

COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

Brigetta D’Olivio v. Greg Fox and Laura Fox

No. 05-18-00868-CV · No. No. 05-18-00868-CV · Decided March 11, 2019

SUMMARY

The Fifth District Court of Appeals of Texas granted Brigetta D’Olivio’s motions for additional time to file an amended brief and abated the appeal. The court ordered the trial court to investigate alleged deficiencies in the clerk’s and reporter’s records, make written findings, and arrange for supplemental or corrected records to be filed.

CASE DETAILS

COURT	Court of Appeals for the Fifth District of Texas at Dallas
WRITING FOR THE COURT	Bill Whitehill
JURISDICTION	Texas
DECIDED	March 11, 2019
DOCKET	No. 05-18-00868-CV
DISPOSITION	other
PROCEDURAL POSTURE	Interlocutory appellate order granting the appellant’s emergency and amended motions to extend the time to file an amended brief, abating the appeal, and directing the trial court and court personnel to supplement and correct the appellate record.
PRECEDENTIAL VALUE	published
PARTIES	Brigetta D’Olivio v. Greg Fox, Laura Fox

TOPICS

- appellate procedure
- civil procedure

PRACTICE AREAS

- appellate procedure
- civil procedure

QUESTIONS PRESENTED

- Whether the appellate record should be supplemented or corrected because documents were missing from the clerk’s record, the reporter’s record contained alleged inaccuracies, or exhibits were missing.

2. What procedures the trial court and court reporter were required to follow under Texas Rules of Appellate Procedure 34.5 and 34.6 to resolve alleged deficiencies in the appellate record.
3. Whether the appeal should be abated while the trial court conducted the required hearing and record-correction proceedings.

HOLDINGS

1. When the clerk's record is alleged to be incomplete or documents are missing, the trial court must determine why the requested documents have not been filed, whether documents are missing, and, if a designated document was lost or destroyed, what constitutes an accurate copy; the trial court must order an appropriate supplemental clerk's record.
2. The trial court must determine whether the reporter's record contains alleged errors or missing exhibits; if inaccuracies exist, the court reporter must conform the record to what occurred in the trial court and file certified corrections, and if an exhibit is missing, the trial court must determine whether the exhibit was lost without the appellant's fault, is necessary to resolution of the appeal, and can be accurately replaced.
3. The appeal was abated to permit the trial court and court reporter to comply with the order concerning supplementation and correction of the record, with reinstatement scheduled in forty-five days.

KEY QUOTATIONS

"We ABATE this appeal to allow the trial court to comply with this order. The appeal will be reinstated in forty-five days." (2)

FACTUAL BACKGROUND

The appellant contended that the appellate record was incomplete or inaccurate. She identified thirty-nine documents that had not been included in a supplemental clerk's record, alleged that six other requested documents might be missing, and challenged errors in the reporter's record and missing or allegedly fabricated exhibits. The court of appeals directed the trial court to investigate these allegations and determine how the record should be supplemented or corrected.

PROCEDURAL HISTORY

The appeal arose from the 191st Judicial District Court of Dallas County, Texas, trial court cause number DC-16-05606. The appellant alleged that the clerk's record was incomplete, documents were missing from the Court Portal, the reporter's record contained inaccuracies, and exhibits were missing. The court of appeals ordered the trial court to conduct a hearing and make written findings, directed the filing of supplemental and corrected records, and abated the appeal for forty-five days.

DISPOSITION

other

REMAND INSTRUCTIONS

The trial court must conduct a hearing within thirty days, make written findings concerning the clerk's and reporter's records, order available or accurately reconstructed documents into a supplemental clerk's record, and order corrections or replacement of exhibits as required by Texas Rules of Appellate Procedure 34.5 and 34.6. The Dallas County District Clerk must file the supplemental clerk's record within forty days, and the official court reporter must file the hearing record and any corrected reporter's record within forty days. The appeal is abated and will be reinstated in forty-five days.

OPINION

PER CURIAM.

Order entered March 11, 2019 In The Court of Appeals Fifth District of Texas at Dallas No. 05-18-00868-CV BRIGETTA D'OLIVIO, Appellant V. GREG FOX AND LAURA FOX, Appellees On Appeal from the 191st Judicial District Court Dallas County, Texas Trial Court Cause No. DC-16-05606 ORDER Before the Court are appellant's March 7, 2019 emergency motion to extend time to file an amended brief and March 4, 2019 third amended motion for an extension of time to file an amended brief and appellees' objection to that motion.

In the motions, appellant complains that (1) the clerk's record is incomplete, (2) certain documents are missing from the "Court Portal", (3) the reporter's record contains inaccuracies, and (4) certain exhibits are missing from the reporter's record. A copy of appellant's motion is attached.

We GRANT the motions as follows. We ORDER the trial court to conduct a hearing, within thirty days of the date of this order and make the following written findings: 1 As to the clerk's record, the trial court shall make written findings regarding: (1) why a supplemental clerk's record containing the thirty-nine documents listed in the attached motion has not been filed and (2) whether the six documents listed in the attached motion and requested for inclusion in a supplemental clerk's record are now missing.

If the trial court finds any document designated for inclusion in the clerk's record has been lost or destroyed, the trial court must determine what constitutes an accurate copy of the missing document and order it to be included in a supplemental clerk's record. See TEX. R. APP. P. 34.5(e).

The trial court shall order a supplemental clerk's record containing all the available requested documents be filed. As to the reporter's record, the trial court shall make written findings regarding: (1) whether the Master Index to the reporter's record contains the errors alleged in the attached motion; (2) whether volumes three and five of the reporter's record contain the errors alleged in the attached motion; and (3) whether volume ten is missing any exhibits and contains exhibits that have been fabricated since trial as alleged in the attached motion.

See id. 34.6(e). If the trial court finds any inaccuracies in the reporter's record, it must order the court reporter to conform the reporter's record to what occurred in the trial court and to file certified corrections in this Court. See id. 34.6(e)(3). If the trial court finds that any exhibit is missing from the reporter's record and the parties cannot agree to replace the missing exhibit, the trial court shall determine if (1) the missing exhibit was lost without appellant's fault, (2) the missing exhibit is necessary to the appeal's resolution, and (3) the exhibit can be replaced with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

See id. 34.6(f)(2)-(4). We ORDER Felicia Pitre, Dallas County District Clerk, to file, within forty days of the date of this order, a supplemental clerk's record containing the trial court's written findings and all the documents requested by appellant the trial court found available. 2 We ORDER Melba Wright, Official Court Reporter for the 191st Judicial District Court to file, within forty days of the date of this order, a reporter's record from the hearing and any corrected reporter's record as ordered by the trial court.

We DIRECT the Clerk of this Court to send a copy of this order to the Honorable Gena Slaughter, Presiding Judge of the 191st Judicial District Court; Ms. Pitre; Ms. Wright; and all parties. We ABATE this appeal to allow the trial court to comply with this order.

The appeal will be reinstated in forty-five days. /s/ BILL WHITEHILL JUSTICE 3