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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. REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

Dripping with condescension from with the very first sentence, instead of engaging directly with Dr. Nath's arguments, Respondents' brief on the merits relies on distraction, misdirected blame, fictional waiver, and "gotcha." It misinterprets Dr. Nath's arguments and repeatedly paints Dr. Nath as a vexatious litigant (despite no court ever concluding so), guilty of attempted extortion (twisting words without any evidence), and as engaged in a quixotic effort "to stave off the inevitable" (Resp. BOM at 2)—which they believe is confirmation of the identical massive sanction award this Court already **reversed twice**.[1] The bottom line, however, is that the parties are here yet again because the lower courts have twice refused to follow this Court's instructions. And Respondents have still failed to show how the massive amount of almost five years of fees "resulted from or were caused by the sanctionable conduct" of Dr. Nath's attorneys having filed claims barred by limitations. *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016).

Notably, Respondents do not even bother to respond directly to Dr. Nath's two important statutory arguments regarding Texas Civil Practice and Remedies Code section 10.004 and the Texas Citizen's Participation Act. Whether a jury

[1] *Nath v. Tex. Children's Hosp*., 576 S.W.3d 707, 709 (Tex. 2019) (per curiam) (*Nath II*); *Nath v. Tex. Children's Hosp*., 446 S.W.3d 355 (Tex. 2014) (*Nath I*).

should be afforded under section 10.004 is important to the jurisprudence of the state given the developments in the law and this Court's instructions that this question must be analyzed based on a specific statutory text's departure from the American Rule. The Court is also presented with the opportunity to resolve an ongoing conflict among the courts of appeals on whether and in what context a motion for sanctions is considered a "legal action" subject to the TCPA.

Because the same sanction has now been imposed three times, this case also requires this Court's continued insistence that due process must be provided. A sanction must be both just and not excessive. Whether the sanction was "not excessive" was remanded in *Nath I* and remained within Respondents' burden of proof after this Court held that their "conclusory affidavits" were insufficient in *Nath II*. The question posed by this Court in *Nath I*—"the extent to which [Respondents] caused the expenses they accrued in litigating a variety of issues over several years"—remains unanswered. *Nath I* at 373.

It is not Dr. Nath's fault that Respondents keep chasing the same massive twice-reversed sanction: Dr. Nath has the right to continue to defend himself, and anyone in his position would do so vigorously. Indeed, Dr. Nath has heightened incentive to defend himself here—this case involves one of the largest sanctions in Texas history. And it is the only reported pleading sanctions case against an individual litigant, who was represented by counsel, who never signed or filed a

single pleading, never set foot in the courtroom, was never admonished by the judge on the merits of the case, and was never given a lesser sanction, and in which the same sanction was imposed (twice) without any evidentiary hearing until nine years after the first sanctions motion was filed.

The issues presented are important to the jurisprudence of the State, and the Petition should therefore be granted. TEX. GOV'T CODE § 22.001(a).

I.

This Court has the authority to render judgment based on the issues and arguments presented.

Despite Respondents' rhetoric, Dr. Nath does not presume to rewrite *Nath I* or *Nath II*, and certainly does not ask this Court to find facts or to act without jurisdiction or authority. Dr. Nath requests that the Court render judgment based on the issues and arguments presented, or in the alternative, reverse and remand to the trial court or court of appeals, as appropriate. Respondents themselves ask this Court to render judgment on Dr. Nath's TCPA issues instead of remanding to the Fourteenth Court because "a remand to the Fourteenth Court … would not advance the litigation, and will necessarily result in another trip back to this Court (the fourth) in a case that has been pending since 2006." Resp. BOM at xviii n.1.

The Court's language and the result in each *Nath* opinion make clear that imposing the same sanction—down to the penny—is not what this Court instructed for remand.

Nath I: After reciting multiple times the undisputed fact that Respondents litigated for nearly half a decade before moving for sanctions after they had a final judgment, the Court remanded for the trial court "**to *reassess* the amount** of the sanctions" because it had "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." *Nath I* at 373 (emphasis added).

The amount of sanctions awarded was not sustainable (then or now) because under "the Legislature's chosen words in Chapter 10 and [this Court's] construction of them," a pleading must be assessed under Chapter 10 "at the time the pleading is filed," not "at the time of a merits adjudication four years or more into a proceeding." *Id.* at 369. In fact, the Court contrasted the circumstances under which it would be appropriate to place the entire cost of litigation on a plaintiff—"if **the plaintiff was the party** responsible for sustaining frivolous litigation **over a prolonged period**"—with the record here:

> **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.

Id. at 372 (emphasis added).

Nath II: The Court again set aside the identical sanctions award. It reiterated that it had "remanded for the trial court **to *reassess* its award** of attorney's fees," because Respondents "had litigated merits issues for nearly a half-decade before … mov[ing] for summary judgment," and Respondents had to show how (as due process requires) that their requested fees "resulted from or were caused by the sanctionable conduct." *Nath II* at 708-09 (citations omitted) (emphasis added). The Court then reversed and remanded again, concluding that "the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions." *Id.* at 710.

The Court's own interpretation of *Nath I* is consistent with Dr. Nath's: "[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." *Bennett v. Grant*, 525 S.W.3d 642, 654-55 (Tex. 2017) (emphasis added). 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 violate the fundamental principle that sanctions must be just and not excessive. *Nath I* at 372.

Yet the question posed by *Nath I*—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 about Respondents'

brand-new theory that this was a complex "bet-the-company" case, contrary to their prior positions that this was an "uncomplicated" case. *See* Pet. BOM at 4-6, 44-45 (1RR69, 123). And the record shows that the trial judge believed her role and "the purpose" of the December 2019 evidentiary hearing (the first evidentiary hearing in this case) was just "**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.RR4 (emphasis added); 1RR250. As explained by this Court in this very case, due process demands more than a rubber stamp.

Dr. Nath is not asking the Court to simply reverse and render judgment. Dr. Nath requests that the Court grant his Petition for Review, and based on the arguments presented, reverse and render that judgment that the lower courts should have rendered. *See* TEX. R. APP. P. 60.2(c), (d), (e), (f).

II.

Only this Court can clarify the scope of *Rohrmoos* in the sanctions context and whether a jury must determine the amount of fees in that context.

A. Dr. Nath did not abandon, waive, or forego his jury arguments.

On second remand, Dr. Nath timely filed a jury demand and timely renewed his jury demand. CR13; 5Supp.CR3-6. It is not clear from Respondents' arguments how Dr. Nath could have previously anticipatorily abandoned or forfeited an argument based on developments in the law that had not yet occurred regarding the

standards for fee shifting. And it is ironic that Respondents fall back on law of the case when it is they—not Dr. Nath—who have repeatedly convinced the lower courts to ignore this Court's directives.

Dr. Nath's briefing in the first appeal complained of the refusal to afford him a jury under Texas Civil Practice and Remedies Code chapter 41, which governs awards of **exemplary damages**. That has nothing to do with the argument Dr. Nath makes now, based on the actual law of this case in *Nath I*, *Nath II*, and *Rohrmoos*. And there could certainly be no waiver as to the brand-new sanction of half a million dollars in appellate fees as the Hospital did not even request them until its third time at bat.

The new *Rohrmoos* standard was not an available argument at the time of Dr. Nath's briefing in *Nath I* or *Nath II*. This Court held in *Rohrmoos Venture v. UTSW DVA Healthcare* that whenever fee shifting is authorized, whether by contract or statute, the party seeking the fees must prove that the requested fees are both reasonable and necessary, and that "[b]oth elements are questions of fact to be determined by the fact finder." 578 S.W.3d 469, 489 (Tex. 2019). In *Rohrmoos* a jury answered the reasonableness question.

Then in *Nath II*, the Court remanded "[b]ecause the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions." *Nath II* at 710. The Court broadly instructed that the *Rohrmoos* standard for fee-shifting awards must

be followed in this and other sanctions cases. Thus, the fee award here is not merely a "sanction," as Respondents try to emphasize, but must meet the standards required for all fee-shifting awards. Respondents acknowledge that *Rohrmoos* and *Nath II* changed the law on how fee-shifting awards must be litigated in the sanctions context.

On appeal, a party may "construct new arguments in support of issues that were raised" in the trial court. *Li v. Pemberton Park Cmty. Ass'n*, 631 S.W.3d 701, 704 (Tex. 2021) (per curiam) (quotation, emphasis, and citation omitted). Dr. Nath was entitled to present his statutory argument—which Respondents do not directly address—as one of his arguments in support of his assertion that he was entitled to a jury. In his jury demand Dr. Nath in fact cited *Bocquet v. Herring*, one of the trilogy of cases analyzing the statutory language to determine if a jury must decide if requested attorney's fees are reasonable and necessary. 5Supp.CR4 n.3. Dr. Nath was entitled on appeal to argue additional cases in support of that issue. *See Li*, 631 S.W.3d at 704.

Based on the evolving law in this area, this Court's language in *Rohrmoos*, and its application of *Rohrmoos* in *Nath II*, Dr. Nath properly asks the Court to clarify how the developments fit together, including whether Dr. Nath is entitled to a jury trial here.

B. None of the cases cited by Respondents forecloses a jury.

Respondents claim this Court cited *Brantley v. Etter* in *Nath II* "for its holding that a jury trial is not required in a fee-shifting sanctions case without any indication that *Brantley* is no longer good law." Resp. BOM at 33. That is incorrect. In *Brantley* this Court wrote: "[W]e 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[.]" 662 S.W.2d 752 (Tex. App.—San Antonio 1983), writ ref'd n.r.e., 677 S.W.2d 503, 504 (Tex. 1984) (per curiam) (emphasis added). In *Nath II* the Court cited *Brantley* not for the no-jury proposition Respondents put forth, but as the source of a "misunderstanding regarding the proof necessary" to shift attorney's fees as sanctions, which requires a showing of reasonableness. *Nath II* at 709.

Respondents claim Dr. Nath admitted *Brantley* is controlling, but that is also not accurate. What Dr. Nath actually stated was that *Brantley* **may be** good law, as far as it goes. In stark contrast to *Brantley*, this is not a discovery sanction under Rule 215 for a discrete violation of the discovery rules. *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. And it is not a broad proclamation that a jury would never be appropriate in any sanctions case. Other than *Nath II*, this Court has cited *Brantley* only one time in its almost 30-year history, in a string

citation capturing a party's argument regarding a default-judgment issue. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 185 & n.9 (Tex. 2012).[2] *Brantley* involved different circumstances both factually and procedurally, it did not involve life-of-the-case fee-shifting as in *Rohrmoos* and this case, and as explained in Dr. Nath's brief on the merits, it cannot support denying Dr. Nath a jury here without this Court's further consideration.

Cire v. Cummings likewise does not "doom" Dr. Nath's argument. That case also involved a discovery sanction, and this Court held that Rule 215 does not mandate an evidentiary hearing in every circumstance. The sanction awarded in that case was $250 sanction related to a motion to compel, and the sanctioned party was given a bevy of lesser sanctions before that discrete amount was awarded. 134 S.W.3d 835, 837-38 (Tex. 2004). The Court did not hold that an evidentiary hearing (or a jury trial) is never required to satisfy due process, and the question remains what process is due under the circumstances here, in light of *Rohrmoos* and *Nath II*.

[2] Respondents cite *Miller v. Bank One, Tex., N.A.*, No. 05-99-01689-CV, 2001 WL 333617, at *4 (Tex. App.—Dallas Apr. 6, 2001, no pet.), and *Neely v. Comm'n for Lawyer Discipline*, 976 S.W.2d 824, 827-28 (Tex. App.—Houston [1st Dist.] 1998, no pet.), as two examples of cases following *Brantley*. Resp. BOM at 29-30. They are likewise not controlling. The Fifth Court did cite *Brantley* as an additional reason why the sanctioned party was not entitled to a jury, but the primary reason was the sanctioned party "waived such a complaint by failing to object to the trial court's role as fact finder at the sanctions hearing." *Miller*, 2001 WL 333617, at *4. *Neely* merely cites *Brantley* without any analysis.

C. Respondents attempt to avoid the Court's statutory framework for determining who should decide a sanctions amount.

Even if *Rohrmoos* does not require a jury in all fee-shifting contexts, whether a jury is required for fee-shifting under Chapter 10 remains an open question and should be answered under the statutory framework developed by this Court. Yet Respondents do not even bother to respond to Dr. Nath's statutory analysis arguments or analyze the language of Chapter 10.

Respondents likely ignore the issue because they have no way to distinguish the statutory language in Chapter 10 from the statutory language in:

- the Declaratory Judgments Act—which this Court held affords a jury, *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998);
- the Open Meetings Act—which this Court held affords a jury, *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 367-68 (Tex. 2000); or
- the Labor Code—which this Court held affords a jury, *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 230 (Tex. 2010).

Like section 10.004, the statutes examined in each of these cases provide that "the court may award" attorney's fees. And this Court held in each case that the trial court's discretion **whether** to award fees is subject to a jury's finding of the **amount** of reasonable fees. Respondents offer no reason for why the language in section 10.004 should be treated differently. Just as the Court explained it "cannot judicially amend" the Open Meetings Act to "prohibit a jury trial on the attorney's

fees amount," the same should be true under the same language of section 10.004. *City of Garland*, 22 S.W.3d at 368.

It cannot be the case that a party is denied a jury and then foreclosed from raising that issue on appeal, in the context of newly developed law and challenging current law. As much as Respondents wish to play ostrich about this statutory symmetry, this Court should address the issue.

III.

Dr. Nath's TCPA motion to dismiss was proper and timely and the Court should render a take-nothing judgment because Respondents failed to present prima facie evidence to support their claims.

A. Dr. Nath's TCPA motion to dismiss was proper and timely.

This Court should resolve the conflict among the courts of appeals regarding when a motion for sanctions can be subject to a TCPA motion to dismiss. Respondents try to avoid this issue, arguing that (1) the TCPA does not apply because their sanctions motions were initially filed in 2010 before the effective date of the TCPA (in 2011) and (2) Dr. Nath's motion to dismiss was untimely because it was not filed within 60 days of their 2010 motions. These arguments are mere misdirection and distraction.

To the contrary, Dr. Nath's did not seek to dismiss the initial 2010 sanctions motions but the renewed sanctions motions filed on November 5, 2019. It is undisputed that the TCPA was in effect in November 2019 when Dr. Nath filed his

TCPA motion; it is likewise undisputed that Dr. Nath's motion was filed within 60 days of the Hospital and Baylor's November 5, 2019 motions (on November 18, 2019). The "gotcha" argument should be rejected.

Respondents criticize Dr. Nath for "intentionally mischaracterize[ing] Respondents' Fee Applications as 'new' or 'renewed' motions for sanctions." Resp. BOM at 38. But it is unclear why they believe the title of the motions is important in a TCPA analysis. What is determinative under the statute is whether the November 2019 pleadings (however labelled) are a "legal action," which is defined 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**." TEX. CIV. PRAC. & REM. CODE § 27.001(6) (emphasis added). A pleading is not a "legal action" if it is "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*. (emphasis added).

Regardless, whether the November 2019 pleadings are "sanctions motions" or "fee applications," those pleadings undisputedly request legal, declaratory, or equitable relief. *See* CR67-68, 76, 84. Respondents claim those requests were not a "legal action" because they were simply amended requests to comport with *Rohrmoos* and argue that they did not even have to file new or renewed motions because the only issue was the amount of sanctions. Resp. BOM at 37, 39. But,

under the statute, the definition of "legal action" does not turn on whether the pleadings sought to relitigate whether any sanction was appropriate—the key question is whether the pleadings requested legal, declaratory, or equitable relief. They did.

Notably, at the time the pleadings were filed, no sanction award was in place. Exactly $0 in sanctions had been affirmed against Dr. Nath—the entire sanction had been reversed (twice). The Hospital and Baylor wanted to try again to get a sanction award against Dr. Nath, so they filed pleadings requesting this relief: *i.e.*, to shift their attorney's fees to Dr. Nath as a sanction. *See* CR67-68, 76, 84. Though they had made a similar request twice before, as they now concede, they **amended** their request for relief in 2019 to comply with the *Rohrmoos* and *Nath II*'s new legal standards. Resp. BOM at 39. Additionally, the Hospital **added** a request for appellate attorney's fees for the first time. CR72, 76-77.

Under this Court's recent precedent clarifying that a pleading alleging new essential facts to support previously asserted claims or asserting new claims involving different elements triggers a new 60-day period to file a TCPA motion to dismiss, these new pleadings triggered a new 60-day period and Dr. Nath timely filed his TCPA motion. *See Reynolds v. Sanchez Oil & Gas Corp.*, 635 S.W.3d 636, 637 (Tex. 2021) (per curiam). Moreover, even when a suit was filed before the TCPA was enacted in 2011, claims added or amended "after the effective date

of the TCPA …are subject to the TCPA." *James v. Calkins*, 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (Huddle, J.).

As Respondents do not dispute, whether a motion for sanctions is a "legal action" remains an open question. *See, e.g.*, *Bitgood v. Harkness*, No. 09-21-00076-CV, 2022 WL 1177275, *4 (Tex. App.—Beaumont Apr. 21, 2022, no pet. h.) (mem. op.) (although deciding case on different ground, noting that "[t]he courts of appeals do not agree on whether a motion for sanctions for frivolous pleadings and motions can be a legal action for purposes of the TCPA"). This Court should resolve the conflict among the courts of appeals in this case—and should hold that Respondents' November 2019 pleadings are legal actions subject to the TCPA.

B. Respondents' claims should have been dismissed.

Once that question is resolved, the remaining analysis is straightforward. There is no serious dispute that Respondents sought to sanction Dr. Nath because he alleged that his former co-worker, Dr. Shenaq, conducted surgeries on children while suffering with hepatitis and blindness. *Nath I* at 365. Nor do Respondents seriously dispute that this is a "matter of public concern" or that Dr. Nath's informing Dr. Shenaq's employers (and the public) about this issue was an exercise of his First Amendment rights, as protected by the TCPA. TEX. CIV. PRAC. & REM. CODE §§ 27.001(3), (7), 27.002, 27.003.

The Legislature has instructed that the purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Id.* § 27.002. And the Legislature has also instructed us that Chapter 27 "shall be construed liberally to effectuate its purpose and intent fully." *Id.* § 27.011(b). When "a health-care operator engages in communications relevant to an employee's ability to safely and competently provide medical services to patients, courts have held that these communications relate to health and safety issues impacting the public, and can be considered a matter of public concern within the meaning of the TCPA." *Clinical Pathology Labs., Inc. v. Polo*, 632 S.W.3d 35, 49 (Tex. App.—El Paso 2020, pet. denied). Respondents' efforts to accuse Dr. Nath of "extortion" for bringing safety issues related to Dr. Shenaq to light goes to the very core of what the TCPA is designed to protect—to speak freely about a matter of public concern.

In response to Dr. Nath's TCPA motion to dismiss, Respondents presented no evidence, much less clear and convincing evidence, of their prima facie case. 2Supp.CR975-91. Their only exhibits consisted of pleadings, including their various sanctions motions, case law, and a transcript of attorneys discussing legal and scheduling issues. 2Supp.CR978-79, 994-1299. This Court concluded in *Nath*

II that Respondents' "additional conclusory affidavits" were insufficient to justify the sanctions awarded here. *Nath II* at 710. Respondents do not explain how their new filings in 2019 met their burden to show the degree to which they caused their own fees or that due process could be met by imposing the same twice-reversed sanction against Dr. Nath.

Instead, Respondents claim that they were not required to present evidence in response to the TCPA motion as to the degree to which they caused, or did not cause, their attorney's fees because they are only required to present evidence on "each essential element" of their claim for sanctions. Resp. BOM at 44-46. If this was not an essential element of their claim, why did this Court remand the case on this exact issue in 2014? *Nath I* at 373 ("[W]hen 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."). The Court then held in *Nath II* that Respondents still did not present sufficient evidence on this essential element and remanded again. *Nath II* at 710 ("Conclusory affidavits containing mere generalities about the fees for working on Nath's frivolous claims are legally insufficient to justify the sanction awarded here."). Because they failed to present

any evidence on this essential element, the TCPA motion should have been granted. TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c).

Likewise, Respondents still do not explain how their response to Dr. Nath's TCPA motion demonstrated by clear and convincing evidence that the requested sanction met the requirements of due process under *TransAmerican.* Resp. BOM at 45. As they argued throughout their brief, however, the issue of **whether** Dr. Nath can be sanctioned is distinct from the issue of **how much** he can be sanctioned. *See, e.g., id*. This second question also squarely remained within their burden of proof on remand. *TransAmerican* imposes due process requirements on the amount of a sanction: "[J]ust sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). This Court in *Nath I* expressly did not decide and remanded the question of assessing a not-excessive sanction. *Nath I* at 371-72. Because the Hospital and Baylor also failed to present evidence on this essential element, Dr. Nath's TCPA motion should have been granted and Respondents' claims should have been dismissed.[3]

[3] Dr. Nath should have been permitted to immediately appeal the denial of his motion to dismiss. Respondents convinced the trial court to proceed to the bench trial on the sanctions motion after hearing—but refusing to rule on—Dr. Nath's TCPA motion, which effectively denied his TCPA motion. As explained in Dr. Nath's Brief on the Merits, Respondents expressly acknowledged (Continued…)

IV.

Respondents have still failed to present evidence on the essential element that this Court held has been missing since *Nath I*.

As is their pattern and practice, Respondents misinterpret Dr. Nath's arguments and attempt to rely on waiver where there is none to avoid answering the question from *Nath I*—"the extent to which [Respondents] caused the expenses they accrued in litigating a variety of issues over several years." *Nath I* at 373. "A party who moves for sanctions bears the burden to establish a right to relief by proving its assertions." *Mann v. Kendall Home Builders Constr. Partners I, Ltd.*, 464 S.W.3d 84, 92 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Not only did Respondents fail to meet their burden on this issue in their TCPA response, but also failed to do so at the bench trial.

First, Respondents misinterpret Dr. Nath's arguments related to the excluded evidence of his own conduct and Respondents' heavily redacted billing records. The point of those arguments is not to contradict or avoid *Nath I*. Indeed, Respondents chide Dr. Nath for failing to call his former counsel to testify, Resp. BOM at 16, but what would that testimony have added under *Nath I* or *II*?

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this strategy was designed to prevent Dr. Nath from exercising his right to take an interlocutory appeal. *See* Pet. BOM at 4; 2Supp.CR976; *see also Simmons v. Taylor*, -- S.W.3d --, No. 14-20-00843-CV, 2022 WL 1498090, at *2-3 (Tex. App.—Houston [14th Dist.] May 12, 2022, no pet. h.) (noting split among courts of appeals and holding that the purpose of the TCPA to encourage and safeguard constitutional rights would be thwarted if a trial court could "insulate its decision from appellate review by refusing to sign a written order and choosing instead to orally deny a motion that should have been granted").

Dr. Nath's argument remains focused on why Respondents waited four years to move for summary judgment (or sanctions) in this case. While redacting fee bills to delete charges the party "is not seeking to recover" might be acceptable in some fee-shifting circumstances, this is still a sanctions case—in which this Court has expressly instructed Respondents to prove that the sanction against Dr. Nath was not excessive because they did not cause some or much of the fees they sought. Without a complete picture, it was not possible for the trial court to determine the appropriate sanction (if any) to be awarded under this Court's prior opinions.

Had the trial court—in any of the three times this case has been before it—done what this Court instructed in *Nath I* and sanctioned Dr. Nath for only the portion of the attorney's fees he was responsible for having caused (and not the portion caused by Respondents or their counsel), Dr. Nath would have paid this amount, for the sake of his professional reputation,[4] and the parties could have moved on. But Respondents persist in blaming Dr. Nath as the reason why their never-ending quest for a fee award has dragged on.

[4] The Fourteenth Court has acknowledged Dr. Nath's extensive professional reputation: "Dr. Rahul Nath is a Board Certified reconstructive microsurgeon. … He specializes in the treatment of brachial plexus injuries, and he is one of only a handful of doctors in the United States who specialize in brachial plexus repair operations." *Johns Hopkins Univ. v. Nath*, 238 S.W.3d 492, 496 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

The history of this case shows:

- There was **no evidentiary hearing of any kind** before December 10, 2019.

- On the first remand, Respondents offered "additional conclusory affidavits," which this Court held were still not good enough to shift responsibility for the entirety of their fees to Dr. Nath "as a penalty." *Nath II* at 710. The Court reiterated there must be proof of "how those fees resulted from or were caused by the sanctionable conduct." *Id.* at 709 (citation omitted).

- On the second remand, the trial court stated twice that she believed her role and "the purpose" of the trial was just "**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 ("The purpose for being here is to go over the *Rohrmoos* requirements for attorneys' fees."). This was true even though this Court had expressly rejected Respondents' request to limit the remand to only "confirm[ing]" the fees award. 4Supp.CR10.

- Though Respondents stated in their 2015 brief to the court of appeals that oral argument was not warranted because "the record is relatively short and the facts and law are uncomplicated,"[5] in 2019 they completely flip-flopped—now claiming this was a complex bet-the-company case. 1RR69, 123; 1RR222-24. They even persuaded the trial court to make findings of fact inconsistent with *Nath I*—that this was a "factually and procedurally complex case" (4Supp.CR1093), implicating "complex areas of the law" (4Supp.CR1095). It is inappropriate to allow Respondents to substantively change their position in an effort to obtain this sanction, which must be just. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007).

[5] Appellees' Brief at x, available at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=93a99675-9dcd-4e84-836-966e00d7f817&coa=coa14&DT=Brief&MediaID=97b2d30a-d853-4c23-b2ae-3583d3f05ab1.

- Because there was no earlier evidentiary hearing, and at the 2019 hearing they did not put forth any evidence of Dr. Nath's personal involvement in this case, the only evidence in the record is Dr. Nath's affidavit in support of his TCPA motion, in which he swore that he entrusted the case to his attorneys. CR109.

Respondents still have not explained, much less offered evidence of the degree to which they caused their own fees by waiting almost half a decade to move for summary judgment on limitations based on pleadings that were so obviously frivolous *ab initio* that a nonlawyer should pay the largest personal sanction in Texas history. This Court has been clear that they must do more than repeatedly ask the trial court to confirm the same twice-reversed award.

Second, Dr. Nath's challenge based on the insufficiency of Respondents' evidence has been the heart of this case since the first appeal. Respondents complain that Dr. Nath waived this complaint because Dr. Nath's Issue IV in his Brief on the Merits contains an extra sentence missing from Reserved Issue II in Dr. Nath's Petition for Review. *Compare* Pet. BOM at xv *with* PFR at xii. Again, Respondents misinterpret Dr. Nath's argument. Dr. Nath did not raise some new surprise issue in his Brief on the Merits. He argued in his Brief on the Merits, as he did throughout this appeal, that he should have been permitted to offer evidence of his conduct, as compared to Respondents' conduct, so that a sanction consistent with due process could be determined.

Texas Rule of Appellate Procedure 55.2(f) provides that:

> The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.

TEX. R. APP. P. 55.2(f). The Court "liberally construe[s] issues presented to obtain a just, fair, and equitable adjudication of the rights of the litigants." *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 849 (Tex. 2018) (quoting *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015)); *see also Ditta v. Conte*, 298 S.W.3d 187, 189-90 (Tex. 2009)

Dr. Nath's Petition for Review Reserved Issue II complained that Respondents "did not meet their burdens under the directives and standards of *Nath I*, *Nath II*, *TransAmerican*, and *Rohrmoos*." PFR at xii. Dr. Nath's arguments under this point in his Brief on the Merits are "fairly included" in Reserved Issue II. Without affirmative evidence of how their fees resulted from or were caused by the sanctioned conduct, this is nothing more than an "arbitrary fine without evidentiary support," and should be reversed. *See CHRISTUS*, 505 S.W.3d at 539-40.

PRAYER

Dr. Nath prays for the relief requested in his Petition for Review.

Respectfully submitted,

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Petitioner certifies that this Reply Brief on the Merits contains 5,834 words (when excluding the caption, table of contents, index of authorities, signature, certificate of service, and certificate of compliance).

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