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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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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REPLY ARGUMENT

As has been typical throughout the long history of this case, the Hospital and Baylor (Respondents) avoid the record, the actual issues, and the express directives of this Court (as did the courts below). Respondents have yet to examine their own conduct—as due process and the prior opinions in this case require—in relation to the massive record-setting shifting of fees for the life of this case against an individual litigant based on an initial pleading.

This is not a typical sanctions case. It is not a $250 fee sanction related to a motion to compel (*Cire v. Cummings*) or a $500 fee sanction related to a discrete filing (*Brantley v. Etter*). This case is exponentially different from those cited by Respondents or the court of appeals, from the statutory basis for the sanction, to the size of the sanction, to Respondents' thrice-repeated failure to show how their almost five years of fees "resulted from or were caused by the sanctionable conduct" of Dr. Rahul Nath's attorneys having filed a petition with claims barred by limitations. *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 707, 709 (Tex. 2019) (per curiam) ("*Nath II*") (citing *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016)). And the court of appeals affirmed not just the twice-reversed amount, but the additional new half-million-dollar pre-sanction

against Dr. Nath for daring to continue to appeal.[1] In other words, the trial judge pre-sanctioned Nath for taking up an appeal, but wholly failed to identify what rule or statute it used to accomplish this pre-sanction. That fact alone demonstrates that the lower courts will not be deterred unless this Court steps in.

The question of whether a jury should be afforded here is important to the jurisprudence of the state given the developments in the law and how that issue is analyzed based on a specific statutory text's departure from the American Rule. In other words, this case is a compelling vehicle for the Court to explain the reach of *Rohrmoos Venture v. UTSW DVA Healthcare*. The Court reiterated in *Rohrmoos* that an attorney's fees claimant 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). And 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. Given that due process requires more in the sanctions context, not less—if the Court does not end this case—the Court should clarify that Dr. Nath is entitled to have a jury determine the amount of the fee-shifting award here.

[1] 4Supp.CR1097-98 (FOF 26), *see* 1 Supp.CR 5-6.

I.

Only this Court can end the lower courts' ongoing refusal to follow its instructions.

Despite Respondents' rhetoric, Dr. Nath does not presume to rewrite *Nath I* or *Nath II* and does not claim that this Court found any facts in its prior opinions. Instead, Dr. Nath relies on the opinions' language and the record showing that another remand would be futile (in the absence of a jury). The Court's language and the result in each *Nath* opinion make clear that imposing the same sanction, down to the penny, for the third time, 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 v. Tex. Children's Hosp.*, 446 S.W.3d 355, 373 (Tex. 2014) ("*Nath I*") (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." 576 S.W.3d at 708, 709 (citation omitted). It then reversed and remanded again, concluding that "the standard for fee-shifting awards in *Rohrmoos* likewise applies to fee-shifting sanctions." *Id.* at 710.

These opinions are neither cryptic nor subtle. They clearly 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'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." 525 S.W.3d 642, 654-55 (Tex. 2017). 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 degree to which the Hospital and Baylor caused their attorney's fees by their own litigation conduct and delay remains unaddressed by anything other than conclusory statements. *See* Petition 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). 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*, 505 S.W.3d at 540; *Nath I* at 363. That proof is still missing, and Respondents are not entitled to 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, vacate the judgment and dismiss the case, or in the alternative, as explained below, clarify

that *Rohrmoos* affords a jury in sanctions cases like this and remand for further proceedings. *See* TEX. R. APP. P. 60.2(c), (d), (e), (f). The Court should exercise its discretion to bring this case to an end.

II.

The Hospital and Baylor's response demonstrates why the Court should clarify the scope of *Rohrmoos* in the sanctions context.

A. Dr. Nath did not "abandon" his jury demand.

On 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 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 *II*. Based on the evolving law in this area, this Court's language in *Rohrmoos*, and its application in *Nath II*, Dr. Nath is entitled to ask the Court to clarify how the developments fit together.

B. A jury should determine the amount to be shifted as a life-of-the-case fees sanction.

1. None of the cases cited by Respondents or the court of appeals forecloses a jury.

First, *Brantley v. Etter* involved different circumstances both factually and procedurally, and as explained in Dr. Nath's petition, is too slender a reed to support denying Dr. Nath a jury without further consideration. 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." 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 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.

Second, *Cire v. Cummings* is of no help to Respondents. That case also involved a discovery sanction, 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).

Third, neither of the other two cases cited by the court of appeals forecloses a jury. *See Nath v. Tex. Children's Hosp.*, Nos. 14-19-00967-CV & 14-20-00231-CV, 2021 WL 451041, *9 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021, pet. filed) (sub. mem. op.). Neither case 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.).

Finally, Respondents have no public policy reason why these cases should control. 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 will require 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.

2. The Court's statutory framework for determining who should decide a sanctions amount should control.

Whether a jury is available 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, and instead try to deflect this important issue by repeatedly calling him a "vexatious litigant"—something that no court has ever declared him to be.

They likely ignore the issue because they have no way to distinguish the fee-shifting 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 (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. As much as Respondents wish to play ostrich about this statutory symmetry, this Court should address it.

PRAYER

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner certifies that this Reply in Support of Petition for Review contains 2,350 words (when excluding the caption, table of contents, index of authorities, signature, certificate of service, and certificate of compliance).

/s/ *Melissa A. Lorber*
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Counsel certifies that a true and correct copy of the foregoing Reply in Support of Petition for Review has been delivered by electronic service to the following on October 12, 2021:

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