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No. 21-0547

IN THE SUPREME COURT
OF TEXAS

RAHUL K. NATH, M.D.,
Petitioner,

v.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE,
Respondents.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas
Nos. 14-20-00231-CV and 14-19-00967-CV

BRIEF OF AMICUS CURIAE EXTREMITY NERVE SURGEONS IN SUPPORT OF PETITIONER RAHUL K. NATH

Douglas W. Alexander
State Bar No. 00992350
dalexander@adjtlaw.com
Alexandra Wilson Albright
State Bar No. 21723500
aalbright@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

COUNSEL FOR AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Association of Extremity Nerve Surgeons (the Association), is a society organized to promote the collaborative study and development of medical research regarding the treatment of extremity nerve disease. Its members are members of the medical profession, including physicians.

The Association has an interest in this case because its members are concerned about fee-shifting and excessive fines imposed as sanctions, especially those imposed against clients, in civil litigation in Texas. Because this case impacts its members and other members of the medical profession in Texas, the Association urges this Court to grant review.

In compliance with Texas Rule of Appellate Procedure 11(c), the undersigned counsel affirms that the Association paid the fee for the preparation of this brief.

SUMMARY OF THE ARGUMENT

"A defending party cannot arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions."[1]

This Court has been steadfast in holding that Texas follows the American Rule on attorney's fees—litigants in Texas generally are responsible for their own fees and expenses in litigation unless a statute or contract between the parties provides otherwise. In this case, it is undisputed that no fee-shifting contractual provision or statute applies. Nevertheless, the courts below have twice shifted *the entirety* of the defendants' fees to the individual plaintiff as a *sanction* for filing frivolous litigation under the auspices of Chapter 10 of the Civil Practices and Remedies Code.

This Court has twice (in this very case) directed that fee-shifting contrary to the American Rule is not to be undertaken cavalierly.[2] But the lower courts have twice upheld 100%-fee-shifting in this case, utterly failing to provide the plaintiff with the protections this Court has ordered and establishing dangerous precedent for the future. In fact, the opinion below provides a roadmap for litigants who succeed at the summary judgment stage to shift all fees incurred in the litigation to

[1] *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 372 (Tex. 2014) (*Nath I*) (emphasis added).

[2] In *Nath I*, this Court demanded an inquiry into "the degree to which the [defendants] caused their [own] attorney's fees." *Id*. In *Nath 2*, it required careful proof of reasonableness of the awarded fees under the standard adopted in *Rohrmoos Venture v. UTSW DVA Healthcare*, LLP, 578 S.W.3d 469 (Tex. 2019). *Nath v. Texas Children's Hosp*., 576 S.W.3d 707 (Tex. 2019) (per curiam) (*Nath II*).

the losing party, a result this Court has refused to allow in other contexts. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018) (refusing Rule 91a sanctions after motion for summary judgment granted).

Texas already has a mechanism for shifting fees when a plaintiff files a pleading that has no basis in law or fact—Rule 91a—that carefully balances the American Rule, the due process rights of the plaintiff, and the pernicious effects of frivolous pleadings. Although not directly applicable to this case,[3] the Court should look to Rule 91a here and whenever a defendant seeks to shift the entirety of its fees to the plaintiff as a pleading sanction. Unless this Court provides adequate guidelines for pleading sanctions that shift attorney's fees after a successful summary judgment motion, Texas may effectively have adopted a loophole that swallows the American Rule and Rule 91a.

This Court should grant the Petition for Review.

[3] Rule 91a was adopted in 2013, after the sanction in this case was first imposed. *See* TEX. R. CIV. P. 91a, cmt.-2013.

ARGUMENT

I. Fee-shifting is disfavored under the American Rule and Texas sanctions statutes.

The sanctions award in this case shifted to the unsuccessful plaintiff virtually all of the attorney's fees the successful defendants incurred—including an award of future appellate fees incurred after the parties made their third trip to the trial court at this Court's direction. The sanction is extraordinary—as this Court noted in its first opinion addressing the award at its original level, it is "one of the highest reported monetary sanctions awards in Texas history," while other "awards for groundless pleadings in Texas have been moderate, at least in monetary terms." *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 358 & 363-64 (Tex. 2014) (*Nath I*). The additional award on remand threatens to make the sanction considerably higher and is especially pernicious as its purpose must be only to constrain Nath's appellate rights: if he does not appeal the award, the sanction remains at its original level—$1.4 million—but if he does appeal, an additional $500,000 sanction is imposed.

A. The American Rule prohibits fee-shifting except as specifically provided.

The Association urges this Court to grant the Petition for Review to consider the sanction's excessiveness against the backdrop of the longstanding rule in Texas (generally referred to as the American Rule) that litigants are responsible for their own litigation fees and expenses unless a statute or contract between the parties

provides otherwise. *See, e.g.*, *Allstate Ins. Co. v. Irwin,* 627 S.W.3d 263, 271 (Tex. 2021); *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483-84, 487 (Tex. 2019) (citing *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) (orig. proceeding) and *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006) ("For more than a century, Texas law has not allowed recovery of attorney's fees unless authorized by statute or contract.")).

Fee-shifting statutes are "in derogation of the common law, are penal in nature and must be strictly construed." *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 804 (Tex. 1974). This Court has been careful to avoid expanding fee-shifting beyond express legislative provision for it, resisting attempts to extend by implication a statute that does not expressly shift fees. *Id.* at 803-04. "The authorization of attorney's fees in civil cases may not be inferred; rather it 'must be provided for by the express terms of the statute in question.'" *Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 593 (Tex. 1996) (orig. proceeding) (quoting *First City Bank—Farmers Branch, Tex. v. Guex*, 677 S.W.2d 25, 30 (Tex.1984)).

The Texas Legislature has adopted a number of fee-shifting statutes that allow a prevailing party to receive an award of reasonable attorney's fees. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 37.009 (declaratory judgments); § 38.001 (breach of contract); TEX. BUS. & COM. CODE § 17.50(c) & (d) (deceptive trade practices). Fee-shifting under these statutes seeks to prevent parties from pursuing non-

meritorious claims and defenses and to encourage quick resolution of the dispute. Fee-shifting is no surprise—the statutes give ample notice before a petition or answer is filed that an unsuccessful party may (or must) pay their opponent's legal fees. And the fees that are shifted are whatever is proven to be reasonable and necessary. *See Rohrmoos*, 578 S.W.3d at 501-02. There is no due process concern about whether the prospect of an unexpected large fee award forced a settlement, preventing the party from having the case decided on the merits. By contrast, when a court shifts fees as a *sanction* instead of pursuant to an explicit fee-shifting statute, concerns for due process are paramount. *Nath 1*, 446 S.W.3d at 358 ("In a civil suit, few areas of trial court discretion implicate a party's due process rights more directly than sanctions.").

This Court has been especially careful not to interpret fee-shifting provisions so broadly that they would effectively eviscerate the American Rule. For example, the Court refused to allow parties to replead a claim for declaratory judgment to take advantage of that fee-shifting provision, noting that such action "cannot serve as a basis for attorney's fees, since such a maneuver would abolish the American Rule and make fees 'available for all parties in all cases.'" *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011) (per curiam); *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009).

This Court has also protected the American Rule in the context of sanction awards. For example, in *Nath I*, this Court was careful to not allow a defendant to "arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions," 446 S.W.3d at 372. Accordingly, it required the trial court to consider "the degree to which the offended person's own behavior caused the expenses for which discovery is sought" as due process requires. *Id*. (citation and quotation marks omitted). And in *Nath II*, while not explicitly invoking the American Rule, this Court upheld it in remanding to require the lower courts to follow the legal and evidentiary requirements of *Rohrmoos* to establish the reasonableness of the fees sought to be shifted. *Nath v. Texas Children's Hosp*., 576 S.W.3d 707, 710 (Tex. 2019) (per curiam) (*Nath II*).

Nevertheless, the courts below have continued to eviscerate the American Rule by shifting "the entirety of [the defendants'] costs" to the plaintiff as a pleading sanction, long after the pleadings were filed and after summary judgment was granted. *Id*. at 708. The opinion below invites courts to use pleading sanctions to shift the entirety of fees *in any case* to an unsuccessful party after its opponent is awarded summary judgment, even years after the pleading deficiency becomes apparent. It is time to explicitly invoke the American Rule and enunciate careful guidelines that prohibit full fee-shifting except in the most unusual case.

B. Chapter 10 does not authorize 100%-fee-shifting in abrogation of the American Rule.

Chapter 10 of the Civil Practice and Remedies Code, under which the sanctions were authorized in this case is a sanction statute, *not a fee-shifting statute*. It has a different purpose—while sanctions statutes, like fee-shifting statutes, may serve to *compensate* the opponent for fees expended,[4] and may also *punish* parties and their lawyers for bad litigation conduct, its primary purpose is to *deter* others from engaging in the same conduct. *See* TEX. CIV. PRAC. & REM. CODE § 10.004(b) ("The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated"); *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 922 (Tex. 1991) (Gonzalez, J. concurring, noting the three purposes of sanctions). Accordingly, unlike fee-shifting awards, a sanction order may not simply shift all of a party's reasonable and necessary attorney's fee to an opponent.

Instead, as this Court made clear in *Nath I*, because sanctions orders implicate constitutional due process, courts must consider whether the sanction is "just." 446 S.W.3d at 363. Just sanctions must have a direct "relationship" between the offensive conduct and the sanction imposed, and they must not be excessive. *Id*.;

[4] Fee-shifting statutes seek to "compensate the prevailing party generally for its reasonable losses resulting from the litigation process." *Rohrmoos*, 578 S.W.3d at 487.

TransAmerican, 811 S.W.2d at 917. A sanction must relate directly to the abuse found and "be no more severe than necessary to satisfy its legitimate purposes." *Id*. at 917. "Although punishment and deterrence are legitimate purposes for sanctions, they do not justify trial by sanctions." *Id*. at 918 (citations omitted).

Perhaps because of this due process concern, Chapter 10 does not provide for a 100%-fee-shifting sanction. Instead, Chapter 10's emphasis is on a more limited fee award. It allows as a sanction "an order to pay to the other party the amount of the reasonable expenses incurred by the other party *because of the filing of the pleading or motion*, including reasonable attorney's fees." TEX. CIV. PRAC. & REM. CODE § 10.004(c)(3) (emphasis added).[5] Elsewhere it allows an award of "reasonable expenses and attorney's fees incurred *in presenting or opposing the motion*," and "if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation." TEX. CIV. PRAC. & REM. CODE § 10.002(c) (emphasis added). While this provision clearly allows for recovery of attorney's fees, it does not clearly provide for 100%-fee-shifting as a pleading sanction at the end of protracted litigation.

[5] Chapter 10 prohibits a monetary sanction "against a represented party for a violation of Section 10.001(2)"—the provision that prohibits the filing of a legal contention that is not "warranted by existing law." TEX. CIV. PRAC. & REM. CODE §§ 10.004(d); 10.001(2). The sanction in this case was awarded against the "represented party," Dr. Nath, not against his lawyer.

A 100%-fee-shifting sanction imposed after summary judgment, such as the sanction in this case, does more than compensate, punish, and deter. It imposes a chilling effect on parties seeking to exercise their legal rights in litigation. This chilling effect applies to all civil litigation where litigants face the prospect of a court shifting fees to a party that unsuccessfully defends a successful motion for summary judgment. And fee-shifting after summary judgment, imposed after years of litigation, without early notice and without the opportunity for early nonsuit, is even more likely to infringe a litigant's due process rights. It deserves special scrutiny. The potential fee award, as evidenced by the award in this case, is far in excess of that envisioned by Chapter 10.

II. Rule 91a authorizes fee-shifting as a pleading sanction and the Court should look to it for guidance.

Texas has a fee-shifting pleading sanction rule, mandated by the Legislature[6]—Rule 91a. TEX. R. CIV. P. 91a. That rule sets the appropriate boundaries for abrogating the American Rule when the defendant claims that a plaintiff has filed a pleading that has no basis in law or fact, taking into account important due process concerns. Accordingly, this Court should follow Rule 91a in

[6] The Texas Legislature mandated this Court to adopt a "loser-pays" rule providing for early dismissal of groundless lawsuits with mandatory fee-shifting. The statute required the Court to "adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence." TEX. GOV'T CODE § 22.004(g). And under those rules, "the court may award costs and reasonable and necessary attorney's fees to the prevailing party." TEX. CIV. PRAC. & REM. CODE § 30.021.

setting out the guidelines applicable to this case. Otherwise, Texas will have multiple standards for fee-shifting as a pleading sanction—one complying with the American Rule and the other not.

Rule 91a of the Texas Rules of Civil Procedure allows fee-shifting when a party moves

> to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

TEX. R. CIV. P. 91a.1. After the motion is heard, "the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." Rule 91a.7.[7]

Importantly, there are strict deadlines for a Rule 91a motion—it must be filed within 60 days of the pleading asserting the challenged claim, set for hearing within 21 days of filing the motion, and ruled upon by the court within 45 days thereafter. Rule 91a.3. The short timeframe has a purpose—it requires early dismissal of groundless suits, which necessarily limits the amount of attorney's fees to that which can be accrued during such a short time.

[7] The rule originally provided that the court "*must* award" costs and fees. Misc. Docket No. 13-9022 (emphasis added) (Tex. 2013). The change to "*may* award" was made pursuant to section 30.021 of the Texas Civil Practice and Remedies Code, applicable to civil actions commenced before September 1, 2019. *See* TEX. R. CIV. P. 91a, cmt.-2013.

Like other fee-shifting statutes, this rule is designed to prevent parties from pursuing non-meritorious claims and defenses and to encourage quick resolution of the dispute. Fee-shifting is no surprise—a plaintiff receives early notice of the possibility of fee shifting. And the rule has a safe-harbor provision, allowing the plaintiff to file a nonsuit or amend the challenged claims at least three days before the hearing to avoid fee-shifting. Rule 91a.5(a) & (b); *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 302 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (concluding that, if a claimant timely nonsuits claims that are the subject of a Rule 91a motion, the court cannot rule on the motion). The rule serves to compensate a party for having to respond to a groundless pleading or motion, and the fees that are shifted are whatever is proven to be reasonable and necessary. Rule 91a.7.

As with other fee-shifting provisions, this Court has also construed this rule narrowly. In *ConocoPhillips Co. v. Koopmann*, the Court held that a later successful summary judgment motion does not transform a party into a "prevailing party" that can recover attorney's fees under Rule 91a.7. 547 S.W.3d at 880. Thus, the Court interpreted Rule 91a to preserve the American Rule—each party is responsible for its own attorney's fees and expenses unless the Legislature or the parties expressly provide otherwise. That reasoning should also apply when a party seeks to shift 100% of its fees as a pleading sanction under Chapter 10.

III. Guidelines are needed for fee-shifting sanctions awards under Chapter 10.

This Court has decided that the fee-shifting sanction awarded below must be judged by due process, *Nath I*, 446 S.W.3d at 372 (citing *Low v. Henry*, 221 S.W.3d 609, 619-20 (Tex. 2007)), and reasonableness standards, *Nath II*, 576 S.W.3d at 710-11 (citing *Rohrmoos*, 578 S.W.3d at 492). It remanded the case for further proceedings to determine whether the sanction in fact can withstand that scrutiny.

But the lower courts apparently did not understand the Court's guidance about the special concerns of fee-shifting. The courts below twice saw this Court's remand as requiring a procedural exercise before again ordering fee-shifting—they did not take seriously their obligation of requiring the defendants to show evidence that the award satisfied this Court's due process and reasonableness concerns. Instead, the courts continued to simply shift all the defendants' fees to Nath—and in doing so they appeared to begin with the English Rule, which assumes that fees are to be shifted, rather than the American Rule, which assumes that they are not. Under the analysis that the due process and the American Rule require, the courts must not assume an award of the defendants' entire fee is appropriate.

Nath 1 and *Nath 2* contain much of the spirit of Rule 91a. They require the lower courts to carefully scrutinize the situation before them and, if a fee award sanction is appropriate, award only fees that are proven to be reasonable and necessary under *Rohrmoos* and incurred to a point at which the defendants could

have put an end to the litigation as due process requires. But the lower courts continue to reward the defendants for their strategy in delaying their motions for summary judgment and sanctions. The defendants have secured a drawn-out, cost-free, defense.

This Court must be explicit that Nath, and other litigants in his position, should not have to bear all of the cost of defendants' strategic choice to prolong litigation. Allowing the judgment below to stand will allow litigants to use this strategy to their benefit—it points to the potential value of filing a motion for sanctions after summary judgment instead of at the pleading stage, contrary to the Legislature's clear intent to encourage *early* dismissal of groundless suits.

The jurisprudence of the State of Texas demands more concrete guidelines for fee-shifting pleading sanctions under Chapter 10. Amicus respectfully suggests that the Court look to Rule 91a for guidance and employ it to provide much-needed clarification to the bench and bar.

PRAYER

For these reasons, Amicus Curiae, the Association of Extremity Nerve Surgeons, urges the Court to grant the Petition for Review.

Respectfully submitted,

/s/ *Douglas W. Alexander*
Douglas W. Alexander
State Bar No. 00992350
dalexander@adjtlaw.com
Alexandra Wilson Albright
State Bar No. 21723500
aalbright@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 3,205 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *Douglas W. Alexander*
Douglas W. Alexander

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2021 a true and correct copy of this brief, including any and all attachments, is served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

Stacey Neumann Vu
svu@velaw.com
Catherine B. Smith
csmith@velaw.com
VINSON & ELKINS L.L.P.
100 Fannin Street, Suite 2300
Houston, Texas 77002

ATTORNEYS FOR RESPONDENT TEXAS CHILDREN'S HOSPITAL

Joy M. Soloway
joy.soloway@nortonrosefulbright.com
Jamila S. Mensah
jamila.mensah@nortonrosefulbright.com
NORTON ROSE
1301 McKinney, Suite 5100
Houston, Texas 77010

ATTORNEYS FOR RESPONDENT BAYLOR COLLEGE OF MEDICINE

Craig T. Enoch
Melissa A. Lorber
Michael S. Truesdale
ENOCH KEVER PLLC
5918 West Courtyard Drive, Suite 500
Austin, Texas 78730

Brad Beers
bbeers@beerslaw.net
BEERS LAW FIRM
5020 Montrose Blvd., Suite 700
Houston, Texas 77006

ATTORNEYS FOR PETITIONER DR. RAHUL K. NATH

/s/ *Douglas W. Alexander*
Douglas W. Alexander

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Bar No. 00992350
ggrimm@adjtlaw.com
Envelope ID: 58408918
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Associated Case Party: RahulK.Nath

Name	BarNumber	Email	TimestampSubmitted	Status
Melissa ALorber		mlorber@enochkever.com	10/21/2021 12:09:37 PM	SENT
Laci Lindsey		llindsey@enochkever.com	10/21/2021 12:09:37 PM	SENT
Craig T.Enoch		cenoch@enochkever.com	10/21/2021 12:09:37 PM	SENT
Michael S. Truesdale	791825	mtruesdale@enochkever.com	10/21/2021 12:09:37 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Esmeralda Henderson		ehenderson@velaw.com	10/21/2021 12:09:37 PM	SENT
Stacey Neumann Vu	24047047	svu@velaw.com	10/21/2021 12:09:37 PM	SENT
Brad Beers	2041400	BBeers@BeersLaw.net	10/21/2021 12:09:37 PM	SENT
M. Joy Soloway	18838700	joy.soloway@nortonrosefulbright.com	10/21/2021 12:09:37 PM	SENT
Catherine Bukowski Smith	3319970	csmith@velaw.com	10/21/2021 12:09:37 PM	SENT
Jamila Shukura Mensah	24055963	jamila.mensah@nortonrosefulbright.com	10/21/2021 12:09:37 PM	SENT
Brooke Noble	24110166	brookeashleynoble@gmail.com	10/21/2021 12:09:37 PM	SENT
Support Center 30		c30hou@velaw.com	10/21/2021 12:09:37 PM	SENT
Patrick W. Mizell	14233980	pmizell@velaw.com	10/21/2021 12:09:37 PM	SENT
Douglas W.Alexander		dalexander@adjtlaw.com	10/21/2021 12:09:37 PM	SENT
Alex Albright		aalbright@adjtlaw.com	10/21/2021 12:09:37 PM	SENT

Associated Case Party: Texas Children's Hospital

Name	BarNumber	Email	TimestampSubmitted	Status
Brooke Noble		bnoble@velaw.com	10/21/2021 12:09:37 PM	SENT

Associated Case Party: Baylor College of Medicine

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Bar No. 00992350
ggrimm@adjtlaw.com
Envelope ID: 58408918
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Associated Case Party: Baylor College of Medicine

Name	BarNumber	Email	TimestampSubmitted	Status
Lety Gracia		lety.gracia@nortonrosefulbright.com	10/21/2021 12:09:37 PM	SENT