial court also found:

1. Trial proceedings in this cause were electronically audio recorded pursuant to that March 27, 2018[,] Order of the Supreme Court of Texas entitled *Approval of Rules Governing Procedure for Making a Record of Civil Court Proceedings by Electronic Recording in the County Court at Law of Lamar County.* A copy of this Order was admitted at the Hearing.
2. At the time of trial, each party consented, and did not object to, the electronic audio recording of the trial proceedings in this cause in lieu of a contemporaneous stenographic recording.

. . . .

5. The electronic audio recording of the trial proceedings was subsequently stenographically transcribed and filed with the Court of Appeals as the Reporter's Record, comprising two volumes.
6. At the Hearing, Appellant did not allege that any portion of the existing audio recording was inaccurately transcribed.
7. At the Hearing, Appellant did not identify the substance or subject matter of the missing portion of Appellant's testimony or how such portion is necessary to the appeal's resolution.
8. At the Hearing, Appellant did not allege that any portion of the audio recording was inaudible.

II. Analysis

Under Rule 34.6(f), a party is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or—if the proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

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9. At the Hearing, Appellant did not allege that any exhibit or portion of any exhibit is missing from the record or has been lost or destroyed.
10. At the Hearing, neither party called any witness present in the courtroom at the time of trial.
11. Appellant was not present at the Hearing and did not testify during the Hearing.
12. The sole witness at the hearing was Ms. Tina Young ("Ms. Young"), who is the court reporter of Lamar County Court at Law who stenographically transcribed the extant audio recording of the trial proceedings in this cause at the request of Appellant. Ms. Young was not present in the courtroom at the time of trial.
13. Ms. Young verified she retrieved all existing electronic audio recording files from the trial in this cause from the Court's audio system and downloaded them to her laptop.
14. Ms. Young completely and accurately transcribed all existing electronic audio recording files from the trial in this cause.

. . . .

16. Appellant did not object at trial that a portion of his direct testimony was not recorded or otherwise memorialized.

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20. Pursuant to TRAP 34.6 the parties have never conferred as to whether any lost or destroyed portion of the reporters [sic] record could be replaced by agreement.

The trial court also entered conclusions of law. Because the abatement order only directed the trial court to make findings of fact and a recommendation to this Court, we do not consider the trial court's conclusions of law.

TEX. R. APP. P. 34.6(f). Coplin is not entitled to a new trial unless all four circumstances are present. We examine each of the elements of the rule to determine whether Coplin is entitled to a new trial.

A. Coplin Timely Requested the Reporter's Record

Coplin filed his notice of appeal on October 2, 2020, and requested the reporter's record on October 6, 2020. The request was timely.

B. Without Coplin's Fault, A Significant Portion of the Recording Was Lost

The audio recording of the trial was made pursuant to the Texas Supreme Court's March 27, 2018, order approving the local rules of the County Court at Law of Lamar County for electronically recording civil proceedings. *See* APPROVAL OF RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF CIVIL COURT PROCEEDINGS BY ELECTRONIC RECORDING IN THE COUNTY COURT AT LAW OF LAMAR COUNTY, Misc. Docket No. 18-9048. The order places responsibility for "[e]nsuring that the recording system is functioning properly throughout the proceeding and that a complete, distinct, clear, and transcribable recording is made" on one or more persons designated by the court as court recorders. *Id.* As a party, Coplin had no obligation under this order to ensure that the recording system was timely activated at the commencement of trial and was, therefore, not at fault for the delay in activating the recording system.

Because of the delay in activating the recording system, a portion of Coplin's trial testimony was not recorded and is, therefore, missing from the record. That portion of the record is therefore "lost" for purposes of Rule 34.6(f). *See Gillen v. Williams Bros. Const. Co.*, 933

S.W.2d 162, 163 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (per curiam) ("the word 'lost,' defined as 'beyond reach or attainment,' is broad enough to encompass" notes that were *not* taken by court reporter) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (1979)).

And the portion of the record that was lost is significant. Although we have no way of knowing how much of Coplin's testimony is missing from the record, the fact that the missing testimony was that of the plaintiff means that it was significant.[3] Under these circumstances, Coplin could not reasonably be expected to show exactly how much testimony is missing or the precise nature of the missing testimony. *See Gavrel v. Rodriguez*, 225 S.W.3d 758, 762 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (appellant could not be reasonably expected to show exactly what testimony was missing due to mis-strokes and "drops" in the court reporter's notes).

C. The Lost Portion of the Record is Necessary to the Appeal's Resolution

Subsection (f)(3) of Rule 34.6 permits a new trial only when the missing portion of the record is necessary to the appeal's resolution. TEX. R. APP. P. 34.6(f)(3). "That provision is itself a harm analysis." *Gavrel*, 225 S.W.3d at 761 (quoting *Issac v. State*, 989 S.W.2d 754, 757 (Tex. Crim. App. 1999)). "If the missing portion of the record is not necessary to the appeal's resolution, then the loss of that portion of the record is harmless under the rule and a new trial is not required." *Id.*

Coplin has represented to this Court that a sufficiency review of the evidence "is fundamentally necessary to a resolution of this appeal," and in the absence of a complete

[3]"Significant" is defined as "having or likely to have influence or effect: IMPORTANT." *Significant*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006).

reporter's record, this Court cannot conduct such a review. The Texas Supreme Court has held that, "when an appellant complains of the factual or legal sufficiency of the evidence, the appellant's burden to show that the judgment is erroneous cannot be discharged in the absence of a complete or an agreed statement of facts." *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991) (per curiam) (footnote omitted) (citing *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968) (per curiam)). The issue is not limited to whether this Court "can be convinced by the missing testimony to reverse the trial court's judgment." *Gavrel*, 225 S.W.3d at 763. Instead, the issue is "whether [the missing] testimony is necessary to the resolution of the appeal." This is because "[t]he 'appeal's resolution' encompasses both affirmance and reversal of the trial court's judgment." *Id.* As a result, in the absence of a complete record, "it is impossible to review all the evidence presented to the [fact-finder] or to apply the appropriate evidentiary sufficiency standard of review." *Id.* We, therefore, conclude that the lost portion of the record is necessary to the appeal's resolution.

D. The Lost Portion of the Record Cannot be Replaced by Agreement of the Parties

As counsel for Coplin explained at the hearing, it is impossible to reconstruct the missing testimony. The trial court agreed when it found that a verbatim reconstruction of the missing portion of Coplin's direct testimony could not be made. Coplin contends that any attempt at an agreement on the missing record would have been futile in light of the fact that the trial happened over thirteen months ago, and there exists no means of accurately and precisely recreating the missing trial testimony. It is apparent that the lost portion of the record cannot be replaced by agreement of the parties.

III. Conclusion

Because a significant portion of the timely requested record necessary to the appeal's resolution has been lost through no fault of Coplin and cannot be replaced by agreement of the parties, we reverse the judgment of the trial court and remand for a new trial. *See* TEX. R. APP. P. 34.6(f).

Ralph K. Burgess
Justice

Date Submitted: March 26, 2021
Date Decided: March 29, 2021