FILED
21-0547
2/9/2022 8:30 PM
tex-61609256
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0547

The Supreme Court of Texas

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

v.

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

On Petition for Review from the Fourteenth Court of Appeals – Houston
Cause Nos. 14-19-00967-CV & 14-20-00231-CV

RAHUL K. NATH, M.D. BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case: This is the third time the approximately $1.4 million sanction in this case—one of the largest sanctions in the country ever imposed against an individual litigant, not the lawyers who signed the pleadings—returns to this Court for review as the courts below continue to issue the identical award, and now have added an additional half-million dollars in sanctions for appealing, despite this Court's direction to the contrary in 2014 and 2019. *See Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355 (Tex. 2014) (*Nath I*) (Appendix A); *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 707 (Tex. 2019) (per curiam) (*Nath II*) (Appendix B).

The case began in 2006 when Dr. Rahul K. Nath sued Texas Children's Hospital ("Hospital") and Baylor College of Medicine ("Baylor") ("Respondents"), initially claiming defamation and tortious interference with business relations. After the trial court granted summary judgment against Dr. Nath four years later in 2010, the Hospital and Baylor requested sanctions for the first time, arguing that Dr. Nath's initial pleading was sanctionable because the claims were barred by limitations. The defendants requested virtually all the attorney's fees they had incurred over the four years of litigation as sanctions. The trial court awarded all the fees requested, and as detailed below, that same sanction—plus now additional future appellate attorney's fees to the Hospital—remains in place despite this Court's having reversed and remanded the sanction twice.

Initial Trial Court: 215th District Court of Harris County, Texas; Cause Nos. 2006-10826 (Hospital) & 2006-10826A (Baylor), consolidated; Honorable Levi Benton (2006-08) and then Honorable Steven Kirkland, presiding.

Initial Trial Court Disposition: The trial court ordered Dr. Nath, personally, to pay the Hospital and Baylor $1.4 million in attorney's fees as sanctions for groundless pleadings under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code Chapter 10. CR1085, 1101.

Initial Court of Appeals: Fourteenth Court of Appeals, Nos. 14-11-00034-CV (Hospital) and 14-11-00127-CV (Baylor), consolidated. *Nath v. Tex. Children's Hosp.*, 375 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2012) (Hedges, C.J., joined by Jamison, McCally, JJ.).

Initial Court of Appeals Disposition: The court affirmed.

This Court's Initial Disposition: In Cause No. 12-0620, this Court reversed and

remanded, directing the trial court on remand to "examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years." *Nath I* at 373.

Trial Court on First Remand: 215th District Court of Harris County, Texas; Cause No. 2006-10826; Honorable Elaine H. Palmer, presiding.

Trial Court Disposition on First Remand: After the Hospital and Baylor filed motions to reassess sanctions, plus additional conclusory declarations, the trial court reentered the identical $1.4 million sanction, without an evidentiary hearing. 2Supp.CR294, 600.[1]

Court of Appeals on Appeal after First Remand: *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 728 (Tex. App.—Houston [14th Dist.] 2016) (Wise, J., joined by Jamison, McCally, JJ.).

Court of Appeals Disposition on Appeal after First Remand: The court again affirmed.

This Court's Second Disposition: In Cause No. 17-0110, this Court reviewed the sanction under Texas Civil Practice and Remedies Code Chapter 10 and again reversed and remanded. It first held that the reasonable-and-necessary evidentiary standard of *Rohrmoos Venture v. UTSW DVA Healthcare*, *LLP*, 578 S.W.3d 469 (Tex. 2019), applies to all attorney fee-shifting situations, including when fees are shifted as sanctions. The Court then remanded again to the trial court because the defendants' "additional conclusory affidavits" did not meet that standard. *Nath II* at 710.

Trial Court on Second Remand: 215th District Court of Harris County, Texas; Cause No. 2006-10826; Honorable Elaine H. Palmer, presiding.

[1] Although labeled "First Supplemental Clerk's Record," the clerk's record filed on April 1, 2020, is actually the second supplemental clerk's record filed in Appeal No. 14-19-00967. The first supplemental record was filed on January 24, 2020. To avoid confusion, Nath will cite to the clerk's record filed on January 24th as the "1Supp.CR" and the clerk's record filed on April 1st as the "2Supp.CR."

Trial Court Disposition on Second Remand: The Hospital and Baylor yet again sought the same $1.4 million sanction, and the Hospital added a new claim for almost half a million dollars in future appellate attorney's fees. 2Supp.CR4, 339. Dr. Nath moved to dismiss under the Texas Citizen's Participation Act (TCPA). CR99-133. On December 10, 2019, the trial court effectively denied Dr. Nath's TCPA motion when it refused to rule on that motion before proceeding to hear the merits of the sanctions motions. 1RR1-35. On December 27, 2019, the trial court signed an order denying Dr. Nath's TCPA motion and—for a third time—awarded the same amount in sanctions to the Hospital and Baylor (plus the Hospital's newly requested appellate fees). 1Supp.CR3-6 (Appendix D).

Court of Appeals on Appeal after Second Remand: *Rahul K. Nath, M.D. v. Tex. Children's Hosp. & Baylor Coll. of Med.*, No. 14-19-00967-CV & No. 14-20-00231, 2021 WL 451041 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021, pet. filed) (sub. mem. op.) (Hassan, J., joined by Wise, Bourliot, JJ.) (Appendix C).

Court of Appeals Disposition on Appeal after Second Remand: Dr. Nath initially filed an interlocutory appeal from the trial court's denial of his TCPA motion (No. 14-19-00967-CV). *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12). Dr. Nath also appealed from the purported final judgment on the Hospital's and Baylor's motions to reassess sanctions (No. 14-20-00231-CV). On the Hospital and Baylor's motion, over Dr. Nath's objection, the court of appeals consolidated the appeals.

The court of appeals rejected all of Dr. Nath's arguments regarding his TCPA motion to dismiss and all of his arguments regarding the sanction—including that he was entitled to have a jury determine the amount of reasonable and necessary fees to be shifted as a sanction. The court reversed for insufficient evidence part of the Hospital's new claim for future appellate attorney's fees, and suggested a remittitur. After accepting the Hospital's remittitur, the court affirmed the judgment as modified, leaving in place the identical sanction that this Court has already twice reversed. Dr. Nath filed a motion for rehearing en banc. The court requested a response, but denied the motion.

STATEMENT OF JURISDICTION

This case is important to the jurisprudence of this State for at least three reasons.

First, this is the third time the lower courts have affirmed to the penny, and then added a half-million-dollar appellate sanction to, the country's largest sanction against an individual litigant by wholesale shifting of the entirety of Respondents' attorney's fees to Dr. Rahul K. Nath, contrary to this Court's prior opinions in this case.

Second this case raises the constitutional and statutory construction question of whether a sanctioned litigant is entitled to a jury on the factual inquiry of reasonable and necessary attorney's fees, as required by *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019).

Third, the Court is presented with the opportunity to resolve a conflict among the courts of appeals on whether and in what context a motion for sanctions is considered a "legal action" subject to the Texas Citizens Participation Act.

Each of these questions is important to the jurisprudence of the State. *See* TEX. GOV'T CODE § 22.001(a). The Petition should therefore be granted.

ISSUES PRESENTED

I. After three attempts, Texas Children's Hospital and Baylor College of Medicine still did not meet their burden under *Nath I* and *Nath II*, and yet despite this Court's directions, the trial court and court of appeals once again affirmed the identical sanction that this Court has twice reversed. The Court should exercise its discretion to bring this case to an end by reversing the sanction and ordering that Respondents take nothing.

II. The trial court abused its discretion by denying Dr. Nath's request to have a jury determine the fact issue of the amount of reasonable and necessary attorney's fees incurred by the Hospital and Baylor as the result of Dr. Nath's conduct.

A. When attorney's fees are awarded under a statute, the language of the statute governs whether jurors or the court must decide the reasonableness and necessity of an attorney's fees award. Under this Court's precedent and the statutory language governing this case—Texas Civil Practice and Remedies Code chapter 10—a jury is required.

B. The case relied on by the court of appeals—*Brantley v. Etter*, a two-paragraph, 37-year-old, writ ref'd n.r.e, per curiam opinion, about a discovery sanction—does not foreclose a jury determination for a Chapter 10 sanction.

C. This Court held in *Nath II* that fee-shifting as a sanction should be handled the same as fee-shifting in all other contexts. A jury must determine reasonableness and necessity before fees can be shifted to the opposing party.

III. Dr. Nath filed a TCPA motion to dismiss the sanctions motions. Under the statute's language, a sanctions motion is a legal action that triggers the requirements of the TCPA. The Hospital and Baylor presented no evidence—let alone "clear and specific" evidence—of their prima facie case in response to the motion. The TCPA motion should have been granted and the court of appeals erred by sidestepping all of Dr. Nath's TCPA arguments on the basis that the motion was outside the scope of this Court's remand in *Nath I* and *Nath II*.

IV. Even if the trial court could properly determine the amount of reasonable and necessary attorney's fees, it abused its discretion by awarding the same twice-reversed $1.4 million sanction to the Hospital and Baylor when they did not meet their burdens under the directives and standards of *Nath I*, *Nath II*, *TransAmerican*, and *Rohrmoos*. Dr. Nath was also improperly precluded from presenting evidence on key issues.

V. No award of future appellate attorney's fees is appropriate for the Hospital. It had neither previously pleaded for that relief nor supported its request with sufficient evidence.

INTRODUCTION

¡Ya basta! Sometimes this Court must take jurisdiction to emphasize its position as the state court of last resort. This case—reputed to be the country's largest sanction against an individual litigant—remains an effort by Texas Children's Hospital and Baylor College of Medicine ("Respondents") to shift the entirety of their attorney's fees to Dr. Nath. This Court has reversed both the trial court and the court of appeals **twice**: the first time for failing to hold Respondents to their duty to demonstrate **all** of their fees were attributable to Dr. Nath; the second time because this Court's opinion and judgment were ignored, and neither lower court required Respondents to present **proof** that all of their fees were attributable to Dr. Nath. This is appeal number **three**. This Court has the authority to end this Bleak House scenario. It should grant the Petition and render a take-nothing judgment against Respondents or vacate the judgment and dismiss the case.

Short of that pronouncement, this Petition presents an important constitutional and statutory construction question on whether a sanctioned litigant is entitled to a jury on the factual inquiry of reasonable and necessary attorney's fees. The trial court and court of appeals denied Dr. Nath a jury, which conflicts with *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), *Nath II*, and the analytical path this Court (and other courts of appeals)

follow when evaluating who—judge or jury—decides the amount of an attorney's fees award. As this Court explained in *Rohrmoos* and *Nath II*, attorney's fees as sanctions should be treated the same as other fee awards. The court of appeals' decision to the contrary can only lead to confusion in this evolving area of the law.

The Petition also presents the Court with the opportunity to resolve a conflict among the courts of appeals about whether and in what context a motion for sanctions is considered a "legal action" subject to the Texas Citizen's Participation Act ("TCPA").

The Court should grant review and bring this 16-year litigation to an end.

STATEMENT OF FACTS

Dr. Nath is a surgeon formerly employed by Baylor and affiliated with the Hospital. *Nath I* at 359. In 2006, Dr. Nath sued Respondents initially for defamation and tortious interference with business relations; he later added claims for negligent supervision and training, declaratory judgment, and intentional infliction of emotional distress. *Id*. at 359-60. "[T]he parties … litigated merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment," including because Dr. Nath's claims were "frivolous *ab initio*" based on limitations. *Nath II* at 708. The trial court granted summary judgment in 2010.

Weeks later Respondents sought and were awarded the entirety of their attorney's fees as sanctions against Dr. Nath individually, despite uncontroverted

evidence that he played no role in handling the litigation, did not sign or file any pleading, and never stepped into the courtroom, and thus was never observed or addressed by any of the three trial judges in the case. CR109. Without an evidentiary hearing, the trial court ordered Dr. Nath to pay a record $1.4 million in fees as a sanction for groundless pleadings. *Nath I* at 361. Ultimately, this Court reversed and remanded twice because of Respondents' lack of proof to support wholesale fee-shifting. Appendices A, B.

On the third attempt, Respondents sought the same fees. 2Supp.CR4-338, 799-974, 339-612, 613-798. Dr. Nath disputed the reasonableness and necessity of the requested fees and demanded a jury. CR4-15; 5Supp.CR3-6. On Respondents' motion, the trial court struck the jury demand. 4Supp.CR1035, 1048.

Further, because Respondents' allegations on second remand attempted to suppress Dr. Nath's constitutional rights to speak freely and participate in government about matters of public concern,[2] Dr. Nath moved to dismiss the sanctions motions under the TCPA. CR99-133. In response to the TCPA motion, Respondents presented no evidence (let alone "clear and specific" evidence establishing a prima facie case on each element of their sanctions claims). CR134-

[2] In their motions for sanctions, Respondents claimed that Dr. Nath's pleadings were groundless, in part, because he made allegations that his former co-worker, Dr. Shenaq, was conducting surgeries on children while diagnosed with hepatitis and suffering from blindness. CR70-71, 80-81, 87-88, 91, 94-95; CR115-16, 124. They labelled Dr. Nath's attempt to inform the employers (and the public) of a potentially dangerous situation as "extortion." CR69, 79, 86, 93, 139.

52. They instead urged the court to deny the motion to dismiss on procedural grounds, "but only after" awarding sanctions. CR134-52 at 135.

Anticipating that the trial court would deny or refuse to rule on the TCPA motion, Dr. Nath filed a notice of interlocutory appeal. CR165-67; TEX. R. APP. P. 27.1(a). Although that should have stayed all proceedings, the trial court took the TCPA motion under advisement, and immediately heard the sanctions motions. 1RR28-35; 1RR35-339. Two weeks later—while the statutory stay was in effect—the court signed an order purporting to render a final judgment and denying the TCPA motion. Appendix D.

At the bench trial on the sanctions motions, Respondents offered testimony and supplemental affidavits from their lead attorneys and copies of billing records, with a number of entries heavily redacted. 2RR3-202; 3RR3-132. The Hospital's attorney, Patrick Mizell, testified that the Hospital insisted on seeking the same amount of sanctions that this Court had twice reversed; it also sought future appellate fees for the first time; all of its fees were reasonable and necessary; and none of the fees were attributable to unnecessary conduct. 1RR58-59, 75-79, 97; *see also* 3RR5-7.

For example, Mizell testified: "I don't believe we caused any of the fees or contributed to the fees in the sense that we did anything to prolong the litigation or do anything that caused any of these fees, other than defending the claims by

Dr. Nath." 1RR78-79. This testimony reiterated statements in his affidavit that the same amount of fees should be awarded for the third time because "all the work performed by attorneys … was reasonable and necessary." 3RR5, ¶11; 3RR6-7, ¶¶12, 15.

Mizell now presented a brand-new theory that the case was a complex "bet-the-company" type case. 1RR69, 123.[3] And still he offered no explanation for waiting almost half a decade to move for summary judgment on limitations—or how to reconcile his new conclusion that the case was so complex with the trial court's ruling that the pleadings were so completely frivolous *ab initio* that a nonlawyer client should be sanctioned. *Nath I* at 372. He also admitted the Hospital had been "thinking of summary judgment at the outset of the lawsuit," which was filed in 2006, and included defamation allegations based on actions that occurred in 2004, and thus were barred by limitations. 1RR90-91.

Baylor's attorney, Shauna Clark, testified similarly, requesting the same twice-reversed amount of sanctions and claiming Baylor did nothing to contribute to any part of its fees. 1RR209-16, 218-20; *see also* 1RR193, 197, 244-47. Clark had no explanation for how to reconcile running up fees for half a decade before

[3] Respondents did not even request oral argument in their 2015 brief to the court of appeals, stating that oral argument was not warranted because "the record is relatively short and **the facts and law are uncomplicated**." Available at Appellees' Brief (emphasis added).

moving for summary judgment while claiming the case was frivolous *ab initio* based on limitations. 1RR222-24.

Dr. Nath presented 50-year trial attorney A.G. Crouch as an expert on the reasonableness and necessity of Respondents' fees. He pointed out procedural options available early in the lawsuit to mitigate fees given the one-year statute of limitations for defamation. 1RR276-80. He explained steps that should have been taken after July 2006 to limit the scope of the lawsuit. 1RR282. Crouch opined that the fees incurred could have been diminished if Respondents had not waited four years to act on their limitations defense. 1RR322-23.

Otherwise, the trial court severely limited Dr. Nath's presentation of the evidence. The court repeatedly stated it would not permit any questions related to Dr. Nath's role in the litigation. 1RR104-05, 135-36. It rejected Dr. Nath's arguments that because *TransAmerican* and *Rohrmoos* require a showing of reasonableness and necessity of fees, evidence regarding both Dr. Nath's and Respondents' roles was relevant. 1RR105-06. Instead, the court limited the evidence to simply calculating attorney's fees, believing "[t]he purpose of being here is to go over the *Rohrmoos* requirements for attorneys' fees" (1RR250), and refused to allow Dr. Nath to present any evidence about his own conduct, through cross-examination or otherwise. 1RR104-05, 135-36, 250. The court did allow Dr. Nath to make an offer of proof, which demonstrated that excluded evidence

would have shown that Dr. Nath never signed a pleading, did not involve himself in the strategy of which claims to plead, deferred to his attorneys, has never appeared in court during the litigation, and that no lesser sanction of any kind was attempted against Dr. Nath. 1RR107-09, 265.

Dr. Nath also objected to the admission of Respondents' supplemental affidavits on multiple grounds, including that large portions of the fee records were redacted, which prevented analysis of what portion of their fees Respondents contributed to or caused. 1RR46, 49-50, 58-59, 206; 1Supp.CR7-26. Respondents claimed that many of the redacted entries were not for privilege, but for fees for which they did not seek recovery. 1RR52-56, 216-17, 226-27. Neither attorney, however, specifically remembered what information had been redacted. 1RR110-13, 226-28. Baylor's attorney even agreed that her testimony and affidavit at the trial was not based on the unredacted fee bills. 1RR228, 230.

Ignoring this Court's instructions from *Nath I* "to reassess the amount of the sanctions award" and from *Nath II* to follow the process used for shifting attorney's fees in *Rohrmoos*, the court—for the third time, without a jury—granted the same $1.4 million sanction, and then awarded the Hospital $489,800 on its new claim for future appellate fees. Appendix D; 4Supp.CR1086-1103 (Appendix E).

Dr. Nath then appealed the sanction, and the court of appeals consolidated that appeal with Dr. Nath's earlier interlocutory appeal challenging the denial of

his TCPA motion. The court of appeals avoided all of Dr. Nath's TCPA-related arguments by concluding his motion to dismiss was "beyond the scope of what was necessary to give full effect to [this Court's] instructions in *Nath I* and *Nath II*," and therefore the trial court had no authority to consider it. Appendix C at *8. On the merits, the court concluded Dr. Nath was not entitled to a jury (*id.* at *9-10), and that sufficient evidence supported the $1.4 million award of trial fees and all but $50,000 of future appellate fees (*id.* at *10-14). After accepting the Hospital's remittitur as to the $50,000, the court affirmed. *Id.* at *14.

SUMMARY OF THE ARGUMENT

This is this third appeal, from the third entry of an identical fee-shifting judgment, which has already twice been reversed by this Court. On their third attempt to shift years of attorneys' fees to Dr. Nath, Respondents convinced the trial court to deny Dr. Nath's constitutional right to have a jury determine the amount of a reasonable and necessary fee award (if any). And Respondents again failed to establish that no part of the fees they generated, over years of litigation, before moving for summary judgment on limitations, were unnecessary and that they are entitled, consistent with due process, to a historic shifting of $1.4 million in fees—plus now almost $500,000 more in future appellate fees if Dr. Nath dared to continue to appeal.

Respondents, the trial court, and the court of appeals have not listened to this Court's instructions in *Nath I* and *Nath II*. The numerous errors made, yet again, by the lower courts give this Court several options for resolving this case—all of which require, once again, reversing this excessive and unsupported sanction.

First, this Court should conclude ¡Ya basta! Enough is enough. It is time to bring this dispute to an end. And the Court should exercise its discretion to order that Respondents take nothing or vacate the judgment and dismiss all claims.

Second, the Court should exercise its discretion to rule on the merits of and grant Dr. Nath's TCPA's motion to dismiss. Alternatively, the Court should remand to the court of appeals with instructions that the intermediate court consider the merits of that motion. Either rendition or remand should resolve a question that has split the courts of appeals—is a motion for sanctions a "legal action" that is subject to the TCPA?—and clarify that the TCPA motion is within the scope of this Court's remand in *Nath I* and *Nath II*.

Third, if this Court does not render a take-nothing judgment or remand to the court of appeals to consider whether the sanctions motions should have been dismissed under the TCPA, the Court should remand for a jury to determine what amount of reasonable and necessary fees (if any) should be shifted to Dr. Nath. Under this Court's precedent and the language of Texas Civil Practice and

Remedies Code chapter 10, the trial court's discretion **whether** to award fees is subject to a jury's finding of the **amount** of reasonable fees.

Fourth, even if this Court were to conclude that the trial court had authority to determine the amount of fees to be shifted to Dr. Nath, and that the court of appeals properly concluded the TCPA motion was outside the scope of remand, the Court still must render judgment that Respondents take nothing. Respondents again failed to meet their burdens under *Nath I* and *Nath II* to come forward with more than conclusory evidence about "the degree to which [Respondents] caused their attorney's fees" or that such a massive sanction comports with due process. The Hospital also failed to present legally sufficient evidence to support its new claim for appellate fees.

Fifth, in the alternative, at a minimum, the Court should reverse and remand (yet again) for a new trial because the sanction is not supported by sufficient evidence.

It is difficult, though, to imagine what evidence Respondents could have that they did not already present in their first, second, or third effort to shift years of their fees to Dr. Nath. This case has been continuing since 2010—now more than a decade—solely on Respondents' efforts to recover attorneys' fees. Another remand would be futile (certainly in the absence of a jury). Which brings us full circle:

should this Court allow Respondents a fourth chance—or conclude that after three strikes they're out? Enough is enough.

ARGUMENT

I.

Only this Court can end the lower courts' ongoing refusal to follow its instructions by again awarding the same twice-reversed sanctions down to the penny. The Court should exercise its discretion to end this case by reversing and rendering or vacating the judgment in the interest of justice, equity, time, money, and judicial resources.

What causes counsel to so zealously represent their clients that they would aggressively encourage lower courts to ignore the directives of the court of last resort? What causes those lower courts to, in fact, ignore the directives of the court of last resort? On this third appeal, from the third entry of the identical fee-shifting judgment, this Court should say "Enough"!

This case has been pending since 2006. The trial court ruled in 2010, after granting summary judgment, that Dr. Nath's claims were frivolous *ab initio* because they were barred by limitations. As this Court has observed twice, Respondents bore some responsibility for prolonging the litigation. *Nath I* at 372-73; *Nath II* at 710. Because neither Respondents, the trial court, nor the court of appeals demonstrates willingness to follow this Court's direction, Dr. Nath respectfully requests that the Court reverse and render the judgment that should

have been rendered and rule that Respondents take nothing or vacate the judgment and dismiss the case. *See* TEX. R. APP. P. 60.2.

Respondents, the trial court, and the court of appeals paid no heed to this Court's writing more than a decade ago in *Nath I*:

> [T]he record indicates that all three parties litigated a host of merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment on such grounds as limitations. Thus, while Nath was the initiator of this litigation, the degree to which the Hospital and Baylor caused their attorney's fees is a relevant inquiry.
>
> A party is entitled to thoroughly and vigorously litigate a matter. But if issues asserted in pleadings are revealed to be frivolous, and the defending party delays moving for summary judgment and sanctions, the defending party adopts some responsibility for the overall increase in litigation costs. Of course, placing the entire cost of litigation on a plaintiff may be proper and deserved if the plaintiff was the party responsible for sustaining frivolous litigation over a prolonged period. Here, the trial court found the defamation claims were frivolous ab initio because the statements were alleged to have been made at least one year before suit was filed. Moreover, the time-barred statements permeated subsequent pleadings. The defendants, however, did not file a summary judgment for years after the allegations were first made. A defending party cannot arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions.

Nath I at 372.

On first remand after *Nath I* the trial court gave no quarter to this Court's concern, entering an identical judgment, again without a hearing, and again the court of appeals summarily affirmed. This Court had to again expend valuable judicial resources, granting a second petition, remanding once more to the trial

court—this time instructing the court to take evidence and to follow *Rohrmoos*. *Nath II* at 710. After the lower courts on second remand after *Nath II* denied the jury trial required by *Rohrmoos*, here we are again. Over the past decade, this Court has been clear and has been ignored. Enough is enough. It is time to bring this dispute to an end.

Indeed, the court of appeals acknowledged that a trial court has "no authority" to take action inconsistent with a higher court's mandate, but now twice has affirmed the imposition of the same sanction despite this Court's direction otherwise. Appendix C at *6. Instructions given to a trial court in the former appeals must be adhered to and enforced. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The lower courts were therefore required to follow this Court's instructions:

- In *Nath I*, this Court remanded for the trial court to examine "**the extent to which the Hospital and Baylor caused the expenses they accrued** in litigating a variety of issues over several years," and directed the court to "***reassess* the amount** of the sanctions award." *Nath I* at 373 (emphasis added).

- In *Nath II*, this Court remanded "for the trial court **to *reassess* its award** of attorney's fees" because Respondents' "additional conclusory affidavits" still did not show "**how [their] fees resulted from or were caused by the sanctionable conduct**," and did not meet *Rohrmoos*' evidentiary standard. *Nath II* at 708-10 (emphasis added) (citation omitted).

The language from these opinions is clear. They instruct the trial court multiple times to do something different than what it has now done for the third

time. This Court acknowledged as much in *Bennett v. Grant*: "**[In *Nath I*] [w]e held the hospital was responsible for some of its attorney fees** because it litigated the case for five years before moving for summary judgment based on the statute of limitations, which could have been brought years earlier." 525 S.W.3d 642, 654-55 (Tex. 2017) (emphasis added). Thus the trial court's job on remand was to determine "the degree to which" Respondents were responsible for their fees, and therefore shifting those fees to Dr. Nath would not violate the fundamental principle that sanctions must be just and not excessive. *Nath I* at 372.

Yet the trial court saw the purpose of the second remand as simply "**to confirm** the reasonableness and necessity of [Respondents'] attorneys' fees after production of relevant portions of [their] legal billing records based on the *Rohrmoos* … test." 1Supp.RR 4 (emphasis added); 1RR250. Consistent with this Court's prior opinions in this case, this bench trial—the very first evidentiary hearing on Respondents' motions for sanctions since they filed them almost a decade earlier—could not properly be limited to the essentially ministerial task of totaling up invoices to see if they matched the prior sanctions awards. Nor could Respondents' new narrative that this was a complex "bet the company" case erase this Court's earlier criticism that they "litigated a host of merits issues for nearly a half-decade" before moving for summary judgment on claims that were "friviolous

ab initio" and, therefore, "the degree to which the Hospital and Baylor caused their attorney's fees is a relevant inquiry." *Nath I* at 372.

The degree to which Respondents caused their attorney's fees by their own litigation conduct and delay remains unaddressed by anything other than conclusory statements. *See supra* at 3 (record citations). Whenever a sanction is imposed, "the punishment must fit the crime." *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 740 & n.5 (Tex. 2020) (Boyd, J., concurring in part and dissenting in part) (citations omitted). And when fees are shifted as a sanction, due process demands proof of a direct relationship between the offensive conduct and sanction imposed. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding); *CHRISTUS Health Gulf Coast v. Carswell,* 505 S.W.3d 528, 540 (Tex. 2016); *Nath I* at 363. That proof is still missing, and it is hard to imagine what proof Respondents could possibly come forward with if given yet another chance—surely if they had such proof, they would have presented it on their first, second, or third efforts.

The Court reiterated this precise point in *Nath I*: "[I]n order to safeguard constitutional due process rights, a sanction must be neither unjust nor excessive." *Nath I* at 363 (citing *TransAm.*). The excessiveness of awarding the identical amount of life-of-the-case fees here, after Respondents waited to move for sanctions until the end of a case, based on pleadings that were deemed frivolous

ab initio because of limitations, remains as fundamentally unfair now as it was in 2010. Respondents have yet to take "responsibility for the overall increase in litigation costs," *Nath I* at 372, and to meet their burden to show the sanction was not excessive given their failure to seek sanctions or dismissal until after years of litigation. *See TransAm.*, 811 S.W.2d at 917.

In the words of Justice Raul Gonzalez, dissenting from this Court's grant of mandamus against the Dallas Court of Appeals (which had tried to end decades-long "vexing litigation"), "¡Ya Basta!" or "[e]nough is enough." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 685-86 (Tex. 1989) (orig. proceeding) (Gonzalez, J., dissenting); *see Browning v. Navarro*, 887 F.2d 553, 554 (5th Cir. 1989) ("[T]he litigants have had their day in court and … it is time to end this dispute.").

It would be a waste of resources, patently unjust, and obviously futile to send this this case back to give Respondents a fourth bite at the apple. Texas Rule of Appellate Procedure 60 affords the Court the authority to reverse and render the judgment that should have been rendered or vacate the judgment and dismiss the case. *See* TEX. R. APP. P. 60.2. The Court should exercise its discretion to bring this case to an end. The sanctions should be reversed and judgment rendered that Respondents take nothing, or the case vacated and dismissed, and all parties sent home.

II.

A jury should determine the reasonableness and necessity of attorney's fees incurred by the Hospital and Baylor.

The Texas Constitution provides that "[t]he right of trial by jury shall remain inviolate." TEX. CONST. art. I, § 15; *see* art. V, § 10. Texas law is clear that litigants are entitled to have controlling and disputed issues of fact decided by a jury. *E.g.*, *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630-31 (Tex. 1992) (per curiam); TEX. R. CIV. P. 278. And this Court has repeatedly held that this includes the amount of reasonable and necessary attorney's fees to be shifted to an opposing party: "Both elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party." *Rohrmoos Venture*, 578 S.W.3d at 489 (citing *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 227, 231 (Tex. 2010) ("[W]hen a question of fact exists on the reasonableness and necessity of a claimant's attorney's fees under § 408.221(c), the carrier has a right to submit that question to a jury.") & *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) ("The reasonableness of attorney's fees, the recovery of which is authorized by ... statute, is a question of fact for the jury's determination. The second limitation, that fees must be necessary, is likewise a fact question.")). Dr. Nath timely filed a jury demand (CR13; 5Supp.CR3-6), and was entitled to have a jury decide the reasonableness and necessity of any fees awarded against him.

A. When attorney's fees are awarded under a statute, the statutory language governs who decides the reasonableness and necessity of a fee award. A jury is required here.

This attorney's fees award is governed by Texas Civil Practice and Remedies Code chapter 10. *Nath II* at 709-10. Whether a jury is available under Chapter 10 is an open question. The question should be answered using the analytical framework this Court developed in a trilogy of cases examining statutes providing (as does Chapter 10) that a trial court "may" award attorney's fees. In that trilogy, the Court explained that the question of who—judge or jury—must decide reasonableness and necessity of fees is determined by the language of the governing statute. *Crump*, 330 S.W.3d at 230 (Labor Code); *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 367 (Tex. 2000) (Open Meetings Act); *Bocquet*, 972 S.W.2d at 20-21 (Declaratory Judgments Act). And in each case the Court held that the trial court's discretion **whether** to award fees is subject to a jury's finding of the **amount** of reasonable fees. Thus under the language of Section 10.004, Dr. Nath was entitled to have a jury determine the reasonableness and necessity of any fees awarded.

First, in *Bocquet,* the Court considered fees requested under the Declaratory Judgments Act, which states that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." 972 S.W.2d at 20 (citing TEX. CIV. PRAC. & REM. CODE § 27.009). Based on this language, the Court held that the

"statute thus affords the trial court a measure of discretion in deciding whether to award attorney fees or not." *Id.* (citations omitted). The statutory language "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact ["for the jury's determination"], and to the additional requirements that fees be equitable and just, which are matters of law ["addressed to the trial court's discretion"]." *Id*. at 21 (citations omitted).

Second, in *City of Garland*, the Court considered similar language in the Open Meetings Act: "[T]he court may assess costs of litigation and reasonable attorney fees" to the prevailing party. 22 S.W.3d at 367. The newspaper argued that by "including the 'court' language and omitting any provision for a jury" the statute required the trial judge to determine the amount of fees. *Id*. Citing *Bocquet*, the Court disagreed:

> Subsection 552.323(a) provides that the court "may" assess attorney's fees. Subsection 552.323(b) describes two factors that the court must consider in making this choice: the governmental body's conduct and whether the litigation was brought in good faith. Thus, the trial judge decides ***whether*** **to award attorney's fees** under the Act.
>
> But section 552.323 does not dictate how to determine the attorney's ***fees amount***, except that the award must be "reasonable." In general, the reasonableness of statutory attorney's fees is a jury question.

> This Court recently interpreted a similarly-worded provision in the Declaratory Judgments Act to allow a jury to determine the amount of attorney's fees. That Act provides, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." We held that **this language requires the trial court to determine *whether* to award attorney's fees and allows the jury to determine the *amount* of reasonable attorney's fees**. Therefore, consistent with our interpretation of a statute containing similar language and our past jurisprudence on this issue, we conclude that the amount of attorney's fees is a fact question for a jury to determine.

Id. (emphasis added) (internal citations omitted). Though the newspaper argued it would be more cost-efficient for the court to determine the amount, this Court held "we cannot judicially amend section 552.323 to prohibit a jury trial on the attorney's fees amount." *Id*. at 368.

Most recently, in *Crump*, the Court considered attorney's fees under Labor Code section 408.221, which states that "[a]n attorney's fee, including a contingency fee, for representing a claimant before the division or court under [the Texas Workers' Compensation Act] must be approved by the commissioner or court" and "the court shall apportion and award fees to the claimant's attorney only for the issues on which the claimant prevails." 330 S.W.3d at 228 (citing TEX. LAB. CODE § 408.221) (second alteration in original). Crump similarly argued that Section "408.221 makes no mention of a jury" and the reference to the court "means that the court alone determines the reasonable and necessary amount of fees." *Id*.

This Court again disagreed: "The statute is silent on the critical judge-or-jury question." *Id*. at 229. And "[b]ecause the plain language of the statute alone is unavailing, [the Court] look[ed] beyond it," including to the Court's "prior decisions examining the issue of reasonable and necessary attorney's fees in the context of fee-shifting provisions in other statutory regimes." *Id*. (citations omitted). Invoking *City of Garland* and *Bocquet*, the Court concluded that "Crump has not pointed us to a reason to exempt § 408.221 from the general rule announced in those cases: '[T]he reasonableness of statutory attorney's fees is a jury question.' Nor do we see language in § 408.221 that distinguishes it from the language of the statutory regimes to which we applied the general rule in those cases." *Id*. at 231 (citation omitted). Again, the Court held that "the carrier is entitled to submit the issue of the reasonableness and necessity of a claimant's attorney's fees, where disputed, to a jury"; the jury's findings are then subject to an additional layer of apportionment and approval by the court. *Id*.

Here, the language of Section 10.004 is consistent with that of the Declaratory Judgment Act, Open Meetings Act, and Labor Code:

> A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.
>
> * * *
>
> A sanction may include … 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(a), (c)(3). Like the statutes examined in the cases cited above, Section 10.004 "is silent on the critical judge-or-jury question." *Crump*, 330 S.W.3d at 229. There is no reason to exempt Section 10.004 from the general rule that "the reasonableness of statutory attorney's fees is a jury question," and no language in Section 10.004 "distinguishes it from the language of the statutory regimes to which [the Court] applied the general rule in those cases." *Id.* at 230-31 (citing *City of Garland*). The language of this statute, therefore, also "requires the **trial court** to determine ***whether*** to award attorney's fees and allows the **jury** to determine the ***amount*** of reasonable attorney's fees." *City of Garland*, 22 S.W.3d at 367 (emphasis added). This Court "cannot judicially amend section [10.004] to prohibit a jury trial on the attorney's fees amount." *Id.* at 368.

Other Texas appellate courts have analyzed the right to a jury trial under a particular statute by following this trilogy—analysis missing from the court of appeals' decision here. *E.g., Riley v. Caridas*, No. 01-19-00114-CV, 2020 WL 7702183, at *18-20 (Tex. App.—Houston [1st Dist.] Dec. 29, 2020, pet. denied) (mem. op.) (Property Code); *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, 622 S.W.3d 74, 88-89 (Tex. App.—Corpus Christi 2020, no pet.) (TCPA); *Meyers*

v. 8007 Burnet Holdings, LLC, 600 S.W.3d 412, 430 (Tex. App.—El Paso 2020, pet. denied) (statutory nuisance).

For example, in *Pisharodi*, the Corpus Christi Court examined the parallel language of the TCPA's attorney's fees provision and concluded that a jury must decide the amount of reasonable and necessary attorney's fees to be awarded under that statute. 622 S.W.3d at 88. The TCPA provides that "the court shall award to the moving party court costs, and reasonable attorney's fees incurred in defending against the legal action." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1). The court noted that the "Texas Supreme Court has consistently held that the issue of a 'reasonable' amount of attorney's fees recoverable under a statute is a question of fact for a jury to resolve." *Pisharodi*, 622 S.W.3d at 88 (citing *Crump*, *City of Garland*, and *Bocquet*). The court held:

> Having reviewed the applicable law, we conclude similarly. Section 27 does not dictate the manner in which to determine the amount of attorney's fees, providing only that the award must be "reasonable." Reasonableness remains a fact issue that a jury, upon proper request, may resolve.
>
> Moreover, § 27.009 does not contain language prohibiting the parties from having a jury determine the reasonableness of the amount of attorney's fees to award. Therefore, we hold that the trial court abused its discretion in denying Pisharodi's request for a jury trial on the issue of the amount of reasonable attorney's fees.

Id. at 89-90 (internal citations omitted).

Similarly, in *Riley*, the Houston First Court analyzed whether two different fee-shifting provisions in the Texas Property Code afforded a jury on attorney's fees; the court held that one did and the other did not. 2020 WL 7702183, *18-20. The court concluded first that Property Code section 82.161(b) did afford a jury trial on fees:

> The Uniform Condominium Act provides that the "prevailing party in an action to enforce the declaration, bylaws, or rules is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party." This statute does not expressly assign the duty of determining the amount of attorney's fees to either the court or the factfinder nor does it expressly state that the court shall consider certain factors in determining the amount of attorney's fees. Therefore, the general rule that the factfinder determines the amount of attorney's fees applies to awards under section 82.161(b).

Id. at *18 (internal citations omitted). In contrast, the court held that a jury was not available to determine fees under section 5.006(b), because the language of that statute directed that "[i]n determining the amount of attorney's fees, the court shall consider: [four listed factors]," committing to the court "'both the question of entitlement to fees and the criteria for awarding fees.'" *Id.* at *19-20 (quoting *Meyers*). In *Meyers*, the El Paso Court noted that this Court has made clear that this question must be answered by the language of the statute underlying the fee award and explained there are numerous "cases [that] have favored the jury as the fact finder for the amount of reasonable attorney's fees when the statute does not

clearly provide otherwise." 600 S.W.3d at 430 (but finding that no jury was required by the statutory language at issue).

The court of appeals here erred by holding that a jury was not available. That decision is inconsistent with this Court's authority and should be reversed.

B. *Brantley v. Etter* does not prohibit a jury here.

The court of appeals relied primarily on *Brantley v. Etter* to deny a jury under Section 10.004. Appendix C at *8-9. Notably, this Court's writing in *Brantley* is 37-years old, only two paragraphs long, was not a granted cause, and does not broadly proclaim that a jury is never available under any fee-shifting sanctions statute. 662 S.W.2d 752, 755 n.2 (Tex. App.—San Antonio 1983), *writ ref'd n.r.e.* 677 S.W.2d 503, 504 (Tex. 1984) (per curiam).

Brantley involved a $500 sanction, under former Rule of Civil Procedure 215a, for failing to appear at a deposition. Rule 215a was not a fee-shifting provision but expressly gave the trial court authority to, among other sanctions, strike pleadings, dismiss actions, or "make such other order … as may be just[.]" 662 S.W.2d at 755 n.2. That language—far different from Section 10.004—was not limited to awarding reasonable fees. *Id*.

While *Brantley* may be good law, as far as it goes, it only goes so far as to conclude (without finding any actual reversible error in the court of appeals' opinion in that case) that "the amount of attorney's fees awarded as sanctions for

discovery abuse is solely within the sound discretion of the trial judge." 677 S.W.2d at 504 (emphasis added). In stark contrast, this is not a discovery sanction under Rule 215 for a discrete violation of the discovery rules. And *Brantley* offers no rationale that would preclude a jury based on this life-of-the-case sanction under Texas Civil Practice and Remedies Code chapter 10.

Cire v. Cummings is likewise of no help to Respondents. That case involved a $250 sanction related to a motion to compel discovery, and this Court held that Rule 215 does not mandate an evidentiary hearing in every circumstance. The Court did not hold that an evidentiary hearing (or a jury trial) is never required to satisfy due process. 134 S.W.3d 835, 843-44 (Tex. 2004).

Moreover, neither of the other two cases cited by the court of appeals forecloses a jury. Appendix C at *9. Neither involved statutory sanctions under Section 10.004. One case was an attorney disciplinary proceeding, and the other was another deposition-related sanction under Rule 215. *Cantu v. Comm'n for Lawyer Discipline*, No. 13-16-00332-CV, 2020 WL 7064806, at *41 (Tex. App.—Corpus Christi Dec. 3, 2020, no pet.) (mem. op. on remand); *Melasky v. Warner*, No. 09-11-00447-CV, 2012 WL 5960310, at *4 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.).

No public policy reason supports denying a jury under the circumstances here. When a party is brought into court at the time it has failed to appear for a

deposition or answer discovery, it is within the expertise and discretion of the trial court to assess a tailored punitive sanction to deter that conduct and compensate the opposing party. But on the other hand, when at the conclusion of a case, a party seeks to shift all (or virtually all) of its fees for the entire multi-year case to its opponent, that presents the same situation—and requires the same discovery and same evidentiary burden—as in every other type of case "[w]hen fee-shifting is authorized, whether by statute or contract." *Rohrmoos*, 578 S.W.3d at 487.

A judge has no specialized knowledge or expertise that is superior to a jury's ability to make this fact-finding for a fee-shifting sanction—particularly in a case like this in which the conduct (filing an initial time-barred pleading) was not complained of until after the litigation concluded. Simply, when *Rohrmoos* and *Nath II* instructed that fee-shifting sanctions cases should be treated the same as all other fee-shifting cases, they meant it. To hold otherwise would encourage parties to try to take the nonjury route of seeking life-of-the-case fees as sanctions, rather than through the contractual and statutory avenues Texas law provides as exceptions to the American Rule.

C. Fee-shifting as a sanction should be handled the same as fee-shifting in other contexts. This includes a jury deciding the amount of fees to be shifted.

In *Rohrmoos*, this Court wrote extensively about the requirements for the reasonableness and necessity of attorney's fees to be shifted to the opposing

party—starting by reiterating that both reasonableness and necessity "are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party." 578 S.W.3d at 489 (citing *Crump* and *Bocquet*).

The Court held in *Nath II* that *Rohrmoos* must be followed even when fees are shifted as a sanction:

> We have recently clarified the legal and evidentiary requirements to establish a reasonable attorney's fee in a fee-shifting situation. Although this case deals with attorney's fees awarded through a sanctions order, the distinction is immaterial because all fee-shifting situations require reasonableness.

Nath II at 709-10 (citing *Rohrmoos*). The Court remanded this case for a third round in the trial court, instructing that:

> Because the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions, we reverse the court of appeals' judgment affirming the sanctions award and, without hearing oral argument, remand the case to the trial court for further proceedings in light of *Rohrmoos*.

Id. at 710.

The Court did not discuss whether the court or a jury should determine the reasonableness and necessity of any fees on remand. But the Court made clear that fee-shifting as a sanction should be treated the same as all fee-shifting situations—and most fee-shifting situations, including *Rohrmoos*, require a jury determination of reasonableness and necessity of fees. In keeping with this Court's instructions

that on remand this case should be litigated following *Rohrmoos*, Dr. Nath filed a jury demand.

Just as Section 10.004's language provides no basis for denying a jury, neither does *Nath II* or *Rohrmoos* provide any policy basis for doing so. To the contrary, the $1.4 million sanction that would shift almost all of Respondents' attorney's fees for the years-long life of this case is the same type of fee-shifting award requested in *Rohrmoos*. And it is exponentially different that the type of sanction for $500 in costs associated with a missed deposition at issue in *Brantley* or the $250 sanction related to a discrete filing at issue in *Cire*. The Court could not have been any clearer: the fact that the fee-shifting requested in this case would be "awarded through a sanctions order … is **immaterial**"—"the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions." *Nath II* at 710 (emphasis added). The fact that this is a sanctions case cannot be the basis for denying a jury. Just as a jury was required to determine the amount of fees to be shifted in *Rohrmoos*, a jury was required to determine the amount of fees to be shifted here.

At its core, Respondents' contrary argument—and the court of appeals' conclusion—is that while a jury is required to determine what amount of fees is reasonable and necessary in almost every other fee-shifting context, less due

process is required for a sanction. That cannot be correct. This Court has explained numerous times, including in *Nath I*, that:

> In a civil suit, few areas of trial court discretion implicate a party's due process rights more directly than sanctions. … We have held that due process concerns impose **additional layers of protection** on sanctions awards by requiring, among other things, that the awards be just and not excessive.

Nath I at 358 (emphasis added). This Court should require (consistent with the appropriate statutory analysis) that, first, a jury determines what amount of fees would be reasonable and necessary to defend against sanctionable conduct. Second, the judge must ensure that any sanction would be "neither unjust nor excessive." *Id*. at 363. Erasing the first step and giving unfettered control to the trial judge ensures **less**—not **additional**—due-process protection.

Moreover, a jury is patently needed here. As the Court has noted, this case involves one of the highest reported pleading sanctions nationwide. *Id*. at 358. This Court twice disapproved of this specific sanction, noting that it did not take into account "the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years." *Id*. at 373; *see Nath II* at 709. The trial court, however, has stubbornly awarded the same amount for a third time—and awarded an additional nearly $500,000 in appellate fees against Dr. Nath for daring to continue to appeal. This case involves wholesale fee-shifting, not a focused sanction for particular litigation conduct. If jury avoidance

is allowed to stand here, then requests for attorney's fees will regularly be brought as post-summary judgment (or even post-trial) requests for "sanctions" to shift life-of-the-case fees to the non-prevailing party, at the whim of the trial judge, eroding litigants' right to a jury. If the Court does not direct a take-nothing judgment or remand to the court of appeals for consideration of whether Respondents' claims should be dismissed under the TCPA, the Court should reverse and remand for a jury trial.

III.

Dr. Nath's TCPA motion should have been granted because Respondents presented no evidence in response to the motion, let alone "clear and specific" evidence of their prima facie case. The court of appeals erred by sidestepping all of Dr. Nath's TCPA arguments.

Because Respondents' renewed sanctions motions seek to punish Dr. Nath's exercise of his constitutional rights to free speech and to participate in government about a "matter of public concern" (i.e. that his former co-worker, Dr. Shenaq, was conducting surgeries on children while diagnosed with hepatitis and suffering from blindness), Dr. Nath filed a motion to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001-011; *Id*. at § 27.001(7)(B)-(C) (defining a "[m]atter of public concern" to include "a subject of concern to the public"). The TCPA requires a court to dismiss a "legal action" that is "based on or is in response to a party's exercise of the right of free speech, right to petition, or right of

association," *Id*. § 27.003, unless the respondents "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(b), (c). Because Respondents submitted **literally no evidence** with their joint response to Dr. Nath's motion to dismiss, Dr. Nath argued in the trial court and court of appeals that the sanctions motions should be dismissed.

The court of appeals improperly sidestepped the merits of Dr. Nath's TCPA arguments, including an important question on which the courts of appeals have split—is a motion for sanctions a "legal action" subject to the TCPA? The court of appeals erroneously concluded that Dr. Nath's motion was outside the scope of this Court's remand and therefore the trial court had no authority to consider it. Appendix C at *6-8. If the Court reaches these issues, it should render judgment granting Dr. Nath's motion to dismiss, or alternatively, remand to the court of appeals for it to address Dr. Nath's TCPA arguments.

A. Respondents' sanctions motions are "legal action[s]" within the scope of the TCPA.

While Respondents did not seriously dispute that their motions were in response to Dr. Nath's exercise of his constitutional rights, they argued at the trial court that a motion for sanctions categorically cannot be a "legal action" under section 27.001(6)(A). CR135-36. The TCPA defines "legal action" as:

> a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim **or any other judicial pleading or filing that requests legal, declaratory, or equitable relief**. The term does not include:
>
> (A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;
>
> (B) alternative dispute resolution proceedings; or
>
> (C) post-judgment enforcement actions.

TEX. CIV. PRAC. & REM. CODE § 27.001(6) (emphasis added). While this Court has yet to decide whether sanctions motions fall within this definition, four courts of appeals have: the Austin and San Antonio courts concluded that the sanctions motions before them were subject to the TCPA, and the Dallas and Houston Fourteenth courts concluded to the contrary.

On one side of the split, the Austin Court held that a motion for sanctions qualifies as a "legal action" under the TCPA. *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 224 (Tex. App.—Austin 2018, no pet.). In that case, the defendant filed a motion for attorney's fees, seeking "sanctions, costs, and attorney's fees under Chapter 9 of the Civil Practice and Remedies Code," and the plaintiff filed a motion to dismiss the sanctions claim under the TCPA. *Id.* The trial court determined the motion for sanctions was not a "legal action" under the TCPA. *Id.* After citing the definition of "legal action," the court of appeals held:

> Construed as a counterclaim, ABT's pleading falls within the express statutory language. Construed as a motion for sanctions, it likewise falls within the statutory definition as a "judicial pleading or filing that requests legal or equitable relief" from Hawxhurst's alleged sanctionable conduct.
>
> * * *
>
> ABT's "counterclaim" or "motion for sanctions" was a "legal action" that was "based on, relate[d] to, or [was] in response to" Hawxhurst's lawsuit, which was an "exercise of [his] right to petition" as a "communication in or pertaining to ... a judicial proceeding." Accordingly, we further conclude that Hawxhurst successfully met his burden to establish that the TCPA applies to ABT's filing, whether construed as a "counterclaim" or as a "motion for sanctions."

Id. at 226, 228-29 (internal citations omitted) (alterations in original); s*ee also Wetmore v. Bresnen*, No. 03-18-00467-CV, 2019 WL 6885031, at *4 (Tex. App.—Austin Dec. 18, 2019, no pet.) (mem. op.); *accord KB Home Lone Star Inc. v. Gordon*, 629 S.W.3d 649, 655 (Tex. App.—San Antonio 2021, no pet.) (following *Hawxhurst* and distinguishing *Misko* and *Patel*, *infra*).

On the other side of the split, the Dallas Court held that a motion for sanctions based "solely on Misko's alleged discovery misconduct during the course of this litigation, not on any of Misko's substantive claims," was not within the purview of TCPA section 27.001(6). *Misko v. Johns*, 575 S.W.3d 872, 877-78 (Tex. App—Dallas 2019, pet. denied). The court distinguished *Hawxhurst* in part on the basis that the motion for sanctions in that case was filed in response to the plaintiff's substantive claims. *Id.* The court further pointed out that the motion for

sanctions before it was based on alleged discovery abuse during litigation, and that "[d]iscovery abuse is not a right protected by the TCPA." *Id*. at 878 n.5.

The Dallas Court later applied its analysis in *Misko* to a counterclaim for sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code Chapter 10, holding that "[s]eeking sanctions for misconduct in litigation, including the filing of an allegedly frivolous or groundless lawsuit, is not a legal action under the TCPA." *Barnes v. Kinser*, 600 S.W.3d 506, 511 (Tex. App.—Dallas 2020, pet. denied); *see also Patel v. Patel*, No. 14-18-00771-CV, 2020 WL 2120313, at *5-6 (Tex. App.—Houston [14th Dist.] May 5, 2020, no pet.) (mem. op.) (counterclaim for sanctions under Rule 13 and Chapter 10 was not a "legal action" subject to dismissal under the TCPA). In concluding that claims for sanctions based on a party's substantive claim are not within the scope of the TCPA, both *Barnes* and *Patel* are at odds with the plain language of the statute and are factually distinct from this case.

First, the TCPA defines a "legal action" as including "any other judicial pleading or filing that requests legal, declaratory, or equitable relief." TEX. CIV. PRAC. & REM. CODE § 27.001(6). The 2019 amendment excludes "a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief." *Id.* Here, the renewed sanctions motions filed on remand were the only live claims (at the time the motions were filed $0 in

sanctions was in place as both prior awards had been reversed), and the motions were filed with new affidavits and even a new claim for future appellate attorney's fees by the Hospital.[4] CR67-68, 76, 84; 2Supp.CR4-338, 339-612, 613-798, 799-974. There is no question that Respondents' sanctions motions were in response to Dr. Nath's substantive claims and his exercise of the right of free speech and to participate in government about a matter of public concern. Thus, Respondents' sanctions motions were based on the core conduct the TPCA protects, the sanctions motions are "legal action[s]" under the TCPA.

Second, a critical factual distinction between those cases and this case goes to the core purpose of the TCPA. In both *Barnes* and *Patel*, plaintiffs sued and shortly thereafter—at an early stage in the litigation—defendants filed counterclaims requesting sanctions and dismissal of allegedly groundless pleadings. *Barnes*, 600 S.W.3d at 508; *Patel*, 2020 WL 2120313, at *1-2. Those counterclaims quickly prompted the plaintiffs to file TCPA motions to dismiss the

[4] This Court recently clarified that a pleading that alleges new essential facts to support previously asserted claims or asserts new claims involving different elements triggers a new 60-day period to file a TCPA motion to dismiss. *See Reynolds v. Sanchez Oil & Gas Corp.*, 635 S.W.3d 636 (Tex. 2021) (per curiam). Moreover, even if suit was filed before the TCPA was enacted in 2011, the TCPA may apply when new claims are added. *James v. Calkins*, 446 S.W.3d 135, 144 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (Huddle, J.). Though they had made a similar request twice before, Respondents **amended** their request for relief in 2019 in an effort to comply with the *Rohrmoos* and *Nath II*'s new legal standards. Respondents' Joint Appellees' Br. at 11. Additionally, the Hospital **added** a request for appellate attorney's fees for the first time. CR72, 76-77.

counterclaims. *Id*. Both TCPA motions were denied, and on interlocutory appeal, both courts held that those sanctions counterclaims were not "legal actions" under the TCPA. *Barnes*, 600 S.W.3d at 510-11; *Patel*, 2020 WL 2120313, at *4-6. Under those circumstances, the courts noted their decisions were consistent with the purpose of the TCPA because to hold otherwise "would defeat the purpose of the TCPA to secure quick and inexpensive dismissal of meritless legal actions." *Barnes*, 600 S.W.3d at 510; *Patel*, 2020 WL 2120313, at *5 (internal quotation omitted).

That is not the case here. Here, Respondents did not file a counterclaim for sanctions or seek dismissal of allegedly groundless pleadings early in the litigation—in fact, nothing could be farther from the truth. They did not seek sanctions until after four years of litigation, when they **moved to modify the final judgment** to award them a monetary sanction. The lawsuit was over, and Respondents then sought to extend the litigation to obtain a fee-shifting sanction. Now a decade later, after the sanctions award has been reversed twice, it is Respondents who seek to keep the litigation alive by filing amended claims for trial attorney's fees and a new claim for appellate fees. Their motions fall squarely within the ambit of the TCPA by requesting "legal, declaratory, or equitable relief." TEX. CIV. PRAC. & REM. CODE § 27.001(6).

B. Dr. Nath's TCPA motion should have been granted because Respondents failed to present "clear and specific" evidence of their prima facie case.

Respondents submitted **no evidence** with their joint response to Dr. Nath's motion to dismiss. They argued primarily that the TCPA does not apply, and in the final section of their response argued that "[i]f Considered, Defendants Sustained Their TCPA Burden of Proving the Elements of Their Requests for Sanctions Under Chapter 10 and Rule 13." CR149-50. They then restated the bases for sanctions under Chapter 10 and Rule 13, and restated this Court's ruling from *Nath I* that the trial court did not abuse its discretion by sanctioning Dr. Nath personally. *Id*. From those basic restatements of the law—and without directing the trial court to any evidence—they then urged that "[t]he Court is thus compelled" to find that they met their evidentiary burden under the TCPA. *Id.* at 150.

By ignoring *Nath II* and failing to submit or even point to evidence meeting *Nath II*'s directive that they come forward with more than "conclusory affidavits" to meet their burden under *Rohrmoos* and *TransAmerican*, they have likewise failed to meet their burden under the TCPA to come forward with "clear and specific" evidence of their prima facie case. *Nath II*, 576 S.W.3d at 708-10; *Rohrmoos*, 578 S.W.3d at 495-98; *TransAm.*, 811 S.W.2d at 917. At a minimum, they failed to come forward with clear and specific evidence, as required by the TCPA and *Nath II*, (1) about "the degree to which the Hospital and Baylor caused

their attorney's fees" and (2) that *TransAmerican*'s due process requirements would be met in a massive sanction against Dr. Nath. *Nath II* at 708 (citing *Nath I*).

1. Respondents presented no evidence of what portion of their fees were caused by Dr. Nath and his lawyers as opposed to Respondents and their lawyers.

In *Nath I*, the Court remanded to determine "the degree to which the Hospital and Baylor caused their attorney's fees." 446 S.W.3d at 372. In *Nath II*, the Court again held that Respondents submitted legally insufficient evidence. They merely "submitted affidavits, asserting they did nothing to prolong the suit or unnecessarily increase their fees," and "stated total amounts billed to their clients in defending against Nath's frivolous suit." *Nath II,* 576 S.W.3d at 708. The Court held that the "[c]onclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here." *Id.* at 710. The Court further held that shifting fees specifically for the purpose of sanctions must meet the same standard for reasonableness under *Rohrmoos*. *Id.* at 709-10. The degree to which Respondents caused (or did not cause) their attorney's fees remains an essential element of their claim that they were required—but failed—to present a prima facie case in response to Dr. Nath's motion to dismiss.

2. Respondents presented no evidence of personal involvement by Dr. Nath or that a lesser sanction was attempted or would have been ineffective if attempted.

In response to Dr. Nath's motion to dismiss, Respondents were also required—but failed—to present a prima facie case that the sanctions they seek would be equitable and just under the *TransAmerican* factors. To be just, "the sanction should be visited upon the offender." 811 S.W.2d at 917. "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. … [A] party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." *Id.*

Further, to not be excessive, a sanction "should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*

Dr. Nath submitted sworn testimony that he did nothing more than entrust the entire case to the judgment of the lawyers who handled the case for him. CR109. Respondents failed to present any contradictory evidence to identify what sanctionable action was attributable to Dr. Nath personally. Further, no less stringent sanction was ever considered in this case, and Respondents presented no evidence that any lesser sanction would have been ineffective. They thus failed

meet their burden under *TransAmerican*, as required by *Nath II*. Dr. Nath's motion to dismiss should have been granted.

C. Dr. Nath's TCPA motion was within the scope of remand.

This Court has twice remanded because Respondents failed to meet their burden of proof. The scope of the Court's remand is outlined in *Nath I* and *Nath II*.

In *Nath I*, the Court remanded for a determination of "the degree to which [Respondents] caused their attorney's fees." 446 S.W.3d at 372. On remand, Respondents submitted new motions for sanctions, but again submitted legally insufficient evidence. They merely "submitted affidavits, asserting they did nothing to prolong the suit or unnecessarily increase their fees," and "stated total amounts billed to their clients in defending against Nath's frivolous suit." *Nath II* at 708. Thus, in *Nath II*, this Court held that the "[c]onclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here." *Id.* at 710. Thus, on the second remand, Respondents were still required to comply with the *Nath I* requirements. Further, the Court in *Nath II* remanded in light of *Rohrmoos*, which gives specific instructions for what kind of evidence is needed to satisfy the standard for fee-shifting awards. *Id*.

"Generally, if [a court] reverse[s] and remand[s] a case for further proceedings and [its] mandate is not limited by special instructions, 'the effect is to

remand the case to the lower court on all issues of *fact*, and the case is reopened in its entirety.'" *In re Henry*, 388 S.W.3d 719, 727 (Tex. App.—Houston [1st Dist.] 2012, mand. and pet. denied) (emphasis in original) (citation omitted). Respondents tried to narrow the scope of this Court's remand by moving to recall and amend this Court's mandate. *See* 4Supp.CR10. They requested the Court change the mandate from "[t]he case is remanded to the trial court for further proceedings consistent with this opinion" (Mandate in Cause No. 17-0110) to "[t]he case is remanded to the trial court for further proceedings, **limited to a determination of reasonable and necessary attorney's fees,** consistent with this opinion." *See* Motion to Recall and Amend the Mandate in Cause No. 17-0110 (emphasis added). This Court swiftly denied that motion.

Thus, to comply with the Court's instructions on remand and meet their burden of proof, Respondents had to file new motions for sanctions supported by new evidence. And they did so on November 5, 2019. CR67-98. This Court did not preclude Dr. Nath from filing anything responsive to actions taken by Respondents on remand, including a motion to dismiss.

The court of appeals relied on *Johnson-Todd v. Morgan*, Nos. 09-17-00168-CV & 09-17-00194-CV, 2018 WL 6684562, at *2 (Tex. App.—Beaumont Dec. 20, 2018, pet. denied) (mem. op.), for the proposition that a trial court could not consider a post-remand TCPA motion. Appendix C at *7. In that case, the court of

appeals determined that its mandate in a prior appeal "did not allow the trial court to consider [Johnson-Todd's] post-remand motion to dismiss … [Morgan's 2017 motion for sanctions] under the TCPA." *Id.* But the court of appeals did no more than review its own prior instructions to the trial court in that case. It did not make a categorical pronouncement that a TCPA motion can never be reviewed if it is filed on remand.

Once Respondents renewed their motions for sanctions in their effort to comply with this Court's instruction that they needed new and different evidence to meet their burden of proof, Dr. Nath timely filed his TCPA motion to dismiss. Those motions were within the scope of the TCPA and this Court's remand. The court of appeals erred by failing to consider the merits of Dr. Nath's motion.

IV.

The trial court abused its discretion by awarding the same twice-reversed $1.4 million sanction to Respondents when they did not meet their burdens under *Nath I*, *Nath II*, *TransAmerican*, and *Rohrmoos*.

Even though the bench trial on the second remand was the first evidentiary hearing on Respondents' sanctions motions, and even with clear guidance from this Court on what they needed to prove, Respondents failed to meet their burdens under *Nath I*, *Nath II, TransAmerican*, and *Rohrmoos* to come forward with more than conclusory evidence (1) about "the degree to which [Respondents] caused their attorney's fees" and (2) that *TransAmerican*'s due process requirements were

met. *Nath II* at 708-10; *Rohrmoos*, 578 S.W.3d at 495-98; *TransAm.*, 811 S.W.2d at 917. The judgment should be reversed and rendered that Respondents take nothing, or alternatively remanded (yet again) to the trial court.

A. Because Hospital and Baylor again failed to meet their burdens under this Court's precedent, no evidence supports the sanctions award.

At trial, Mizell, the Hospital's attorney, simply repeated his conclusions (as he had in his prior affidavits) that the Hospital bore none of the responsibility for the identical amount of fees as this Court had reversed, plus stated that the Hospital now also should be awarded additional appellate fees. He testified: "I don't believe we caused any of the fees or contributed to the fees in the sense that we did anything to prolong the litigation or do anything that caused any of these fees, other than defending the claims by Dr. Nath," and that all fees were reasonable and necessary. 1RR78-79; *see also* 1RR58-59, 75-79, 97; *see also* 3RR5-7.

Yet Mizell now presented a brand-new theory that the case was a complex "bet-the-company" type case. 1RR69, 123. And still he offered no explanation for waiting almost half a decade to move for summary judgment on limitations—or how to reconcile his new conclusion that the case was so complex with the trial court's ruling that the pleadings were so completely frivolous *ab initio* that a nonlawyer client should be sanctioned. *Nath I* at 372. He also admitted the Hospital had been "thinking of summary judgment at the outset of the lawsuit,"

which was filed in 2006, and included defamation allegations based on actions that occurred in 2004, and thus were barred by limitations. 1RR90-91.

Clark, Baylor's attorney, testified similarly, requesting the identical amount of sanctions this Court had twice reversed and claiming Baylor did nothing to contribute to any part of its fees. 1RR209-16, 218-20; *see also* 1RR193, 197, 244-47. Clark had no explanation for how to reconcile running up fees for half a decade before moving for summary judgment while claiming the case was frivolous *ab initio* based on limitations. 1RR222-24.

And there is still no evidence that Dr. Nath did anything other than entrust the handling of this case to his lawyers. There is no evidence that he signed or filed a pleading, attended a hearing, or chose which claims to plead or what strategy to pursue. There is also no evidence that any lesser sanction of any kind, not even an admonishment, was attempted before the trial court granted Respondents' post-judgment sanctions motions, filed four years after litigation began, requesting massive fee shifting as a sanction against Dr. Nath personally. Because there is still no evidence of what portion of the attorney's fees award was attributable to Dr. Nath—and thus potentially sanctionable—and what portion was caused by Respondents' dilatory behavior in waiting four years to move for summary judgment on pleadings ruled frivolous from the outset, the award of the identical amount that was twice reversed must be reversed yet again.

Dr. Nath's efforts to offer his own evidence on those issues were repeatedly rejected by the trial court, and the court of appeals affirmed those rulings. Appendix C at *9-11. But even if that rejection was proper, the record evidence is legally insufficient to support wholesale fee shifting as a sanction against Dr. Nath. As observed by Amicus Curiae Extremity Nerve Surgeons:

> A 100%-fee-shifting sanction imposed after summary judgment, such as the sanction in this case, does more than compensate, punish, and deter. It imposed a chilling effect on parties seeking to exercise their legal rights in litigation. … 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.

Amicus Br. at 14. Judgment should be rendered that Respondents take nothing.

B. Dr. Nath should have been allowed to present evidence of his role in the litigation, which is necessary to determine what portion of Respondents' fees were caused by Dr. Nath and his lawyers as opposed to their own conduct and that of their lawyers.

Under *Nath I*, Dr. Nath's conduct is relevant in determining if the amount of the sanction is proper:

> Due process requires that sanctions be just, meaning that there be a direct nexus between the sanction and the sanctionable conduct, and be visited on the true offender. Here, the trial court's sanctions award complied with these requirements because Nath's petitions were filed for the improper purpose of pursuing an unrelated issue and advancing time-barred claims. However, when assessing the amount of sanctions, the trial court failed to examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years. Accordingly, we remand for the

> trial court to reassess the amount of the sanctions award while considering the omitted factor.

Nath I at 373. The "extent to which the Hospital and Baylor caused the expenses that accrued" means that their (and their attorneys') actions have to be examined in context. Whatever expenses they did not cause logically would have to be attributable to Dr. Nath (or his counsel). The question of **whether** due process permits Dr. Nath to be sanctioned—which this Court decided in *Nath I*—is distinct from the question of what **amount** of sanction is permitted by due process. That second question was to be litigated in second remand and all parties should have been allowed to present relevant testimony.

In *Nath II*, the Court again determined that Respondents offered legally insufficient evidence to support a sanction amount. They merely "submitted affidavits, asserting they did nothing to prolong the suit or unnecessarily increase their fees," and "stated total amounts billed to their clients in defending against Nath's frivolous suit." *Nath II* at 708. The Court held that the "[c]onclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here." *Id.* at 710. The Court further held that shifting fees specifically for the purpose of sanctions must meet the same standard for reasonableness under *Rohrmoos*. *Id.* at 709-10. The degree to which Respondents caused (or did not cause) their

attorney's fees remains unaddressed by anything more than conclusory statements. 3RR3-132 (TCH Ex. 1); 2RR3-202 (Baylor Ex. 1).

In *Nath I* and *Nath II*, this Court has made clear that Respondents cannot just keep answering that they were responsible for none of their $1.4 million in fees: "A party is entitled to thoroughly and vigorously litigate a matter. But if issues asserted in pleadings are revealed to be frivolous, and the defending party delays moving for summary judgment and sanctions, the defending party adopts some responsibility for the overall increase in litigation costs." *Nath I* at 372; *see Bennett*, 525 S.W.3d at 654-55 ("[In *Nath I*] [w]e held the hospital was responsible for some of its attorney's fees because it litigated the case for five years before moving for summary judgment based on the statute of limitations, which could have been brought years earlier.").

Dr. Nath should have been permitted to offer evidence of his conduct, as compared to Respondents' conduct, so that the appropriate amount of a fee-shifting sanction (if any) could be determined. A party is entitled to present evidence on a controlling issue. *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). Dr. Nath repeatedly requested that the trial court allow him to present evidence, on cross-examination and through his expert witness, concerning to what extent Dr. Nath engaged in conduct warranting sanctions. 1RR104-06, 135-36, 250. Both sides' conduct is

material to the sanctions analysis, yet the trial court improperly excluded any evidence of Dr. Nath's role. *Id.* The total exclusion of such evidence was error.

Additionally, Dr. Nath should have been allowed to present evidence that would have demonstrated that a now almost $2 million sanction against Dr. Nath was both unjust and excessive. As noted, while this Court held in *Nath I* that due process would permit sanctioning Dr. Nath, the Court held in *Nath I* and *Nath II* that Respondents had not met their burden to demonstrate that due process would permit sanctioning Dr. Nath in the massive amount they sought.

As emphasized by the Court in *Nath I* and *Nath II*, sanctions must be just. *See, e.g., Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). That determination depends on a showing that there is a "direct nexus between the improper conduct and the sanction imposed." *Id.* (citations omitted). In other words, the fees shifted as a sanction must have been caused by the sanctioned conduct. *CHRISTUS Health*, 505 S.W.3d at 540; *Low*, 221 S.W.3d at 621. *TransAmerican* likewise requires proof of a "direct relationship … between the offensive conduct and the sanction imposed." 811 S.W.2d at 917. Also, "the sanction should be visited upon the offender." *Id.* "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. … [A] party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." *Id.*

To meet this due process requirement, Respondents needed to show what role Dr. Nath played before the trial court could determine the appropriate amount of sanctions consistent with due process. In other words, the sanction must be tied to Dr. Nath's conduct as the offender—otherwise there is no way to evaluate what fees were caused by Dr. Nath (and thus should be shifted to him as an appropriate sanction that complies with due process) as compared to what fees were caused by Respondents' own conduct.

Further, to not be excessive, a sanction "should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*; *Brewer*, 2020 WL 1979321, at *20 & n.5 ("[W]e have repeatedly demanded that with all sanctions … the punishment must fit the crime." (citations omitted)); *Low*, 221 S.W.3d at 620; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding); *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding). But no less stringent sanction was ever considered in this case, nor did the trial court allow Dr. Nath to present evidence supporting a less stringent sanction.

Dr. Nath submitted sworn testimony that he did nothing more than entrust the entire case to the judgment of the lawyers who handled the case for him, and attempted to offer evidence regarding his role at the bench trial. CR109; 1RR104-

06, 135-36. While the trial court finally conducted an evidentiary hearing, Dr. Nath was precluded from presenting evidence material to the issues presented. This was the first opportunity to join issue on the evidence required by *Nath I* and *TransAmerican*, yet the trial court precluded Dr. Nath from asking questions or presenting evidence on the salient question—what role did Respondents' own conduct play in the delay and mounting fees on a case that was ruled "frivolous *ab initio*" because of limitations? It is not a surprise then, that the trial court awarded the identical sanction for the third time. The court of appeals erred in affirming the exclusion of any evidence of Dr. Nath's role and in affirming the sanctions based on insufficient evidence.

C. Respondents' heavily redacted billing records are not legally sufficient to support the award.

The trial court needed to review the redacted parts of Respondents' fee invoices so it could evaluate what work was performed in the litigation and whether and to what extent Respondents contributed to any unnecessary delay and expense. Without that complete picture, it was not possible for the court to determine the appropriate sanction (if any) to be awarded under *Nath I* and *Nath II*.

"General, conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting

sufficient evidence to support the fee award sought." *Rohrmoos*, 578 S.W.3d at 501-02 (citations omitted). The Court further emphasized in *Rohrmoos* that billing records are "*strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.* at 502 (emphasis in original). Such records can be used to support the reasonableness and necessity of requested fee awards and provide a basis for cross-examination. *Id.* But the kinds of heavily redacted records submitted here are not legally sufficient to support the sanctions award. *See McGibney v. Rauhauser*, 549 S.W.3d 816, 821-22 (Tex. App.—Fort Worth 2018, pet. denied); *see also Sullivan v. Abraham*, 488 S.W.3d 294, 299-300 (Tex. 2016) (noting that billing descriptions must be specific enough to allow trial court to meaningfully review fee application).

Respondents submitted heavily redacted billing records—redacted based not on privilege, but on Respondents' claims that the redacted information reflects time entries that they are not seeking in this case, and therefore are not "relevant." 1RR52-56, 216-17, 226-27; 2Supp.CR4-338, 339-612, 613-798, 799-974. Dr. Nath objected to these redacted records. 1RR46, 49-50, 58-59, 206. Just because Respondents are not seeking those amounts in this case does not mean that the information in those redacted records was not relevant and admissible. The redacted entries are necessary to understand the case in context—disclosing the full scope of the work and an accurate timeline of that work—and potentially revealing

that counsel for Respondents could have resolved the litigation much more efficiently and thus were responsible for some (or much) of the fees the trial court awarded against Dr. Nath. Moreover, Respondents' attorneys admitted they had not reviewed the redacted information before testifying or requesting the new sanctions award. 1RR226-27. Their opinions at trial could not have been based on the full scope of work performed in the case.

As *Nath I* and *Nath II* addressed, twice now Respondents failed to provide legally sufficient evidence as to what degree of culpability they had in ratcheting up the attorney's fees incurred when the initial lawsuit filed was "frivolous ab initio." Instead, as noted in *Nath II*, they again simply conclude, from incomplete information, that they bear no responsibility for any of the fees. The billing records and conclusory opinions presented by Respondents are too heavily redacted and vague to allow for a meaningful review of their fees request. It is improper to allow counsel to self-servingly redact unprivileged entries based on their decision to not seek fees for certain entries that they did not want to disclose. Again, in this case, context is everything.

The court of appeals improperly affirmed the trial court's judgment relying on those redacted records. Without the improperly redacted billing records, Respondents failed to present sufficient evidence to support their requested fees under *Rohrmoos*.

V.

No award of future appellate attorney's fees is appropriate for the Hospital.

The Hospital's new claim for appellate attorney's fees is nine years too late. When the Hospital moved for sanctions in 2010, it asked for $776,607.00. 2Supp.CR1012-13. The trial court awarded every penny of its requested sanction then, as it did again in 2015 and 2019. 2Supp.CR291-96; 1Supp.CR5. That sanction was twice appealed and twice reversed. If the Hospital wanted an additional half a million dollars in sanctions, it needed to ask in 2010—not now.

And as with its other arguments, the Hospital wants it both ways. It argued below that the trial court was only permitted to reassess the same amount of fees awarded in connection with the 2010 sanctions motions (that is, the fees incurred between 2006 and 2010), but then it brought a new fee claim nine years later. *See* 2Supp.CR4-338, 799-974. Tellingly, Baylor did not make the same improper request. But even if the Hospital's request could be considered, there is no evidence to support the future fees awarded, and the court of appeals improperly affirmed any of this new award.

A. The Hospital failed to plead for an award of future appellate fees and the issue was not tried by consent.

The Hospital asked for future appellate fees for the first time in its ongoing sanctions odyssey in its November 5, 2019 application for fees. 2Supp.CR4-338,

799-974. Yet the Hospital failed to ever plead for future appellate attorney's fees. A "party requesting attorney's fees must affirmatively plead for them to be eligible for a judgment containing a fee award." *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015); *Shaw v. Lemon*, 427 S.W.3d 536, 540 (Tex. App.—Dallas 2014, pet. denied) ("[W]hen a party pleads a specific ground of recovery of attorney's fees, the party is limited to that ground and cannot recover attorney's fees on another, unpleaded ground." (citation omitted)); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apts, Inc.*, 416 S.W.3d 642, 660 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (same).

Moreover, nothing in this Court's second remand allows for the Hospital to assert a new claim for future appellate attorney's fees. The Hospital's new claim contradicts its own repeated assertions about the "limited scope of this remand"—arguing that the trial court could do nothing more than reassess the amount of attorney's fees previously awarded in connection with the 2010 sanctions motions. 2Supp.CR4-338, 799-974; 1RR248. The Hospital cannot have it both ways by arguing that the scope of remand is so limited, but then obtaining an entirely new award not requested in 2010.

Likewise, the Hospital's argument that appellate fees may be included in a sanctions award misses the point. Unlike here, in each of its cited cases below, appellate fees were part of the initial sanctions order appealed from—not a new

claim added years later after sanctions orders were reversed on appeal (here twice). *See Wein v. Sherman*, No. 03-10-00499-CV, 2013 WL 4516013, at *11 (Tex. App.—Austin Aug. 23, 2013, no pet.) (mem. op.); *In re Kristina S.*, No. 14-10-00966-CV, 2010 WL 4293122, at *1 (Tex. App.—Houston [14th Dist.] Oct. 28, 2010, orig. proceeding) (per curiam) (mem. op.); *Loeffler v. Lytle Indep. Sch. Dist.*, 211 S.W.3d 331, 351 (Tex. App.—San Antonio 2006, pet. denied).

Further, failing to plead for such an award means that the Hospital did not lay the proper foundation to recover those fees. Dr. Nath did not object to Mizell's testimony as to appellate fees on the specific basis of pleading deficiency, but he did object to lack of foundation. 1RR74-75. The court of appeals concluded that the issue was tried by consent, but trial by consent is reserved for the "exceptional" case in which it "clearly appears from the record as a whole that the parties tried the unpleaded issue"; it "should be applied with care" and "is not intended to establish a general rule of practice." *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citation omitted); *Greene v. Young*, 174 S.W.3d 291, 301 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). This is not such an exceptional case, and the award based on a new claim on second remand is improper.

B. Even if the belated request for future appellate fees could be considered, there is no evidence to support the award.

No evidence supports the $489,800 award of "reasonable and necessary" appellate attorney's fees. The evidence presented by the Hospital, both Mizell's affidavit and his testimony at the bench trial, consists of conclusory statements with little explanation about why such large amounts would be warranted on appeal. 1RR75-78; 2Supp.CR26, ¶ 13-15.

While Mizell in his affidavit opined as to the reasonable and necessary amount of appellate attorney's fees both at the court of appeals and at the Texas Supreme Court, he stated only that he is "familiar with appeals in the Houston Courts of Appeals," with no mention of any familiarity at this Court. 1RR75-76; 2Supp.CR26, ¶ 13. Yet the bulk of the award ($293,100) was for future work at this Court. He also did not go into sufficient detail about the factors supporting the amounts requested at either the court of appeals or this Court. 1RR75-78; 2Supp.CR26, ¶ 13-15; *see Kinsel v. Lindsey*, 526 S.W.3d 411, 428 (Tex. 2017). This testimony—devoid of detail or explanation—is insufficient to support the award. *Rohrmoos*, 578 S.W.3d at 501-02; *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

PRAYER

Dr. Rahul K. Nath, M.D., prays the Court reverse and render judgment that Respondents take nothing, or alternatively, remand to the court of appeals or the

trial court as this Court deems appropriate. Dr. Nath additionally prays for any further relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner certifies that this Brief on the Merits contains 14,176 words (when excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, statement of issues presented, signature, certificate of service, certificate of compliance, and appendix).

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APPENDIX

A. Texas Supreme Court's Opinion, Judgment, and Mandate in *Nath v. Texas Children's Hosp*., 446 S.W.3d 355 (Tex. 2014) (*Nath I*)

B. Texas Supreme Court's Opinion, Judgment, and Mandate in *Nath v. Texas Children's Hosp*., 576 S.W.3d 707 (Tex. 2019) (per curiam) (*Nath II*)

C. Court of Appeals Substitute Opinion and Judgment in *Nath v. Texas Children's Hosp*., 2021 WL 451041 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021, pet. filed) (sub. mem. op.)

D. "Final Judgment" including Denial of Dr. Nath's Motion to Dismiss (Dec. 27, 2019)

E. "[Amended Proposed] Second Supplemental Findings of Fact and Conclusions of Law" (signed Dec. 18, 2019)

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APPENDIX A

446 S.W.3d 355
Supreme Court of Texas.

Rahul K. NATH, M.D., Petitioner,

v.

TEXAS CHILDREN'S HOSPITAL and Baylor College of Medicine, Respondents.

No. 12–0620.
|
Argued Feb. 5, 2014.
|
Decided Aug. 29, 2014.
|
Rehearing Denied Nov. 21, 2014.

Synopsis

Background: After filing numerous amended petitions against hospital and medical school, physician filed an amended petition in which he abandoned all previous claims and substituted a claim for intentional infliction of emotional distress. The 215th District Court, Harris County, Steven Kirkland, J., granted defendants' motions for summary judgment and subsequently ordered physician to pay defendants' attorney fees as sanctions. Physician appealed, and the Court of Appeals, 375 S.W.3d 403, affirmed. Physician petitioned for review.

Holdings: The Supreme Court, Guzman, J., held that:

trial court did not abuse its discretion in sanctioning physician for filing frivolous pleadings;

one-year statute of limitation applied to tortious interference claim based solely on allegedly defamatory statements; and

remand was necessary to determine whether, by litigating for over four years before seeking sanctions, the defendants bore some responsibility for the attorney fees they incurred.

Reversed and remanded.

Green, J., filed dissenting opinion joined by Lehrmann, Boyd, and Brown, JJ.

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Opinion

Justice GUZMAN delivered the opinion of the Court in which Chief Justice HECHT, Justice JOHNSON, Justice WILLETT, and Justice DEVINE joined.

In a civil suit, few areas of trial court discretion implicate a party's due process rights more directly than sanctions. This proceeding involves one of the highest reported monetary sanctions awards in Texas history stemming from baseless pleadings and one of the largest such awards in the United States.[1] Further, the award was levied against a party rather than an attorney. The Civil Practice and Remedies Code and our Rules of Civil Procedure allow for pleadings sanctions against parties and attorneys when, among other things, a pleading was filed with an improper purpose or was unlikely to receive evidentiary support. We have held that due process concerns impose additional layers of protection on sanctions awards by requiring, among other things, that the awards be just and not excessive.

In this suit between a physician and other medical providers, the trial court imposed sanctions against the physician well in excess of one million dollars for filing groundless pleadings in bad faith and with an improper purpose. We conclude the physician plaintiff's pleadings asserted time-barred claims and addressed matters wholly irrelevant to the lawsuit in an attempt to leverage a more favorable settlement, and therefore are sanctionable. But in assessing the amount of sanctions, the trial court failed to consider whether, by litigating for over four years before seeking sanctions, the defendants bore some responsibility for the attorney's fees they ***359** incurred. Accordingly, we reverse the court of appeals' judgment and remand to the trial court to reassess the amount of the sanctions award.

I. Background

Dr. Rahul K. Nath is a plastic surgeon who was employed by Baylor College of Medicine and affiliated with Texas Children's Hospital (the Hospital). Nath reported to Dr. Saleh Shenaq, the Chief of Baylor College of Medicine's Division of Plastic Surgery, who also was Nath's partner at the Hospital's Obstetrical Brachial Plexus Clinic. Baylor received fifteen percent of the clinic's patient fees, and Nath and Shenaq evenly split the remainder of the fees.

Nath's relationship with his colleagues turned acrimonious in 2003, when several doctors complained that Nath billed excessively, performed unnecessary procedures, and treated fellow colleagues in an unprofessional manner. A letter from his faculty supervisors states that, “there have been several complaints pertaining to your billing practices, ethics, and professional conduct,” and described his academic contributions as “minimal.” For these reasons, the letter announced that Nath's faculty appointment would not be renewed, and his employment with Baylor was terminated effective June 30, 2004. Nath's former office manager also claimed Nath had a history of making racially-provocative statements and seemed to harbor delusions of grandeur.

Shortly after receiving the letter, Nath retained an attorney and notified Baylor that its employees were making statements “potentially damaging to Dr. Nath's reputation,” allegedly in an effort to get Nath's patients to remain at the clinic. In 2006, Nath sued Shenaq, Baylor, and the Hospital. Nath and Shenaq settled two years later. Shenaq and another clinic doctor subsequently died and the clinic never reopened.

In his original pleading in 2006, Nath asserted claims for defamation and tortious interference with business relations against Baylor and the Hospital.[2] Nath's third amended petition added claims for negligent supervision and training predicated on the previously alleged facts. Nath's fourth amended petition added allegations that Shenaq had been operating on patients despite impaired vision. Similarly, Nath's fifth amended petition added that Shenaq had been operating on patients while afflicted with hepatitis. The fifth amended petition also included a declaratory judgment claim (that Nath could or should disclose to his patients that Shenaq was in poor health). The Hospital counterclaimed for attorney's fees pursuant to the declaratory judgment

act, and in December 2009, moved for summary judgment on all of the claims in Nath's fifth amended petition. Baylor moved for summary judgment in January 2010. In response, Nath moved to compel additional depositions, extend the deadline to respond to the motions, and continue the summary judgment hearing-all of which the trial court granted. In March 2010, Nath again moved to continue the summary judgment hearing, which the trial court denied. Nath retained new counsel, Daniel Shea, who appeared at the hearing and filed a motion to recuse the judge. Nath also moved to recuse the judge assigned to hear the motion to recuse. Ultimately, the motions to recuse were denied.

***360** Nath also filed a sixth amended petition in April 2010, in which he abandoned his defamation, tortious interference, negligence, and declaratory judgment claims and brought a claim for intentional infliction of emotional distress. The Hospital and Baylor moved for summary judgment on the new claim. Nath failed to respond to the motions and instead objected to the notice of hearing based on a technical defect. All parties appeared at a summary judgment hearing in June 2010, more than four years after the suit began, where the trial court dismissed Nath's claims.[3]

Two months later, the Hospital nonsuited its declaratory judgment counterclaim. The Hospital then moved to modify the judgment to assess attorney's fees as sanctions against Nath. Nath retained new counsel and filed special exceptions to the motion for sanctions in September. After a hearing on the special exceptions and the Hospital's sanctions motions, the trial court denied the special exceptions and granted the sanctions motion. The court issued findings of fact and conclusions of law indicating the sanctions were based on: (1) "Nath's improper purposes in filing the pleadings in this case;" (2) "the bad faith that his actions manifest;" and (3) "the lack of any factual predicate for his claims, as previously established by the Court's orders granting the motions for summary judgment." The court explained that its finding of bad faith stemmed from Nath's conduct in seeking information regarding Shenaq's health, conduct for which the court had previously admonished Nath.[4] Finally, the court concluded that Nath's leveraging of this information in an attempt to obtain a settlement constituted an improper purpose.

The trial court further found that Nath took "a personal, participatory role in this litigation." The court posited that Nath "is knowledgeable about the law and legal issues, having previously studied the law," for several semesters in the early 1980s in Canada. According to the trial court, Nath insisted on delaying the summary judgment hearing so he could be present at two depositions. Nath also filed an affidavit in response to the motion for summary judgment indicating he authorized the facts and theories set forth in the petitions. The court further found that Nath met with one deponent shortly before his deposition to discuss his testimony. And the trial court observed that "Nath has used the court system to intimidate ***361** adversaries and to stifle dissent with baseless legal allegations" by suing an alleged defamer, suing his former partner in a MRI business, suing two individuals associated with the Texas Medical Board (which later dismissed its proceedings against Nath), and asserting claims in federal court related to the sale of his home (on which he prevailed).[5] Ultimately, the trial court found that the Hospital's fees of $776,607 in defending the suit were reasonable and awarded them as sanctions.

Before the hearing on the Hospital's motion for sanctions, Nath moved to sever the claims as to Baylor, and after severance, Baylor also moved to modify the judgment to assess fees as sanctions. After a hearing on Baylor's sanctions motion in November 2010, the trial court made similar findings and awarded Baylor's $644,500.16 in attorney's fees as sanctions against Nath. The court of appeals affirmed the awards, and we granted Nath's petition for review. 375 S.W.3d 403, 415 (Tex.App.–Houston [14 Dist.] 2012).

II. Discussion

Nath primarily argues in this Court that the sanctions imposed against him as the client were not visited on the true offender and were excessive. The Hospital and Baylor counter that Nath had personal, active involvement in the litigation and that the fee award was appropriate given the circumstances. We agree with the Hospital and Baylor that the trial court properly sanctioned Nath because he pursued time-barred claims and irrelevant issues in order to leverage a more favorable settlement. But concerning the excessiveness of the award, the Hospital and Baylor waited almost four years into the litigation before

moving for summary judgment on Nath's claims and only moved for sanctions after obtaining a final judgment. We previously advised courts to consider a variety of factors when imposing sanctions, including the degree to which the non-sanctioned parties' behavior caused their own expenses. The trial court failed to discuss this relevant factor, and we reverse and remand for it to do so.

A. Standard of Review

We review the imposition of sanctions under an abuse of discretion standard. *Low v. Henry,* 221 S.W.3d 609, 614 (Tex.2007). Both Chapter 10 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 13 are applicable to this case, and sanctions imposed pursuant to both are reviewed under this abuse of discretion standard. *Id.* A sanctions award will not withstand appellate scrutiny if the trial court acted without reference to guiding rules and principles to such an extent that its ruling was arbitrary or unreasonable. *Cire v. Cummings,* 134 S.W.3d 835, 838–39 (Tex.2004). A sanctions award that fails to comply with due process constitutes an abuse of discretion because a trial court has no discretion in determining what the law is or applying the law to the facts. *See TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex.1991); *Huie v. DeShazo,* 922 S.W.2d 920, 927 (Tex.1996). But we will not hold that a trial court abused its discretion in levying sanctions if some evidence supports its decision. *Unifund CCR Partners v. Villa,* 299 S.W.3d 92, 97 (Tex.2009). Generally, courts presume pleadings and other papers are filed in good faith. *GTE Commc'ns Sys. Corp. v. Tanner,* 856 S.W.2d 725, 730 (Tex.1993). The party seeking sanctions bears the burden of overcoming this presumption of good faith. *Id.* at 731.

***362 B. Substantive Law Governing Sanctions**

The sanction at issue here concerns pleadings, and its propriety is thus primarily governed by Chapter 10 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 13.[6] Chapter 10 allows sanctions for pleadings filed with an improper purpose or that lack legal or factual support. It provides that upon signing a pleading or motion, a signatory attests that:

> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

Tex. Civ. Prac. & Rem.Code § 10.001.[7] Pleadings that violate these Chapter 10 requirements are sanctionable. *Id.* § 10.004(a). But a court may not sanction a represented party under section 10.001 for unfounded legal contentions. *Id.* § 10.004(d).
Rule 13 provides that pleadings that are groundless and in bad faith, intended to harass, or false when made are also sanctionable:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who ... make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt....
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. “Groundless” for purposes of

this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law....

Tex.R. Civ. P. 13. Importantly, Rule 13 does not permit sanctions on the issue of ***363** groundlessness alone. Rather, the filing in question must be groundless and also either brought in bad faith, brought for the purpose of harassment, or false when made. *Id.*

We have held that in order to safeguard constitutional due process rights, a sanction must be neither unjust nor excessive. We promulgated this standard most clearly in *TransAmerican,* 811 S.W.2d at 913. The underlying case in *TransAmerican* was complex and multi-partied. *Id.* at 914. In brief, TransAmerican's president was sanctioned for discovery abuse pursuant to Rule of Civil Procedure 215 for failing to appear at a deposition. *Id.* at 915–16. In considering whether those sanctions complied with due process, we established a two-part test.

The first prong of the *TransAmerican* test concerns the relationship between the conduct evinced and the sanction imposed and requires a direct nexus between the offensive conduct, the offender, and the sanction award. *See id.* at 917. A just sanction must be directed against the abusive conduct with an eye toward remedying the prejudice caused to the innocent party, and the sanction must be visited upon the true offender. *Id.* A court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. *Id.* Yet we warily noted in *TransAmerican* that apportioning blame between an attorney and a represented party "will not be an easy matter in many instances." *Id.* Such caution is warranted. The closeness that typically defines interaction between a litigant and his attorney not only binds their interests but may lend an overall opacity to the relationship that renders it difficult to determine where a party's input ends and where an attorney's counsel begins.

The second prong of the due process analysis under *TransAmerican* considers the proportionality of the punishment relative to the misconduct and warns "just sanctions must not be excessive." *Id.* Not only should a punishment (*i.e.,* sanctions) fit the crime (*i.e.,* the triggering offense), the sanction imposed should be no more severe than necessary to satisfy its legitimate purposes. *Id.* Legitimate purposes may include securing compliance with the relevant rules of civil procedure, punishing violators, and deterring other litigants from similar misconduct. *Spohn Hosp. v. Mayer,* 104 S.W.3d 878, 882 (Tex.2003).

We require courts to consider less stringent sanctions and weigh whether such lesser sanctions would serve to promote compliance. *TransAmerican,* 811 S.W.2d at 917.[8] Evidencing our reticence to wield the heavy hammer of sanctions, we have cautioned: "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." *Tanner,* 856 S.W.2d at 729.

Historically, awards for groundless pleadings in Texas have been moderate, at least in monetary terms. *See id.* at 730 (reversing a sanctions award of $150,000 in attorney's fees for groundlessness and discovery non-compliance); *Dike v. Peltier Chevrolet, Inc.,* 343 S.W.3d 179, 183 (Tex.App.-Texarkana 2011, no pet.) (reversing a groundless pleadings sanction of $15,353); ***364** *Parker v. Walton,* 233 S.W.3d 535, 538 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (reversing a groundless pleading sanction of $3,500 in attorney's fees); *Emmons v. Purser,* 973 S.W.2d 696, 699 (Tex.App.-Austin 1998, no pet.) (reversing a groundless pleadings sanctions award of $3,200); *see also Robson v. Gilbreath,* 267 S.W.3d 401, 405 (Tex.App.-Austin 2008, pet. denied) (affirming a groundless pleadings sanction of $10,000 for failure to conduct a reasonable inquiry). While this tour d'horizon is not intended to be comprehensive, it is nonetheless representative of what our reported cases suggest have been typical groundless pleadings awards in this state.[9]

Though we specifically addressed sanctions stemming from a charge of discovery abuse in *TransAmerican,* we have previously held the due process requirements we established there apply to pleadings sanctions as well. *Low,* 221 S.W.3d at 619–20.

C. Analysis

In the trial court, Nath brought claims for a declaratory judgment (regarding Shenaq's health), intentional infliction of emotional distress, defamation, tortious interference, and negligence. The trial court sanctioned Nath for (1) bad faith in his pursuit of discovery on the irrelevant issue of Shenaq's health; (2) an improper purpose of leveraging information concerning Shenaq's health to favorably settle a baseless claim; and (3) bringing claims that lacked a factual predicate. Chapter 10 requires that we analyze an improper purpose pleading-by-pleading, but we assess claim-by-claim whether a claim lacked a legal or factual basis.[10]

1. Waiver

As an initial matter, we address the claim of the Hospital and Baylor that Nath waived his objection to the size of the sanctions award by failing to raise the issue of excessiveness at the trial court level. The court of appeals agreed, finding that the issue had not been properly preserved for review. 375 S.W.3d at 412. We disagree. The record plainly reveals Nath's objections to the award, including objections specifically predicated on the ground of excessiveness. On December 20, 2010, Nath filed a motion for new trial and a motion to modify the trial court's November judgment and sanctions order, arguing the sanctions award "violates the Excessive Fines clause of the Constitution of the United States of America—Eighth Amendment—and the Excessive Fines clause of the Texas Constitution—Article I, section 13." Additionally, Nath cited United States Supreme Court precedent to ***365** bolster his contention that the trial court should consider "whether the penalties in question were excessive."[11] We are generally loath to turn away a meritorious claim due to waiver; where the party has clearly and timely registered its objection, we find a waiver argument particularly unavailing. *See Verburgt v. Dorner,* 959 S.W.2d 615, 616–17 (Tex.1997). We conclude Nath did not waive his objection to the excessiveness of the sanctions award.

2. Nath's Fourth, Fifth, and Sixth Amended Petitions

Central to its ultimate imposition of sanctions, the trial court found that Nath's pursuit of information relating to Shenaq's health was in bad faith, and that Nath's ostensible intent to use that information to leverage a favorable settlement for a baseless claim constituted an improper purpose. Nath originally included allegations relating to Shenaq's health in his fourth amended petition, filed in November 2008.[12] Nath moved to compel discovery relating to Shenaq's health and in July 2009 filed a fifth amended petition that included a request for declaratory judgment relating to Shenaq's health. The trial court admonished Nath's counsel that the information was irrelevant to his lawsuit. *See supra* note 4. Nath later filed a sixth amended petition that abandoned his prior claims and added a claim for intentional infliction of emotional distress. But that petition retained allegations regarding Shenaq's health.[13] For the reasons explained below, we agree with the court of appeals that the trial court properly found Nath's pleadings sanctionable.

The hallmarks of due process for sanctions awards are that they be just and not excessive. *TransAmerican,* 811 S.W.2d at 917. Sanctioning Nath for pleadings relating to Shenaq's health was demonstrably just. First, there was a direct nexus between this portion of the trial court's sanctions and the offensive conduct. The trial court found such pleadings to be in bad faith (due to their irrelevance) and filed for an improper purpose (leveraging a settlement). The trial court's finding is supported by some evidence and is therefore not an abuse of discretion. *See Unifund,* 299 S.W.3d at 97. Nath admittedly was seeking information relating to Shenaq's health so he could disclose it to Shenaq's patients. But such disclosures would not be relevant to triable issues related to Nath's then-contemporaneous claims for defamation, tortious interference, and negligence.

Moreover, there was some evidence supporting the trial court's determination that Nath was improperly seeking ***366** irrelevant information to leverage a favorable settlement. On the eve of a mediation in June 2009, Nath's counsel sent a letter to the Hospital indicating Nath was anxious to conduct discovery regarding Shenaq's health conditions, the results of which "would most certainly require prompt actions to notify patients so that they can undergo immediate testing and obtain legal counsel to advise them of their rights." During Nath's deposition, attorneys for Baylor and the Hospital likened Nath's use of legal process

in this manner to extortion. The trial court agreed with this assessment, characterizing Nath's conduct in seeking information related to Shenaq's health as "an abuse of process" and "a form of extortion." Accordingly, the improper purpose of Nath's pleadings regarding Shenaq's health indicates the trial court appropriately levied sanctions regarding this conduct.[14]

In addition to considerations described, the just-award prong of the due process analysis also examines whether the sanction was visited on the true offender. The trial court made various findings of fact regarding Nath's direct involvement in the case, particularly noting his effort to seek information relating to Shenaq's health, and the record supports these findings. Relations between Nath and Shenaq deteriorated to the point of acrimony in the time leading up to Nath's departure from Baylor, and they only worsened as litigation ensued. The affidavit Nath filed in response to the motions for summary judgment claimed the relationship between Nath and Shenaq grew tense when Nath confronted Shenaq for performing surgery with allegedly impaired vision. And Nath, by his own admission, specifically sought information related to Shenaq's health so that he could inform former patients of Shenaq's health problems. Nath's affidavit also lists forty-five patient surgeries Shenaq performed with allegedly impaired vision. Further, Nath personally attended two depositions of Shenaq's colleagues where his counsel asked questions concerning Shenaq's health. Ultimately, Nath's conduct surrounding Shenaq's health appears to be less about pursuing a legal redress for an injury (the province of the attorney) and more about seeking irrelevant personal information (an extrajudicial desire of the client). While litigation is contentious by definition and often utilized to compel a desired end, we agree with the trial court that, on these facts, using a legal mechanism to force damaging, irrelevant information into the public domain and thereby compel a more favorable settlement constitutes an improper purpose. Against this backdrop and the logical inferences that flow from it, we cannot say the trial court abused its discretion by imposing the sanction against Nath personally.

Nath claims that even if some of the sanctions against him were proper, sanctions against him for the sixth amended petition were improper because the lawyer who drafted that petition swore in an affidavit that Nath had no involvement with the claim in that petition. Specifically, the attorney indicated he "exercised [his] own legal judgment" when deciding what claims to file in the sixth amended petition and asserted that Nath "had no involvement in the selection of what pleadings and motions were filed in this case." Nonetheless, the sixth amended petition contains facts regarding Shenaq's health ***367** from the prior petitions, and we have already determined that information likely came from Nath himself. In addition, Nath almost certainly knew of the inclusion of those allegations in the sixth amended petition because his attorney "kept Dr. Nath reasonably informed"—as was his professional obligation.[15] Accordingly, we reject Nath's argument and conclude the trial court did not abuse its discretion in labeling Nath the true offender, insofar as the sixth amended petition continued to make issue of Shenaq's health.

We note, however, that while Nath may be properly deemed the true offender, his attorneys possess ethical obligations and may share in the blame for sanctionable conduct. An attorney has ethical obligations to both his client and to the judicial system as an officer of the court.[16] Though zealous advocacy is expected of an attorney—indeed, it is a professional obligation—the attorney must not permit client desires to supersede the attorney's obligation to maintain confidence in our judicial system.[17] As our rules of professional conduct unambiguously require: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[18] Further, these rules of conduct require an attorney to "maintain the highest standards of ethical conduct" throughout representation.[19] Regardless, Baylor and the Hospital only moved to sanction Nath—not his lawyers—and the trial court declined to sanction the lawyers sua sponte.[20] Thus, under the true-offender inquiry, we must uphold the trial court's decision to sanction Nath personally because some evidence supports the sanction. *See Unifund,* 299 S.W.3d at 97.

We are mindful of course that due process analysis for sanctions must encompass analyzing whether the award was excessive. But we will refrain from engaging in this analysis until we have examined all pleadings and claims for which Nath may appropriately be sanctioned.

3. Defamation

Nath's initial petitions included claims for defamation, tortious interference, and negligence. We address them in turn. The trial court made discrete findings as to Nath's defamation claim. Specifically, the trial court found the defamation claim was time-barred by a one-year statute of limitations[21] and that some of the statements Nath claimed were defamatory were not actually defamatory.[22] But Chapter 10 expressly disallows sanctions against a party for improper legal contentions when the party is represented by counsel. Tex. Civ. Prac. & Rem.Code § 10.004(d). The trial court did not find ***368** that the statements did not occur. Rather, it sanctioned Nath because of legal impediments to recovering for the alleged statements.[23] Thus, Chapter 10 precluded the trial court from sanctioning Nath for groundlessness based upon improper legal contentions when he was represented by counsel.

However, the trial court also held that the time-barred status and nondefamatory nature of some of the statements in his defamation claim indicated Nath filed the claim in bad faith and for an improper purpose. Defamation claims are subject to a one-year limitations period, and Nath filed suit in February 2006. The trial court found that most of the allegedly defamatory statements occurred in June or July of 2004, and none occurred after the end of 2004, when the Hospital closed the clinic. Nath's affidavit opposing summary judgment detailed the allegedly defamatory statements and claimed they damaged his medical practice and caused him financial harm. Further, Nath's affidavit admits he learned of eight of these allegedly defamatory statements in 2004—over one year before he filed suit.[24] As previously addressed, this matter involves legal contentions—which Chapter 10 does not allow Nath to be sanctioned for on the basis of legally groundless pleadings because he was represented by counsel. *Id.* But Chapter 10 offers no similar stricture for sanctions based on improper purpose. And in any event, Nath was represented by counsel no later than June 8, 2004, when he claimed the statements were "potentially damaging to [his] reputation." Because there is some evidence supporting the finding that Nath brought his defamation claim with an improper purpose, the trial court did not abuse its discretion in sanctioning Nath for this claim.

Nath nonetheless argues such sanctions violate the constitutional requirement that the sanction be visited on the true offender. We disagree. The fact that Chapter 10 does not shelter parties from sanctions for flawed legal contentions that demonstrate an improper purpose is simply a reflection of our warning in *TransAmerican* that the attorney-client relationship is opaque by default. Nath only diminished that opacity for his sixth amended petition, which contained a claim for intentional infliction of emotional distress. The attorney who filed that claim indicated Nath had no involvement in drafting the claim. But Nath presented no similar evidence with respect to the pleadings containing Nath's defamation claim. Accordingly, because some evidence supports the trial court's finding, and no evidence clarifies the respective roles of Nath and his attorneys in regards to his defamation claim, we conclude the trial court did not abuse its discretion in sanctioning Nath for that claim.

4. Tortious Interference

Nath's remaining claims are for tortious interference and negligence. The trial court did not find that Nath filed his tortious interference claim in bad faith or for an improper purpose. Rather, the trial court generally found Nath's claims to be sanctionable because they lacked merit, ***369** as evidenced by the court's summary judgment dismissal. The trial court also found Nath's claim to be groundless to the extent it relied on time-barred defamatory statements. As explained below, the trial court's first rationale violates the Legislature's directive in Chapter 10, but some evidence supports its second rationale.

Generally, groundless pleadings are sanctionable under either Rule 13 or Chapter 10. Under Rule 13, groundlessness in and of itself is an insufficient basis for sanctions. A pleading must also be in bad faith, intended to harass, or knowingly false to justify sanctions. Tex.R. Civ. P. 13.[25] The trial court made no findings of bad faith, improper purpose, or falsity regarding the tortious interference claim. Accordingly, Rule 13 cannot support the sanctions as to this claim.

However, Chapter 10 provides that a claim that lacks a legal or factual basis—without more—is sanctionable. Tex. Civ. Prac. & Rem.Code § 10.001; *see also Low,* 221 S.W.3d at 617. Legally, the claim must be warranted by existing law or a nonfrivolous argument to change existing law. Tex. Civ. Prac. & Rem.Code § 10.001(2). But Chapter 10 expressly prohibits monetary

sanctions against a represented party based on the legal contentions in a pleading. *Id.* § 10.004(d) ("The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2)."). Accordingly, the trial court could not have properly awarded sanctions against Nath for groundless legal contentions in his tortious interference claim.

Chapter 10 requires that each factual contention must have evidentiary support or be likely to receive it after a reasonable opportunity for discovery. *Id.* § 10.001(3); *Low,* 221 S.W.3d at 616–17. We held in *Low* that a pleading was sanctionable because it alleged two doctors prescribed a drug that medical records in the attorney's possession demonstrated they did not prescribe. 221 S.W.3d at 616. Thus, in holding the pleading was sanctionable, we held that the allegations did not have, and were not likely to subsequently receive, evidentiary support in light of the evidence the attorney possessed when filing the claim. *Id.*

Unlike in *Low,* the trial court's findings here only indicate it viewed the pleadings as groundless as of the time it granted summary judgment. But the court's findings miss the mark, as the vantage point for assessing evidentiary support is at the time the pleading is filed.[26] Establishing a vantage point at the time of a merits adjudication four years or more into a proceeding would unnecessarily chill litigation in cases where claimants in good faith believe they possess a claim, but have not yet discovered sufficient evidence on every essential element of their claim. We cannot endorse a view that runs so contrary to the Legislature's chosen words in Chapter 10 and our construction of them.

Nonetheless, a distinction between sanctions for groundless pleadings and ***370** sanctions for discovery abuse is worth noting. A claim may be likely to receive evidentiary support when filed and thus not be groundless under Chapter 10. But if a party later learns through discovery that no factual support for the contention exists and still pursues litigation, such conduct might be sanctionable. But the sanctionable conduct would likely be the abuse of the discovery process, not the filing of pleadings, as our rules of civil procedure specify that a court may sanction a party or counsel if the court "finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing." Tex.R. Civ. P. 215.3. While the ultimate penalty may be similar in its effect on the sanctioned party, its application is predicated on a different ground.[27]

But in addition to concluding that Nath's claims ultimately lacked merit, the trial court also specifically noted in a footnote in its findings of fact and conclusions of law that "Nath's claims of negligence and tortious interference are also groundless to the extent that those claims rely on time-barred, allegedly defamatory statements." Defamation is subject to a one-year statute of limitations, Tex. Civ. Prac. & Rem.Code § 16.002(a), while tortious interference is subject to at least a two-year statute of limitations, *First Nat'l Bank of Eagle Pass v. Levine,* 721 S.W.2d 287, 289 (Tex.1986). However, the Fifth Circuit and several Texas courts of appeals have held that, when the sole basis for a tortious interference claim is defamatory statements, the one-year statute of limitations for defamation applies.[28] Likewise, we have applied a one-year statute of limitations to business disparagement claims when the gravamen of the complaint is defamatory injury to reputation and there is no evidence of special damages. *See Hurlbut v. Gulf Atl. Life Ins. Co.,* 749 S.W.2d 762, 766 (Tex.1987). We now similarly conclude that if a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies.

Nath's tortious interference claim was predicated solely on the allegedly defamatory statement because it alleges the Hospital and Baylor tortiously interfered "by continuing to make false statements regarding" Dr. Nath to third parties. Accordingly, Nath's tortious interference claim was subject to the one-year statute of limitations. The trial court correctly found the earliest of the allegedly defamatory statements occurred in June 2004. Nath filed his tortious interference claim in February 2006, after the one-year limitations period had run. Thus, some evidence supports the trial court's finding that Nath's tortious interference claim (as with his defamation claim) was time-barred and demonstrated an improper purpose.

***371 5. Negligence**

Nath's final claim was for negligence, in which Nath claimed that Baylor and the Hospital's negligent training and supervision of its employees led them to defame him and tortiously interfere with his practice. As with Nath's tortious interference claim,

the trial court (1) generally found Nath's claims to be sanctionable because they lacked merit due to their dismissal at summary judgment, and (2) specifically found the negligence claim to be groundless to the extent it relied on time-barred defamatory statements. As explained above, assessing groundlessness only at the time of a merits dismissal over four years into the litigation contravenes the requirement in Chapter 10 that groundlessness is assessed as of the time of filing. Thus, the trial court's first rationale cannot support sanctions as to the negligence claim.

But the trial court's second rationale—that the negligence claim relied on time-barred statements—is a sufficient basis for sanctions. Nath filed his negligence claim in his third amended petition in September 2008, over four years after learning of the first allegedly defamatory statements in June 2004. Regardless of whether the two-year limitations window for negligence claims was truncated to one year because Nath's claim was predicated solely on defamatory statements (as with the tortious interference claim), limitations barred the negligence claim. For the same reason sanctions are appropriate for Nath's defamation and tortious interference claims, they are appropriate for his negligence claim.

D. Remand

In short, all of Nath's petitions are sanctionable. But we must still assess whether the amount of the award was excessive. A trial court abuses its discretion by failing to adhere to guiding rules and principles. *Cire,* 134 S.W.3d at 838–39. We set forth these guiding rules and principles for assessing the amount of pleadings sanctions in ***372** *Low.*[29] 221 S.W.3d at 620 n. 5. This nonexclusive list of factors is helpful in guiding the often intangible process of determining a penalty for sanctionable behavior, and it provides context for our review of the trial court's award. We advised in *Low* that "[a]lthough we do not require a trial court to address all of the factors ... to explain the basis of a monetary sanction ... it *should consider relevant factors* in assessing the amount of the sanction." *Id.* at 620–21 (emphasis added). In practice, this means that when a factor is relevant to a party being sanctioned, that factor must inform the issuance of the award. To take just one example, one factor we referenced in *Low* is "any prior history of sanctionable conduct on the part of the offender." *Id.* at 620 n. 5. A court obviously need not consider prior sanctionable conduct in calibrating a sanction award for a first-time litigant for the self-evident reason that no such conduct exists. Yet, were the example reversed and a sanctioned litigant possessed a lengthy history of prior sanctions, the court "should consider" that party's checkered history in levying a sanction. *Id.* at 620–21 & 620 n. 5.

Here, the trial court cited and then considered nearly all of the relevant *Low* factors. In the context of this matter, however, one factor made relevant by the protracted nature of this litigation is "the degree to which the offended person's own behavior caused the expenses for which recovery is sought." *Id.* at 620 n. 5 (quotation marks omitted). The trial court failed to address this factor, though it is unquestionably relevant. The statements Nath addressed in his original petition were made in 2004, and Nath filed suit well after the one-year limitations period had run. Yet, the record indicates that all three parties litigated a host of merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment on such grounds as limitations. Thus, while Nath was the initiator of this litigation, the degree to which the Hospital and Baylor caused their attorney's fees is a relevant inquiry.

A party is entitled to thoroughly and vigorously litigate a matter. But if issues asserted in pleadings are revealed to be frivolous, and the defending party delays moving for summary judgment and sanctions, the defending party adopts some responsibility for the overall increase in litigation costs. Of course, placing the entire cost of litigation on a plaintiff may be proper and deserved if the plaintiff was the party responsible for sustaining frivolous litigation over a prolonged period. Here, the trial court found the defamation claims were friviolous ab initio because the statements were alleged to have been made at least one year before suit was filed. Moreover, the time-barred statements permeated subsequent pleadings. The defendants, however, did not file a summary judgment for years after the allegations were first made. A defending party cannot arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions. Because the trial court did not discernibly examine this relevant *Low* factor, we remand for it to do so.[30]

E. Response to the Dissent

The dissent tacitly agrees with our analysis, but would affirm the sanctions award rather than remand for the trial court to assess the relevant *Low* factor. Specifically, ***373** the dissent argues that we should outright affirm the award of sanctions because, among other things: (1) the findings of fact and conclusions of law contained a typographical error, and (2) our direction that trial courts "should" consider the relevant *Low* factors is permissive.

The dissent first contends the trial court made a typographical error in stating that it considered the extent to which Nath caused the Hospital and Baylor's fees. But viewing the findings and conclusions as a whole belies the dissent's position. The trial court was careful to detail its rationale for the *Low* factors it found to be relevant—except the extent to which the Hospital and Baylor caused their own injuries. For example, the findings and conclusions spent considerable time discussing Nath's bad faith, his degree of willfulness, and his knowledge and expertise. When a trial court recites a relevant issue but fails to discuss it, we cannot automatically conclude that such cursory mention is tantamount to compliance. This was true in the case of the $50,000 sanction we reversed in *Low,* and it is equally as true of the $1.4 million sanction presented here.

Additionally, the dissent contends that our admonishment that trial courts "should" consider the relevant *Low* factors is permissive. Notably, the dissent does not contend the extent to which the Hospital and Baylor caused their attorney's fees is irrelevant. And regardless of whether consideration of the relevant *Low* factors is permissive, the trial court went to great lengths to examine all the relevant *Low* factors except for the extent to which the non-sanctioned parties caused their own injuries. We do not believe the standard of review allows a trial court that dutifully considers almost all of the relevant *Low* factors to essentially ignore a relevant factor. As noted, failure to adhere to guiding rules and principles constitutes an abuse of discretion. *Cire,* 134 S.W.3d at 838–39. *Low* offered these guiding rules and principles, the trial court failed to adhere to them, and this amounted to an abuse of discretion.

III. Conclusion

Due process requires that sanctions be just, meaning that there be a direct nexus between the sanction and the sanctionable conduct, and be visited on the true offender. Here, the trial court's sanctions award complied with these requirements because Nath's petitions were filed for the improper purpose of pursuing an unrelated issue and advancing time-barred claims. However, when assessing the amount of sanctions, the trial court failed to examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years. Accordingly, we remand for the trial court to reassess the amount of the sanctions award while considering the omitted factor. *See Low,* 221 S.W.3d at 622.

Justice GREEN filed a dissenting opinion, in which Justice LEHRMANN, Justice BOYD, and Justice BROWN joined.

Justice GREEN, joined by Justice LEHRMANN, Justice BOYD and Justice BROWN, dissenting.
The Court holds that the trial court abused its discretion when it assessed sanctions against Dr. Rahul K. Nath without examining the extent to which Texas Children's Hospital and Baylor College of Medicine caused the accrual of their own attorney's fees. 446 S.W.3d 355, 358. Because I read the trial court's orders as having addressed that specific factor, and because I believe the trial court's discretion is broader in this context than the Court does, I respectfully dissent.

***374** The abuse of discretion standard is critical to our analysis in this case. Under this standard, we may reverse the trial court *only* if it acted "without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Low v. Henry,* 221 S.W.3d 609, 614 (Tex.2007) (citing *Cire v. Cummings,* 134 S.W.3d 835, 838–39 (Tex.2004)).

The amount of a sanction is limited only by the trial court's duty to act within its sound discretion in accordance with the Due Process clause of the Texas Constitution. *Low,* 221 S.W.3d at 619; *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex.1991). In exercising its discretion, the trial court must ensure that the sanction: (1) relates directly to the abuse found; and (2) is not excessive. *Low,* 221 S.W.3d at 620; *Powell,* 811 S.W.2d at 917. In *Low,* we provided a list of non-exhaustive factors to assist a trial court in determining whether a sanction is appropriate. *Low,* 221 S.W.3d at 620–21 n. 5. We explained that a trial court need not consider every factor listed, but rather "should consider relevant factors in assessing the amount of the sanction" in each case. *Id.* at 621.

The Court's holding that the trial court abused its discretion in assessing the amount of sanctions rests on two erroneous propositions: (1) the trial court omitted from its analysis a single *Low* factor regarding the extent to which Texas Children's Hospital and Baylor caused the accrual of their own attorney's fees, *see Low,* 221 S.W.3d at 620–21 n. 5; and (2) the trial court was required to consider that factor when assessing monetary sanctions. 446 S.W.3d at 369.

First, the trial court's exhaustive findings of fact and conclusions of law in support of its sanctions award indicate that it considered all of the *Low* factors. Paragraph 91 of the Texas Children's Hospital order concluded:

> *In determining the amount of sanctions, this Court has considered the factors listed in Low v. Henry,* 221 S.W.3d at 620 & n. 5. In light of Nath's bad faith and improper purposes, as set forth herein; Nath's knowledge of the law as a former legal student; Nath's prior conduct as a litigant in numerous cases; the expenses incurred by Texas Children's Hospital as a result of the litigation and their reasonable proportion to the amount Nath sought in damages; the relative culpability of Nath, as set forth above; the minimal risk of chilling legitimate litigation activity posed by sanctions here; Nath's ability to pay for the damages he has caused Texas Children's Hospital; the need for compensation to Texas Children's Hospital as a result of the damages inflicted upon it in defending against this lawsuit; the necessity of imposing a substantial sanction to curtail Nath's abuse of the judicial process and punish his bad faith and improper conduct; the burdens on the court system attributable to Nath's misconduct, including his consumption of extensive judicial time and resources in prosecuting this case; and *the degree to which Nath's own behavior caused the expenses for which Texas Children's Hospital seeks reimbursement,* the Court concludes that Texas Children's Hospital should be awarded a substantial portion of its attorney's fees to sanction Nath for his conduct. (Emphasis added).

The trial court reached a similarly-worded conclusion in its findings of fact and conclusions of law in support of its judgment granting Baylor's request for sanctions. In both orders, the trial court expressly stated that it was familiar with the *Low* factors and had considered them in assessing sanctions. The Court claims, however, ***375** that in both orders, the trial court failed to "discernibly examine" an "unquestionably relevant" *Low* factor. 446 S.W.3d at 372, 372. However, reading the findings and conclusions as a whole, I can conclude only that the trial court *did* consider the factor that the majority claims was omitted. In its findings and conclusions, the trial court expressly stated that it considered "the degree to which Nath's own behavior caused the expenses for which Texas Children's Hospital [and Baylor] seeks reimbursement." The trial court's list of considerations mirrors the *Low* factors except in this one instance. While the trial court appears to have transposed Nath's name where Texas Children's Hospital or Baylor's name should have been, we should view this transposition as merely a typographical error which may be forgiven, rather than an omission. *Cf. Bd. of Adjustment of City of San Antonio v. Wende,* 92 S.W.3d 424, 428 n. 2 (Tex.2002) (reading the printed word "riot" to mean "not" in a statute containing a typographical error); *City of Amarillo v. Martin,* 971 S.W.2d 426, 428 n. 1 (Tex.1998) (inserting the word "not" into a statute to indicate the obvious legislative intent); *Beall v. Chatham,* 100 Tex. 371, 99 S.W. 1116, 1117–18 (1907) (affirming a judgment containing a typographical error which obscured the trial court's reasoning). After all, Nath's conduct was covered fully by other *Low* factors that the trial court considered.

The trial court's extensive findings of fact and conclusions of law regarding Baylor's request for sanctions totaled forty-one pages and contained ninety-five discrete findings and conclusions. The trial court's findings and conclusions regarding Texas Children's Hospital's request for sanctions totaled forty-two pages and contained ninety-four discrete findings and conclusions. Given the trial court's exhaustive effort to explain its decision and address the *Low* factors, it seems a waste of judicial resources to remand this case so that the trial court may correct a typographical error.

Second, contrary to the Court's holding, a trial court has as much discretion in determining which *Low* factors to consider as it does in determining the amount of the sanctions assessment. The Court cites *Low* for the proposition that when a factor is relevant, a trial court must consider it or risk reversal on appeal. 446 S.W.3d at 376 (citing *Low,* 221 S.W.3d at 620–21). This reading of *Low,* which unnecessarily constrains a trial court's discretion, begs the question-who is to determine whether a factor is relevant, and, under what standard is that decision reviewed? In my view, we must respect the trial court's discretion to determine which factors are relevant and its discretion to ensure that the amount of its sanctions assessment is appropriate and supported by evidence. After all, the trial court witnessed the parties' behavior firsthand.

Furthermore, the Court's interpretation of *Low's* use of "should" as creating a mandatory requirement is unconvincing. Just as this Court has held that a statute or rule containing "shall" does not always mandate action, surely our own use of "should" must likewise be interpreted to be merely directory. *Cf. Lewis v. Jacksonville Bldg. & Loan Ass'n,* 540 S.W.2d 307, 310–11 (Tex.1976) (interpreting administrative rule containing "shall" to be merely directory, not mandatory); *Chisholm v. Bewley Mills,* 155 Tex. 400, 287 S.W.2d 943, 945 (1956) (interpreting statute containing "shall" to be merely directory, not mandatory); *Thomas v. Groebl,* 147 Tex. 70, 212 S.W.2d 625, 630–32 (1948) (same).

Again, I would caution against excessive scrutiny of the trial court's application of the *Low* factors when the trial court's assessment ***376** of sanctions, as a whole, does not amount to an abuse of discretion. As we noted in *Low,* the amount of a penalty under Chapter 10 of the Civil Practice and Remedies Code should "begin with an acknowledgment of the costs and fees incurred because of the sanctionable conduct." 221 S.W.3d at 621. The trial court found that a large sanction was "required to sufficiently punish Nath's conduct and deter similar conduct in the future." The record details Texas Children's Hospital and Baylor's incurred attorneys' fees, and the trial court's sanctions assessment excludes fees related to the recusal proceedings.[1] The trial court, after finding ten of the thirteen *Low* factors to be applicable, had an ample basis for assessing sanctions at the amount of Texas Children's Hospital and Baylor's incurred attorneys' fees.

We might critique the final amount of the sanctions imposed. We might reach a different result under de novo review. But that is simply not our task. We normally afford the trial court considerable latitude under the abuse of discretion standard. We should not modify our test even when it yields unpalatable results. Provided that the trial court relies upon the guiding principles this Court established in *Low* and supports its findings with evidence in the record, we should affirm even debatable sanctions. Why? Because, as the trial judge wrote: "The Court has witnessed much of this behavior firsthand." The trial court dealt with the parties throughout four years of litigation. The court watched Nath cycle through claim after claim in multiple petitions. The court dealt with numerous attorneys. The court dealt with Nath's last-minute effort to recuse the trial judge—followed by Nath's attempt to recuse the judge overseeing the recusal process. The court admonished Nath's attorneys to cease certain irrelevant pursuits, and then saw Nath ignore this admonishment in an affidavit reemphasizing irrelevant matters. Finally, the trial court dismissed all of Nath's remaining claims at the summary judgment stage. The trial court witnessed all of Nath's actions firsthand, found support in the record, and relied upon the factors this Court set out in *Low* to arrive at its assessment. Therefore, I would hold that the trial court did not abuse its discretion in assessing sanctions against Nath.

The Court's remand of this case is especially troubling because the trial court judge who presided over the case for four years lost reelection in 2012. His replacement will face the same disadvantage in reviewing the sanctions assessment that the Court does today-she did not witness Nath's behavior firsthand. The current trial court's unfamiliarity with the parties and the litigation will require her to either conduct additional hearings or base her decision upon the same cold record this Court cautions against. *E.g., In re United Scaffolding, Inc.,* 377 S.W.3d 685, 688 (Tex.2012). Neither of these options are adequate substitutes for a trial court's firsthand observations, and the Court should not remand the case for an unfamiliar trial court to reconsider sanctions.

Low provides boundaries for trial courts assessing sanctions. We must ensure that trial courts act within these boundaries; however, we cannot have appellate courts unnecessarily circumventing a trial court's discretion. Detailed findings of fact and conclusions of law and an extensive record provide support for both the decision to sanction and the amount of the sanctions. On the record here, I conclude that the ***377** trial court acted within its discretion. Because the Court holds otherwise, I respectfully dissent.

All Citations

446 S.W.3d 355, 57 Tex. Sup. Ct. J. 1328

Footnotes

1 *See* Peter Vieth, *2013: The Year in Review,* Virginia Lawyers Weekly, Dec. 9, 2013 ($881,000 sanction award in a divorce proceeding was "the largest sanction ever imposed" in Virginia); Cheryl Millet, *Divorcee Slapped with Record–Setting $552K Sanction in Custody Case,* Daily Bus. Rev., Feb. 7, 2012 (discussing record setting sanctions award of $552,000 in a California divorce proceeding); Lisa Provence, *Unusual outcome: $722K in sanctions, juror judges judge,* The Hook, Nov. 4, 2011, *available at* www.readthehook.com/101759/final-order –plaintiffs–sanctioned–722k–juror–judges–judge ($542,000 sanction against counsel and $180,000 sanction against litigant was "one of the largest sanctions in Virginia legal history"); *Hunton & Williams and Wachovia Obtain Largest Sanctions Award by Tennessee Court,* Bus. Wire News Releases, Nov. 13, 2006, *available at* http://www.businesswire.com/news/home/20061113006140/en/Hunton-Williams-WachoviaObtain-Largest-SanctionsAward# .U6Q—WPldX0s ($1.2 million sanction against litigant was the "largest sanctions award ever granted by a Tennessee court").

2 Nath subsequently sued Dr. Allan Belzberg and his employer, Johns Hopkins University, over an allegedly defamatory statement Belzberg made regarding Nath in Belzberg's capacity as a Johns Hopkins employee. After a battle over whether the trial court possessed personal jurisdiction over Belzberg and Johns Hopkins, Nath nonsuited them.

3 The trial court dismissed all the claims in Nath's fifth and sixth amended petitions, even though the sixth amended petition was Nath's only live pleading at the time of the hearing.

4 At a hearing on a motion to compel in July 2009 where Nath sought production of information regarding the patients Shenaq had seen, the court responded:

> I can't do that. You can't do that. The State Medical Board could do that. Hospital Board, someone else. Somebody that's not here can do that....
>
> You should be before some other board that has a different authority than me. It shouldn't be used as a tool in your litigation....
>
> I'm wondering why you're asking me to uncover [Shenaq's alleged health issues and patients allegedly at risk] instead of the State Medical Board. That's my big issue with your approach....
>
> You're coming to me asking me to blow open this cover. When there is an agency out there that is well situated to deal with all of the [privilege] issues that you are raising....

At another hearing on a motion to compel in January 2010, the court stated:

> I think—I answered that by saying Dr. Shenaq's condition is not in this suit....
>
> I think I was very clear about it last time. If I wasn't, I want to be clear now....
>
> I said it's not relevant to this lawsuit....
>
> It's irrelevant to your lawsuit so it's not your job to do it. Your doctor has an obligation to report it to his medical board and they have a job to do. We don't.

5 Nath was defending a suit the Fifth Circuit ultimately determined to be groundless. *See Petrello v. Prucka,* 484 Fed.Appx. 939, 942–43 (5th Cir.2012).

6 Chapter 9 of the Texas Civil Practice and Remedies Code also addresses frivolous pleadings and claims, but its application is limited to proceedings in which neither Rule 13 nor Chapter 10 applies. *See* Tex. Civ. Prac. & Rem.Code § 9.012(h); *see also Low,* 221 S.W.3d at 614 (noting "Chapter 9 of the Texas Civil Practice and Remedies Code only applies in proceedings in which neither Rule 13 nor Chapter 10 applies"). Chapter 9 has largely been subsumed by subsequent revisions to the code. *See* Cynthia Nguyen, *An Ounce of Prevention is Worth a Pound of Cure?: Frivolous Litigation Diagnosis Under Texas Government Code Chapters 9 and 10, and Texas Rule of Civil Procedure 13,* 41 S. Tex. L.Rev. 1061, 1083–84 (2000) (theorizing "it would be difficult to conceive of a scenario in which Chapter 9 would be applicable," and noting that "there are only a handful of cases that even cite Chapter 9, and these date from before the 1999 amendment to Section 9.012").

7 Section 10.001 of the Civil Practice and Remedies Code is worded similarly to Federal Rule of Civil Procedure 11(b). *See Low,* 221 S.W.3d at 615.

8 *See also Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 849 (Tex.1992) (citing *TransAmerican* to note that "[a] permissible sanction should, therefore, be no more severe than required to satisfy legitimate purposes. This means that a court must consider relatively less stringent sanctions first to determine whether lesser sanctions will fully promote compliance, deterrence, and discourage further abuse").

9 Although imposed pursuant to the federal groundless pleadings rule, *see supra* note 7, federal pleadings sanctions may also provide a useful barometer to gauge the size of typical awards. *See generally* Maryann Jones, "*Stop, Think, & Investigate*": *Should California Adopt Federal Rule 11?,* 22 Sw. U.L.Rev. 337, 354 (1993) (noting that "[w]hile there are reported cases of awards exceeding $100,000, a recent comprehensive survey of Rule 11 sanctions in the Fifth, Seventh, and Ninth Circuits shows that the median sanction imposed pursuant to Rule 11 [at that time was] $2,500").

10 *See* Tex. Civ. Prac. & Rem.Code § 10.001 (providing that signing a pleading or motion certifies that "the pleading or motion is not being presented for any improper purpose, ... each claim, defense, or other legal contention in the pleading or motion is warranted by existing law ... [and] each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); *see also Low,* 221 S.W.3d at 615 (recognizing that Chapter 10 requires analysis of each claim against each defendant).

11 *Austin v. United States,* 509 U.S. 602, 622, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

12 For example, the fourth amended petition claimed:

> Defendants were further motivated to discredit Dr. Nath, damage his reputation, and remove him from their facilities because Dr. Nath had discovered that Dr. Shenaq had become partially or completely blind in one eye after suffering a detached retina in 2003.... On information and belief, Defendants sought to protect their own interests when they failed to inform Dr. Shenaq's patients about Dr. Shenaq's compromised medical condition.... Drs. Grossman and Brunicardi, along with Baylor and [the Hospital], knew that Dr. Nath was concerned about, and was knowledgeable of, Dr. Shenaq's condition and were fearful that Dr. Nath would make Dr. Shenaq's condition public.

13 For example, the sixth amended petition alleged "that many patients were operated on or treated by Dr. Shenaq at Baylor and [the Hospital] after Dr. Shenaq had become partially or completely blind in one eye after suffering a detached retina in November 2003...."

14 While bad faith must be coupled with groundless pleadings to support sanctions under Rule 13, Tex.R. Civ. P. 13, an improper purpose alone is a sufficient predicate for sanctions under Chapter 10, Tex. Civ. Prac. & Rem.Code § 10.001; *see Low,* 221 S.W.3d at 617 (discussing the disjunctive nature of Chapter 10's bases for sanctions).

15 An attorney owes a client a duty to inform the client of matters material to the representation, provided such matters are within the scope of representation. *See, e.g., Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 160 (Tex.2004).

16 Tex. Disciplinary R. Of Prof'l Conduct pmbl. ¶ 1.

17 *Id.* at ¶ 2.

18 *Id.* at ¶ 4.

19 *Id.* at ¶ 1.

20 *See* Tex. Civ. Prac. & Rem.Code § 10.002 (providing that court may sanction a party or attorney under Chapter 10 "on its own initiative"); Tex.R. Civ. P. 13 (providing that court may sanction a party or attorney under Rule 13 "upon its own initiative").

21 Tex. Civ. Prac. & Rem.Code § 16.002(a).

22 "[A] defamatory statement is one that tends to injure a person's reputation." *Hancock v. Variyam,* 400 S.W.3d 59, 62 (Tex.2013).

23 *Cf. Dolenz v. Boundy,* 197 S.W.3d 416, 421–22 (Tex.App.-Dallas 2006, pet. denied) (affirming pleadings sanctions of $250 against a party when the party was a lawyer proceeding pro se and presumably aware that the claims were time-barred).

24 For example, on or about June 2, 2004, Nath learned his appointment at Baylor was not renewed because of his billing practices and minimal academic contributions. Nath's affidavit also indicates he learned of seven other allegedly defamatory statements in 2004.

25 *See also Able Supply Co. v. Moye,* 898 S.W.2d 766, 772 (Tex.1995).

26 For example, Chapter 10 specifies that anyone signing a pleading certifies that each allegation "has evidentiary support or ... is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Tex. Civ. Prac. & Rem.Code § 10.001(3). Likewise, the trial court's sanctions order in *Low* indicated that the factual contentions "did not, on January 31, 2002 [when the petition was filed], and do not now, have evidentiary support; nor were they on January 31, 2002, likely to have evidentiary support after a reasonable opportunity for further investigation." 221 S.W.3d at 617.

27 This analysis need not detain us here. Nath engaged in questionable discovery conduct surrounding the original setting for the summary judgment motions. But even if this conduct was sanctionable as discovery abuse, it occurred during a time when Nath's fourth, fifth, and sixth amended petitions were on file—which we have found to be sanctionable pleadings. Thus, we need not assess whether such conduct was sanctionable for a second reason. And in any event, the Hospital and Baylor did not move for discovery sanctions.

28 *See Nationwide Bi–Weekly Admin., Inc. v. Belo Corp.,* 512 F.3d 137, 146–47 (5th Cir.2007); *Williamson v. New Times, Inc.,* 980 S.W.2d 706, 710–11 (Tex.App.-Fort Worth 1998, no pet.); *Martinez v. Hardy,* 864 S.W.2d 767, 776 (Tex.App.-Houston [14th Dist.] 1993, no writ); *Gulf Atl. Life Ins. Co. v. Hurlbut,* 696 S.W.2d 83, 97–98 (Tex.App.-Dallas 1985), *rev'd on other grounds,* 749 S.W.2d 762 (Tex.1987).

29 The list of nonexclusive factors we enumerated was:

a. the good faith or bad faith of the offender;
b. the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
c. the knowledge, experience, and expertise of the offender;
d. any prior history of sanctionable conduct on the part of the offender;
e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;
g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
h. the risk of chilling the specific type of litigation involved;
i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
j. the impact of the sanction on the offended party, including the offended person's need for compensation;
k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;

....

n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

Low, 221 S.W.3d at 620 n. 5 (quoting American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, reprinted in 121 F.R.D. 101, 104 (1988) (omission in original)).

30 We are confident in the trial court's ability to resolve this discrete issue on remand either on the existing record or, at most, after a hearing examining briefing accompanied by affidavits regarding the degree to which the Hospital and Baylor caused their attorney's fees.

1 Only the judge hearing the recusal motion may assess these sanctions. Tex.R. Civ. P. 18a(h).

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IN THE SUPREME COURT OF TEXAS

NO. 12-0620

RAHUL K. NATH, M.D., PETITIONER,

v.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fourteenth District, and having considered the appellate record, briefs, and counsels' argument, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The case is remanded to the trial court for further proceedings consistent with this Court's opinion; and

3) The parties shall bear the costs they incurred in this Court.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fourteenth District and to the District Court of Harris County, Texas, for observance.

Opinion of the Court delivered by Justice Guzman,

joined by Chief Justice Hecht, Justice Johnson, Justice Willett, and Justice Devine.

Dissenting opinion filed by Justice Green, joined by Justice Lehrmann, Justice Boyd, and Justice Brown.

August 29, 2014

****

IN THE SUPREME COURT OF TEXAS

NO. 12-0620

RAHUL K. NATH, M.D., PETITIONER

V.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

MANDATE

To the Trial Court of Harris County, Greetings:

Before our Supreme Court on August 29, 2014, the Cause, upon petition for review, to revise or reverse your Judgment.

No. **12-0620** in the Supreme Court of Texas

No. **14-11-00034-CV** in the **Fourteenth** Court of Appeals

No. **2006-10826** in the **215th District Court** of **Harris** County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fourteenth District, and having considered the appellate record, briefs, and counsels' argument, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The case is remanded to the trial court for further proceedings consistent with this Court's opinion; and

3) The parties shall bear the costs they incurred in this Court.

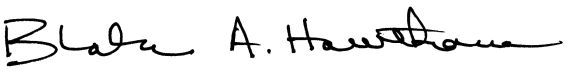
Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fourteenth District and to the District Court of Harris County, Texas, for observance.

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS,

with the seal thereof annexed, at the City of Austin, this the 21st day of November, 2014.

Blake A. Hawthorne, Clerk



By Monica Zamarripa, Deputy Clerk

APPENDIX B

576 S.W.3d 707
Supreme Court of Texas.

Rahul K. NATH, M.D., Petitioner,

v.

TEXAS CHILDREN'S HOSPITAL and Baylor College of Medicine, Respondents

No. 17-0110
|
Opinion Delivered: June 21, 2019

Synopsis

Background: Plastic surgeon filed suit against hospital and college of medicine, asserting claims for defamation and tortious interference. The 215th District Court, Harris County, entered summary judgment in defendants' favor and awarded attorney fees to defendants as sanction for surgeon's filing of frivolous claims. Surgeon appealed, and the Court of Appeals, 375 S.W.3d 403, affirmed. On surgeon's petition for review, the Supreme Court, 446 S.W.3d 355, remanded for reconsideration of sanctions award. On remand, the District Court, Elaine H. Palmer, J., reassessed sanctions in same amount, and surgeon appealed. The Houston Court of Appeals, 14th District, 2016 WL 6767388, affirmed. Surgeon petitioned for discretionary review.

Holdings: The Supreme Court held that:

in order to shift attorney fees to surgeon as sanction for frivolous claims, hospital and college had to show that fees incurred in defending claims were reasonable, abrogating *Pressley v. Casar*, 567 S.W.3d 28, *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, *Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, *Olibas v. Gomez*, 242 S.W.3d 527, *Glass v. Glass*, 826 S.W.2d 683, and *Allied Assocs., Inc. v. INA Cty. Mut. Ins. Cos.*, 803 S.W.2d 799, and

conclusory affidavits that merely referenced attorney fees incurred in defending frivolous claims were insufficient to show that fees incurred were reasonable.

Judgment of Court of Appeals reversed; remanded to District Court.

***708** On Petition for Review from the Court of Appeals for the Fourteenth District of Texas, Wise, Kenneth Price, Judge

Attorneys and Law Firms

Alexandra W. Albright, Douglas W. Alexander, Alexander Dubose & Jefferson LLP, Austin, for Amicus Curiae Association of Extremity Nerve Surgeons.

Melissa A. Lorber, Craig T. Enoch, Michael S. Truesdale, Enoch Kever PLLC, Austin, Brad Beers, Beers Law Firm, Houston, for Petitioner.

Joy M. Soloway, Jamila Shukura Mensah, Shauna Johnson Clark, Norton Rose Fulbright US LLP, Houston, Edward B. Adams Junior, Fulbright & Jaworski LLP, Houston, Jaclyn Hermes Caugherty, Exxon Mobil Corp. Law Dept., Houston, Stacey Neumann Vu, Catherine 'Cathy' B. Smith, Patrick W. Mizell, Russell T. Gips, Vinson & Elkins LLP, Houston, for Respondents.

Opinion

PER CURIAM

This is the second appeal of a $ 1.4 million sanction, levied to compensate the prevailing parties, Texas Children's Hospital and Baylor College of Medicine, for their attorney's fees in defending against a frivolous suit. In the first appeal, the Hospital and Baylor moved for attorney's fees as a compensatory sanction based on Nath's frivolous claims that the trial court described as frivolous *ab initio*. *Nath v. Tex. Children's Hosp.* (*Nath I*), 446 S.W.3d 355, 364–65, 372 (Tex. 2014); *see also* Tex. Civ. Prac. & Rem. Code § 10.004(c)(3); Tex. R. Civ. P. 13. We agreed that Nath's pleadings were groundless and sanctionable. *Nath I*, 446 S.W.3d at 371–72. We remanded, however, because the parties had litigated merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment, noting that "the degree to which the Hospital and Baylor caused their attorney's fees is a relevant inquiry." *Id.* at 372. While acknowledging that placing the entire cost of litigation on Nath might be proper, we noted further that a party "cannot arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for sanctions." *Id.* We remanded for the trial court to reassess its award of attorney's fees.

On remand, the prevailing parties' attorneys submitted affidavits, asserting they did nothing to prolong the suit or unnecessarily increase their fees. The affidavits stated total amounts billed to their clients in defending against Nath's frivolous suit. The trial court found the evidence sufficient and reassessed the same $ 1.4 million sanction for attorney's fees "pursuant to Chapter 10 of the Texas Civil Practice and Remedies Code and/or Texas Rule of Civil Procedure 13."

Nath argues that the Hospital and Baylor's affidavits are insufficient to prove that the $ 1.4 million sanction is a reasonable and necessary attorney's fee. *See In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) (observing that the party seeking attorney's fees "bears the burden of establishing the fees are reasonable and necessary"). The Hospital and Baylor, however, argue that a different standard of proof applies for attorney's fees awarded ***709** as sanctions because the purpose of sanctions is to punish violators and deter misconduct. Because sanctions are intended to punish, the Hospital and Baylor argue they should not be held to the same evidentiary burden as in other fee-shifting cases. *Cf. Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 2019 WL 1873428 (Tex. 2019) (clarifying the evidentiary standards for shifting attorney's fees). Indeed, some courts of appeal have not required proof of necessity or reasonableness when assessing attorney's fees as sanctions. *See, e.g.*, *Quick Change Artist, LLC v. Accessories*, No. 05-14-01562-CV, 2017 WL 563340, at *6 (Tex. App.—Dallas Feb. 13, 2017, no pet.) (mem. op.); *Pressley v. Casar*, 567 S.W.3d 28, 61 (Tex. App.—Austin 2016), *rev'd per curiam,* 567 S.W.3d 327 (Tex. 2019); *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 575–76 (Tex. App.—San Antonio 2011, no pet.); *Scott Bader, Inc. v. Sandstone Prods., Inc.*, 248 S.W.3d 802, 816–17 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Olibas v. Gomez*, 242 S.W.3d 527, 535 (Tex. App.—El Paso 2007, pet. denied); *Glass v. Glass*, 826 S.W.2d 683, 688 (Tex. App.—Texarkana 1992, writ denied); *Allied Assocs., Inc. v. INA Cty. Mut. Ins. Cos.*, 803 S.W.2d 799, 799 (Tex. App.—Houston [14th Dist.] 1991, no writ).

This line of authority is premised on a misunderstanding of a per curiam opinion from this Court. In *Brantley v. Etter*, we refused the writ, no reversible error, observing in a brief opinion that a party complaining about an award of attorney's fees as a sanction does not have the right to a jury trial on the amount of the sanction. 677 S.W.2d 503, 504 (Tex. 1984) (per curiam). Rather, we said the amount awarded by the trial court was solely within the court's sound discretion, subject only to its abuse. *Id.* Several years later, an intermediate appellate court cited *Brantley* to support its "belief that proof of attorney's fees expended or the reasonableness thereof is not required when such fees are assessed as sanctions." *Allied Assocs.*, 803 S.W.2d at 799. The line of authority thus developed from this initial misunderstanding regarding the proof necessary to invoke the trial court's discretion.

Before a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness because without such proof a trial court cannot determine that the sanction is "no more severe than necessary" to fairly compensate the prevailing party. *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex. 2008) (quoting *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)); *see also Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007) ("[A] sanction cannot be excessive nor should it be assessed without appropriate guidelines."). "Consequently,

when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016).

Chapter 10 of the Civil Practice and Remedies Code authorizes a court to award sanctions for groundless allegations and other pleadings presented for an improper purpose. Tex. Civ. Prac. & Rem. Code §§ 10.001-.006. The sanction may include a "directive" from the court, the payment of a "penalty into court," and a payment to the opposing party of "the amount of the reasonable expenses incurred by the other party ... including reasonable attorney's fees." *Id.* § 10.004(c)(1)-(3). We have recently clarified the legal and evidentiary requirements to establish a reasonable attorney's fee in a fee-shifting situation. *See* ***710** *Rohrmoos*, 578S.W.3d at 492. Although this case deals with attorney's fees awarded through a sanctions order, the distinction is immaterial because all fee-shifting situations require reasonableness.

On remand, the Hospital and Baylor attempted to prove the reasonableness of the awarded fees by submitting two additional conclusory affidavits. Although we expressed confidence in *Nath I* that the reasonableness of the sanction might be resolved on the existing record or through additional affidavits, 446 S.W.3d at 372 n.30, the subsequent affidavits here merely reference the fees without substantiating either the reasonable hours worked or the reasonable hourly rate. *See Rohrmoos,* 578 S.W.3d at 498 (explaining the applicability of the lodestar analysis for fee-shifting awards). *Rohrmoos* explains the necessity of presenting either billing records or other supporting evidence when seeking to shift attorney's fees to the losing party. *Id.* Conclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here. *See Long v. Griffin*, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam) (overturning an attorney's fee award when the affidavit supporting the fees "only offer[ed] generalities" and "no evidence accompanied the affidavit"); *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763–64 (Tex. 2012) (discussing the insufficiency of attorney's fee evidence that "based [its] time estimates on generalities").

The trial court's judgment awards the Hospital attorney's fees of $ 726,000 and Baylor attorney's fees of $ 644,500.16 for their respective defenses to Nath's groundless claims and recites that this amount "fairly compensates [them] with regard to defending against the claims that serve as the basis for this award." The court has thus used its authority under Chapter 10 to shift responsibility for the defendant's reasonable attorney's fees to the plaintiff, Nath, as a penalty for his pursuit of groundless claims. Because the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions, we reverse the court of appeals' judgment affirming the sanctions award and, without hearing oral argument, remand the case to the trial court for further proceedings in light of *Rohrmoos*. *See* Tex. R. App. P. 59.1.

Justice Guzman did not participate in this decision.

All Citations

576 S.W.3d 707, 62 Tex. Sup. Ct. J. 1290

IN THE SUPREME COURT OF TEXAS

NO. 17-0110

RAHUL K. NATH, M.D., PETITIONER,

v.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fourteenth District, and having considered the appellate record and briefs, but without hearing oral argument under Texas Rule of Appellate Procedure 59.1, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The case is remanded to the trial court for further proceedings consistent with this opinion; and

3) Rahul K. Nath shall recover, and Texas Children's Hospital and Baylor College of Medicine shall pay, the costs incurred in this Court.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fourteenth District and to the District Court of Harris County, Texas, for observance.

Opinion of the Court delivered Per Curiam. Justice Guzman did not participate in the decision.

June 21, 2019

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IN THE SUPREME COURT OF TEXAS

NO. 17-0110

RAHUL K. NATH, M.D., PETITIONER

V.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

MANDATE

To the Trial Court of Harris County, Greetings:

Before our Supreme Court on June 21, 2019, the Cause, upon petition for review, to revise or reverse your Judgment.

No. **17-0110** in the Supreme Court of Texas

No. **14-15-00364-CV** in the **Fourteenth** Court of Appeals

No. **2006-10826** in the **215th District Court** of **Harris** County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fourteenth District, and having considered the appellate record and briefs, but without hearing oral argument under Texas Rule of Appellate Procedure 59.1, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The case is remanded to the trial court for further proceedings consistent with this opinion; and

3) Rahul K. Nath shall recover, and Texas Children's Hospital and Baylor College of Medicine shall pay, the costs incurred in this Court.

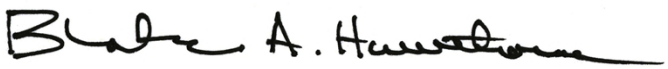
Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fourteenth District and to the District Court of Harris County, Texas, for observance.

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS,

with the seal thereof annexed, at the City of Austin, this the 1st day of August, 2019.

Blake A. Hawthorne, Clerk



By Monica Zamarripa, Deputy Clerk

APPENDIX C

2021 WL 451041
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Houston (14th Dist.).

Rahul K. NATH, M.D., Appellant

v.

TEXAS CHILDREN'S HOSPITAL and Baylor College of Medicine, Appellees

NO. 14-19-00967-CV, NO. 14-20-00231-CV

|

Opinion filed February 9, 2021

On Appeal from the 215th District Court, Harris County, Texas, Trial Court Cause No. 2006-10826

Attorneys and Law Firms

Patrick W. Mizell, Catherine B. Smith, Brooke Noble, Stacey Neumann Vu, for Appellees Texas Children's Hospital.

Brad Beers Craig, Trively Enoch, Melissa A. Lorber, for Appellant.

Jamila Shukura Mensah, Joy M. Soloway, for Appellees Baylor College of Medicine.

Panel consists of Justices Wise, Bourliot, and Hassan.

SUBSTITUTE MEMORANDUM OPINION

Meagan Hassan, Justice

***1** Fourteen years after the inception of this lawsuit, Dr. Rahul K. Nath, M.D. pursues his third and fourth appeals in this case. In this third appeal, Nath asserts the trial court erred by denying his motion to dismiss brought under the Texas Citizens Participation Act. Nath also contends that he is entitled to an interlocutory appeal with respect to said denial. We overrule the issues in Nath's third appeal.

In the fourth appeal, Nath raises four issues challenging the sanctions awarded to appellees Texas Children's Hospital (the "Hospital") and Baylor College of Medicine (together with the Hospital, "Appellees"). Specifically, the trial court's final judgment awards the Hospital $726,000 in attorney's fees and awards Baylor $644,500.16 in attorney's fees. The trial court's final judgment also awards the Hospital $489,800 in future appellate attorney's fees.

We sustain Nath's sufficiency challenge to the trial court's future appellate attorney's fees award. We suggested a remittitur of $50,375, which would result in an award of $439,425 for the Hospital's future appellate attorney's fees. The Hospital has timely filed a remittitur. We therefore modify the trial court's final judgment and affirm as modified.

Background

I. The Underlying Litigation and Resulting Sanctions

Nath is a plastic surgeon who was employed by Baylor and affiliated with the Hospital. Nath reported to Dr. Saleh Shenaq, the chief of Baylor's plastic surgery division and Nath's partner at the Hospital's obstetrical brachial plexus clinic. Nath's relationship with his colleagues (including Shenaq) turned acrimonious in 2003, when several doctors complained that Nath billed excessively, performed unnecessary procedures, and treated fellow colleagues in an unprofessional manner.

In February 2006, Nath filed his original petition against Baylor, the Hospital, and Shenaq, claiming the defendants made defamatory statements about Nath that tortiously interfered with his business relationships. Approximately two months later, Nath filed a first amended petition naming two additional defendants. These defendants' addition resulted in a jurisdictional dispute that ended in September 2008, when Nath non-suited the additional defendants in his third amended petition. Nath's third amended petition also asserted additional claims against Baylor and the Hospital.

In November 2008, Nath filed a fourth amended petition alleging Shenaq had been operating on patients while his vision was impaired. Nath filed his fifth amended petition in July 2009 and sought declaratory relief based on Shenaq's alleged health problems. In December 2009, the Hospital filed traditional and no-evidence summary judgment motions with respect to all of Nath's claims. Baylor filed traditional and no-evidence summary judgment motions challenging Nath's claims in January 2010.

***2** After Appellees filed their summary judgment motions, Nath moved to compel additional depositions, extend the deadline to respond to the motions, and continue the summary judgment hearing—all of which were granted. Nath again moved to continue the summary judgment hearing, which was denied. Nath filed motions to recuse both the trial judge and the judge assigned to hear the first recusal motion; both motions were denied.

Nath filed a sixth amended petition, in which he abandoned all of his prior claims and asserted a new claim for intentional infliction of emotional distress. Appellees again moved for summary judgment; Nath did not respond and instead objected to the notice of hearing based on a technical defect. The trial court granted Appellees' summary judgment motions.

Appellees sought sanctions against Nath under Texas Rule of Civil Procedure 13 and chapter 10 of the Texas Civil Practice and Remedies Code. The trial court held hearings on the motions for sanctions and issued sanctions based on, among other things: (1) "Nath's improper purpose in filing the pleadings in this case"; (2) "the bad faith that [Nath's] actions manifest"; and (3) "the lack of any factual predicate for [Nath's] claims, as previously established by the court's orders granting the motions for summary judgment." The trial court explained that its finding of bad faith stemmed from Nath's conduct in seeking information related to Shenaq's health—conduct for which the trial court had previously (and repeatedly) admonished Nash. The trial court concluded that Nath's leveraging of this information in an attempt to obtain a settlement constituted an improper purpose.

The trial court sanctioned Nath in the amount of $726,000 in favor of the Hospital, representing a portion of the Hospital's reasonable fees in defending the suit, and in the amount of $644,500.16 in favor of Baylor, representing a portion of Baylor's reasonable fees defending the suit. The trial court also filed extensive findings of fact and conclusions of law supporting the sanctions orders. Nath appealed.

II. *Nath I*

This court upheld the sanctions awards in Nath's 2012 appeal. *See Nath v. Tex. Children's Hosp.*, 375 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2012), *rev'd*, 446 S.W.3d 355 (Tex. 2014).

Nath pursued his appeal to the Texas Supreme Court. *See Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355 (Tex. 2014) ("*Nath I*"). "[A]gree[ing] with the court of appeals that the trial court properly found Nath's pleadings sanctionable," the supreme court held that "[s]anctioning Nath for pleadings related to Shenaq's health was demonstrably just" and "supported by some evidence". *Id.* at 361, 365. The supreme court also held that the trial court did not abuse its discretion by sanctioning Nath personally, particularly in light of Nath's efforts to seek information about Shenaq's health. *Id.* at 366.

The supreme court then addressed the amount of sanctions awarded by the trial court. *See id.* at 371-72. The supreme court noted the trial court considered most of the relevant factors in *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007), which were promulgated to "guid[e] the often intangible process of determining a penalty for sanctionable behavior." *Id.* at 620 n.5. But the supreme court held the trial court failed to address one *Low* factor: the degree to which Appellees' conduct caused the expenses for which they sought recovery. *Nath I*, at 371-72,. Specifically, the supreme court noted that "all three parties litigated a host of merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment on such grounds as limitations." *Id.* The supreme court remanded the case so the trial court could "examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years." *Id.* at 373.

III. *Nath II*

***3** Back in the trial court, Nath filed several motions, including a motion to disqualify Appellees' counsel and a motion for continuance. Appellees filed motions to reassess sanctions.

The trial court held a hearing on Appellees' motions. On January 20, 2015, the trial court granted Appellees' motions to reassess sanctions and later issued supplemental findings of fact and conclusions of law in which it determined that no behavior by either the Hospital or Baylor caused the expenses for which they sought recovery. The trial court ordered Nath to pay the Hospital $726,000 for its attorney's fees and pay Baylor $644,500.16 for its attorney's fees.

Nath appealed and this court affirmed the trial court's sanctions awards. *See Nath v. Tex. Children's Hosp.*, 576 S.W.3d 728, 743 (Tex. App.—Houston [14th Dist.] 2016), *rev'd*, 576 S.W.3d 707 (Tex. 2019) (per curiam). Nath again pursued his appeal to the Texas Supreme Court. *See Nath v. Tex. Children's Hosp.*, 576 S.W.3d 707 (Tex. 2019) (per curiam) ("*Nath II*"). Reversing this court's decision, the supreme court held that, before fees may be shifted as a sanction, "there must be some evidence of reasonableness". *Id.* at 709. The supreme court pointed out that, on remand, Appellees attempted to prove reasonableness "by submitting two additional conclusory affidavits". *Id.* at 710. Referencing its decision in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), the supreme court said it previously "explain[ed] the necessity of presenting either billing records or other supporting evidence when seeking to shift attorney's fees to the losing party." *Nath II*, at 710,. The Court then "remand[ed] the case to the trial court for further proceedings in light of *Rohrmoos*." *Id.*

IV. Proceedings After the Second Remand

Back in the trial court, Appellees filed separate applications for attorney's fees. Both applications included billing records to substantiate the claimed fees.

Nath aggressively pursued discovery and motion practice that included (1) noticing corporate representative and nonparty depositions related to Appellees' 2010 decisions to seek sanctions; (2) filing a cross-motion for sanctions; (3) filing motions to disqualify Appellees' counsel; (4) filing special exceptions to Appellees' motions for sanctions; and (5) filing a jury demand seeking a retrial of all issues.

Nath also filed a motion to dismiss pursuant to the Texas Citizens Participation Act (the "TCPA"). *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.011. Nath set his TCPA motion to dismiss for hearing on December 10, 2019, the same day as the evidentiary hearing on Appellees' fee applications. On December 5, 2019, Nath filed a premature notice of appeal. In the notice, Nath stated the appeal was deliberately premature and filed in the event the trial court refused to rule on his TCPA motion. This appeal was assigned case number 14-19-00967-CV.

At the December 10 hearing, the trial court heard arguments on Nath's TCPA motion and took it under advisement. The trial court proceeded to hear evidence with respect to Appellees' fee applications.

On December 18, 2019, the trial court entered findings of fact and conclusions of law in which it determined that the evidence supported reassessing sanctions against Nath in the same amounts awarded in 2010: $726,000 for the Hospital's attorney's fees

and $644,500.16 for Baylor's attorney's fees. On December 27, 2019, the trial court signed a final judgment ordering Nath to pay these amounts to Appellees. The trial court's final judgment also awards the Hospital $489,800 for its future appellate attorney's fees. With respect to Nath's TCPA motion, the final judgment states:

> ***4** Subsequent to this award of attorneys' fees as sanctions, it is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Rahul K. Nath's Motion to Dismiss dated November 18, 2019 is DENIED.

Nath filed a second notice of appeal with respect to the trial court's final judgment, which was assigned case number 14-20-00231-CV. By order dated April 16, 2020, and over Nath's objections, this court consolidated Nath's two appeals.

Analysis

Nath's two appeals present a total of seven issues. His third appeal focuses on issues related to the trial court's disposition of his TCPA motion to dismiss and his fourth appeal addresses the trial court's sanctions award. We address these issues separately.

I. Nath's TCPA Motion to Dismiss

Nath raises three issues with respect to his TCPA motion to dismiss:

1. Nath is entitled to pursue an interlocutory appeal of the trial court's denial of his TCPA motion to dismiss while the remainder of the case is stayed.
2. The trial court erred in denying Nath's motion to dismiss.
3. This court should reverse its decision to consolidate Nath's appeals and stay its review of Nath's second appeal until the interlocutory appeal is resolved.

Because they raise similar arguments, we begin by addressing Nath's first and third issues together.

A. Nath Is Not Entitled to Pursue an Interlocutory Appeal of the Denial of His TCPA Motion Independent From the Remainder of the Final Judgment.

In general, Texas appellate courts have jurisdiction only with respect to final judgments. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). But statutes authorizing interlocutory appeals are a narrow exception to this general rule. *Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020).

Relevant here, the Civil Practice and Remedies Code provides for interlocutory appeal of an order that "denies a motion to dismiss filed under Section 27.003" of the TCPA. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12). An interlocutory appeal under this section "stays the commencement of trial" and "also stays all other proceedings in the trial court pending resolution of that appeal." *Id.* at (b).

Relying on these provisions, Nath argues he is entitled to pursue an interlocutory appeal from the trial court's denial of his TCPA motion to dismiss while the remainder of the trial court's final judgment is stayed pending the resolution of that appeal. Nath contends his interlocutory appeal was perfected at the December 10, 2019 hearing or, in the alternative, after the trial court signed its final judgment.

1. The December 10 Hearing

We begin with Nath's contention that his interlocutory appeal was perfected at the December 10 hearing when the trial court heard argument on Nath's TCPA motion and took it under advisement. After the trial court took the motion under advisement, Nath asserts that his counsel (1) demanded a ruling on the motion to dismiss; (2) objected to the trial court's refusal to rule; (3)

re-urged the objection to the refusal to rule; and (4) objected to the trial court's refusal to rule on that objection. This exchange, Nath argues, constitutes a deemed denial of his TCPA motion to dismiss that perfected his prematurely-filed appeal and invoked a mandatory stay of further proceedings. *See* Tex. R. App. P. 27.1(a) ("In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.").

***5** But the cases Nath cites do not support this contention. Two of these cases involve preservation of error and do not address the "deemed denial" of a motion. *See In re W.A.B.*, No. 14-18-00181-CV, 2019 WL 2181205, at *2 (Tex. App.—Houston [14th Dist.] May 21, 2019, no pet.) (mem. op.) (the appellant's challenge to the trial court's denial of his motion for continuance was not preserved where the record did "not show that [appellant] presented the motion for continuance to the trial court with a request for a ruling or otherwise brought it to the trial court's attention before the final judgment was rendered"); *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 449 (Tex. App.—Dallas 2011, no pet.) (error was not preserved where the record did not show the appellant brought her motions to the trial court's attention or that the trial court ruled on them). And in the third case Nath cites, the relator filed a petition for writ of mandamus after the trial court took the relator's chapter 74 motion to dismiss under advisement but failed to issue a ruling for approximately nine months. *See In re Baylor Coll. of Med.*, Nos. 01-19-00105-CV, 01-19-00142-CV, 2019 WL 3418504, at *1-2 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (per curiam) (mem. op.). This case is not analogous to the facts presented here, where the trial court took Nath's motion under advisement and ruled on it nine days later. These cases do not compel the conclusion that the trial court's actions at the December 10 hearing constituted a "deemed denial" of Nath's TCPA motion to dismiss.

The TCPA explicitly addresses when a motion brought pursuant to its provisions is deemed denied: when the motion has not been ruled on more than 30 days following the date the hearing on the motion concludes. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(a); *see also Inwood Forest Cmty. Improvement Ass'n v. Arce*, 485 S.W.3d 65, 72 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) ("the motions to dismiss were denied by operation of law as the TCPA requires when the trial court does not rule within the 30-day deadline"). Citing this provision, Nath argues that, "[b]y proceeding to trial on the merits, the trial court 'ruled' that [Appellees'] claims ... should not be dismissed." Nath cites no direct authority to support this contention and this court has found none.

Instead, the TCPA provides that, upon the filing of a motion under this section, "all discovery in the legal action is suspended until the court has ruled on the motion to dismiss." Tex. Civ. Prac. & Rem. Code Ann. § 27.003(c). If the Legislature had intended for the filing of a TCPA motion to dismiss to stay ***all*** proceedings, instead of just discovery, it would have stated so in the relevant provision. *See Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325-26 (Tex. 2017) ("We presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.") (internal quotation omitted). But it did not and we decline to expand the provision beyond its plain meaning. *See id.* at 326 ("we take statutes as we find them and refrain from rewriting the Legislature's text"); *see also In re SPEX Grp. US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *3-4 (Tex. App.—Dallas Mar. 14, 2018, orig. proceeding, [mand. dism'd]) (mem. op.) (concluding that the TCPA does not "prohibit a trial court from considering and granting a temporary restraining order or a temporary injunction before deciding a motion to dismiss brought under the TCPA").

We reject Nath's contentions that (1) the trial court's actions at the December 10 hearing constituted a "deemed denial" of his TCPA motion, and (2) the trial court denied his TCPA motion by proceeding to an evidentiary hearing regarding Appellees' fee applications. Therefore, Nath's prematurely-filed appeal was not perfected at the December 10 hearing and Nath was not entitled to a stay of all proceedings.

2. The Trial Court's Final Judgment

In addition to awarding Appellees their attorney's fees, the trial court's December 27, 2019 final judgment also explicitly denies Nath's TCPA motion to dismiss. Nath argues that "[t]he TCPA denial portion of the court's order is reviewable in this interlocutory appeal before the rest of the purported final judgment takes effect."

***6** Nath does not cite any authority to support his proposition and this court has found none. Rather, a review of relevant case law shows that the denial of a TCPA motion to dismiss may be considered in conjunction with other relief granted by the trial court. *See, e.g., Petrobras Am., Inc. v. Astra Oil Trading NV*, Nos. 14-18-00793-CV, 14-18-00798-CV, 2020 WL 4873226, at *22-25 (Tex. App.—Houston [14th Dist.] Aug. 20, 2020, pet. filed) (mem. op.); *Roach v. Ingram*, 557 S.W.3d 203, 211-12, 216-18, 228-32 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

We reject Nath's argument that the trial court's denial of his TCPA motion is reviewable in an interlocutory appeal before the rest of the final judgment takes effect.

3. Consolidation of Nath's Appeals

After Nath filed his second notice of appeal, Appellees filed a motion to consolidate both appeals, which this court granted. Arguing that this decision should be reversed, Nath contends that consolidation was inappropriate because he has "a statutory right to first pursue an interlocutory appeal of the denial of his TCPA motion to dismiss."

To support this contention, Nath raises the same argument discussed above, namely, that his prematurely-filed appeal was perfected at the December 10 hearing. For the reasons discussed above, we conclude Nath's appeal was not perfected at the December 10 hearing.

We reject Nath's argument regarding the consolidation of his appeals.

B. The Trial Court Did Not Err by Denying Nath's TCPA Motion to Dismiss.

Asserting that the trial court should deny Nath's TCPA motion, Appellees raised the following arguments in their TCPA response:

- Nath's TCPA motion to dismiss was outside the scope of the Texas Supreme Court's limited remand.
- The TCPA does not apply to Appellees' sanctions motions because the motions were filed in 2010 and the TCPA did not become law until 2011.
- A motion for sanctions is not a "legal action" subject to dismissal under the TCPA.
- Alternatively, if the court were to find that the TCPA applies, Appellees met their burden of presenting a prima facie case with respect to the elements of their sanctions requests.

Nath challenges these bases on appeal and, in response, Appellees contend each ground is sufficient to affirm the trial court's denial of Nath's TCPA motion. Because we conclude Nath's TCPA motion to dismiss was outside the scope of remand as set out in *Nath I* and *Nath II*, we do not reach the other grounds raised in Appellees' joint response.

When an appellate court remands a case and limits a subsequent trial to a particular issue, the trial court may only determine that particular issue. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Russell v. Russell*, 478 S.W.3d 36, 42 (Tex. App.—Houston [14th Dist.] 2015, no pet.). On remand, "the trial court has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate." *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013). Moreover, the appellate court's judgment is final "not only in reference to the matters actually litigated, but as to all other matters that the parties might have litigated and had decided in the cause." *Scott Pelley P.C. v. Wynne*, 578 S.W.3d 694, 699 (Tex. App.—Dallas 2019, no pet.) (internal quotation omitted). In interpreting the mandate of an appellate court, the court should look not only to the mandate itself but also to the court's opinion. *Hudson*, 711 S.W.2d at 630.

***7** The facts in *Johnson-Todd v. Morgan*, Nos. 09-17-00168-CV, 09-17-00194-CV, 2018 WL 6684562 (Tex. App.—Beaumont Dec. 20, 2018, pet. denied) (mem. op.), are similar to those presented here. In the first appeal in the *Johnson-Todd* litigation, the appellate court instructed the lower court to dismiss the plaintiff's claims and award the defendant damages and costs. *Id.* at *2. On remand, the plaintiff filed a motion for sanctions and the defendant filed a TCPA motion to dismiss the plaintiff's sanctions motion. *Id.* The trial court denied the defendant's TCPA motion and the defendant appealed. *Id.*

On appeal, the court held that its "instructions in the prior appeal did not allow the trial court to consider [the defendant's] post-remand motion to dismiss ... under the TCPA". *Id.* Instead, the trial court only was instructed to award the defendant damages and costs. *Id.* Therefore, the trial court "had no authority to consider [the defendant's] post-remand motion to dismiss." *Id.*

Like the first *Johnson-Todd* appeal, the Texas Supreme Court's decisions in *Nath I* and *Nath II* significantly limited the issues remaining to be determined in the underlying proceeding. In *Nath I*, the supreme court concluded the trial court properly found that Nath's pleadings were sanctionable and did not abuse its discretion by imposing those sanctions upon Nath personally. *Nath I*, at 361, 365-66,. The supreme court remanded the case solely to permit the trial court to "examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years." *Id.* at 373.

And in *Nath II*, the supreme court remanded the case to the trial court "for further proceedings in light of *Rohrmoos*." *Nath II*, at 710,. The supreme court addressed shifting attorney's fees at length in *Rohrmoos* and reiterated its intention that "the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate". 578 S.W.3d at 498-99. Although "[c]ontemporaneous billing records are not required to prove that the requested fees are reasonable and necessary", such records "are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.* at 502 (emphasis in original).

Referencing these principles, the supreme court in *Nath II* stated:

> On [the first] remand, the Hospital and Baylor attempted to prove the reasonableness of the awarded fees by submitting two additional conclusory affidavits. Although we expressed confidence in *Nath I* that the reasonableness of the sanction might be resolved on the existing record or through additional affidavits, the subsequent affidavits here merely reference the fees without substantiating either the reasonable hours worked or the reasonable hourly rate. *Rohrmoos* explains the necessity of presenting either billing records or other supporting evidence when seeking to shift attorney's fees to the losing party. Conclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here.
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> * * *
>
> Because the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions, we reverse the court of appeals' judgment affirming the sanctions award and, without hearing oral argument, remand the case to the trial court for further proceedings in light of *Rohrmoos.*

***8** *Nath II*, at 710,.

Nath's TCPA motion to dismiss was beyond the scope of what was necessary to give full effect to supreme court's instructions in *Nath I* and *Nath II. See Phillips*, 407 S.W.3d at 234. Specifically, Nath's TCPA motion did not address (1) if and how Appellees' conduct in the underlying litigation contributed to their attorney's fees, or (2) the reasonableness and necessity of Appellees' claimed fees. *See Nath I*, at 373,; *Nath II*, at 710,. Instead, Nath's TCPA motion focused on Appellees' "Sanctions Motions" and the propriety of sanctioning Nath's conduct in the litigation—an issue separate from the calculation of and evidence necessary to support the requested attorney's fees. Therefore, the trial court had no authority to consider Nath's TCPA motion to dismiss. *See Phillips*, 407 S.W.3d at 234; *Hudson*, 711 S.W.2d at 630; *see also, e.g., Johnson-Todd*, 2018 WL 6684562, at *2.

We overrule Nath's issue regarding the trial court's denial of his TCPA motion to dismiss.

II. The Trial Court's Final Judgment

Nath raises four issues in his fourth appeal:

1. After it denied Nath's TCPA motion to dismiss, the trial court erred by proceeding to trial on the merits in violation of the automatic stay.

2. The trial court abused its discretion by denying Nath's jury demand.

3. The trial court abused its discretion by awarding $1.37 million in sanctions to Appellees.

4. The trial court erred by awarding the Hospital its future appellate attorney's fees.

Nath's first issue incorporates the arguments previously raised in his appeal from the trial court's denial of his TCPA motion. As we concluded above, these contentions lack merit. We overrule Nath's first issue and proceed to address the remaining three issues.

A. The Trial Court Did Not Err in Denying Nath's Jury Demand.

After the Texas Supreme Court remanded the case in *Nath II*, Nath filed in the trial court a jury demand "as to all issues". Appellees filed a motion to strike Nath's jury demand and the trial court granted the motion to strike in an order signed December 2, 2019. Asserting the trial court abused its discretion by granting Appellees' motion to strike, Nath argues that "[u]nder *Nath II* and *Rohrmoos*, [he] is entitled to have a jury determine the amount (if any) of reasonable and necessary compensatory attorney's fees awarded against him."

But neither *Nath II* nor *Rohrmoos* state that attorney's fees sought as sanctions must be tried to a jury. *See Nath II*, at 708-10,; *Rohrmoos*, 578 S.W.3d at 483-505. Moreover, the Texas Supreme Court previously has held that a party complaining about an award of attorney's fees as sanctions does not have the right to a jury trial on the amount of the sanction. *See Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam). In *Brantley*, the plaintiff was awarded monetary sanctions for attorney's fees because of the defendant's failure to comply with discovery orders. *Id.* The defendant appealed and the court of appeals affirmed the judgment with respect to the imposition of sanctions but concluded the defendant "was entitled to a jury trial on the issue of attorney's fees". *Id.* Reversing this determination, the supreme court stated:

> ***9** There is, however, language in the opinion of the court of appeals from which it could be inferred that one complaining of the award of attorney's fees as sanctions has the right to a jury trial to determine the amount of such attorney's fees. We do not think it was the intent of the court of appeals to provide for this, but as their opinion is susceptible to such interpretation, ***we expressly hold that the amount of attorney's fees awarded as sanctions for discovery abuse is solely within the sound discretion of the trial judge***, only to be set aside upon a showing of clear abuse of that discretion.

Id. (emphasis added); *see also Cantu v. Comm'n for Lawyer Discipline*, No. 13-16-00332-CV, 2020 WL 7064806, at *41 (Tex. App.—Corpus Christi Dec. 3, 2020, no pet. h.) (mem. op.) (citing *Brantley* to support conclusion that the appellant "did not have a constitutional right to a jury to determine his sanction in a disciplinary proceeding"); *Melasky v. Warner*, No. 09-11-00447-CV, 2012 WL 5960310, at *4 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.) ("When the trial court imposes sanctions, a party is not entitled to a jury determination concerning the amount the trial court may choose to award as sanctions.").

Nath does not cite any authority that warrants deviating from this precedent; instead, the cases on which Nath relies examine issues different from the one presented here. *See Transcont'l Ins. Co. v. Crump*, 330 S.W.3d 211, 227-232 (Tex. 2010) (examining "whether a judge or jury decides attorney's fees under Texas Labor Code § 408.221(c)"); *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547-49 (Tex. 2009) (concluding there was no evidence to support the jury's refusal to award any attorney's fees); *CHCA Woman's Hosp., L.P. v. Uwaydah*, No. 01-18-00220-CV, 2020 WL 4299567, at *9 (Tex. App.—Houston [1st Dist.] July 28, 2020, no pet.) (mem. op.) (after concluding the trial court, as fact finder, erred by rendering a take-nothing judgment on the defendant's counterclaim for breach of contract, the court remanded for a new trial on the issue of attorney's fees); and *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, No. 13-18-00364-CV, 2020 WL 2213951, at *7-10 (Tex. App.—Corpus Christi May

7, 2020, no pet.) (the nonmovant, whose suit was dismissed pursuant to the TCPA, was entitled to a jury determination as to the amount of the movant's statutory "reasonable attorney's fees" under the TCPA).

We overrule Nath's issue challenging the trial court's denial of his jury demand.

B. Sufficient Evidence Supports the Trial Court's Sanctions Awards.

Challenging the sanctions awards in the trial court's final judgment, Nath argues (1) the trial court abused its discretion in refusing to allow Nath to present evidence regarding his personal actions during the litigation, and (2) Appellees' "heavily redacted timesheets and billing records are not legally sufficient evidence" to support the awards. We reject both arguments.

1. Evidence Regarding Nath's Involvement in the Litigation

According to Nath, he "repeatedly requested that the trial court allow him to present evidence, on cross-examination and through his expert witness, concerning to what extent [he] engaged in conduct warranting sanctions." Nath argues that the trial court's exclusion of this evidence "runs afoul of the Texas Supreme Court's decision in *Nath I* and was in error."

We review a complaint regarding the admission or exclusion of evidence under an abuse of discretion standard. *Mandell v. Mandell*, 214 S.W.3d 682, 691 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995)). A trial court abuses its discretion when it acts in an unreasonable or arbitrary manner, or without reference to any guiding rules or principles. *Merrill v. Sprint Waste Servs. LP*, 527 S.W.3d 663, 669 (Tex. App.—Houston [14th Dist.] 2017, no pet.). "[W]e must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling." *Id.*

***10** As we discussed above with respect to Nath's challenge to the denial of his TCPA motion, on remand the trial court's authority is limited to those determinations necessary to give full effect to the appellate court's judgment and mandate. *See Phillips*, 407 S.W.3d at 234; *Hudson*, 711 S.W.2d at 630. In *Nath I*, the Texas Supreme Court remanded this case with respect to a single issue: to determine the extent to which Appellees caused the expenses they sought to recover as attorney's fees. *Nath I*, at 373,. And in *Nath II*, the supreme court remanded this case for a second time for "further proceedings in light of *Rohrmoos*", which "explain[ed] the necessity of presenting either billing records or other supporting evidence when seeking to shift attorney's fees". *Nath II*, at 710,.

The trial court did not abuse its discretion by concluding that evidence regarding Nath's personal actions during the litigation was irrelevant to the determinations remaining after *Nath I* and *Nath II.* Moreover, in *Nath I*, the supreme court examined evidence addressing "whether the sanction was visited on the true offender." *Nath I*, at 366,. "[R]eject[ing] Nath's argument and conclud[ing] the trial court did not abuse its discretion in labeling Nath the true offender", the supreme court held:

> Nath's conduct surrounding Shenaq's health appears to be less about pursuing a legal redress for an injury (the province of the attorney) and more about seeking irrelevant personal information (an extrajudicial desire of the client). While litigation is contentious by definition and often utilized to compel a desired end, we agree with the trial court that, on these facts, using a legal mechanism to force damaging, irrelevant information into the public domain and thereby compel a more favorable settlement constitutes an improper purpose.

Id. Against this backdrop, it was reasonable for the trial court to conclude that evidence regarding Nath's involvement in the litigation was not relevant to the issues remaining to be resolved.

We overrule Nath's challenge to the trial court's exclusion of evidence addressing his personal actions during the litigation.

2. Redacted Portions of Appellees' Billing Records

Citing collectively to hundreds of pages of billing records attached as exhibits to Appellees' fee applications, Nath contends that Appellees' "heavily redacted timesheets and billing records are not legally sufficient evidence to support the award."

Appellees filed approximately 350 pages of billing records with their fee applications. The billing records also were admitted into evidence at the hearing on Appellees' fee applications. Some of the entries in the Hospital's billing records are fully redacted and provide no information about their contents; similarly, some of the entries included in Baylor's billing records have a line running through the included information.

At the hearing, Patrick Mizell (one of the Hospital's attorneys) testified as follows with respect to the redacted entries in the Hospital's billing records:

> So we have in 2010 when I did this originally, I segregated fees which were not directly attributable to Nath's claims and so when you see it blacked out from left to right all the way across, ***that is for entries that we are not seeking fees***....

(emphasis added). And Shauna Clark (one of Baylor's attorneys) testified that these "strike throughs" in certain entries in Baylor's billing records represent "portions of the fees for which Baylor is not seeking reimbursements through sanctions."

As this testimony shows, the redacted entries of which Nath complains represent fees Appellees are not seeking to recoup as sanctions. Nonetheless, Nath asserts that "simply because [Appellees] are not seeking those amounts in this case does not mean that the information in those redacted records was not relevant and admissible." Nath does not cite any caselaw or other authority to support this contention.

***11** We reject Nath's argument. *Nath I* and *Nath II* remanded this case for a determination regarding Appellees' roles in causing the fees they sought to recover as sanctions and whether those fees were reasonable. *See Nath II*, at 710,; *Nath I*, at 373,. Because the redacted entries do not represent fees Appellees sought to recover, they do not render the evidence legally insufficient to support the trial court's sanctions award.

Rather, considered in light of *Rohrmoos*, the unredacted billing records constitute legally sufficient evidence supporting the trial court's sanctions award. In *Rohrmoos*, the supreme court stated that it intended for the "lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed" to determine the amount of attorney's fees to be awarded. 578 S.W.3d at 497-98. "[T]here is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to the non-prevailing party." *Id.* at 499.

"Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.* at 498. "General, conclusory testimony devoid of any real substance will not support a fee award." *Id.* at 501. Although billing records are not required to meet these requirements, such records "are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.* at 502 (emphasis in original).

The evidence and testimony admitted at the hearing on Appellees' fee applications satisfy this standard. The Hospital filed as an exhibit 172 pages of billing records showing the legal work performed with respect to Nath's case against the Hospital. Each entry in the billing records includes (1) the date the work was performed, (2) the person who performed the work, (3) a description of the work, (4) the time spent, and (5) the amount charged. The end of each billing invoice also lists the timekeepers that worked on the matter, the hours they spent, and the total amount charged for each person. The billing records show that this

work was performed from March 6, 2006 (approximately two weeks after Nath filed his original petition) through November 22, 2010 (after the trial court ruled on Nath's motions for new trial).

At the December 10 hearing, Mizell testified that the total fees charged to the Hospital during this period were $1,000.043.61. Mizell said that, "based on [his] analysis of the invoices and the segregation [he] performed," $802,498 was "directly attributable to the Hospital's defense of Nath's claims against it[.]" Mizell said the Hospital was seeking fees of $726,000, which was the original sanctions amount awarded by the trial court in 2010.

Mizell also provided a summary of the legal work performed with respect to Nath's claims over this four-year period. According to Mizell, he did not "believe [the Hospital's attorneys] caused any of the fees or contributed to the fees in the sense that we did anything to prolong the litigation or do anything that caused any of these fees, other than defending the claims by Dr. Nath."

***12** Baylor filed as an exhibit 182 pages of billing records showing the legal work performed on Nath's case against Baylor. Each entry in the billing records includes (1) the date the work was performed, (2) the person who performed the work, (3) the time spent, and (4) a description of the work. The end of each billing invoice also lists (1) the timekeepers that worked on the case, (2) the amount of time each timekeeper spent working on the matter, (3) each timekeeper's rate, and (4) the total fee for each timekeeper. The billing records show that this work was performed from March 1, 2006 through June 24, 2020.

At the December 10 hearing, Clark testified that the total amount charged to Baylor for this time period was $688,260.13. Clark testified that $644,500.16 was "directly attributable to Baylor's defense against Dr. Nath's claims in this lawsuit[.]"

Like Mizell, Clark also provided a summary of the legal work performed for Baylor with respect to Nath's claims. When asked whether Baylor "caused or contributed to any portion of the fees it [sought] as sanctions in this case", Clark responded, "Absolutely not."

Considered in light of *Rohrmoos*'s standards and this case's lengthy history, this testimony and Appellees' billing records are legally sufficient evidence to support the trial court's sanctions awards.

We overrule Nath's legal-sufficiency challenge.

C. The Hospital's Future Appellate Attorney's Fees Award is Not Supported by Legally Sufficient Evidence.

In his final issue, Nath asserts the trial court abused its discretion by awarding the Hospital future appellate attorney's fees, arguing (1) the Hospital "failed to plead for an award of future appellate fees, and (2) "[n]o evidence" supports the appellate attorney's fees award.

1. The Hospital's Pleadings

At the December 10 hearing, Mizell testified regarding the Hospital's request for its future appellate attorney's fees. In its final judgment, the trial court awarded the Hospital $489,800 in future appellate fees "conditioned upon the Hospital prevailing on any appeal of this case by Nath." Nath contends on appeal that the Hospital's failure "to ever plead for future appellate attorney's fees" is fatal to its recovery.

Under Texas Rule of Civil Procedure 301, the trial court's judgment must conform to the pleadings. Tex. R. Civ. P. 301. But issues not raised in the pleadings can be tried by express or implied consent of the parties. Tex. R. Civ. P. 67; *see also Flowers v. Flowers*, 407 S.W.3d 452, 457 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The unpleaded issue may be deemed tried by consent when evidence on the issue is developed without objection under circumstances indicating both parties understood the issue was being contested. *See Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009); *Adeleye v. Driscal*, 544 S.W.3d 467, 484

(Tex. App.—Houston [14th Dist.] 2018, no pet.). "The trial court has broad discretion to determine whether an unpleaded issue was tried by consent." *Adeleye*, 544 S.W.3d at 484.

During Mizell's testimony on the Hospital's future appellate attorney's fees, Nath did not object to this evidence as being outside the Hospital's pleadings. Therefore, it was within the trial court's discretion to conclude that the issue of the Hospital's future appellate attorney's fees was tried by consent. *See Ingram*, 288 S.W.3d at 893; *Adeleye*, 544 S.W.3d at 484; *see also, e.g., Mansfield v. Mansfield*, No. 04-18-00551-CV, 2019 WL 6138984, at *4 (Tex. App.—San Antonio Nov. 20, 2019, pet. denied) ("Because [the appellant's] attorney did not object to the absence of any pleadings when the trial court addressed the issue of an award of appellate attorney's fees, we hold the issue was tried by consent."); *Sheen v. Sheen*, No. 03-18-00358-CV, 2019 WL 2554570, at *5 (Tex. App.—Austin June 21, 2019, no pet.) (mem. op.) (issue of appellate attorney's fees was tried by consent when the appellee's attorney "testified regarding his trial and appellate fees without objection").

***13** With respect to this line of testimony, the only objection Nath raised addressed the foundation for Mizell's opinion:

> Objection, Your Honor. Lack of foundation on the part of this witness with regard to what appellate fees may or may not be with regard to any matter or this mater. There's not been a proper foundation with regard to this witness.

This objection was not sufficient to make the trial court aware of the issue Nath now raises on appeal, *i.e.*, whether appellate attorney's fees were outside the scope of the Hospital's pleadings. *See* Tex. R. App. P. 33.1(a).

We overrule Nath's argument that the Hospital failed to plead for an award of future appellate attorney's fees.

2. Evidentiary Sufficiency

Nath argues that there is "no evidence" to support the trial court's award of the Hospital's future appellate attorney's fees.

"When reviewing a trial court's award of attorney's fees, we must ensure the record contains sufficient evidence to support such an award." *Yowell v. Granite Operating Co.*, —— S.W.3d ——, 2020 WL 2502141, at *12 (Tex. May 15, 2020) (applying *Rohrmoos* to an issue challenging the sufficiency of the evidence to support an award of contingent appellate fees). "The party seeking attorneys' fees bears the burden of proof and must supply enough facts to support the reasonableness of the amount awarded." *Id.* Specifically, to recover contingent appellate fees, the party with the burden of proof must "provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Id.* at *13.

At the December 10 hearing, Mizell testified that he represented the Hospital on both prior appeals in this case. Mizell also said he has handled "approximately 35, 40 appeals over [his] career." Mizell testified that he had argued in the court of appeals on ten separate occasions, including in the appeal that preceded *Nath I.*

Mizell provided the following testimony about the fees that would be incurred in each stage of the appellate process if Nath pursues an appeal:

- Appeal to the intermediate court of appeals: Mizell opined that an appeal through this stage would incur $196,700 in attorney's fees. Included in this number were the following estimates for attorneys' work on the matter: (1) Stacey Vu working 70 hours at $850/hour; (2) Kathy Smith working 70 hours at $760/hour; and (3) Brooke Noble working 200 hours at $420/hour.

- Petition for review to the Texas Supreme Court: Mizell opined that an appeal through this stage would incur $96,950 in attorney's fees. Included in this number were the following estimates for attorneys' work on the matter: (1) Vu working 25 hours at $850/hour; (2) Smith working 25 hours at $760/hour; and (3) Noble working 135 hours at $420/hour.

- Merits briefing at the Texas Supreme Court: Mizell opined that an appeal through this stage would incur $96,950 in attorney's fees. Included in this number were the following estimates for attorneys' work on the matter: (1) Vu working 25 hours at $850/hour; (2) Smith working 25 hours at $760/hour; and (3) Noble working 135 hours at $420/hour.

***14** • Oral argument at the Texas Supreme Court: Mizell opined that an appeal through this stage would incur $48,825 in attorney's fees. Included in this number were the following estimates for attorneys' work on the matter: (1) Vu working 22.5 hours at $850/hour; (2) Smith working 22.5 hours at $760/hour; and (3) Noble working 30 hours at $420/hour.

These estimates are the same as those included in Mizell's affidavit, which was filed as an exhibit to the Hospital's attorney's fee application. The combined total for these parts of the appellate process equal $439,425 in future appellate attorney's fees. Mizell testified that these fees "are in keeping with similar top-flight appellate lawyer rates in Houston, Harris County and in the State of Texas."

The trial court's final judgment awarded the Hospital $489,800[1] in future appellate attorney's fees—$50,375 more than the amounts Mizell testified to at the evidentiary hearing. The record does not contain any evidence to support this additional amount. Therefore, although the evidence is legally sufficient to support a finding of some amount of future appellate attorney's fees, it is legally insufficient to support the entire amount awarded in the trial court's final judgment. *See, e.g., Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 123-24 (Tex. 2009); *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 127-18 (Tex. App.—El Paso 2015, pet. denied).

An appellate court possesses the inherent power in a civil case to suggest a remittitur under Rule 46.3 of the Texas Rules of Appellate Procedure when an appellant complains there is insufficient evidence to support an award and the appellate court agrees but concludes there is sufficient evidence to support a lesser award. Tex. R. App. P. 46.3; *see, e.g., Enzo Invs., LP v. White*, 468 S.W.3d 635, 654-55 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Accordingly, we suggest to the Hospital a remittitur of $50,375, which will result in a future appellate attorney's fee award of $439,425 if accepted. *See* Tex. R. App. P. 46.3.

Conclusion

In his third appeal, case number 14-19-00967-CV, Nath asserted three issues raising two arguments: (1) he was entitled to an interlocutory appeal with respect to the trial court's denial of his TCPA motion to dismiss, and (2) the trial court erred by denying his TCPA motion. We overrule these issues.

In his fourth appeal, case number 14-20-00231-CV, Nath raised four issues asserting the trial court (1) erred by proceeding to trial on the merits; (2) abused its discretion by denying Nath's jury demand; (3) abused its discretion by awarding $1.37 million in sanctions to Appellees; and (4) erred by awarding the Hospital its future appellate attorney's fees. We overrule Nath's first, second, and third issues.

We sustain Nath's fourth issue with respect to the insufficiency of the evidence to support the award of $489,800 to the Hospital for its future appellate attorney's fees. In response to our suggestion of remittitur, the Hospital timely remitted $50,375. Accordingly, we modify the trial court's judgment to reduce the award of future appellate attorney's fees to $439,425 and affirm the judgment as modified.

All Citations

Not Reported in S.W. Rptr., 2021 WL 451041

Footnotes

1 The trial court's future appellate attorney's fees award is apportioned as follows: (1) $196,700 in the event of an appeal to the intermediate court of appeals; (2) $99,200 in the event of a petition for review to the Texas Supreme Court; (3) $96,950 in the event of merits briefing at the Texas Supreme Court; and (4) $96,950 in the event oral argument is granted at the Texas Supreme Court.

February 9, 2021

JUDGMENT

The Fourteenth Court of Appeals

RAHUL K. NATH, M.D., Appellant

NO. 14-19-00967-CV

NO. 14-20-00231-CV V.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, Appellees

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The court today issued a substitute memorandum opinion. We order this court's former judgment of January 21, 2021 vacated, set aside, and annulled. We further order this court's memorandum opinion of January 21, 2021 withdrawn.

This cause, an appeal from the judgment in favor of appellees, Texas Children's Hospital and Baylor College of Medicine, signed December 27, 2019, was heard on the appellate record. We have inspected the record and find the trial court erred by awarding Texas Children's Hospital $489,800 for its future appellate attorney's fees. However, we find the evidence supports an award of $439,425 for the Hospital's future appellate attorney's fees. We therefore:

REPLACE the portion of the judgment addressing the Hospital's future appellate attorney's fees with the following and **AFFIRM THE JUDGMENT AS MODIFIED**:

It is further ORDERED, ADJUGDED, AND DECREED that Plaintiff Rahul K. Nath, M.D. pay to Texas Children's Hospital its reasonable and necessary future appellate attorney's fees as follows:

$196,700.00 to Texas Children's Hospital in the event of an appeal to the intermediate court of appeals;

$96,950.00 to Texas Children's Hospital in the event of a petition for review at the Texas Supreme Court;

$96,950.00 to Texas Children's Hospital in the event of merits briefing at the Texas Supreme Court;

$48,825.00 to Texas Children's Hospital in the event oral argument is granted at the Texas Supreme Court.

We order that each party shall pay its costs by reason of this appeal.

We further order this decision certified below for observance.

Judgment Rendered February 9, 2021.

Panel Consists of Justices Wise, Bourliot, and Hassan. Substitute Memorandum Opinion delivered by Justice Hassan.

APPENDIX D

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8A

CAUSE NO. 2006-10826

RAHUL K. NATH, M.D.,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
	§	
TEXAS CHILDREN'S HOSPITAL and BAYLOR COLLEGE OF MEDICINE,	§	
	§	
Defendants.	§	**215TH JUDICIAL DISTRICT**

FINAL JUDGMENT

In 2015, the Texas Supreme Court held that legally sufficient evidence supported this Court's prior 2010 conclusion that Plaintiff Rahul K. Nath, M.D. ("Nath") should be personally sanctioned, pursuant to Chapter 10 of the Texas Civil Practice and Remedies Code, for all of the baseless petitions he filed in the above-captioned matter. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355 (Tex. 2014) [*Nath I*]. The Texas Supreme Court remanded this case to this Court for a reassessment of the amount of sanctions by taking into consideration "the degree to which the offended person's own behavior [*i.e.*, the behavior of Defendants Texas Children's Hospital (the "Hospital") and Baylor College of Medicine ("Baylor")] caused the expenses for which recovery is sought" in determining the appropriate amount of sanctions to award. *Id.* at 371-74 (noting "the trial court went to great lengths to examine all the relevant *Low* factors except for the extent to which the non-sanctioned parties caused their own injuries."). Pursuant to the *Nath I* remand, this Court reassessed sanctions in 2015.

In 2019, the Texas Supreme Court reversed this Court's 2015 sanctions award, holding for the first time that detailed proof of the reasonableness and necessity of attorneys' fees, such as details on attorney billing rates and time expended on specific tasks, is required when

assessing attorneys' fees as sanctions. *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 709-11 (Tex. 2019). The Supreme Court remanded this case for further proof of the Hospital's and Baylor's reasonable and necessary attorneys' fees in accordance with clarified standards set forth in *Rohrmoos Venture v. UTSW DVA Heathcare, LLP*, 578 S.W.3d 469 (Tex. 2019). *Id.*

The Court has now held an evidentiary hearing and has considered the proof of attorneys' fees required under *Rohrmoos*, the amount of fees attributable to Defendants, and the amount of reasonable and necessary fees directly resulting from Nath's sanctioned conduct.

Accordingly, the Court hereby ORDERS that the Application for Attorneys' Fees Incurred by Defendant Texas Children's Hospital as Reassessment of Sanctions Against Rahul K. Nath is GRANTED. The Court further ORDERS that Baylor College of Medicine's Application for Fees as Sanctions is GRANTED. It is, therefore,

ORDERED, ADJUDGED, AND DECREED, as it had been in (a) the ORDER AND FINAL JUDGMENT in Cause No. 2006-10826 signed on September 17, 2010, and (b) the ORDER AND *MODIFIED* FINAL JUDGMENT in Cause No. 2006-10826-A signed on November 19, 2010, that (i) Nath's claim for intentional infliction of emotional distress was groundless; (ii) a reasonable inquiry would have revealed that the claim was barred by the statute of limitations, was without factual basis, and was barred by well settled and existing Texas law addressing the tort of intentional infliction of emotional distress; (iii) the claim lacked any evidentiary basis with regard to "extreme and outrageous" behavior and severe emotional distress; (iv) Nath filed his claim in bad faith and for an improper purpose; (v) Nath's claim for defamation, and his related claims of tortious interference with contract and negligence, were groundless; (vi) a reasonable inquiry would have revealed that the claims were barred by the statute of limitations, and that the claims were groundless inasmuch as the statements were non-

defamatory in nature; (vii) Nath filed his claims in bad faith and for an improper purpose; (viii) Nath's claim for a declaratory judgment was groundless; (ix) a reasonable inquiry would have revealed that the claim was groundless inasmuch as the statute, on its face, had no application to Nath's claim; and (x) Nath filed his claim in bad faith and for the improper purpose of seeking irrelevant and confidential information through discovery to use as a tool in his litigation.

It is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Rahul K. Nath, M.D. pay to Texas Children's Hospital its reasonable and necessary past attorney's fees in the amount of $726,000.00. The Court has determined that this amount adequately takes into account Texas Children's Hospital's behavior, if any, that caused the expenses for which recovery is sought, and fairly compensates Texas Children's Hospital with regard to defending against the claims that serve as the basis for this award.

It is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Rahul K. Nath, M.D. pay to Texas Children's Hospital its reasonable and necessary future appellate attorney's fees as follows:

$196,700.00 to Texas Children's Hospital in the event of an appeal to the intermediate court of appeals;

$99,200.00 to Texas Children's Hospital in the event of a petition for review at the Texas Supreme Court;

$96,950.00 to Texas Children's Hospital in the event of merits briefing at the Texas Supreme Court;

$96,950.00 to Texas Children's Hospital in the event oral argument is granted at the Texas Supreme Court

These amounts are expressly conditioned upon the Hospital prevailing on any appeal of this case by Nath.

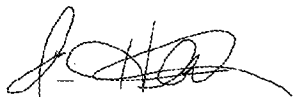
It is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Rahul K. Nath, M.D. pay to Baylor College of Medicine its reasonable and necessary past attorney's fees in the amount of $644,500.16. The Court has determined that this amount adequately takes into account Baylor College of Medicine's behavior, if any, that caused the expenses for which recovery is sought, and fairly compensates Baylor College of Medicine with regard to defending against the claims that serve as the basis for this award.

Subsequent to this award of attorneys' fees as sanctions, it is further ORDERED, ADJUDGED, AND DECREED that Plaintiff Rahul K. Nath's Motion to Dismiss dated November 18, 2019 is DENIED.

This order and judgment is final and disposes of all claims and parties. For avoidance of doubt, upon entry of this order and judgment, this Court's Order dated September 12, 2019 shall be of no further force or effect. Costs are assessed against Plaintiff Rahul K. Nath, M.D. Post judgment interest is allowed at 5% per annum.

Signed on _____.

Signed:
12/27/2019



Judge Presiding

APPENDIX E

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CAUSE NO. 2006-10826

RAHUL K. NATH, M.D.,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
	§	
	§	
TEXAS CHILDREN'S HOSPITAL and BAYLOR COLLEGE OF MEDICINE,	§	
	§	
	§	
Defendants.	§	**215TH JUDICIAL DISTRICT**

[AMENDED PROPOSED]
SECOND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Second Supplemental Findings of Fact and Conclusions of Law in connection with the Application for Attorneys' Fees Incurred by Defendant Texas Children's Hospital (the "Hospital") as Reassessment of Sanctions Against Rahul K. Nath and Defendant Baylor College of Medicine's ("Baylor") Application for Fees as Sanctions.

These findings and conclusions incorporate by reference, to the maximum extent consistent with the Texas Supreme Court's opinions in *Nath v. Texas Children's Hospital*, 446 S.W.3d 355 (Tex. 2014) [*Nath I*] and *Nath v. Texas Children's Hospital*, 576 S.W.3d 707 (Tex. 2019) [*Nath II*], this Court's prior findings of fact and conclusions of law in this lawsuit, signed on November 8, 2010 (relating to the Hospital); January 11, 2011 (relating to Baylor); January 30, 2015 (relating to the Hospital); and January 30, 2015 (relating to Baylor). These findings and conclusions are entered pursuant to the Texas Supreme Court's remand in *Nath II*.

SUPPLEMENTAL FINDINGS OF FACT

A. Procedural Background

1. On September 17, 2010, this Court (Judge Steven Kirkland presiding) held a hearing on the Hospital's 2010 Motion for Sanctions. Without objection, this Court took judicial notice of the Court's file, specifically including the motions for summary judgment, the evidence attached to those motions, the Hospital's motion for sanctions, and the evidence attached to that motion. This evidence was unrebutted. On November 8, 2010, this Court entered findings of fact and conclusions of law that assessed sanctions in the amount of $726,000 against Nath personally and in favor of the Hospital.

2. On November 12, 2010, this Court (Judge Steven Kirkland presiding) held a hearing on Baylor's 2010 Motion for Sanctions. At that hearing, this Court again took judicial notice of the Court's entire file in this case and Cause No. 2006-20826-A. This evidence was unrebutted. On January 10, 2011, this Court entered findings of fact and conclusions of law and assessed sanctions in the amount of $644,500.16 against Nath and in favor of Baylor.

3. As set forth in the Court's prior findings of fact and conclusions of law, the awards to the Hospital and Baylor represented a portion of the legal fees these parties incurred in defending themselves against the groundless claims Nath asserted with an improper purpose in this litigation.

4. On November 21, 2014, the Texas Supreme Court concluded that this Court properly sanctioned Nath for his outrageous conduct in asserting groundless pleadings while simultaneously attempting to "us[e] a legal mechanism to force damaging, irrelevant information into the public domain and thereby compel a more favorable settlement," an act the Supreme Court agreed was "an abuse of process" and "a form of extortion" warranting sanctions. *Nath I*, 446 S.W.3d at 366. The Supreme Court, however, remanded this cause for this Court to more clearly

examine one relevant issue, namely, the extent to which the Hospital and Baylor may have caused their own legal fees in defending themselves against Nath's groundless claims. *Id.* at 372.

5. On January 30, 2015, after a duly-noticed hearing in which this Court (the undersigned presiding) considered additional evidence submitted by the Defendants, this Court entered two sets of supplemental findings of fact and conclusions of law. This Court concluded that (i) the Hospital was not responsible for any portion of the $726,000 in fees and (ii) Baylor was not responsible for any portion of the $644,500.16 in fees that the Court reassessed against Nath pursuant to the *Nath I* remand. The Court entered an amended and consolidated final judgment on February 9, 2015, which Nath appealed.

6. On June 21, 2019 the Supreme Court of Texas issued an opinion in this case overruling caselaw upon which this Court had relied in its original and supplemental sanctions orders. *See Nath II*, 576 S.W.3d 707. Earlier decisions of numerous Texas Courts of Appeals, including the First and Fourteenth Districts in Houston, held that strict proof of reasonableness and necessity of fees, such as details on attorney billing rates and time for specific tasks, was not required when assessing attorneys' fees as sanctions. *Nath II*, at 709. In *Nath II*, the Supreme Court overruled those cases and remanded this case for further proof of the Hospital's and Baylor's reasonable and necessary attorneys' fees in accordance with clarified standards set forth in *Rohrmoos Venture v. UTSW DVA Heathcare, LLP,* 578 S.W.3d 469 (Tex. 2019). *Nath II*, 576 S.W.3d at 709-11.

B. The Fee Applications on Remand from *Nath II*

7. On November 5, 2011, each Defendant filed an Application for Attorneys' Fees pursuant to the *Nath II* remand and pursuant to the Court's September 12, 2019 Order. The Hospital's Application attached the Second Supplemental Declaration of Patrick W. Mizell and

Baylor's Application attached the Second Supplemental Affidavit of Shauna J. Clark. Mr. Mizell and Ms. Clark were the Hospital's and Baylor's respective lead trial counsel from the 2006-2011 proceedings in this lawsuit. The Hospital's Second Supplemental Declaration and Baylor's Second Supplemental Affidavit each attached the Defendants' respective legal invoices documenting the work for which the Defendants seek recovery of their fees. The invoices detail the timekeepers, the work each attorney and other legal personnel performed, the time spent on the tasks for which Defendants seek to recover fees, and the amount charged for that time.

8. The Court finds that the Hospital's Second Supplemental Declaration and Baylor's Second Supplemental Affidavit were timely filed in compliance with the Court's order and otherwise meet the requirements of Texas Civil Practice & Remedies Code § 18.001. *See also* TEX. CIV. PRAC. & REM. CODE § 132.001.

9. Nath did not submit controverting affidavits in response to the Hospital's Second Supplemental Declaration or Baylor's Second Supplemental Affidavit.

10. On November 26, 2019, Nath filed a pleading he styled as "Response to the Motions for Sanctions Filed by TCH and BCM Subject to and Without Waiving His Motion to Dismiss." He attached the Expert Report of A.G. Crouch to the Response. Mr. Crouch's Expert Report is unsworn and does not otherwise meet the requirements of Texas Civil Practice & Remedies Code §§ 18.001(e)-(f), 132.001.

C. The Evidentiary Hearing

11. Consistent with the Court's September 12, 2019 Order, the Court held a hearing on December 10, 2019 on Defendants' Applications for Attorneys' Fees. At the hearing, the Court admitted evidence, including the Hospital's Second Supplemental Declaration, Baylor's Second Supplemental Affidavit, the invoices for work performed by Vinson & Elkins on behalf of the

Hospital, the invoices for work performed by Fulbright & Jaworski (now Norton Rose Fulbright) on behalf of Baylor, and the live testimony of Mr. Mizell and Ms. Clark.

12. The Court concludes that the Second Supplemental Declaration of Patrick W. Mizell and Second Supplemental Affidavit of Shauna J. Clark are clear, direct, and uncontroverted and establish the reasonableness and necessity of Defendants' fees. The Court nevertheless also considers the additional live testimony of Mr. Mizell and Ms. Clark, which is relevant to the Court's assessment of what amount of reasonable and necessary fees were caused by Nath's conduct, rather than the Defendants' conduct.

13. The Court finds that Mr. Mizell and Ms. Clark are qualified to provide expert testimony regarding the reasonableness and necessity of their clients' fees, and in particular the amount of such fees solely attributable to Nath's conduct. The Court also finds that the testimony of Mr. Mizell and Ms. Clark is credible.

D. The Reasonableness and Necessity of Defendants' Legal Fees

14. Pursuant to *Rohrmoos,* the Court has considered the Hospital and Baylor's respective "evidence of reasonable hours worked multiplied by a reasonable hourly rate," 578 S.W.3d at 499, as well as the other factors identified in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) and Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the

experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. As part of this analysis, the Court has considered the Defendants' "evidence of (1) particular services performed, (2) who performed those services, (3) approximately when those services were performed, (4) the reasonable amount of time required to perform those services, and (5) the reasonable hourly rate for each person performing such services." *Rohrmoos*, 578 S.W.3d at 499. The Court finds that these factors support the reassessment of sanctions.

15. Here, the complexity of this litigation, as well as the complete dismissal obtained by counsel, clearly satisfy the first, second, and fourth *Andersen/Rohrmoos* factors. Nath's baseless claims and improper and harassing litigation tactics required the Defendants' attorneys to dedicate significant time and effort to defending their interests. Such work included:

- Researching and drafting respective answers to Nath's Original through Sixth Amended Petitions;
- Responding to Nath's extensive discovery requests to each Defendant;
- Preparing for each Defendant's defense in the event the case proceeded to trial, including drafting discovery, investigating facts, interviewing witnesses, developing deposition testimony, reviewing documents and discovery responses produced by Nath and codefendants;
- Preparing a protective order to protect the sensitive information in this case;
- Researching and objecting to medical peer review privilege issues and motion practice regarding same;
- Researching and objecting to patient confidentiality issues and motion practice regarding same;
- For the Hospital, discussing the complex issues of the case with various expert witnesses;
- Attending various discovery hearings that resulted from Nath's failure to provide basic information about his own allegations;
- Preparing for and attending an unsuccessful mediation due to Nath's extortionist settlement tactics;
- Preparing for and taking the deposition of Nath, which was taken twice as a result of Nath's improper obstruction;
- Preparing for and defending nine depositions requested by Nath;
- Preparing for and attending hearings on Nath's baseless motions, including Nath's

motion to compel depositions and two motions for continuance of the summary judgment hearing;

- Researching and drafting multiple motions for summary judgment per Defendant;
- Preparing and appearing for the initial hearing setting on the Defendants' respective original traditional and no evidence motions for summary judgment, which hearing did not transpire because Nath moved to recuse the Court;
- Researching and responding to Nath's special exceptions to the Defendants' motions for summary judgment on the Sixth Amended Petition;
- Preparing and appearing for the summary judgment hearing on Nath's Sixth Amended Petition;
- Researching and drafting the motions requesting sanctions for Nath's improper litigation conduct;
- Drafting respective proposed findings of fact and conclusions of law for the motions for sanctions.
- Preparing and appearing for the hearings on the motions for sanctions;
- Responding to Nath's motions for a new trial and preparing for and arguing hearings on same;

All of this work was necessary to a successful defense of this case. And this work was successful: the Court dismissed all of Nath's claims and sanctioned his improper conduct.

16. The Court declines to credit Nath's expert A.G. Crouch's testimony, in which he criticizes the timing of Defendants' summary judgment motions and the work Defendants' counsel undertook between the time of filing their initial answers in 2006 and moving for summary judgment in 2009-2010. Mr. Crouch essentially argues that the Defendants' attorneys should have answered, moved to abate the case as frivolous, and immediately moved for summary judgment, and that all other work performed was unnecessary. Viewing the allegations in Nath's pleadings in the context of the law, procedural rules, and local customs applicable at the time, the Court finds that Mr. Crouch's testimony is not credible and his suggested approach would not have been a reasonable or prudent manner to approach defending this case. The Court also finds that Mr. Couch's testimony is unreliable because it not based on the actual record. For example, the testimony ignores the fact that when Defendant first moved for summary judgment, Nath moved for and was granted a continuance. An expert's opinion is unreliable if it based on assumed facts

that vary from the actual facts or data that does not support the conclusion reached. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009).

17. As to the first, fourth, and fifth *Andersen/Rohrmoos* factors, this was a factually and procedurally complex case and the manner in which Nath pursued this case dramatically increased the amount of time and work performed by each of the attorneys involved in this matter. Nath's accusations were copious and severe. Nath accused the Defendants of encouraging Dr. Shenaq to make false statements about Nath and financially benefiting from those statements. Nath also accused the Defendants of tortiously interfering with his business and patient relationships by allowing their employees to make false statements and refusing to provide him with confidential medical information regarding former patients. Nath sought to discover confidential medical information about Dr. Shenaq and his patients. To further his harassing campaign and personal vendetta against his former colleague, Nath then asserted a claim for a declaratory judgment based on the health problems he alleged Dr. Shenaq suffered. Nath further accused the Defendants of negligently supervising and training their respective employees, thereby allowing them to defame him. Nath pleaded the discovery rule to avoid dismissal of his groundless claims. In the end, to avoid summary judgment, Nath abandoned all of his previous claims for defamation, tortious interference, and negligence and instead asserted a newly-minted claim for intentional inflicting emotional distress—four years into the litigation.

18. Nath's bad faith and harassing litigation tactics further compounded the Defendants' fees in this case. For example, Nath refused to answer threshold questions about his own earnings in his deposition, even though he was claiming lost profits as damages. The defense of the improper discovery requests and the contested pursuit of privileged and irrelevant information significantly increased the amount of time and worked performed by the attorneys

involved in this matter. When Defendants moved to compel information about Nath's earnings, he nonsuited his lost profits claim. Nath also engaged in other bad faith discovery practices, such as routinely seeking irrelevant and privileged medical information about Dr. Shenaq and his patients after the Court already denied such discovery. This Court found that such information was sought in an attempt to extort a settlement from Defendants.

19. Furthermore, Nath delayed and duplicated the summary judgment proceedings in this matter. When the Defendants filed their respective traditional and no-evidence motions for summary judgment with respect to Nath's Fifth Amended Petition, Nath responded by moving for an emergency continuance of the summary judgment hearing, claiming that the evidence was needed to prepare his summary judgment responses. Per its routine practice, the Court granted Nath's motion for continuance, reset the summary judgment hearing, and ordered additional depositions. Nath eventually filed another emergency motion for continuance, which this Court denied.

20. Instead of defending his claims at the rescheduled summary judgment hearing, Nath hired a new attorney and filed a baseless motion to recuse this Court. To delay the hearing of the motion to recuse, Nath then moved to recuse the judge hearing the first recusal motion. Meanwhile, Nath also abandoned all of his claims and filed a sixth amended petition alleging new claims, which necessitated another round of briefing and required the Defendants' attorneys to prepare for the new summary judgment oral argument. These improper and abusive tactics unnecessarily increased the costs of defense.

21. The Court rejects Nath's argument that the Defendants' fee invoices are too heavily redacted to constitute evidence sufficient to meet their burden under *Andersen/Rohrmoos.* The Court finds that the portions of the invoices for which Defendants seek recovery of their fees are

not heavily redacted and are sufficient to ascertain the particular services performed, who performed those services, when those services were performed, the amount of time spent performing those services, and the hourly rates charged for each person performing such services. *See Rohrmoos*, 578 S.W.3d at 499. Defendants' limited redactions to preserve attorney client privilege, medical peer review privilege, and the privilege for communications with the Texas Medical Board are appropriate and consistent with *Rohrmoos*. While Defendants have more heavily redacted portions of their invoices for which they do not seek fees, the reasonableness and necessity of the fees associated with such time entries are not at issue here.

22. As to the sixth and seventh *Andersen/Rohrmoos* factors, Nath's claims implicated complex areas of the law, requiring certain expertise on the part of the Defendants' attorneys. Nath asserted claims against Baylor, his former employer, and the Hospital, Baylor's affiliate, of defamation, tortious interference with existing and prospective business relations, negligent hiring and supervision, and intentional infliction of emotional distress. In addition to those tort claims, Nath filed a declaratory judgment action based on the alleged health problems of Dr. Shenaq, his former business partner. Nath sought substantial damages and attempted to secure confidential medical peer review and patient records in violation of such patients' privacy rights. Thus, the Hospital and Baylor took these allegations and privacy concerns seriously and sought counsel with expertise in this area. Mr. Mizell and Ms. Clark are partners with extensive experience in complex litigation, including health care litigation and employment cases, respectively, and the other attorneys that were assigned to the case have a wide range and wealth of private practice experience.

23. Finally, as to the third and eighth *Andersen/Rohrmoos* factors, the fixed rates charged to the Hospital and Baylor were reasonable and necessary, and the Hospital and Baylor

actually paid all of the fees reflected on the invoices. These rates were standard for attorneys in civil trial practice in the Houston legal markets when compared to the rates of other, similar firms in Texas at the time the fees were incurred. The rates paid by the Hospital were between $375 and $650 per hour for time billed by V&E partners; between $450 and $515 per hour for time billed by V&E counsel; between $220 and $405 per hour for time billed by associates; and between $90 and $270 per hour for time billed by paralegals, practice support personnel, and project assistants. The rates paid by Baylor were between $425 and 495 per hour for time billed by its lead counsel, Ms. Clark, and between $125 and $680 per hour for time billed by the other attorneys and professionals and para-professionals working on the lawsuit. These rates were standard for the time for similar representation in a case of this nature. Given the complex nature of the case, particularly with respect to its implication of the Hospital's peer review investigation of Nath and patient confidentiality, it was necessary for the Hospital to hire experienced legal counsel with specific expertise in complex commercial litigation and in particular peer review privilege and medical privacy issues. Likewise, given the complex nature of this case, including the exhaustive and improper litigation and discovery tactics employed by Nath in pursuit of his baseless claims, it was necessary for Baylor to engage highly skilled legal counsel with specific expertise in complex employment litigation and significant trial experience.

24. In conclusion, the particular services performed by Vinson & Elkins and Fulbright were reasonable and necessary, the amount of time charged to perform those services was reasonable and necessary, and the hourly rate charged for each person performing such services was reasonable, necessary, and customarily charged in the locality for similar legal services in light of the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly. Additionally, consistent with the Court's supplemental findings of fact and

conclusions of law, signed on January 30, 2015 (relating to the Hospital) and January 30, 2015 (relating to Baylor), the Court again finds, to the extent necessary, that no behavior by Defendants caused the fees for which recovery is sought.

25. After considering the foregoing, the Court determines that the following sanctions are the appropriate amount to sanction Nath for past reasonable and necessary attorneys' fees incurred by the Defendants:

$644,500.16 to Baylor College of Medicine

$726,000.00 to Texas Children's Hospital

This amount is far less than the actual fees incurred by the Defendants as it does not include all of the fees incurred prior to the entries of judgment in 2010, it does not include any of the fees incurred by the Defendants in defending against the two appeals brought by Nath, and it does not include any of the fees incurred by the Defendants in defending against Nath's abusive litigation tactics on this remand.[1]

26. In addition, after considering the foregoing, the Court determines that the following sanctions are the appropriate amount to sanction Nath for reasonable and necessary future appellate fees:

---

[1] On this remand, Nath has only intensified the harassing and vexatious conduct that led to the original sanctions award. Nath has repeatedly refused to accept the preclusive effect of the Texas Supreme Court's *Nath I* opinion and the limited effect of the Supreme Court's *Nath II* holding. Despite the limited scope of this remand, Nath has moved to compel extensive written discovery and document production relating to issues decided in 2010, noticed corporate representative and nonparty depositions relating to the Defendants' *2010* conduct, filed cross-motions for sanctions against the Defendants and their counsel based on their decision to file the 2010 motions for sanctions, filed motions to disqualify Defendants' counsel, filed special exceptions to the 2010 motions for sanctions, filed a motion to certify an interlocutory appeal to the Texas Supreme Court (a procedure unavailable under Texas law), filed a jury demand seeking retrial of all issues by a jury, filed a motion to dismiss Defendants' fee applications pursuant to the TCPA, and filed an improper and ineffective premature notice of appeal. None of these filings had any merit. For example, the special exceptions and the cross motion for sanctions repeat arguments Nath made, through different attorneys, in special exceptions and a sanctions request in 2010. Similarly, the motions to disqualify likewise re-urged issues raised, and unsuccessfully appealed, on the prior remand. Nath's actions on this remand reinforce the Court's inference that Nath heavily controls the course of this litigation.

$196,700 to Texas Children's Hospital in the event of an appeal to the intermediate court of appeals;

$99,200 to Texas Children's Hospital in the event of a petition for review at the Texas Supreme Court;

$96,950 to Texas Children's Hospital in the event of merits briefing at the Texas Supreme Court;

$96,950 to Texas Children's Hospital in the event oral argument is granted at the Texas Supreme Court.[2]

This amount is expressly conditioned upon the Hospital prevailing on appeal of this case by Nath.

27. To the extent that any conclusion of law should be characterized as a finding of fact, the Court recharacterizes it here accordingly.

SUPPLEMENTAL CONCLUSIONS OF LAW

A. Law of the Case.

28. In *Nath I*, the Texas Supreme Court analyzed this Court's 2010 (Hospital) and 2011 (Baylor) findings of fact and conclusions of law and the record from this case in detail, and held that this Court "properly found Nath's pleadings sanctionable" under Chapter 10 of the Texas Civil Practice and Remedies Code. 446 S.W.3d at 365. Under Chapter 10, a party may be sanctioned for causing a pleading to be presented for an "improper purpose." TEX. CIV. PRAC. & REM. CODE § 10.001; *Nath I*, 446 S.W.3d at 362, 364. The Supreme Court concluded that each of Nath's pleadings demonstrated an improper purpose, and held that the evidence was sufficient to support this Court's decision to sanction Nath personally for his misconduct. *Nath I*, 446 S.W.3d at 365–6.

[2] Baylor has not sought conditional future appellate fees.

29. In *Nath I*, the Supreme Court affirmed this Court's finding that Nath's pursuit of irrelevant private medical information relating to former Baylor employee Dr. Shenaq's health (and the medical records of Dr. Shenaq's patients), in connection with his Fourth Amended Petition and subsequent petition amendments, "was in bad faith, and that Nath's ostensible intent to use that information to leverage a favorable settlement for a baseless claim constituted an improper purpose." 446 S.W.3d at 365. As the Supreme Court concluded, "the improper purpose of Nath's pleadings regarding Shenaq's health indicates the trial court appropriately levied sanctions regarding this conduct." *Id.* at 367.

30. In Nath's first three petitions in this case, he asserted claims of defamation, tortious interference, and negligence. *Id.* at 367. In *Nath I*, the Supreme Court upheld this Court's finding "that the time-barred status and nondefamatory nature of some of the statements in his defamation claim indicated Nath filed the [defamation] claim in bad faith and for an improper purpose." *Id.* at 368. With respect to the tortious interference and negligence claims, the Supreme Court held that the evidence that those claims were time-barred also supported an inference of improper purpose under the circumstances presented. *Id.* at 370–71. Thus, the Supreme Court held that all of Nath's pleadings were sanctionable.

31. In *Nath I*, the Supreme Court recounted this Court's "various findings of fact regarding Nath's direct involvement in the case, particularly ... his effort to seek information relating to Shenaq's health." *Id.* at 366. The Supreme Court concluded that the Court's findings were supported by the record, and that "[a]gainst this backdrop and the logical inferences that flow from it, we cannot say the trial court abused its discretion by imposing the sanction against Nath personally." *Id.*

32. In *Nath II*, the Supreme Court confirmed its prior holding that "Nath's pleadings were groundless and sanctionable." 576 S.W.3d at 708. The Supreme Court, however, found that this Court must apply "the standard for fee-shifting awards in *Rohrmoos* ... to fee-shifting sanctions" when exercising "its authority under Chapter 10 to shift responsibility for the Defendant's reasonable attorney's fees to the plaintiff, Nath, as a penalty for his pursuit of groundless claims." *Id.* at 710. The Supreme Court thus remanded "for further proceedings in light of *Rohrmoos*." *Id.*

33. In seeking review to the Texas Supreme Court from the judgment rendered following the first remand, presumably cognizant of law of the case principles, Nath did not assign error to this Court's, the Court of Appeals', or the Supreme Court's prior conclusions that Nath's misconduct was sanctionable, or that Nath could be sanctioned personally for such misconduct. *See Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (issues not presented in Supreme Court petition for review and brief on the merits are waived). Furthermore, nothing in *Nath II*, or the Supreme Court's mandate on remand, suggests that the Supreme Court overruled its prior opinion in *Nath I sua sponte*. To the contrary, *Nath II* favorably acknowledges the Supreme Court's prior conclusions in *Nath I*.

34. Under the law of the case doctrine, "questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Harris Cty. v. Walsweer*, 930 S.W.2d 659, 663-64 (Tex. App.—Houston [1st Dist.] 1996, writ denied). A court of appeals is then bound by its initial decision in later appeals of the same case. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003); *see also Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) ("[I]n a subsequent appeal, instructions given to a trial court in the former appeal will be adhered to and enforced."). Thus, where a court expressly affirms a portion of a judgment and reverses

and remands a subsequent portion, the remand is limited to the reversed portion, and subsequent remands do not change the limited nature of the remand. *Freightliner Corp. v. Motor Vehicle Bd. of Tex. Dept. of Transp.*, 255 S.W.3d 356, 364 (Tex. App.—Austin 2008, pet. denied).

35. The Supreme Court's conclusions in *Nath I,* as summarized in these conclusions of law, are legal conclusions. *See In re United Services Automobile Ass'n,* 521 S.W.3d 920, 928 (Tex. App.—Houston [1st Dist.] 2012, mand. denied) ("Review of a trial court's action under the abuse of discretion standard is a question of law" ... "the merits determination made in [a] prior proceeding is the law of this case"); *In re Henry*, 388 S.W.3d 719, 727-28 (Tex. App.—Houston [1st Dist.] 2012, mand. and pet. denied) (holding that prior appellate decision remanding for award of payment credit was law of the case, and trial court had no discretion to resubmit liability issue to a jury on remand). Here, there are no factual questions for this Court to resolve regarding the sanctionable conduct or Nath's personal culpability for such conduct, because the Supreme Court previously concluded, as a matter of law, that the evidence was sufficient to sanction Nath personally for all of his pleadings in this case.

36. The Supreme Court's conclusions in *Nath I,* as summarized in these conclusions of law, are law of the case, and the Court is without authority to revisit them. *See, e.g, Phillips v. Bramlett,* 407 S.W.3d 229, 234, 243-44 (Tex. 2013) (concluding, where original judgment was reversed in its entirety and the case was remanded, that further findings on remand relating to issues previously resolved on first appeal would have been moot); *Hudson*, 711 S.W.2d at 630 ("By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. The doctrine is based on public policy and is aimed at putting an end to litigation."). Nath's numerous requests

that this Court revisit those conclusions (*i.e.*, whether he was properly personally sanctioned) are improper. [3]

B. The Reasonableness and Necessity of Defendants' Legal Fees

37. Under Texas Civil Practice & Remedies Code Section 18.001, in response to a movant's testimony by affidavit regarding the amount of reasonable and necessary attorneys' fees, the nonmovant must file a counter-affidavit contesting the reasonableness of the movant's attorney's fee claim. *See* TEX. CIV. PRAC. & REM. CODE § 18.001(b). Unless a controverting affidavit is filed, an affidavit as to the amount of attorneys' fees may be presumed reasonable. *Id.*; *Hunsucker v. Fustok,* 238 S.W.3d 421, 432 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Petrello v. Prucka,* 415 S.W.3d 420, 431(Tex. App.—Houston [1st Dist.] 2013, no pet.). The party intending to controvert a claim in the attorneys' fee affidavit must file a counter-affidavit no later than 14 days before the beginning of trial. TEX. CIV. PRAC. & REM. CODE § 18.001(e). Nath did not file a sworn controverting affidavit, nor did he file a declaration meeting the requirements of Texas Civil Practice & Remedies Code §132.001.

38. In addition to Baylor's Second Supplemental Affidavit and the Hospital's Second Supplemental Declaration, the Court has also considered the live testimony of Mr. Mizell and Ms. Clark, the Defendants' fee invoices, and other evidence presented at the hearing on Defendants' Applications for Fees. "A trial court may grant appellate attorney's fees as part of a sanctions order, but the award must be conditioned on the appeal's outcome." *In re Kristina S.*, 14-10-00966-CV, 2010 WL 4293122, at *1 (Tex. App.—Houston [14th Dist.] Oct. 28, 2010, no pet.).

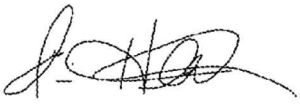
39. This Court has considered the Hospital's Application for Attorneys' Fees Incurred as Reassessment of Sanctions Against Rahul K. Nath and Baylor's Application for Fees as

[3] In the alternative, even if the Court were to have authority to reconsider its earlier findings and conclusions which were upheld in *Nath I*, the Court declines to do so in an exercise of its discretion.

Sanctions, consistent with the directives set forth by the Texas Supreme Court as discussed herein. Exercising its discretion, and by considering the existing record and additional evidence submitted by the parties, the Court has determined that the sanctions set forth in the foregoing findings of fact are the appropriate amount to sanction Nath for reasonable and necessary attorneys' fees incurred by the Defendants as a result of Nath's misconduct. The Court has determined that no behavior by Defendants caused the fees for which recovery is granted herein.

40. To the extent that any finding of fact should be characterized as a conclusion of law, the Court recharacterizes it here accordingly.

SIGNED on _____.

Signed:
12/18/2019 

JUDGE PRESIDING

APPENDIX F

APPELLATE COURT NO. 14-11-00034-V

REPORTER'S RECORD

VOLUME 2 OF 2 VOLUMES

CAUSE NO. 2006-10826

RAHUL K. NATH, MD	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, T E X A S
SALEH M. SHENAQ, MD	§	215TH JUDICIAL DISTRICT

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MOTIONS

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On the 19th day of November, 2010, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE STEPHEN KIRKLAND, Judge Presiding of the 215th District Court of Houston, Harris County, Texas.

Proceedings reported by stenographic method.

LaVEARN IVEY

OFFICIAL COURT REPORTER

215TH DISTRICT COURT

HARRIS COUNTY, TEXAS

A P P E A R A N C E S:

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November 19, 2010

THE COURT: On the record with 2006-10826. This is your motion for --

MR. BEERS: Dr. Nath. Our motion for new trial and for reconsideration of the order of sanctions. Brad Beers and Susan Norman here for Dr. Nath, Your Honor.

THE COURT: Okay.

MS. VU: Your Honor, Stacey Vu and Russell Gips for Texas Children's Hospital.

THE COURT: The gist of your motion. You have the floor.

MR. BEERS: Thank you, Judge. May I approach?

THE COURT: Sure.

MR. BEERS: Just as a demonstrative aid to help get the timeline in perspective as it relates to this motion, Judge, we're asking the court to reconsider the sanctions order that it imposed against Dr. Nath on September 17, 2010.

The basic fundamental reason the court should reconsider and set that order aside is because the court was without jurisdiction to impose the sanctions because the court had lost its plenary jurisdiction in this case.

The dates that are well familiar to the court June 18, 2010 the court granted a summary judgment motion

or a group of summary judgment motions that disposed of Dr. Nath's claims against Texas Children's Hospital. The same day the court granted summary judgment motions that disposed of Dr. Nath's claims against Baylor College of Medicine. The case was still alive because Texas Children's Hospital had claims pending against Dr. Nath. The notice of nonsuit was filed on August 12, 2010. That ended the case on that day. That made the prior summary judgment orders final.

The court signed an order on August 17, 2009 recognizing that the Texas Children's Hospital notice of nonsuit had been filed. The court's order actually recognizes, as many courts fail to recognize, that the nonsuits were effective on the day they were filed August 12, 2010.

The 30 day deadline for filing a motion for new trial or a motion to modify the judgment started running on August 12, 2010.

Texas Children's files a motion on August 27, 2010 seeking sanctions against Dr. Nath. Texas Children's in their motion actually --

THE COURT: Is that the 26th or the 27th?

MR. BEERS: I believe it was filed the 26th of August, Judge.

THE COURT: Okay. You said 27th.

MR. BEERS: I apologize.

THE COURT: Just want to make sure I got the right day.

MR. BEERS: Hopefully I was just not looking through my glasses right when I looked down.

THE COURT: Okay.

MR. BEERS: Texas Children's files a motion for sanctions within the 30 day frame of time in which the court has plenary jurisdiction. Texas Children's Hospital cites the case of Lane Bank Equipment Company as the basis for saying that the court retains jurisdiction and that they -- because they called this a motion to modify the judgment, that somehow that extends the court's plenary jurisdiction.

They misread Lane Bank Equipment Company, Judge, in a couple of different respects.

And it's probably most helpful to look at Judge Hecht's concurring opinion and I have got a copy of the opinion if it would be of help to hand it up to the court.

THE COURT: Sure.

MR. BEERS: Judge Hecht in his concurrence which starts around page 7 of the printed copy that we have points out that the majority opinion is creating trick opportunities. And that as a result of the majority

opinion in Lane Bank Equipment Company, there now have to be magic words in a motion such as the one filed by Texas Children's Hospital in this case.

And Judge Hecht goes to great lengths to point out that the reason he disagrees with the majority opinion but yet concurs in the result is because starting with Lane Bank Equipment, the motion such as the one Texas Children's filed now has to use the magic words that not just that it's seeking a motion for sanctions which can be a stand-alone order and if the court had granted it within 30 days of August 12, 2010, we probably would not be in a position to make this argument. But because the court did not rule within 30 days of the filing of the notice of non-suit, the court lost its plenary jurisdiction.

Because Judge Hecht points out that one of the tricks is and the magic words now become that the motion has to not only ask for sanctions, but it must say that the sanctions be included, quote, in the judgment, unquote. This is on printed page 8 under the caption trick No. 1, as opposed to being imposed in a separate order as they could be. The magic, the motion has to contain the magic words if it is to extend the court's plenary jurisdiction.

And the Judge goes on in that same paragraph under trick No. 1 on page 8 of the opinion, this is the

Lexis opinion, that if the motion does not contain the magic words then it does not affect the court's plenary power or the appellate deadlines. And that without -- if the losing party moves for sanctions without specifying that they be included in the judgment then that does not extend the court's plenary jurisdiction.

When the court looks at the motion filed in this case by the Texas Children's Hospital, it asks -- and it calls the motion, its motion to modify the judgment to assess fees as sanctions against plaintiff Rahul K. Nath.

In the first paragraph which is not the controlling paragraph but it says that pursuant to Chapter 10 and Rule 13 the hospital files this motion seeking to modify the judgment to assess attorneys fees as sanctions against plaintiff, Dr. Nath. It does not say that they seek to have the judgment modified in here. It does not say that they seek to have the judgment changed and they do not seek to incorporate the sanctions as part of the final judgment.

When the court looks at the prayer in the motion filed by Texas Children's Hospital on August 26, it asks simply that the court grant the motion to modify and impose a monetary sanction against Dr. Nath under Chapter 10 and Rule 13.

Texas Children's does not ask that the

judgment be modified, does not ask that the judgment be changed in a substantive part. Does not ask that the sanctions be incorporated as part of the final judgment. They did not use the magic words that are pointed out by Judge Hecht as being required under the Lane Bank decision. They did not ask that the prior judgment be vacated. And that a substitute final judgment be put in place that incorporates the findings of the summary judgment. That's not there.

They simply ask for and you gave them a stand-alone sanctions order. Your order that you signed on September 17 that we are here about does not say that the prior judgment is set aside; this is the new judgment. It does not say that the judgment is modified to incorporate as part of the judgment this sanction order. Your order, in fact, says you recognize that those prior orders are still out there with regard to the summary judgment proceedings. So there has not been an incorporation of the sanctions as part of the final judgment which Lane requires.

There is not -- and in fact, in the Lane case, the motion filed by the party seeking sanctions in Lane specifically asks for sanctions and rendition of a new final judgment. And in the Lane case, the motion was to incorporate a sanction as part of the final judgment.

That did not happen in this case.

Because it did not happen, because their motion did not ask that the sanctions be incorporated into part of the judgment, but simply ask for and obtained a stand-alone sanctions order, because the court signed the order on September 17th, you had lost plenary jurisdiction in the case.

So that is the jurisdictional problem. There have been a couple of cases that point out this problem since then. One is a Court of Appeals case from Dallas in 2002. I believe it to be pronounced shoe, X-U vs. Mao, M-A-O, and I have got copies of this that I'll hand up.

And the Xu case specifically looks at Judge Hecht's concurrence and points out, yes, that's a problem. You have to have that magic language, the Xu case was a case seeking sanctions and the court points out that if the motion for sanctions includes the magic words that sanctions are to be included in the judgment, quote unquote, the trial court's plenary power is extended, but if the motion does not contain the magic words, there is no affect.

The case -- it won't be a final opinion yet, but Miranda vs. Wilder from Dallas this week November 16, Tuesday, goes back and seizes upon that same issue and points out the problem with Lane.

Let me hand these up so counsel will have an opportunity to look at them, Judge.

So the jurisdictional problem cannot be overcome in this case because the magic language was not used. They sought sanctions. They said it was a motion to modify the judgment but as the court knows what you call the motion doesn't control what is actually in the motion and what you pray for is what the ultimate tenure of what the motion is going to be and what controls.

The second issue, Judge, with regard to the sanction order, if you were not to -- if you disagree with my analysis of Lane, is that there still is a presumption that the pleadings were filed in this case in good faith. As I went back and reread -- and as the court knows I don't have the benefit of the four year plus history of this case; I'm new to the case. So actually, I had to go back and look at some of these things.

And one of the things that I looked at in particular, as I was reading the motion for sanctions was that out of a 19 page motion that was filed by Texas Children's Hospital in this case, out of 19 pages there are only two paragraphs, starting on page 17 of the motion that make an effort to try to explain why Dr. Nath should personally be held responsible for these sanctions, as opposed to the law firm that had represented him for four

years in the case.

And I realize that in motion for sanctions, there were allegations that, well, Dr. Nath changes lawyers like he changes his underwear; every time he doesn't like the way things are going he changes lawyers. I'm overstating that a bit, but this court knows and the court can tell from looking at the docket sheet that when the case was originally filed the law firm from Dallas or actually two law firms from Dallas working together on the case. They were on the case until the beginning of this year. They were on the case four years. They didn't -- Dr. Nath was not changing lawyers every time he didn't like the way things were going.

Mr. Shea took over the case the early part of this year and was on the case until the court entered its sanction order on September 17th, 2010. Since that time action Dr. Nath has gotten different counsel. But with regard to the conduct that is at issue in this case or the conduct that which arguably could form the basis of a sanction against the lawyers or Dr. Nath, Texas Children's just has not met its burden of proof. And one of the things that was telling in its response today or for today's hearing was that they said that Dr. Nath -- this is on page 3 of their response, completely absent from the record is a sworn denial by Nath that he participated and

approved of the bad faith legal maneuvers in this case.

That begs the question that Dr. Nath does not have the burden of proof in this case with regard to this sanctions motion. The burden of proof to actually put on evidence lies with Texas Children's and they haven't accomplished that.

And as they tried to explain to you in the two paragraphs of their 19-page motion as to why Dr. Nath should personally be held responsible, out of four years, out of four and a half years of litigation, the most they could point out is that Dr. Nath attended two depositions, that his lawyers said they needed to have him present at apparently these same two depositions and Dr. Nath signed an affidavit that was used in response to a summary judgment motion.

Now that kind of disregards the other three hundred pleadings or however many hundred there are in the case that were signed by the lawyers. And if Dr. Nath had ever signed a pleading in this case, we would have had it I'm sure on 30x40 blow-ups showing here is Dr. Nath personally involved in the litigation.

What was also interesting in looking at the cases cited by Texas Children's in their response for today, one of the cases they point out, Young vs. Texas State Bank. Well, under the notion that the court can take

judicial notice of the conduct of the case in determining whether to impose sanctions, well, the thing that was interesting about Young vs. Texas State Bank, I believe this was a case where the litigant that was sanctioned was pro se. So the litigant had been there in the courtroom, had been doing all the things, had been signing the pleadings.

So in that case, well, it might make sense that the court would have firsthand knowledge of what the misconduct was because the person that got sanctioned was the person that walked into the courtroom every time and signed all the pleadings.

I think the thing that's notable in this case is Dr. Nath has never been in this courtroom ever in the four and a half years this case has been pending. I haven't been here the whole time but I don't believe Dr. Nath has ever been here.

THE COURT: He has not been introduced to me, so --

MR. BEERS: And I realize the case was pending before you came. But nonetheless, if he had been here, I'm sure somebody would have pointed out, said, well, Dr. Nath was here 23 times or 14 times or once. So we have the distinction and the difference between the Young vs. Texas State Bank case where the litigant, I

think he was a lawyer, but is pro se. So the litigant is in the courtroom. The conduct is taking place in the courtroom. By the party that ultimately got sanctioned. The party that signed the pleadings was the party that got sanctioned.

The in re: Lewis case was also one that seems interesting that's cited in the response for today in that the basis for the sanction in that case appears to be that the party, not the lawyer, signed a false affidavit in support of a, as I read it, a Rule 202 suit.

So the conduct there was not for filing, quote, a frivolous pleading in the sense of the pleading making some claim but the party in that case had actually signed an affidavit or a verification that was false, so the sanction was being sought against the party for signing a false verification or affidavit.

If that was the case here, we would have heard about that in the context of their sanctions motion.

About the best they could do is say, well, Dr. Nath signed a really long verification that basically recited the factual allegations in his petition in response to a summary judgment motion.

But Dr. Nath's belief or knowledge about certain facts is not what the conduct is that's being sanctioned or at least I hope it's not. The sanctions

motion is not supposed to be because your facts aren't any good, the sanctions motion is supposed to be because you have advanced a legal cause of action that is baseless or doesn't have any grounds to be filed in the first place or doesn't have grounds to be prosecuted. Those are the decisions that are made by the lawyers in the case.

And the fact that Dr. Nath may have gone to law school for one or two semesters, if that becomes the criteria for when a party can be sanctioned I don't think I have seen the case that says well just because the guy went to law school once or twice suddenly puts him in a different position to criticize or evaluate or know whether his lawyers are making a good faith effort to advance a legal theory or not or whether the legal theory is viable or not.

There has been absolutely no evidence to that effect and the fact that Texas Children's response today or for today says well, Dr. Nath hasn't filed an affidavit denying that kind of points that out and reiterates that.

There is not a shifting of the burden of proof by the filing of a motion for sanctions. And I think probably the only motion that you can file that actually shifts the burden of proof to the other side is a Rule 12 motion to show authority. And the filing of one of those motions actually shifts the burden of proof to the other

side. But filing a motion for sanctions as Texas Children's did in this case does not shift the burden of proof over to Dr. Nath to disprove the allegations of their motion.

Couple of other issues, one, there is no evidence, no competent evidence in this case to support the sanctions. And a couple of points in that regard. One has to do with whether the court can or should or did take judicial notice of its file. And I have gone back and read the transcript from September 17th. I wasn't here. But the interesting twist on how Texas Children's in its response today characterizes the court's taking judicial notice of its file or the contents of its file is interesting because in the response that was filed for today, page 1, paragraph 1, Texas Children's tells the court that the court's file was offered as evidence via judicial notice. And goes on to say that error may not be predicated upon the court's admission of this evidence unless there was an objection.

Well, I don't think taking judicial notice is quite the same thing as we're offering as evidence the entire contents of the file and whether there is an objection to that or not. And I think that's borne out in part by the hearing that's not part of this cause but in the A case you heard last week Baylor College of Medicine

actually had an exhibit sticker that they wanted to put on a list of pleadings, they were actually offering the contents of the court's file as an exhibit and the court went through and made rulings about what would or would not be admitted as evidence which is completely different from the court taking judicial notice of whether things are filed in its file or not.

And the additional point I would make in that regard is that just because the court takes judicial notice whether somebody asks you to or whether you do it sua sponte, whether somebody objects or doesn't object, taking judicial notice of the contents of the file does not mean that the court is permitted to take as true the allegations that are contained in the file, otherwise we wouldn't need trials. I could simply file my best evidence, put it in the file and when it comes time for trial stand up and say plaintiff asks the court to take judicial notice of its file, we rest and sit down and you would never have to call a witness if that's all that was required to put on evidence, quote, unquote, in a case.

The second thing that stands out in my mind was the point that -- they make the point at page 3 of their motion that there was no objection to the offering of their affidavit in support of the amount of the lawyer's fees. And I think they are mistaken because Mr.

Shea at page 17 or 18 of the transcript, page 14 of the transcript of the hearing when he is asked about whether he has any objection to the affidavit as to the amount of the lawyer's fees objects, the court as I recall overruled the objection.

So the final point I would make is that again, almost kind of in a back-handed way in the motion for sanctions itself and back to that page 17, the two paragraphs about why Dr. Nath should be held personally responsible for these sanctions as opposed to his lawyers if they had sought sanctions against the lawyer, why he's personally behind this, the point they made about, well, Dr. Nath is involved in all these lawsuits. Well, as the court knows two of the lawsuits that are cited involve the same parties that are involved in this case, Dr. Shenaq if I'm pronouncing his name correctly, and the doctor who because of a plea to the jurisdiction ended up having the suit brought in Baltimore. So it's part of the same suit.

The one that I like the best though is Texas Children's Hospital criticizes Dr. Nath and says Judge Kirkland, you should take this as one of the reasons why Dr. Nath should be personally sanctioned in this case is because he's involved in a lawsuit in federal court over his house. What the court may have heard at some prior hearing but what they don't tell you is it's a Texas

Children's Hospital board member who is the plaintiff in that lawsuit. Dr. Nath bought a house, the Texas Children's board member sued the seller of the house saying you were supposed to sell the house to me, Dr. Nath intervenes in the case because he doesn't want to end up with his house, who owns his house or issues related to his house getting decided by parties in a lawsuit to which he is not involved. After he intervenes to protect the money he spent buying the house, the Texas Children's board member sues Dr. Nath alleging that he violated the Houston city ordinance on discriminating against people with disabilities or something to that effect.

So Dr. Nath is in a federal court lawsuit over his house. He's a stranger to the transaction. He buys a house from the next door neighbor of the Children's board member. The Children's board member is mad at the seller. The children's board member sues the seller. Dr. Nath intervenes, Dr. Nath gets sued by the Children's Hospital board member for conspiring and being involved in the purchase of the house. So that's why he's in federal court.

So this notion that Dr. Nath goes out and beats up on people with lawsuits and therefore you should extrapolate from this hearsay data that he's responsible for this just doesn't make sense.

Mr. Shea's affidavit which is attached to our motion also flatly shows the court that the decisions that were made, the pleadings that were filed in this case when he took over the case back in the April time frame of 2010 were his decisions. And Dr. Nath was not making those decisions about what causes of action or what pleadings should be filed. For each of these reasons the court should set aside and vacate the sanctions award because the court lacked jurisdiction in the first place; that should bring an absolute total end to this litigation. Ironically, the motion for new trial that Mr. Shea filed on September 15, 2010 would be untimely because now that we go back and look at this, the court lost its plenary jurisdiction on September 11th, that was 30 days after the Texas Children's notice of non-suit because Texas Children's did not use the magic words that Judge Hecht points out in the Lane decision in their motion for sanctions.

This case ended on September 11, 2010. If the court vacates the sanctions, the case is done, over, and we all go home.

THE COURT: Had they not sought sanctions against Dr. Nath personally but rather have gone after the lawyers, do you concede that there is a basis for sanctions there?

MR. BEERS: No, sir. They still don't have jurisdiction, first of all. Whether the court -- if you are asking me the substantive question of were the causes of action founded or not --

THE COURT: Asking for substantive responses from Dr. Nath's side from the get-go on this issue. At the very first trial I asked for substantive response to the motion. At the very first hearing I got no response. Other than procedural standing and procedural posturing. It's only after continuous prodding that I even get an objection from Mr. Shea to any of the stuff that was before me. I got no guidance from your side.

MR. BEERS: All right. I understand.

THE COURT: Until now that it's all over. This is the first substantive argument I have heard from Dr. Nath's side of the column since this began back in, whenever the motion was first filed. It's all been procedural.

MR. BEERS: The short answer, Judge, is no, there would not be a basis for sanctions against the lawyers, either. And the reason for that is if you go back, as I understand the file, there were responses filed to various motions for summary judgment that were filed by Texas Children's back as I recall at the end of last year

or the beginning of this year before Mr. Shea got involved in the case.

And my time frame may be off a bit. But in that time frame. And Mr. Shea as the court is well aware changed in the sixth amended pleading, abandoned claims that had been filed and proceeded on a new claim and a new theory of recovery in the case. But there are summary judgment responses, stacks of paper as I understand it, that were filed by the lawyers who had been involved in the case for the first four years give or take, substantively responding to the allegations in the summary judgment motions about limitations and the other claims and causes of action.

THE COURT: Mere fact of a response doesn't mean the response was filed in good faith either, does it?

MR. BEERS: Well, there is a presumption that it was filed in good faith, yes. Could there be some affirmative evidence that the lawyers from Dallas filed the response in bad faith? I haven't heard what it is. Could it be that the court, if Mr. Shea had not filed the sixth amended petition and the court had proceeded with the summary judgment motions with the Dallas lawyer responses, is it possible the court would have granted summary judgment to Texas Children's anyway? Yes, it's

possible. But it's also possible that as to some or all of the causes of action the court would have found there are fact issues or legal issues that would have precluded summary judgment on the causes of action that were being advanced at that time.

I think the other thing that is a bit informative and enlightening and again you and I weren't here for the first couple of years and I haven't been here for the ensuing couple of years since you have gotten involved in the case but the part that struck me as I read through the motion for sanctions the first time was the notion that this litigation has been going on for four years and we have known from day one -- and this is the tenure of their motion -- that it was frivolous from day one and the question that I kind of rhetorically ask myself, well, if this has been such nonsense starting in 2006 when it was filed, why wasn't there a summary judgment motion filed in 2006? Or in 2007 or in 2008 or 2009 if the claims were so patently frivolous? If it was so patently clear that the statute of limitations had run as to some of the defamation claims? And I don't think I have seen anything that said there was a claim that it had run as to all of them but as to some of the claims for defamation, the allegation is it was patently obvious to anybody that the statute of limitations had run.

Well, if it was so patently obvious in 2006, why did they wait four years to file a motion for summary judgment on an issue, if it's so patently obvious.

As I understand it, the summary judgment motions first get filed literally four years into the life of the case. So that tells me as an outsider looking at this, well, it must not have been so obviously frivolous --

THE COURT: You understand my frustration as to having to actually issue a huge sanctions order to get that response?

MR. BEERS: Yes, sir.

THE COURT: No one has said that from your side at all, ever.

MR. BEERS: I understand that, Judge.

THE COURT: Anything else you want to say?

MR. BEERS: No, sir.

THE COURT: Ms. Vu.

MS. VU: Your Honor, these jurisdictional arguments are new. They are not in the motion for new trial so I haven't had an opportunity to review the cases, the Miranda case and the Xu case that we have been presented with today. The jurisdictional argument appears to me to be based on some language in the concurrence of Lane Bank.

But if you look at Lane Bank itself, what it says is that a motion made after judgment to incorporate a sanction as part of the final judgment does propose a change to that motion. Such a motion is on its face a motion to modify, correct or reform the existing judgment within the meaning of 329(b)(g).

329(b)(g) does not provide for a prior judgment to be vacated as they suggested. It provides for it to be modified. And Lane Bank specifically says that you can modify it by incorporating a sanction and then all those orders together will form a final judgment and that's exactly what we did.

Mr. Beers' other arguments, I believe we have addressed very thoroughly in the written response that we filed and the court addressed these points as well in its findings of fact and conclusions of law.

I think it's interesting that nowhere is it really suggested that the underlying lawsuit did have any factual or legal merit. I think the court was correct in its initial assessment that the evidence of Dr. Nath's procedural machinations in this case, what Ms. Zaner represented to the court about Dr. Nath's wanting the testimony of Dr. Stal and Hollier, and his meeting with those doctors so that they could get the testimony that they wanted about Dr. Shenaq and about Dr. Shenaq's

patients to use that information which was totally irrelevant to the frivolous and underlying litigation to extract leverage in this lawsuit is bad faith conduct. And there has not been any evidence put on by Dr. Nath to rebut the presumption that's raised by the evidence that Texas Children's Hospital has cited to that's already in the record.

And there are many, many cases where courts consider everything that's happened in the history of the case in assessing sanctions against a party. There is nothing in Chapter 10 or in Rule 13 that says that a party can only be sanctioned for something that they signed. Those provisions both say that you can sanction the lawyer who signed it or the party that the lawyer represents. There just has to be some sort of involvement by the client in the bad faith conduct according to the many cases interpreting those rules. And the court was correct when it found before that there was that bad faith.

Beyond that, I think we're willing to stand on our prior written materials and prepared to address any questions you may have.

THE COURT: You are not telling me that you think Dr. Nath has any burden of proof here, are you?

MS. VU: Well, I do think that given the evidence that we have cited to in the record about his

involvement in the case and his seeking improper recovery and his pressing of the frivolous claims in this litigation, given that evidence then the burden does shift to him. There has been no denial that Dr. Nath is heavily involved in pressing the frivolous claims in this suit.

THE COURT: So it's the burden of persuasion?

MS. VU: Right. And I would just add also that the Texas Supreme Court has said that this case is American Flood Research vs. Jones, that there is a presumption that an attorney's knowledge is imputed to the client because the attorney is the client's agent. And that's a sanctions case.

So when you combine that with the evidence that we have put forward about Dr. Nath's bad faith motives in this lawsuit and the underlying frivolousness of the claims, when you put that all together, I think it's ample basis to sustain your sanctions award.

THE COURT: Okay. Anything else?

MS. VU: No. I'm happy to answer any questions you have.

THE COURT: Anything else?

MR. BEERS: Judge, I can appreciate the court's frustration with the route this case took starting back in the April time frame and I apologize on behalf of

Dr. Nath that the court didn't -- for the way the case was handled. Could have been handled very differently. I still don't believe it rises to the level of being sanctionable conduct. Certainly not an example of the best way to handle it or counsel putting their best foot forward or doing some of the things that we would prefer be done in the handling of a case.

But the bottom line is the motion as filed does not seek having sanctions incorporated into and does not follow the magic language that Justice Hecht points out. It does not ask the court to sign a new judgment. It does not ask the court to incorporate the sanction as part of a final judgment. They are simply seeking to have sanctions imposed, added on which is not incorporated into.

What's interesting in the Lane Bank case is, and you look at the concurrence, the court actually points out that not only do you have to under 329(b)(g) seek to modify the judgment in order to trigger the extension of the appellate deadlines but you have to seek a substantive change, a substantial change. It can't just be some minor change which is not written anywhere in the rule. So it's a trap for the unwary when you have to go out and look at case law that adds a substantial change to the judgment component. Distinguished from 329(b) I think it's (h)

that says that the court goes back and I think the example adds a comma to the judgment, that resets the appellate deadlines, but the relief sought -- and Lane Bank is here in black and white. The case, if the court sets aside the sanctions, vacates the sanction award, the case is over, done, nobody gets to appeal. There is nothing to appeal. And we all leave.

Again I apologize on behalf of Dr. Nath for the conduct I'm aware of and the frustration that I know the court feels for the last six months, give or take, not having its questions answered as good as they could have or should have been.

THE COURT: Okay. That's all you got, I'll issue a decision soon.

(End of proceedings).

THE STATE OF TEXAS

COUNTY OF HARRIS

I, LaVearn Ivey, Official Court Reporter in and for the 215th District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and -numbered cause, all of which occurred in open court or in chambers and were reported by me.

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