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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0547

In 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 COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS, HOUSTON
NO. 14-19-00967-CV & NO. 14-20-00231-CV

RESPONDENTS' SUR-REPLY

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Respondents Baylor College of Medicine ("Baylor") and Texas Children's Hospital (the "Hospital") file this brief sur-reply to make one point: Nath's complaint that Respondents "have yet to examine their own conduct" (Reply at 1) and that the "proof is still missing" as to whether Respondents "caused their attorney's fees by their own litigation conduct" (Reply at 5) are factually incorrect and wholly inappropriate—it is attempted sandbagging at its finest.

Nath's statement that "proof is still missing" is 100% false. The trial court record contains substantial evidence presented by Baylor and the Hospital that their conduct did not cause the fees they sought to be shifted to Nath as compensatory sanctions. Baylor's and the Hospital's lead trial counsel (Shauna J. Clark and Patrick W. Mizell respectively) each testified at the December 10, 2019 day-long evidentiary hearing following the second remand[1] that they excluded fees not directly attributable to Nath's conduct, that no behavior by either Respondent caused the fees that Respondents asked be shifted to Nath, and that the delays in concluding the case were caused by Nath. *See* RR52-55, 59, 78-79, 178-80, 222. Nath's passing claim that Mizell's and Clark's testimony was conclusory (Reply at 5) is refuted by the record. For example, Mizell and Clark explained that Nath's adding two non-Texas defendants caused a two-year delay while those defendants filed special

[1] Prior to the hearing, Ms. Clark and Mr. Mizell sat for depositions and testified regarding the reasonableness and necessity of Respondents' fees. 4SCR56, 1050, 1060, 1065.

appearances and an appeal and that once jurisdiction returned to the trial court, Respondents filed case-endings motions for summary judgment which were not heard because Nath sought continuances so that he could conduct further discovery and amended his pleadings. They further explained why they did not file an early no-evidence summary judgment motion, testified that they filed special exceptions in an effort to force Nath to more specifically plead his case so that they could move for summary judgment, that any earlier motion would likely have been met with the same granted continuance and that they had to develop the case so that, if their summary judgment motions were unsuccessful, they could defend against Nath's claims at trial. *See id.*; *see also* RR53-54, 64-67, 81-82, 86-88, 90-94, 97-98, 118-19, 121, 145, 189-96, 199-200.[2]

Moreover, aside from his purported expert's unconventional theory that the Hospital and Baylor somehow could have avoided all of the fees they incurred by filing a plea in abatement at the outset of the case—testimony the trial court found lacked credibility—the Hospital's and Baylor's evidence that their conduct was not the cause of the fees incurred that they sought to shift to Nath went unrebutted. RR270, 276; 4SCR1092. Instead of controverting Respondents' evidence, Nath

[2] *See* RR82 where Mizell elaborated: "We had to tie Nath down to specific allegations and make him plead specific allegations and then move for summary judgment on those claims, especially in light of the discovery rule being pleaded and the self-publication pleading, that was a particularly difficult moving target." Nath's purported expert agreed that Nath's original petition was vague and not facially time barred. RR302.

sought to introduce evidence of his own purported lack of involvement in the litigation, which evidence the trial court excluded as irrelevant. *E.g.*, RR104-09, 135-36. The Fourteenth Court overruled Nath's complaint that the trial court abused its discretion in excluding his evidence. *Nath*, 2021 WL 451041, at *9-10 (holding that because this Court had already upheld the determination that Nath was the "true offender" the trial court correctly determined that evidence regarding Nath's involvement in the litigation was irrelevant to the issues to be resolved on remand).

The trial court's December 18, 2019 findings of fact even included specific findings that no behavior by Respondents "caused the fees for which recovery is sought":

> 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.
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> …
>
> [C]onsistent 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***.

4SCR1090, 1096-97 (emphasis added); *see also* Joint Response to Petition for Review at 8-9.

In rejecting Nath's appellate complaint that insufficient evidence supported the trial court's order reassessing sanctions in the same amount, the Fourteenth Court

cited this very evidence. *See Nath v. Tex. Children's Hosp.*, No. 14-19-00967; No. 14-20-00231, 2021 WL 451041, *11-12 (Tex. App.—Houston [14th Dist.] February 9, 2021) (subst. mem. op.). Instead of facing these facts within the requisite framework of evidentiary sufficiency, Nath simply ignores them. Nath's misrepresentations of the record should not gain him access to this Court.[3]

Nath continues to act as if the rules do not apply to him—this time by arguing an unbriefed issue in his reply brief. The sole reason that Baylor and the Hospital did not discuss the foregoing evidence in their Response to Nath's Petition for Review is that Nath identified this complaint as an unbriefed issue. Specifically, Nath's *reserved* issue II stated:

> 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*.

Petition for Review at xii (emphasis added).

And in keeping with customary routine practice before this Court, Baylor's and the Hospital's Joint Response to Nath's Petition for Review identified the following as a responsive *unbriefed* issue:

[3] Nath also misrepresents the record by stating (Pet. at 9) that "no court" has declared him a "vexatious litigant." *See* 4SCR1097 n.1 (the trial court's statement in its finding of facts and conclusions of law that, on the second remand, "Nath has only intensified the harassing and vexatious conduct that led to the original sanctions award").

> 3. Whether the trial court's reassessment of sanctions (1) comports with *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), and (2) ***is supported by sufficient evidence that Respondents were not the cause of any of the fees shifted to Nath***?

Joint Response to Petition for Review at xiv-xv (emphasis added).

Of course, the petition for review process is plainly stated in Rule 53 and it is beyond debate that the rules do not allow petitioners to use their reply brief to argue unbriefed issues. Yet, that is precisely what Nath has done.

CONCLUSION AND PRAYER

Nath's continued flouting of rules and proper litigation conduct further demonstrates why this dispute needs to be over once and for all. Respondents ask that the Court deny Nath's Petition and, to the extent necessary, they object to Nath using his Reply to argue an unbriefed issue from his Petition for Review.

Respectfully submitted,

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CERTIFICATE OF WORD COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel – in reliance upon the word count of the computer program used to prepare this document – certifies that this brief contains 1,190 words, excluding the words that need not be counted under Texas Rule of Appellate Procedure 9.4(i)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, Respondents served a copy of this Sur-Reply by electronic service upon the following counsel of record:

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