AFFIRMED; Opinion Filed November 7, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00128-CV

JOSEPH GEETING, RICHARD GEETING, AND LAURI GEETING, Appellants
V.
CRAIG DYER INDIVIDUALLY AND ON BEHALF OF DYER CUSTOM INSTALLATION, INC., Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-04-01100

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Stoddart

Following a jury trial and entry of final judgment, Joseph Geeting, Richard Geeting, and Lauri Geeting filed this appeal in which they argue two issues: they are entitled to a new trial because significant portions of the reporter's record are missing or have been destroyed and because appellee Craig Dyer presented evidence and arguments supporting his now-disallowed cause of action for shareholder oppression.[1] We affirm the trial court's judgment.

PROCEDURAL BACKGROUND

It is uncontested that significant portions of the reporter's record from the trial in this case have been lost or destroyed. After the appeal was filed, this Court abated the appeal and

[1] Appellee raises a single issue on cross-appeal, which is contingent upon the Court determining appellants are entitled to a new trial. Because appellants are not entitled to a new trial, we need not reach the merits of appellee's cross-appeal. *See* TEX. R. APP. P. 47.1.

ordered the trial court to conduct a hearing and enter findings of fact regarding, among other things, whether, without appellants' fault, a significant exhibit or other portion of the court reporter's notes and record were lost or destroyed or a significant portion of the electronic recording, if any, was lost or destroyed.

Pursuant to this Court's order, the trial court conducted a hearing and entered findings of fact. The trial court found the case was tried before a jury on June 21, 22, 23, 24, 28, 29, and 30, 2010, and July 6, 7, 8, 12, and 13, 2010. The jury returned its verdict on July 19, 2010. The trial court's official court reporter was absent on July 6, 7, and 8, 2010, but she engaged another court reporter, Shelley Etheridge, to attend and take the trial proceedings on those dates and Etheridge did so. On August 8, 2012, before the entry of a final judgment, the trial court received a Notice of Bankruptcy, which resulted in an immediate automatic stay. The record shows the case was reinstated and a final judgment was entered on November 13, 2015, more than five years after the trial ended.

Etheridge testified at the trial court's hearing. She stated she no longer has notes or transcripts from the trial. She testified that in the summer of 2015, she did some "housecleaning" and destroyed the "notes, paper notes, audio recordings - - I used back then cassette tapes - - floppy discs, any paperwork that I had" that were more than three years old. She then was asked whether she kept "all that" on a computer and she replied: " I had a computer and I'm assuming, if I can elaborate, that that's what happened . . . because I had a computer stolen, among other things. . . And I had not backed up . . ." Her computer was stolen in 2012 or 2013, and she believed the three days of missing testimony was on that computer. At the time of the hearing, there were no remaining records of the proceedings from July 6, 7, and 8 from which she could prepare a transcript. Etheridge later reiterated she had old notes and recordings as late

as the summer of 2015, until she did her "housecleaning." Etheridge had no recollection of the appellants or their counsel contacting her and asking her to preserve the record.

The trial court found Etheridge's computer was stolen in 2012 or 2013, sometime during 2015—but before any notice of appeal in this case was filed—Etheridge destroyed her notes of the trial proceedings in this case, the notes were not backed up, no transcript exists of most of the testimony of the witnesses from July 6, 7, or 8, 2010, and there is no recording from which the record could be reconstructed or recovered. Further, the record cannot be replaced by agreement of the parties or with a copy the trial court finds reasonably similar to the original proceeding. The trial court's findings state: "A substantial portion of the record is missing without any fault" of appellants. The trial court also determined the missing portion of the record is necessary to the appeal.

LAW & ANALYSIS

In their first issue, appellants argue they are entitled to a new trial under rule 34.6(f), which addresses reporter's records that are lost or destroyed. *See* TEX. R. APP. P. 34.6(f). We review a trial court's findings under appellate rule 34.6(f) for an abuse of discretion. *In Interest of S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *3 (Tex. App.—Dallas Aug. 30, 2017, no pet. h.) (collecting cases). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Id.*

Texas Rule of Appellate Procedure 34.6(f) entitles appellants to a new trial if, as relevant to this case, they timely requested a reporter's record; a portion of the court reporter's notes and records have been lost or destroyed through no fault of their own; the lost or destroyed record is necessary to the resolution of their appeal; and the lost or destroyed portion of the reporter's record cannot be replaced by agreement of the parties. *See* TEX. R. APP. P. 34.6(f); *see also In*

Interest of S.V., 2017 WL 3725981, at *3. The resolution of appellants' first issue turns on whether the reporter's record was lost or destroyed through no fault of their own.

On request, an official court reporter shall, among other things, take full shorthand notes of oral testimony offered before the trial court and "preserve the notes for future reference for three years from the date on which they were taken." *See* TEX. GOV'T CODE ANN. § 52.046(a)(2), (4). The Texas Supreme Court discussed this provision in its opinion in *Piotrowski v. Minns*, 873 S.W.2d 368 (Tex. 1993). After citing the government code, the supreme court stated:

> By negative implication, the statute authorizes reporters to cull stale notes from their records after three years when no party has requested otherwise. If a litigant has not requested the reporter to prepare a statement of facts within three years, nor specifically requested that the notes of a proceeding be preserved beyond three years, then the litigant is not free from fault if the notes are destroyed as the statute authorizes.

Piotrowski, 873 S.W.2d at 371. Courts of appeals in Texas have applied the supreme court's language when considering whether a party is free from fault when it failed to request a reporter's record within three years. *See Sarro v. Sarro*, No. 04-15-00392-CV, 2016 WL 3342340, at *3 (Tex. App.—San Antonio June 15, 2016, no pet.) (mem. op.) ("[T]he record does not show that Joyce took any action to preserve the reporter's record from the 2004 trial. Accordingly, she is not free from fault under rule 34.6(f) and, therefore, is not entitled to a new trial."); *Houser v. McElveen*, No. 13-05-00426-CV, 2010 WL 1256054, at *4 (Tex. App.—Corpus Christi Apr. 1, 2010, pet. denied) (mem. op.) ("Because Houser could have requested that the court reporter prepare the record within three years, and nothing in the record indicates that such request was ever made, Houser is not free from fault."); *Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 349 (Tex. App.—Austin 2002, pet. denied) ("Because Ganesan could have requested the reporter to prepare the record within three years of the proceeding, or at a

minimum requested that the record be preserved, he is not free from fault [and] . . . not entitled to a new trial.").

Here, although the trial court found a "substantial portion of the record is missing without any fault" of appellants, the record does not support this finding. The record shows that although Etheridge's computer was stolen in 2012 or 2013, which may have occurred within three years after the trial ended, she testified she did not purge her "notes, paper notes, audio recordings - - I used back then cassette tapes - - floppy discs, any paperwork that I had" until the summer of 2015. While it is not clear from her testimony whether a record could have been constructed from the items she destroyed in 2015, we cannot assume it could not have been, particularly because the items included audio recordings of the proceedings. Had appellants acted within three years of the trial ending to request Etheridge preserve the record beyond three years, then a complete record may have been produced for this appeal. However, appellants failed to do so and the trial court erred by finding they met their burden to show they are free from fault. For this reason, we also reject appellants' argument that requesting the record within three years would have been futile and, therefore, was unnecessary.

Appellants could have requested the reporter prepare the record within three years or request the notes of the proceeding be preserved beyond three years, but did not do so. Accordingly, appellants are not free from fault. *See Piotrowski*, 873 S.W.2d at 371. Because appellants have not satisfied the second prong of 34.6(f), we conclude they failed to prove they are entitled to a new trial under rule 34.6. *See* TEX. R. APP. P. 34.6(f).

Appellants argue *Piotrowski* is no longer controlling precedent in Texas, citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005) and *Crawford v. XTO Energy, Inc*., 509 S.W.3d 906 (Tex. 2017). We disagree because neither case overrules *Piotrowski*. In *Michiana*, the supreme court distinguished *Piotrowski* in the context of changes to the rules of

appellate procedure. *See Michiana Easy Livin' Country*, 168 S.W.3d at 783. The *Michiana* court did not discuss rule 34.6, section 52.046(a)(4), or when a litigant is at fault for failing to request a reporter's record. In *Crawford*, the supreme court, citing *Michiana*, discussed *Piotrowski* in the context of determining when a reporter's record is necessary for an appeal. *See Crawford*, 509 S.W.3d at 910. Again, the court did not state it was overruling *Piotrowski* nor did it discuss rule 34.6 or section 52.046. As an intermediate appellate court, we are bound by supreme court precedent. *Texas Office of Comptroller of Pub. Accounts v. Saito*, 372 S.W.3d 311, 315 (Tex. App.—Dallas 2012, pet. denied) (citing *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008)). We also note two of our sister courts applied the *Piotrowski* rule after the supreme court decided *Michiana*. *See Sarro*, 2016 WL 3342340, at *3; *Houser*, 2010 WL 1256054, at *4.

Finally appellants argue this Court declined to follow the *Piotrowski* rule in *Banks v. State*, 312 S.W.3d 42 (Tex. App.—Dallas 2008, pet ref'd), and we should do likewise in this appeal. *Banks* is a criminal case involving an out-of-time appeal in which there was no dispute the court reporter's notes were lost or destroyed and the court reporter had died. On remand, we considered whether the appellant was at fault for the missing records under appellate rule 13.6.[2] *See Banks*, 312 S.W.3d at 44-45; TEX. R. APP. P. 13.6. Without discussing *Piotrowski*, we concluded that the appellant was not at fault because he filed his notice of appeal within fifteen years of his conviction. *Id.* at 45. Our opinion in *Banks* is about rule 13.6, which is not at issue in the appeal before us today.

[2] Rule 13.6 states: "When a defendant is convicted and sentenced, or is granted deferred adjudication for a felony other than a state jail felony, and does not appeal, the court reporter must—within 20 days after the time to perfect the appeal has expired—file the untranscribed notes or the original recording of the proceeding with the trial court clerk. The trial court clerk need not retain the notes beyond 15 years of their filing date." TEX. R. APP. P. 13.6.

Because we conclude appellants failed to meet their burden to show they are free from fault, we need not consider whether they satisfied the other elements of rule 34.6(f). *See* TEX. R. APP. P. 47.1. We overrule appellants' first issue.

In their second issue, appellants assert they are entitled to a new trial "due to the prevalence of shareholder oppression in the original trial." One of Dyer's causes of action on which he presented evidence and argument at trial was shareholder oppression. However, after the trial ended, the Texas Supreme Court issued its opinion in *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014) in which it determined it was "unnecessary to recognize a new common law claim for shareholder oppression." *Sneed v. Webre*, 465 S.W.3d 169, 188 (Tex. 2015) (citing *Ritchie*, 443 S.W.3d at 876–91). Appellants request we remand this case for a new trial in the interest of justice because the evidence of shareholder oppression at trial was prejudicial.

On November 10, 2015, appellants filed a motion for new trial based in part on the supreme court's *Ritchie* opinion. The trial court entered its final judgment on November 13, 2015. Following a hearing on December 7, 2015, the trial court denied the motion for new trial. However, on appeal, appellants do not argue the trial court erred by denying their motion for new trial or otherwise ask us to review that ruling. Rather, they ask this Court to exercise its "broad discretion" to remand for a new trial "in the interest of justice." Appellants have neither cited us to legal authority nor provided substantive analysis indicating that we may independently review whether the interest of justice could entitle them to a new trial in lieu of analysis of whether the trial court abused its discretion by denying their motion for new trial. *See Neese v. Lyon*, 479 S.W.3d 368, 390 (Tex. App.—Dallas 2015, no pet.) (citing TEX. R. APP. P. 38.1).

Appellants have the burden to show reversible error. *See Meachum v. Comm'n for Lawyer Discipline*, 36 S.W.3d 612, 615 (Tex. App.—Dallas 2000, pet. denied) (appellant's burden to establish reversible error). By failing to challenge the trial court's motion for new

trial, appellants have not argued the trial court erred and, therefore, have not met their burden. We conclude appellants' second issue presents nothing for review.

CONCLUSION

We affirm the trial court's judgment.

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/Craig Stoddart/
CRAIG STODDART
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSEPH GEETING, RICHARD GEETING, AND LAURI GEETING, Appellants

No. 05-16-00128-CV V.

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Trial Court Cause No. DC-04-01100.
Opinion delivered by Justice Stoddart.
Justices Bridges and Fillmore participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee CRAIG DYER INDIVIDUALLY AND ON BEHALF OF DYER CUSTOM INSTALLATION, INC. recover his costs of this appeal from appellants JOSEPH GEETING, RICHARD GEETING, AND LAURI GEETING.

Judgment entered this 7th day of November, 2017.