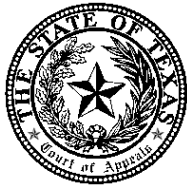


Reversed and Remanded and Memorandum Opinion filed January 25, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00307-CV

**ESTATE OF J.T. NEAL, NEAL FAMILY LIMITED PARTNERSHIP,
and TOAD WEST LTD., Appellants**

V.

**RIVER INN ASSOCIATION OF UNIT OWNERS d/b/a RIVER INN RESORT
AND CONFERENCE CENTER and GERALDINE SMALLWOOD, Appellees**

**On Appeal from the 198th District Court
Kerr County, Texas
Trial Court Cause No. 05-40-B**

MEMORANDUM OPINION

This is an appeal from a judgment signed December 21, 2009. The reporter's record in this case was due April 20, 2010. *See* Tex. R. App. P. 35.1. The official court reporter, Lisa C. Greenwalt, requested and was granted an extension of time to file the record. On June 11, 2010, the official court reporter filed six volumes of reporter's record. The official court reporter advised this court that Volume 2, the record for pre-trial matters, was reported by a substitute court reporter, Lou Ann Berry.

In response to this court's notice that the record was past due, on July 15, 2010, Lou Ann Berry filed a request for an extension of time to file her portion of the record until

August 30, 2010. The court granted the requested extension. The record was not filed. On September 9, 2010, the clerk of this court again advised Lou Ann Berry that the record was past due. No response was filed. On September 30, 2010, the court ordered her to file the record in 30 days. The order advised that no further extensions would be granted absent exceptional circumstances.

To date, Lou Ann Berry has not filed the record covering pre-trial matters or requested a further extension of time. Lou Ann Berry has advised this court that she is unable to prepare the reporter's record because of a problem with her computer. Therefore, a portion of the record has been lost or destroyed.

Rule 34.6(f) of the Texas Rules of Appellate Procedure provides that an appellant is entitled to a new trial when the reporter's record or exhibits are lost, under the following circumstances:

- (1) if the appellant 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 . . . ;
- (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.

Tex. R. App. P. 34.6(f).

Accordingly, on December 16, 2010, this court abated the appeal and directed the trial court to make the necessary findings. The trial court conducted a hearing on January 5, 2011. The record of hearing conducted pursuant to our order was filed January 13, 2011. At the hearing, the court reporter, Lou Ann Berry, provided a partial transcript of the testimony reported on October 13, 2008, and she testified that the remainder of the

record was destroyed when her computer crashed and she had no way to produce the complete record. According to the hearing record, the missing portion of the record included testimony from the appellees' expert witness that the court later relied upon in ruling on the appellants' *Daubert* motion to exclude the witness's expert testimony. The court's ruling on the *Daubert* motion is one of the issues appellants seek to raise on appeal.

The supplemental clerk's record containing the trial court's findings of fact was filed on January 14, 2011. The trial court made the following findings:

1. The Appellants, the Estate of J.T. Neal, Neal Family Limited Partnership, and Toad West Ltd., timely requested a reporter's record.
2. Without Appellants' fault, significant portions of the record have been lost or destroyed;
3. The missing portions of the record are necessary to Appellants' appeal; and
4. The missing portions of the reporter's record cannot be replaced by agreement.

Based on the trial court's findings, we conclude that appellants are entitled to a new trial pursuant to Texas Rule of Appellate Procedure 34.6(f). See *Bauserman v. Unimax Express, Inc.*, No. 14-06-00077-CV, 2006 WL 3040782 (Tex. App.—Houston [14th Dist.] Oct. 26, 2006, no pet.) (mem. op.) (reversing and remanding based on trial court's findings pursuant to Rule 34.6(f)); *Thomson v. Riley*, No. 01-05-00421-CV, 2005 WL 3560617 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.) (reversing and remanding for new trial after finding the four prongs of Rule 34.6(f) were satisfied).

Accordingly, we reverse the trial court's judgment and remand the cause for a new trial.

PER CURIAM

Panel consists of Justices Anderson, Seymore and McCally.