

**COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT
AMARILLO**

City of Lubbock v. Larry Ackers

City of Lubbock · No. No. 07-10-00071-CV · Decided June 11, 2010

SUMMARY

The Court of Appeals for the Seventh District of Texas held that the requirements of Texas Rule of Appellate Procedure 34.6(f) were satisfied because a significant portion of the reporter's record was lost through no fault of the appellant, was necessary to resolve the appeal, and could not be replaced by agreement. The court granted the City of Lubbock's motion, reversed the judgment, and remanded the case for a new trial.

CASE DETAILS

COURT	Court of Appeals for the Seventh District of Texas at Amarillo
WRITING FOR THE COURT	Quinn, C.J.; Campbell, J.; Hancock, J.
JURISDICTION	Texas
DECIDED	June 11, 2010
DOCKET	No. 07-10-00071-CV
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The City of Lubbock appealed a final judgment declaring a City practice unconstitutional and void, finding a taking under the Texas Constitution, and awarding Larry Ackers \$116,000 in attorney's fees. After a substantial portion of the trial reporter's record was lost because of a computer malfunction, the City moved for remand for a new trial under Texas Rule of Appellate Procedure 34.6(f).
PRECEDENTIAL VALUE	published
PARTIES	City of Lubbock v. Larry Ackers

TOPICS

appellate procedure motion for new trial civil procedure remedies municipal law

PRACTICE AREAS

appellate procedure civil procedure constitutional law remedies municipal law

QUESTIONS PRESENTED

1. Whether the requirements of Texas Rule of Appellate Procedure 34.6(f) were satisfied so that the City was entitled to a new trial because a significant, necessary portion of the reporter's record had been lost or destroyed without the City's fault and the parties could not agree on a replacement.

HOLDINGS

1. The requirements of Texas Rule of Appellate Procedure 34.6(f) were satisfied, entitling the City to a new trial.

FACTUAL BACKGROUND

The trial in the underlying case was recorded by the official court reporter, but a large portion of the reporter's record was lost because of a computer malfunction. The missing record was material to resolution of the appeal, and the parties could not agree on a complete replacement. The underlying judgment declared a City practice unconstitutional and void, found a taking of Ackers's property under the Texas Constitution, and awarded him \$116,000 in attorney's fees.

PROCEDURAL HISTORY

The 72nd District Court of Lubbock County entered final judgment for Ackers. During the appeal, the official court reporter reported that a large portion of the trial transcript had been lost. The City certified that the missing portions were necessary to resolution of the appeal and that the parties could not agree on a replacement record. The court of appeals granted the motion, reversed the judgment, and remanded for a new trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The cause was remanded to the trial court for a new trial.

OPINION

PER CURIAM.

NO. 07-10-00071-CV IN THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT AMARILLO PANEL B JUNE 11, 2010 CITY OF LUBBOCK, APPELLANT v. LARRY ACKERS, APPELLEE FROM THE 72ND DISTRICT COURT OF LUBBOCK COUNTY; NO. 2006-533,594; HONORABLE RUBEN GONZALES REYES, JUDGE Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ. MEMORANDUM OPINION Appellant, City of Lubbock, appeals from a Final Judgment declaring a practice of the City to be unconstitutional and void, finding that the City took appellee's, Larry Ackers, property in violation of the Texas Constitution, and awarding Ackers \$116,000 in attorney's fees.

While the trial of this cause was duly recorded by the Official Court Reporter for the 72nd District Court of Lubbock County, the reporter has attested that, due to a computer malfunction, a large portion of the transcript of the trial has been lost. According to Texas Rule of Appellate Procedure 34.6(f), an appellant is entitled to a new trial if (1) the appellant has timely requested a reporter's record, (2) without the appellant's fault, a significant portion of the recording has been lost or destroyed or is inaudible, (3) the lost, destroyed, or inaudible portion of the record is necessary to the appeal's resolution, and (4) the parties cannot agree on a replacement for the lost, destroyed, or inaudible portion of the reporter's record.

See Tex. R. App. P. 34.6(f). On June 2, 2010, this Court informed the parties of the affidavit received from the official court reporter and directed appellant to certify whether the lost or destroyed portion of the reporter's record is necessary to the appeal's resolution and whether the parties have been able to reach an agreement concerning a replacement for the lost or destroyed portion of the reporter's record.

In response, the City filed a Motion to Remand for New Trial in which it certifies that the lost portions of the reporter's record are necessary to the appeal's resolution and that the parties are unable to agree on a complete reporter's record.

In view of the circumstances present in this case, we conclude that the elements of Rule 34.6(f) exist at bar. Consequently, we grant the City's motion, reverse the judgment, and remand the cause for a new trial. Mackey K. Hancock Justice