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SUPREME COURT OF TEXAS
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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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

STATEMENT OF THE CASE

This is an ongoing and seemingly unending sanctions dispute.

First sanctions judgment, first appeal, and first remand by this Court: In 2010, the trial court (the Honorable Judge Steve Kirkland presiding) sanctioned Nath personally for outrageous litigation conduct in his suit against Respondents, Texas Children's Hospital (the "Hospital") and Baylor College of Medicine ("Baylor"). Nath appealed, and among other complaints, argued that the trial court erred by denying his request for a jury trial on the amount of compensatory sanctions. Appendix A. The Fourteenth Court rejected Nath's claim that he was entitled to a jury trial and affirmed the sanctions. *See Nath v. Tex. Children's Hosp.*, 375 S.W.3d 403 (Tex. App.—Houston [14th Dist.] 2012). In his first appeal to this Court, Nath ***abandoned*** his argument that he was entitled to a jury trial. He complained only that the award was unjust and excessive, and not "visited on the true offender." This Court affirmed the issuance of sanctions against Nath personally, holding that there was evidentiary support for the trial court's finding that Nath was the true offender, but remanded the case for the trial court to consider the "discrete issue" of whether Respondents bore any responsibility for the attorney's fees they incurred and that were awarded to them by the trial court as compensatory sanctions. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 371-72 (Tex. 2014) (hereinafter, "*Nath I*"). This Court contemplated an efficient remand proceeding—*i.e.*, where the discrete issue would be determined ***by the trial judge***. *Id*. at 372, n.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.") (emphasis added).

Second sanctions judgment, second appeal and second remand by this Court:

After attempting to comply with the remand instructions by considering supplemental affidavits presented by Respondents' counsel and taking judicial notice of the existing record, the trial court (the Honorable Elaine Palmer presiding) found that Respondents did not bear any responsibility for the fees assessed as sanctions against Nath and rendered judgment reassessing sanctions. 2SCR294-96. Nath again appealed and after the Fourteenth Court again affirmed, this Court issued its second *Nath* opinion—*Nath v. Texas Children's Hospital*, 576 S.W.3d 707 (Tex. 2019) (per curiam) (hereinafter, "*Nath II*")—in which it remanded the case for a second time for purposes of having Respondents re-present their request for fees in accordance with the newly announced standards set forth in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Following the second remand, the trial court issued a scheduling order setting the date on which it would hold an evidentiary hearing on Respondents' fee applications. 4SCR56-57. On November 6, 2019, Nath filed a new jury demand in which he expressly conceded that under existing law he had no right to a jury trial on the amount of compensatory sanctions. 5SCR3-6; Appendix B. On November 18, 2019, Nath attempted to hijack the remand proceedings by filing a motion to dismiss under the Texas Citizens Participation Act ("TCPA") and setting it for hearing on December 10, 2019, the same day set for the evidentiary hearing on Respondents' fee applications, and by filing a premature notice of appeal prior to entry of any adverse order. CR99, 165; 4SCR56-57. On December 10, after hearing

argument on Nath's TCPA motion, and despite Nath's attempt to stop the hearing from proceeding (by unsuccessfully seeking emergency appellate relief, *see* Cause No. 14-19-00967-CV; Cause No. 19-1079), and taking Nath's TCPA motion under advisement (RR5-35, 136), the trial court conducted an all-day evidentiary hearing on Respondents' fee applications. RR3-4, 42-325. On December 27, 2019, the trial court signed its latest final judgment. 1SCR3-6. That judgment and separate findings of fact and conclusions of law restated that Respondents did not cause any of the fees they sought to shift to Nath, reassessed the amount of fees to be awarded to Respondents as compensatory sanctions against Nath, and denied Nath's TCPA motion to dismiss. *Id.*; 4SCR1086-1103.

Court of appeals' disposition following second remand:

The Fourteenth Court, in an opinion written by Justice Hassan, joined by Justices Wise and Bourliot, affirmed the trial court's denial of Nath's TCPA motion and rejected Nath's argument that the trial court violated a statutory stay by proceeding with the evidentiary hearing on the amount of fees that should be awarded as compensatory sanctions. The Fourteenth Court also held that Nath was not entitled to a jury trial on compensatory sanctions, and it held that the sanction awards were supported by sufficient evidence. *See Nath v. Tex. Children's Hosp*., No. 14-19-00967; No. 14-20-00231, 2021 WL 451041 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021) (subst. mem. op.). Nath filed a motion for en banc reconsideration complaining that the Fourteenth Court erred by holding he was not entitled to a jury trial. In their response, Respondents noted that Nath had waived that argument by not raising it in his first petition for review after having raised it in his first court of

appeals' brief. The Fourteenth Court denied Nath's motion for en banc reconsideration.

STATEMENT OF JURISDICTION

This Court remanded this case for the trial court to reassess fees as sanctions under the lodestar method, a "readily administrable and objectively reasonable calculation," as set forth in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). The trial court meticulously followed *Rohrmoos* and, based on ample documentary and testamentary evidence demonstrating that neither Respondent caused any of the fees that they sought to be shifted to Nath as compensatory sanctions, reassessed the amount of sanctions. Nath identifies no issue that justifies this Court exercising its jurisdiction to overturn the trial court's award.

This Court should not exercise its jurisdiction to consider whether Nath is entitled to a case-ending order. Nath's claim that the Court can render a judgment in his favor without examining whether the lower courts committed reversible error ignores foundational appellate review principles. Nath is not entitled to a judgment in his favor simply because he believes the case has gone on too long or because it has generated multiple appeals.

This Court should not exercise its jurisdiction to reconsider whether a sanctioned litigant is entitled to a jury trial on the amount of compensatory sanctions. Nath knows full well that, under settled law, he has no right to a jury trial on the amount of fee shifting sanctions, and ***he*** so told the trial court in 2019. Nath

forfeited the right to ask for a change in existing law because in his first appeal, he argued to the Fourteenth Court that he had a right to a jury trial but then made the decision to abandon it when he was previously before this Court. Parties cannot save previously-abandoned arguments in their back pocket to use as do-overs in an endless succession of appeals. Regardless, there is no reason to revisit this issue. The Court's decision in *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam) that there is no right to a jury trial on the amount of compensatory sanctions remains sound, has been duly followed by the lower courts (*see Nath*, 2021 WL 451041, at *9 (collecting cases); *see also 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.) (not designated for publication) (no right to jury trial on whether Chapter 10 has been violated); *Neely v. Comm'n for Law. Discipline*, 976 S.W.2d 824, 827-28 (Tex. App.—Houston [1st Dist.] 1998, no pet.)), and applies here.

This Court should not exercise its jurisdiction to consider whether Nath's TCPA motion was properly denied. The Fourteenth Court's holding that the trial court properly denied Nath's TCPA motion to dismiss because it was outside this Court's limited remand is consistent with precedent. *E.g.*, *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Scott Pelley P.C. v. Wynne*, 578 S.W.3d 694, 699 (Tex. App.—Dallas 2019, no pet.); *Johnson-Todd v. Morgan*, No. 09-17-00194, 2018 WL 6684562, at *2 (Tex. App.—Beaumont Dec. 20, 2018, pet. denied) (mem.

op.). The trial court's order could also have been affirmed on multiple other grounds, including that the TCPA does not apply here; but even if it did, Respondents indisputably met their TCPA burden.

This Court should not exercise its jurisdiction to reconsider whether Nath was properly personally sanctioned, or to consider whether Respondents met their Rohrmoos and Low factor (n) burdens or whether Nath was improperly barred from presenting evidence. Nath's complaint that Respondents did not meet their *TransAmerican* burden ignores that the question of whether sanctions could be awarded against him personally was conclusively decided against him in *Nath I*. His arguments that Respondents did not meet their *Rohrmoos* or *Low* factor (n) burdens were fully vetted and properly rejected by the Fourteenth Court and similarly present no issue worthy of this Court's attention. The Court should not exercise jurisdiction to consider Nath's exclusion-of-evidence complaint because he failed to raise it as an issue in his petition for review, and it is meritless.

This Court should not exercise its jurisdiction to address Nath's complaint about the trial court's conditional appellate fee award. Nath waived his right to complain of the award of conditional appellate fees to the Hospital, but even if not waived, the award was proper and supported by legally sufficient evidence (following acceptance of the appellate-court suggested remittitur).

This Court should allocate its scarce resources elsewhere.

STATEMENT OF ISSUES

1. It is a foundational principle of appellate law that in order to obtain appellate relief, an appellant must show that the lower court erred and rendered an incorrect judgment. Can Nath obtain case-ending appellate relief from this Court merely because, at his request, the case is returning to the Court for a third time, after the trial court followed this Court's instructions to reassess sanctions?

2. Nath argued in his 2011 appeal from the sanctions award that he was entitled to a jury trial on the amount of compensatory sanctions, which argument the Fourteenth Court rejected. Nath then abandoned that issue. May Nath resurrect an issue he abandoned ten years ago?

3. In his November 2019 demand for a jury trial on the amount of compensatory sanctions, Nath properly conceded that this Court's precedent "foreclosed" the trial court from granting his request. Nath cites no post-November 2019 sanctions case from this Court in support of his claimed right to a jury trial. But even if this Court were to revisit the issue of whether a party is entitled to a jury trial on the amount of compensatory sanctions, should the Court reach the same conclusion it reached previously (*see Brantley*, 677 S.W.2d at 504) based on important policy grounds and practical reasons?

4. Whether the trial court properly denied Nath's TCPA motion to dismiss when: (a) as the Fourteenth Court correctly held, Nath's TCPA motion was outside

this Court's limited remand in *Nath II*; (b) the TCPA is not applicable because (i) Respondents' motions for sanctions predate the enactment of the TCPA and the TCPA is not retroactive or (ii) a sanctions motion is not a "legal action" within the meaning of the TCPA; (c) Nath's motion to dismiss was untimely; or (d) Respondents met their TCPA burden?[1]

5. Whether the trial court's reassessment of sanctions (1) comports with *Nath II* and *Rohrmoos*, and (2) is supported by sufficient evidence that Respondents were not the cause of any of the fees shifted to Nath?

6. Whether Nath's complaint that the trial court erred by "improperly preclud[ing] him from presenting evidence on key issues" (*see* last sentence of Nath Issue IV) can be reached when this issue was not raised in his petition for review? *See* TEX. R. APP. P. 55.2(f) (merits brief may not raise additional issues or change the substance of the issues or points presented in the petition); *Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (per curiam) (refusing to address an argument raised in petitioners' merits brief because petitioners failed to advance it in their

[1] If the Court were to grant Nath's petition and disagree with the Fourteenth Court's basis for affirming the denial of Nath's TCPA motion (on the basis that his TCPA motion was outside the scope of the remand), a remand to the Fourteenth Court to have it weigh in on the other bases on which the order could be affirmed 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. *See* TEX. R. APP. P. 53.4 ("To obtain a remand to the court of appeals for consideration of issues or points briefed in that court but not decided by that court, ***or to request that the Supreme Court consider such issues or points***, ***a party may raise those issues or points in the petition, the response,*** the reply, any brief, or a motion for rehearing.") (emphasis added).

petition for review). If reached, whether the Fourteenth Court properly held that the trial court correctly rejected Nath's efforts to present any evidence about his own conduct, through cross-examination or otherwise, as "not relevant to the issues remaining to be resolved" on remand?

7. Whether Nath waived his argument that the Hospital was not entitled to conditional appellate attorney's fees by trying the issue by consent, and if not waived, whether the trial court properly exercised its discretion in awarding the Hospital those fees, given that the award, following the Hospital's acceptance of the Fourteenth Court's suggestion of remittitur, was supported by legally sufficient evidence and fairly compensates Hospital for some of its reasonable and necessary costs in pursuing the sanctions award?

RECORD REFERENCES

The Original Clerk's Record, filed December 17, 2019, is cited by volume and page number as "CR__." The First Supplemental Clerk's Record, filed on January 24, 2020, is cited as "1SCR__." The Second Supplemental Clerk's Record (mislabeled First Supplemental Clerk's Record), filed on April 1, 2020, is cited as "2SCR __." The Third Supplemental Clerk's Record, filed on April 28, 2020, is cited as "3SCR__." The Fourth Supplemental Clerk's Record, filed on May 1, 2020, is cited as "4SCR__." The Fifth Supplemental Clerk's Record, filed on August 6, 2020, is cited as "5SCR__."

The Reporter's Record from the December 10, 2019 hearing is cited as "RR__." The Reporter's Record from the September 12, 2019 hearing is cited as "1RR__." The Reporter's Record from the October 31, 2019 hearing is cited as "2RR__." The Reporter's Record from the November 11, 2019 hearing is cited as "3RR__." The Reporter's Record from the November 14, 2019 hearing is cited as "4RR__."

INTRODUCTION

Nath was sanctioned for outrageous litigation conduct, including an extortion attempt. The first time this Court exercised discretionary review (2014), it wanted to ensure that the trial court examined whether Respondents caused any portion of the fees shifted to Nath. It was a 5-4 decision. In a hat tip to the dissent, the Court made clear that the proceedings on remand should be efficient, "at most" a hearing with affidavits.

The Court's 2014 decision should have ended any argument by Nath that he should not be personally sanctioned, leaving the parties to litigate only the amount of the sanctions. But Nath cannot respect the finality of the Court's decision on this issue. Close to a decade later, as if he could unilaterally transport us all back to 2014, Nath claims that Respondents failed to present "evidence identify[ing] what sanctionable action was attributable to Dr. Nath personally." BOM40. Ironically, Nath now claims that he is entitled to a case-ending order because the lower courts and Respondents' counsel have spent the last decade "ignor[ing]" this Court's "directives" (BOM7, 11, 13[2]) when it is Nath himself who, without an ounce of compunction, relentlessly attempts to re-litigate arguments he lost in this Court.

[2] Nath's assertion that the lower courts "ignor[ed] this Court's directives" is refuted by the hearing transcripts (*e.g.*, 1RR37, 2RR23-24, 4RR21, RR104-07, 250) and ignores that *Rohrmoos*, which overruled long-standing precedent, had not been decided at the time the trial court first re-entered sanctions following the first remand.

In addition to ceaselessly arguing that he personally took no action deserving of sanctions, Nath's vexatious litigation conduct has continued audaciously. Following the first remand, which was to be confined to the issue of whether any of the fees Respondents sought to shift to Nath were incurred because of their own conduct, Nath did his best to make the proceedings burdensome and expensive, including seeking depositions of non-parties and moving to disqualify Respondents' counsel. But Nath was unable to stave off the inevitable; the Honorable Elaine Palmer reassessed sanctions against Nath, which award the Fourteenth Court affirmed. *Nath*, 576 S.W.3d 728.

After the case reached this Court a second time, this Court, in a per curiam decision, wanted conformation with another recent-at-the-time case, *Rohrmoos*, which held for the first time that lodestar proof of reasonableness is required in all fee-shifting cases. This Court thus remanded the case to the trial court a second time for Respondents to provide additional support for their request for shifted fees in accordance with *Rohrmoos*. *Nath II*, 576 S.W.3d at 709-10.

Nath continued his dilatory antics back in the trial court following the second remand. While Respondents produced billing records and presented their billing attorneys for depositions, Nath again sought a non-party deposition and filed numerous motions having nothing to do with the remanded issue. These antics included another round of motions to disqualify Respondents' counsel, a cross-

motion for sanctions, a TCPA motion directed to Respondents' motions for sanctions that had been filed nearly a decade prior to the enactment of the TCPA, and emergency filings in the Fourteenth Court and this Court to delay an evidentiary hearing on the amount of fees to be awarded as sanctions.

Nath's attempted stonewalling again failed, and on December 10, 2019, over Nath's objection, Judge Palmer held a day-long evidentiary hearing during which Respondents' lead counsel each testified in detail about the fees incurred and confirmed that Respondents were not seeking to shift fees to Nath caused by their own conduct. After due consideration of this evidence, Judge Palmer rendered a final judgment against Nath, which the Fourteenth Court, in a lengthy opinion addressing each of Nath's seven issues, affirmed.

Now, Nath wants it all to just go away or, failing that cutting edge argument, a jury trial on the amount of fees that should be awarded—an argument he previously raised and abandoned, and thus waived. Even if not waived, a party is not entitled to a jury determination of the amount of compensatory sanctions under this Court's precedent. Were the Court inclined to revisit this issue, its decades-old decision remains sound. Nath's remaining issues, including his complaint that Respondents failed to meet their burdens under *Nath I* and *Nath II*, are also meritless.

Nath is right about one thing—enough is enough. This Court should deny Nath's petition for review.

STATEMENT OF FACTS

I. Following Years of Litigation and Stonewalling, the Trial Court Sanctions Nath

Nath is a plastic surgeon specializing in brachial plexus injuries. 2SCR254-55, 562-63. He was formerly employed by Baylor and had privileges at the Hospital. *Id.*

In 2003, a number of Nath's coworkers complained that Nath over-billed patients, performed unnecessary procedures, and treated his colleagues poorly. *Nath I*, 446 S.W.3d at 359.

In 2004, Baylor terminated Nath's employment. 2SCR255-56, 563. Nath subsequently formed a private medical practice, which flourished, at times earning annual taxable income "in the low to mid seven figure range." 2SCR257, 565, 575.

Despite this success, Nath could not leave the past behind. In 2006, Nath sued the Hospital, Baylor, and Dr. Shenaq, his former supervisor at Baylor, claiming that Dr. Shenaq and other Baylor doctors and clinicians made defamatory statements about Nath, thereby tortiously interfering with his business relations. CR4-13; 2SCR249; *Nath I*, 446 S.W.3d at 359. Nath's original petition contained a jury demand. CR13.

Throughout the litigation, which included several amended petitions and constantly shifting legal theories, Nath attempted to obscure the factual defects in his meritless claims. For example, Nath refused to provide information about his

own alleged damages and personal finances and even nonsuited claims when compelled to provide discovery into them—all while seeking privileged health information regarding Dr. Shenaq, not because it was relevant but because he hoped to use the threat of publicizing that information to extort a settlement. 2SCR250-51, 260-61, 569; *Nath I*, 446 S.W.3d at 366.

When the time came for summary judgment, Nath again refused to engage on the merits and instead pursued a number of dilatory tactics, including moving for two continuances to obtain additional discovery, moving to recuse judges, and ultimately abandoning all his time-barred claims and asserting a new, equally meritless claim for intentional infliction of emotional distress in a *sixth* amended petition. 2SCR251-53, 558-60; *Nath I*, 446 S.W.3d at 359-60. When Respondents again moved for summary judgment on Nath's new claim, rather than respond on the merits, Nath claimed that the electronic signatures on the motions rendered them defective. 2SCR252-53, 559-60; *Nath I*, 446 S.W.3d at 360. The trial court granted summary judgment in favor of Respondents. 2SCR253, 560; *Nath I*, 446 S.W.3d at 360.

After the trial court granted summary judgment, the Hospital filed a motion asking the trial court to assess attorney's fees as sanctions against Nath. 2SCR995-1013. Nath specially excepted to the Hospital's motion, but filed no substantive response. 2SCR253-54. Following a hearing, during which Nath declined to present

rebuttal evidence (2SCR259), the trial court overruled Nath's special exceptions, agreed with the Hospital that Nath's conduct was sanctionable, and entered extensive findings of fact and conclusions of law including that "Nath has used the court system to intimidate adversaries and to stifle dissent with baseless legal allegations." *Nath I*, 446 S.W.3d at 360-61; *see also* 2SCR248-89. The trial court awarded the Hospital $726,000 in attorney's fees as sanctions against Nath. *Nath I*, 446 S.W.3d at 361.

In November 2010, Baylor filed its own motion for sanctions (2SCR1057-82) and after a hearing and consideration of the evidence presented by Baylor, the trial court made similar findings of fact and conclusions of law, and awarded Baylor $644,500.16 in attorney's fees as sanctions against Nath. *Nath I*, 446 S.W.3d at 361; *see also* 2SCR555-95. Again, Nath was given the opportunity to present rebuttal evidence at the hearing but declined to do so. 2SCR567.[3]

II. Nath's First Appeal to the Fourteenth Court of Appeals

In his first appeal challenging the sanctions, among other complaints, Nath complained that the trial court erred by refusing his request to have a jury decide the

[3] Nath's assertion that the trial court did not conduct evidentiary hearings in 2010 and that the first evidentiary hearing was held on December 2019 (BOM3, 14, 43, 51) is incorrect. *See Nath*, 375 S.W.3d at 413 (noting that the trial court considered evidence presented by Respondents before assessing sanctions in 2010); 2SCR259, 263-64 (Judge Kirkland's FOF## 37-38, 47), 2SCR567 (Judge Kirkland's FOF## 39-41). Nath cannot erase those hearings from the record merely because he deliberately chose not to present any evidence in response to the sanctions requests.

proper sanctions amount (Appendix A at 28-29) and that the trial court improperly assessed sanctions against him rather than his attorneys. The Fourteenth Court rejected each of Nath's arguments. *Nath*, 375 S.W.3d at 412-14.

III. *Nath I* and Remand Guidance

Nath then appealed to this Court; his primary complaints, asserted in a single issue, were that sanctions should not have been assessed against him personally because he was not the "true offender" and the sanctions amounts were excessive because "the trial court failed to ensure that the sanction … was not more severe than necessary." Cause No. 12-0620, Petitioner's Brief on the Merits at 11. Nath made no mention of, and thus abandoned, his jury trial complaint.

This Court held that the trial court did not abuse its discretion in sanctioning Nath personally. *Nath I*, 446 S.W.3d at 367 ("[U]nder the true-offender inquiry, we must uphold the trial court's decision to sanction Nath personally because some evidence supports the sanction."). This Court noted the trial court's assessment that Nath's conduct amounted to "an abuse of process" and "a form of extortion," and concluded that "the record supports" the trial court's finding of Nath's "direct involvement in the case." *Id.* at 366-67; *see id*. at 361 (elaborating that "the trial court properly sanctioned Nath because he pursued . . . irrelevant issues in order to leverage a more favorable settlement" of his time-barred claims).

However, a majority of the Court concluded that the trial court failed to consider factor (n) of *Low v. Henry*, 221 S.W.3d 609, 620 n.5 (Tex. 2007), the degree, *if any*, to which Respondents' own conduct caused the expenses for which they sought recovery. The dissent disagreed that the trial court failed to consider *Low* factor (n) and expressed concern about remanding the case for sanctions-focused litigation. *Nath I*, 446 S.W.3d at 376. In its footnote 30, the Court addressed the dissent's concern:

> 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.

Id. at 372 n.30 (emphasis added).

IV. Following the First Remand, Nath's Stonewalling Resumes

Back in the trial court, Respondents submitted affidavits in support of their position that their own conduct did not cause any of the expenses for which they sought recovery. Continuing his pattern of refusing to engage on the merits, Nath attempted to derail the proceedings by filing numerous motions unrelated to *Low* factor (n), including requesting the opportunity to re-litigate whether he was the true offender and seeking an order disqualifying Respondents' counsel. *Nath*, 576 S.W.3d at 732-33 (detailing Nath's post-remand filings). Respondents successfully resisted Nath's extraneous motions, at great expense. After considering Respondents' supplemental affidavits, the existing record, and the briefing, the trial

court reassessed the amount of the compensatory sanctions based on the evidence presented and awarded the same amount awarded in 2010. 2SCR294-96. The Fourteenth Court affirmed. *Nath*, 576 S.W.3d at 743.

V. *Nath II* and Remand Guidance

Nath again sought review from this Court. While Nath's petition for review was pending, this Court decided *Rohrmoos* and held that a fee claimant bears the burden of proving the reasonable number of hours worked multiplied by a reasonable hourly rate and explained that the claimant must present evidence of (1) the 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. 578 S.W.3d at 498. The Court further explained that "billing records are *strongly* encouraged" to meet this burden. *Id.* at 502.

On June 21, 2019, this Court issued a per curiam opinion addressing Nath's argument that fee-based sanctions require the same type of evidence as required in other fee-shifting awards. *Nath II*, 576 S.W.3d at 709. The Court acknowledged that "some courts of appeal have not required proof of necessity or reasonableness when assessing attorney's fees as sanctions" based on their misunderstanding of the Court's per curiam decision in *Brantley*. *Id.* *Brantley* held that (1) a party does not have the right to a jury trial on the amount of the sanction and (2) the amount of 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." 677 S.W.2d at 504 (emphasis added). The Court went on to explain that several years after *Brantley*, "an intermediate appellate court" improperly cited the case "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.'" *Nath II*, 576 S.W.3d at 709 (citation omitted). The Court overruled that intermediate appellate court decision and others that also held that proof of necessity or reasonableness was not required when assessing fees as sanctions. *Id.* It noted that *Brantley* did not concern the nature of the proof required before a court may exercise its discretion to award fees as a sanction. *Id*. The Court, citing *Rohrmoos*, then held that proof of reasonableness is required in "all fee shifting situations" and therefore, Respondents needed to meet the evidentiary requirements of *Rohrmoos*. *Id*. at 709-10. The Court also held that Respondents' supplemental affidavits were too conclusory to meet this standard and remanded the case "to the trial court for further proceedings in light of *Rohrmoos*." *Id*. at 710. The Court left undisturbed *Brantley*'s holding that a party does not have the right to a jury trial on the amount of the sanction. *Id*. at 709.

VI. Proceedings on Second Remand

A. Nath Again Resumes His Vexatious Habits

After jurisdiction returned to the trial court, in an attempt to keep the remand process orderly and focused, on September 12, 2019, the trial court ordered Respondents to present their lead counsel for depositions by November 12 and to then file their applications for fees (herein "Fee Applications"). 4SCR56-57. It also set the *Rohrmoos* evidentiary hearing for December 10. 4SCR56.

An orderly and focused remand process was not to be, as Nath's shenanigans continued. He defiantly sought to re-litigate decided issues and expand the scope of the remand. For example, Nath noticed corporate representative and nonparty depositions relating to Respondents' 2010 decision to seek sanctions. 4SCR116-20, 124-25. Nath also filed a cross-motion for sanctions and an amended cross-motion for sanctions against Respondents and their counsel based on Respondents' 2010 decision to seek sanctions. 3SCR27-31; 4SCR437-47. Those motions, like so many of his other filings, repeated his complaint that he could not be properly personally sanctioned. 4SCR443. Nath's pugnaciousness reached new heights; he equated Respondents' counsel's conduct with that of the disbarred prosecutor in the *Michael*

Morton case. 4SCR440-42;[4] *see also* CR123-24 (repeating this same inflammatory claim).

But there is of course more. Nath also filed motions to disqualify Respondents' counsel (his second attempt) and special exceptions to Respondents' motions for sanctions, nine years after the sanction motions had been filed and nine years after his first special exceptions to the Hospital's sanction motion had been denied. 2SCR253-54; 4SCR927-38; *see also Nath*, 2021 WL 451041, at *3.[5]

B. Nath Candidly Tells the Trial Court He Is Not Entitled to a Jury Trial, While Demanding One Anyway

On November 5, 2019, Respondents filed their Fee Applications as directed by the trial court. 2SCR4, 339. On November 6, 2019, Nath demanded a jury trial. 5SCR3-6. Nath expressly acknowledged that his request was "foreclosed" by precedent and contended that he wanted to preserve the argument so that this Court would "revisit" the issue. 5SCR4-6; Appendix B. The trial court struck Nath's jury demand. 4SCR1035, 1048.

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[4] According to Nath: "Just like in the case of Michael Morton, TCH and BCM's counsel know and have known for quite some time that they have caused harm to the wrong person by targeting Dr. Nath, instead of the lawyers who filed the lawsuit, for no other reason than they can."

[5] Although the trial court concluded that none of these filings had any merit, Respondents were forced to expend many tens of thousands of dollars responding to Nath's improper onslaught. *E.g.,* 4SCR951, 945, 1033, 1068. Respondents also had to respond to Nath's many meritless arguments at the multiple hearings required by Nath's filings. For example, at the November 14 hearing on Respondents' motion to quash subpoenas issued by Nath, Nath again argued that there had been a "complete reversal" of the 2010 findings of fact and conclusions of law including the finding that he should be personally sanctioned. 4RR8-11.

C. Nath Thinks He Has One More Rabbit to Pull Out of His Hat—a TCPA Motion to Dismiss

But Nath hadn't yet exhausted his bag of tricks. On November 18, 2019, Nath filed a TCPA motion to dismiss Respondents' sanction motions. CR99. Nath reprised his now-familiar refrain that he should not be personally sanctioned. *E.g.*, CR99 (Nath's complaint that he should not have been sanctioned after entrusting his case to his lawyers); CR102 (claiming yet again that "TCH and BCM have yet to show, much less prove how Dr. Nath was personally involved in the filing of this case"). He also deliberately mischaracterized Respondents' Fee Applications as new "Sanctions Motions" (CR99), even though Respondents' *actual* sanctions motions were filed in 2010 (2SCR995, 1057), and despite the fact that 19 days earlier, on October 31, 2019, Nath directed special exceptions to Respondents' 2010 motions (4SCR935) and had earlier, on September 11 and October 27, filed a ***cross***-motion and amended ***cross***-motion for sanctions (3SCR27; 4SCR437), thereby explicitly recognizing that the operative motions for sanctions were Respondents' 2010 motions, ***not*** their yet-to-be-filed Fee Applications.[6] Nath's TCPA motion even shamelessly asked the trial court to assess fees and sanctions ***in his favor***. CR107.

On December 2, 2019, Respondents filed their joint response to Nath's TCPA motion, asking that it be denied for several reasons, including: (1) the TCPA was

[6] Respondents filed their Fee Applications on November 5, 2019. 2SCR4, 339. Nath's special exceptions to the 2010 sanctions motions was heard on November 11. 3RR4.

enacted in 2011, was not retroactive, and thus did not apply to their 2010 motions for sanctions; (2) even if Respondents' Fee Applications were deemed motions for sanctions, a motion for sanctions is not a "legal action" and is thus outside the TCPA's reach; (3) Nath's TCPA motion was untimely because it was filed more than nine years after service of the true "legal action" (Respondents' 2010 motions for sanctions), well beyond the statute's 60-day time limit; (4) Nath's motion was outside the scope of the remand, and (5) even if the motion was not outside the scope of the remand and the statute was applicable, Respondents met their TCPA burden. 2SCR975-92.

D. After a Day-Long Hearing, During Which the Trial Court Hears Substantial Evidence, Judgment Is Entered

On December 10, the parties appeared before the trial court; Nath's TCPA motion was heard first. RR5. After the trial court took Nath's TCPA motion under advisement, Nath immediately asked the trial court to delay the *Rohrmoos* hearing (it declined) and then pursued emergency appellate relief to stop the *Rohrmoos* hearing from proceeding, relying on a purported statutory stay. RR28-29; Cause No. 14-19-00967-CV; Cause No. 19-1079; BOM4. Both the Fourteenth Court and this Court denied Nath relief.

Over the course of the day-long *Rohrmoos* hearing, the trial court heard from the lead attorneys who defended Respondents from 2006 through 2010. Each testified that no behavior by either Respondent caused the fees that Respondents

asked to be shifted to Nath and that the delays in concluding the case were caused solely by Nath. RR42-267. For example, Respondents' counsel explained that Nath's adding two non-Texas defendants caused a two-year delay while those defendants filed special appearances and an appeal, and that once jurisdiction returned to the trial court, Respondents fought to obtain basic information necessary to move for summary judgment and then filed case-ending motions for summary judgment which were not heard because Nath sought continuances so that he could conduct additional discovery and amend his pleadings. They further explained why they did not file no-evidence summary judgment motions earlier and testified that they joined in 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. RR64-67, 81-82, 85-88, 90-98, 117-19, 121, 145, 170-71, 189-96, 199-204; *see infra* at Argument § IV. The trial court also heard from Nath's expert witness (RR270-325) and admitted several exhibits, including Respondents' minimally-redacted billing records (RR3-4 (list of exhibits)).

Aside from his purported expert's unconventional theory that Respondents could have avoided all of the fees they incurred by securing an order abating the case

at the outset—testimony the trial court found lacked credibility—Respondents' evidence that their conduct was not the cause of the fees they sought to shift to Nath went unrebutted. Nath declined to call any of the trial counsel who represented him at various times from 2006 through 2010 to testify on his behalf. RR270, 325; 4SCR1092. Instead, Nath sought to introduce evidence of his own purported lack of involvement in the sanctionable conduct, which evidence the trial court excluded as irrelevant. *E.g.*, RR104-09, 135-36.

During his closing argument, consistent with his broken record refrain, Nath continued his lament that he was not the wrongdoer and should not be personally sanctioned and, despite this Court having upheld the sanctions against him five years earlier, insisted on his right to a do-over. *E.g.*, RR333-34 (arguing that the trial court needed to "make a threshold determination that, 'if' it was going to impose a sanction 'against whom should it be imposed?'").

On December 18, the trial court entered findings of fact and conclusions of law in which it determined that Respondents' billing records and testimony supported reassessing sanctions against Nath in the same amounts awarded in 2010 and 2015. 4SCR1086-1103. Among its specific findings were that Respondents had met their *Rohrmoos* and *Low* factor (n) evidentiary burdens. 4SCR1090-97. Shortly thereafter, the trial court signed a final judgment in which it also denied Nath's TCPA motion. 1SCR3-6.

In a thorough and thoughtful opinion, in which it addressed separately each of the seven issues Nath raised, the Fourteenth Court affirmed. *Nath*, 2021 WL 451041.

SUMMARY OF ARGUMENT

Nath's "three strikes and you're out argument" is meritless. Nath's attempt to fashion a new appellate remedy fails. Neither Rule 60.2 nor Nath's cases support his claim that the Court has "discretion" to order Respondents to "take nothing."

The trial court properly struck Nath's jury demand. Nath has an insurmountable waiver problem. But even if not, this Court held in *Brantley* that a party is not entitled to a jury trial on the amount of compensatory sanctions. *Brantley* remains sound. The availability of sanctions serves as a needed check on litigation malfeasance. Holding that a party found to have abused the judicial process is entitled to a jury trial on the amount of compensatory sanctions invites vexatious multiplication of proceedings and would strongly discourage parties from seeking sanctions (or trial courts from unilaterally imposing sanctions), to the detriment of the legal process.

The trial court's order denying Nath's TCPA motion can be affirmed on any one of a number of bases. Several independent reasons support affirming the trial court's TCPA order, including that: (1) Nath's motion was outside this Court's limited remand (the basis on which the Fourteenth Court affirmed the order); (2) the

TCPA was not in effect in 2010 when Respondents filed their sanction motions and therefore does not apply; (3) a sanctions motion is not a "legal action" and therefore it is not subject to dismissal under the TCPA; (4) Nath's TCPA motion was untimely; and (5) Respondents met their TCPA burden. If the Court decides to exercise jurisdiction, and determines that the Fourteenth Court erred in holding that Nath's TCPA motion was outside the limited remand, it should affirm the trial court's order on one or more of these other bases in the interest of judicial economy. *Supra* n.1.

The trial court did not err in awarding the Hospital $726,000 and awarding Baylor $644,500.16 in sanctions. The awards are supported by legally sufficient evidence under *Rohrmoos*; the evidence also supports the trial court's findings that none of the fees Respondents sought to shift were incurred because of their own conduct and that redactions to the fee records were minimal. Also, were the Court willing to consider an argument that Nath waived by failing to raise it in his petition for review, the trial court properly excluded evidence allegedly probative of whether Nath was the true offender, which issue was conclusively litigated long ago.

The conditional fee award to the Hospital is proper. The conditional appellate fee award did not exceed the scope of the remand and is supported by legally sufficient evidence. Also, there is no requirement to plead for fees awarded as sanctions, but even if there were, Nath tried the issue by consent when he did not object to the testimony regarding the Hospital's conditional appellate fees.

ARGUMENT

I. Nath Is Not Entitled to a Case-Ending Order

According to Nath, this Court should erase the sanctions awards and render judgment in his favor because the sanctions remain unsupported by sufficient evidence and the lower courts have ignored this Court's directives. *E.g.*, BOM11 (the lower courts have "in fact ignore[d] the [Court's] directives" by awarding sanctions in the same amounts as previously awarded); *id*. 15 (the degree to which Respondents caused their fees by their own conduct "remains unaddressed by anything other than conclusory statements"); *id*. 17 (at this point, the parties should be "sent home"). This argument fails for many reasons.

First, Nath attempts to rewrite *Nath I* and *Nath II* by stating that this Court "observed twice" that Respondents "bore some responsibility for prolonging the litigation." BOM11. This Court never made that determination, nor could it. Reviewing courts do not find facts. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744-45 (Tex. 1986). Instead, *Nath I* held that the trial court was required to consider all relevant *Low* factors, and one it had not considered, but which was "unquestionably relevant," was *Low* factor (n), and it thus remanded the case to the trial court to consider that factor. 446 S.W.3d at 361, 372. *Nath II* remanded the case so that Respondents could comply with the evidentiary standards set forth in recently-decided *Rohrmoos*. 576 S.W.3d at 710. Contrary to Nath's

claim, this Court did not, nor could it have, presupposed the fact finding that the trial court would make after considering *Low* factor (n) any more than it could make the initial determination itself. *Bellefonte Underwriters*, *supra*.

Second, even if Nath's excessiveness and sufficiency arguments had merit (and they do not, *see infra* at Argument § IV), Nath cites no authority that allows this Court to, in its discretion, end this case now in his favor. Justice Gonzalez's passing remark in his dissent in *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989) (orig. proceeding), a case addressing whether an appellate court had authority to issue a writ of prohibition, certainly provides no support for Nath's argument. And *Browning v. Navarro*, 887 F.2d 553, 564 (5th Cir. 1989), where the Fifth Circuit held that the district court erred in denying appellant's motion for summary judgment based on res judicata and rendered judgment in appellant's favor, is equally unpersuasive. Nath cites no case under Rule 60.2 (or any other rule) where this Court ended a case because of successive appeals.

Nath's claim that the trial court treated the remand proceedings as a "ministerial" function "to confirm" the previous award (BOM14) is refuted by the record, which instead establishes that the trial court understood its task was a substantive one: to determine the appropriate amount of sanctions under the *Rohrmoos* standard and to consider relevant Low *factor* (n) evidence. *E.g.*, 1RR37; 2RR23-24; 4RR21; RR104-07; *see also* RR250.

Nath's assertions that 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" and that the "proof is still missing" as to the "direct relationship between the offensive conduct and the sanction imposed" (BOM15) are likewise refuted by the record. Baylor's and the Hospital's lead trial counsel (Shauna J. Clark and Patrick W. Mizell, respectively) each explained at the day-long evidentiary hearing that (1) Nath's adding two non-Texas defendants caused a two-year delay while those defendants filed special appearances and an appeal, (2) once jurisdiction returned to the trial court, Respondents had to fight to obtain the information necessary to move for summary judgment,[7] and (3) once Respondents filed case-ending motions for summary judgment, those motions were not heard because Nath successfully sought a continuance so that he could conduct additional discovery and then amended his pleadings to abandon his claims.[8] They further explained that they could not move for a no-evidence summary judgment motion until an "adequate time for discovery" had passed, TEX. R. CIV. P. 166a(i), 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

[7] Nath's purported expert agreed that Nath's original petition was vague and not facially time barred. RR302.

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

motions were unsuccessful, they could defend against Nath's claims at trial. And they each testified that they excluded fees not directly attributable to Nath's conduct, explained the reasons why the delays in concluding the case were caused by Nath and why no behavior by either Respondent caused the fees that Respondents asked be shifted to Nath. RR64-67, 81-82, 85-88, 90-98, 117-19, 121, 145, 170-71, 189-96, 199-204; *see also infra* at Section IV.

Nath's Issue I should be overruled.

II. Judges, Not Juries, Determine the Amount of Compensatory Sanctions

A. Nath Is Barred From Re-Urging His Alleged Right to a Jury Trial

To facilitate judicial efficiency and fairness, the law of the case prevents litigants from taking serial appeals on the same issues and issues that could have been raised but were not. *See Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003) (rationale for the doctrine is that it narrows the issues in successive stages of the litigation to achieve uniformity of decision as well as judicial economy and efficiency); *Scott Pelley P.C.*, 578 S.W.3d at 699 (appellate court's judgment is final as to matters actually litigated and "to all other matters that the parties might have litigated"). Were it not for this rule, trial courts, courts of appeals, and the parties would waste untold time and resources on proceedings that have no bearing on the ultimate determination of a particular case (the very outcome Nath urges here).

As noted above, Nath's first appeal challenging the sanctions award complained that the trial court erred by denying him a jury trial on the amount of sanctions to be awarded. Appendix A. Thus, when Nath failed to raise the issue of his supposed right to a jury trial on the amount of compensatory sanctions in his first appeal to this Court (*see* Cause No. 12-0620), depriving successive courts and Respondents of the opportunity to address the issue, he forfeited the right to litigate that issue later in this case. *See Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (on reh'g) (appellate court's judgment remained "in effect" as to "abandoned issues"). To conclude otherwise would invite litigants to reserve abandoned issues as insurance policies to mount serial appeals, striking a fatal blow to the consequential law of the case doctrine.

In response to Respondents' waiver argument, Nath claims that he only abandoned his argument that he was entitled to a jury trial under Chapter 41, "which governs awards of **exemplary damages**," and could not have abandoned his argument that he was entitled to a jury trial under *Rohrmoos*, which hadn't yet been decided. Reply in Support of Petition for Review 6-7. But his dodge fails because (1) there was never an award of exemplary damages in this case, so any right-to-jury-trial argument was necessarily tied to the fees assessed as sanctions and not to exemplary damages, and (2) Nath's argument that parties have a constitutional right

to a jury trial on all fee disputes based on the "analytical framework this Court developed in a trilogy of cases" issued by this Court between 1998 and 2010 (BOM18-22[9]) was available to him in 2011, and having foregone that argument, he should not be able to raise it now. *See generally* TEX. R. APP. P. 33.1(a); *Li v. Pemberton Park Cmty. Ass'n*, 631 S.W.3d 701, 704 (Tex. 2021) (per curiam); *Guitar Holding*, 263 S.W.3d at 918.

As discussed next, there are other reasons that Nath's jury trial argument is meritless.

B. Under *Brantley*, Nath Is Not Entitled a Jury Trial

1. *Brantley* Is Controlling

Brantley started as a breach of contract case. The buyer, plaintiff Etter, brought suit for specific performance of an earnest money contract for the sale of real property against the seller, Brantley. After the suit was filed, Brantley moved to Germany and was never heard from but was represented by counsel in the suit. The title company interpleaded Etter's earnest money and sought fees "for its trouble." *Brantley v. Etter*, 662 S.W.2d 752, 754 (Tex. App.—San Antonio 1983). Thereafter, Etter filed a motion for sanctions based on Brantley's failure to appear for a deposition. *Id.* The trial court granted Etter's motion, deferred the amount of

[9] Citing *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211 (Tex. 2010); *City of Garland v. Dall. Morning News*, 22 S.W.3d 351 (Tex. 2000); and *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998).

the sanctions to be awarded to a later hearing, struck Brantley's pleadings, and transferred possession and title to Etter. *Id.* at 755. At the later hearing on the sanctions amount, Brantley demanded a jury trial, which the trial court denied. *Id*. at 756. The trial court then awarded the title company $500 but awarded the plaintiff no sanctions. *Id*. at 755 nn.2, 5. Brantley appealed; her third point of error complained in part that she was entitled to a jury trial "at the final hearing on attorney's fees" which were awarded to the interpleader. *Id*. at 756. The appellate court agreed with her. *Id*. ("the trial court was unauthorized to deny her a jury trial.").

Brantley then appealed to this Court complaining that the trial court abused its discretion in imposing sanctions and that she was entitled to a jury trial on the amount of fees awarded to the title company. *Brantley*, 677 S.W.2d at 504. This Court refused her application for writ of error, finding no reversible error. *Id.* But it issued a per curiam opinion to make one simple point. *Id.* This Court noted that it could be "inferred" from language in the appellate court's opinion "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." *Id.* The Court "expressly" held that "the amount of fees awarded as sanctions for discovery abuse is solely within the sound discretion of the trial ***judge.***" *Id.* (emphasis added).

Brantley thus recognized that a sanctioned party has abused the judicial process and should not be able to demand a jury trial on the amount of sanctions because that would promote costly satellite litigation—a principle that applies whether the abuse is discovery or non-discovery related. *See also Rohrmoos*, 578 S.W.3d at 503 (expressing same sentiment). If abusive litigants have a right to demand a jury trial on the issue of the amount of sanctions (either in the discovery or non-discovery context), then sanctions will become a little-used procedural device to check abusive litigation tactics, as the cost to the movant to obtain the sanctions will nearly always exceed the sanction award.

Also, trial courts can initiate sanctions. TEX. CIV. PRAC. & REM. CODE § 10.002(b); TEX. R. CIV. P. 13. If *Brantley* were limited to discovery abuse sanctions, and parties were entitled to a jury trial on the amount of Chapter 10 sanctions as a matter of course, the entitlement would apply regardless of whether the party's opponent or the trial court initiated the sanctions process. Thus, by exercising its authority on "its own initiative," the trial court would impose an undue burden on the litigant who did not engage in sanctionable conduct to incur the time and expense associated with a jury trial. Further, under this scenario, allowing a jury to assess the amount of sanctions also opens the door to allowing a jury to effectively exercise a veto over a trial court's determination as to whether sanctions are warranted at all.

2. Nath's Efforts to Marginalize *Brantley* Fail

After begrudgingly agreeing that *Brantley* "may be good law," Nath then lobs a series of reasons why its prohibitions on a jury trial would not apply here. BOM25-27. None have merit.

Nath first opines that a judge has specialized knowledge she or he can bring to bear on the amount of discovery-related sanctions but lacks specialized knowledge that could be brought to bear on the amount of sanctions for pleadings or other non-discovery abuse. BOM26-27. Even were Nath's opinion on the scope of judicial expertise relevant, Nath offers no basis for his ad hoc line drawing, and Respondents can think of none.

Nath then argues that when *Rohrmoos* and *Nath II* instructed that fee-shifting sanctions should be treated the same as all other fee shifting cases, the Court meant it. BOM27-28. That is true, in the sense that regardless of the basis of the award (discovery sanctions, litigation sanctions, fees under the Texas Medical Liability Act, the Texas Labor Code or Chapter 38), *Rohrmoos* controls the nature of evidence that must be provided by the claimant. *See Nath II*, 576 S.W.3d at 710 ("all fee-shifting situations require reasonableness"). But if *Rohrmoos* is construed as holding that "all other" rules that apply to fee shifting, and particularly the requirement of a jury trial on the amount, always apply too, then *Rohrmoos* implicitly overruled *Brantley*. *Nath II* proves otherwise. Had the Court wanted to overrule *Brantley*, it

would have said so; instead, it explained that *Brantley* had been misread only with regard to "the proof necessary to invoke the trial court's discretion" in determining the amount of fees to be awarded. *Nath II*, 576 S.W.3d at 709. The Court went on to discuss the matters that must be considered "[b]efore a court may ***exercise its discretion*** to shift attorney's fees as sanctions[.]" *Id.* (emphasis added).

Likewise unavailing is Nath's feigned concern that if judges can decide the amount of sanctions, parties will be encouraged "to take the nonjury route of seeking life-of-the-case fees as sanctions, rather than through the contractual and statutory avenues…." BOM27. The idea that parties would simply choose not to follow the law is a fallacy. Moreover, if this were true, why hasn't it already happened? In reality, courts are loathe to grant life-of-the-case fees as sanctions except in the most egregious circumstances, such as this case.

Nath's related argument that "[i]f 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" (BOM30-31), is equally unfounded. Indeed, since *Brantley* was decided (1984), and since this Court recognized a trial court's authority to enter sanctions at the end of the case (*Lane Bank Equip. Co. v. Smith S. Equip., Inc*., 10 S.W.3d 308, 312 (Tex. 2000)), parties have not flooded the trial courts with post-trial sanctions motions,

secure in their knowledge that the amount sought would not be scrutinized by a jury. And of course, Nath's assertion that a litigant is somehow afforded less due process when trial courts make a decision because they do so at their "whim," or by exercising "unfettered control" (BOM29-30), besides being obviously untrue, does not advance his argument. As Nath well knows, the imposition of sanctions is reviewable for abuse of discretion (*e.g.*, *Nath I*, 446 S.W.3d at 361), and fee-shifting sanctions are also reviewed for *Rohrmoos* compliance (*Nath II*, 576 S.W.3d at 710). The Court should not cripple lower courts' ability to issue meaningful sanctions in response to a problem that resides only in Nath's imagination.[10]

3. Lower Courts Addressing Sanction Awards Have Appropriately Followed *Brantley*, Leaving Nath to Rely on Non-Sanctions Cases

Notably, Nath ignores Respondents' cases that, faithfully following *Brantley*, held there is no right to a jury trial on the amount of compensatory sanctions. *E.g.*, *Miller*, 2001 WL 333617 at *4 (no right to jury trial on whether Chapter 10 has been

[10] The same can be said about the concerns raised by the Association of Extremity Nerve Surgeons in its amicus brief. Amicus Br. 11 (claiming that the Fourteenth Court's opinion "invites courts to use pleading sanctions to shift the entirety of fees *in any case* to an unsuccessful party") (emphasis in original). Furthermore, the Association's request that this Court limit fee shifting under Chapter 10 by engrafting onto it Rule 91a's requirements (imposed long after the sanctioned conduct at issue here) (*id*. at 15-16) impermissibly asks this Court to substitute its judgment for that of the Legislature's. Its claim that the lower courts "did not take seriously their obligations" to require Respondents to prove their fees in accordance with due process requirements (*id*. at 17) is refuted for all the reasons stated herein.

violated); *Neely*, 976 S.W.2d at 827-28 (no right to a jury trial on the issue of whether rule 13 has been violated).

Nath also fails to meaningfully distinguish the two cases cited by the Fourteenth Court (*Nath*, 2021 WL 451041, *9 (citing *Cantu v. Comm'n for Law. Discipline*, No. 13-16-00332-CV, 2020 WL 7064806 (Tex. App.—Corpus Christi Dec. 3, 2020, no pet. h.) (mem. op.); *Melasky v. Warner*, No. 09-11-00447-CV, 2012 WL 5960310 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.)), noting only that neither involved sanctions awarded under Chapter 10 (BOM26) which, while true, for the reasons stated above, is a meaningless distinction.

None of the intermediate appellate court cases Nath cites concern sanction awards and, therefore, those courts properly did not consider *Brantley*. BOM22-23 (citing *Riley v. Caridas*, No. 01-19-00114-CV, 2020 WL 7702183, at *18-20 (Tex. App.—Houston [1st Dist.] Dec. 29, 2020, pet. filed) (mem. op.) (fees awarded to prevailing party under the Texas Property Code); *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, 622 S.W.3d 74, 88-89 (Tex. App.—Corpus Christi 2020, no pet.) (fees awarded to prevailing party under the TCPA); *Meyers v. 8007 Burnet Holdings, LLC*, 600 S.W.3d 412, 430-31 (Tex. App.—El Paso 2020, pet. denied) (fees awarded to prevailing party under TEX. CIV. PRAC. & REM. CODE § 125).

C. Nath's Effort to Distinguish *Cire* Fails

As Respondents noted in their Response to Nath's petition for review, this Court's decision in *Cire v. Cummings*, 134 S.W.3d 835, 843-44 (Tex. 2004), although it did not cite to *Brantley*, nonetheless dooms Nath's argument that he is entitled to a jury trial on the amount of compensatory sanctions. *Cire* held that a trial court could consider a motion for sanctions by written submission. Although the Court was addressing sanctions awarded under Rule 215, there is no principled reason to not apply *Cire* to sanctions awarded under Chapter 10.

Nath is left to argue that by holding in *Cire* that an oral hearing was not necessary, the Court did not hold that a jury trial is never required. BOM26. By such logic, this Court's holdings in all manner of cases would be for naught; the Court would be required to state its holding, and then spell out what it is not holding.

D. Nath's Case Trilogy Does Not Support His Jury Trial Argument

Nath's claim that a trilogy of this Court's cases establishes that "a jury is required to determine the reasonableness of fees under Chapter 10" (BOM18-22; *see supra* n.9) also misfires. If any of those cases actually stood for the proposition that the amount of statutory fee shifting sanctions must be determined by a jury, then how does Nath explain *Nath I*, where this Court remanded the issue of Chapter 10 fee shifting sanctions with instructions that the ***trial court***, not a jury, determine an appropriate sanctions amount based on affidavits or the existing record? *Nath I*, 446

S.W.3d at 372 n.30 (expressing confidence 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") (emphasis added).[11] By directing the trial court to "at most" examine a paper record, this Court essentially preempted Nath's previously-claimed right to a jury trial.

Nath attempts to use the trilogy to explain why a jury trial should be required under Chapter 10 but not under Rule 215 (BOM25-26), but Nath's analysis is contrary to *Rohrmoos* and *Nath II*, which held that reasonableness is ***always*** required. Thus, even if a trial court has broader discretion under Rule 215 (or had broader discretion under former Rule 215a), that discretion is still limited to awarding *Rohrmoos*-compliant reasonable fees (which are undoubtedly determined by the trial judge under *Brantley*).

E. Nath's Last Gasp Arguments Are Baseless

Nath's assertion that a "jury is patently needed here" because (i) the sanctions amount is substantial, (ii) the trial court awarded the same amounts previously awarded, and (iii) the trial court engaged in "wholesale fee-shifting" (BOM30) is baseless. Nothing in *Nath I* or *Nath II* prohibited the trial court from awarding the same amounts if the evidence supported the award. To the contrary, *Nath I*

[11] In *Nath II*, this Court did not prohibit Respondents from submitting their fee evidence by affidavit and instead held only that Respondents' affidavits, following the first remand, were conclusory and did not comport with *Rohrmoos.* 576 S.W.3d at 710.

recognized that life-of-the-case fees may be justified. *Nath I*, 446 S.W.3d at 372 ("placing the entire cost of litigation on a plaintiff may be proper and deserved"). Nath's argument, no matter how many times he repeats it, is also factually incorrect because, as the Fourteenth Court noted, the trial court did not shift "all" of Respondents' fees to Nath. *Nath*, 2021 WL 451041, at *11-12.

Likewise, to the extent Nath suggests that this Court's decision not to recognize a right to a jury trial in *Brantley* or *Cire* was because of the size of the awards ($500 and $250 respectively) (BOM25-26), he discredits the Court. The right to a jury trial, when it exists, is agnostic to the amount in controversy. And that must be the case because trial courts and litigants need to know before (not after) the imposition of monetary sanctions whether a jury trial where demanded is required.

In sum, in 2019, this Court in *Nath II* cited *Brantley* 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. At bottom, Nath's argument presumes that the Court did so carelessly and that it really meant to overrule *Brantley*. Nath provides no principled reason to revisit *Brantley* or to hold that a litigant is entitled to have a jury determine the amount of compensatory sanctions.

Nath's Issue II should be overruled.

III. Nath's TCPA Motion Was Properly Denied

Nath urges the Court to resolve a conflict among the appellate courts on whether a motion for sanctions qualifies as a "legal action" under the TCPA. BOMxiii, 2, 9, 32-37. This case is not a proper vehicle to resolve that conflict, but even if were, and were the Court to conclude that a sanction motion qualifies as a "legal action" under the pre-amended version of the TCPA,[12] the trial court's order denying Nath's TCPA motion should still be affirmed.

A. Nath's TCPA Motion Was Outside the Scope of the Remand

Citing numerous cases, the Fourteenth Court determined that Nath's TCPA motion "was beyond the scope of what was necessary to give full effect" to this Court's instructions in *Nath I* and *Nath II.* 2021 WL 451041, at *6-8 (citing *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013); *Johnson-Todd*, 2018 WL 6684562; *Scott Pelley P.C.*, 578 S.W.3d at 699)); *see also Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 03-18-00617-CV, 2019 WL 3756485, at *2-3 (Tex. App.—Austin, Aug. 9, 2019, no pet.) (mem. op.) (collecting cases and holding that where its decision on the plaintiff's prior appeal resulted in a remand for consideration of plaintiffs' attorney's fees, the trial court correctly refused to consider plaintiffs' request for other relief).

[12] The Texas Legislature amended the TCPA in its 2019 legislative session and the amendments are effective September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1-12, 2019 Tex. Gen. Laws 684, 684-87.

The Fourteenth Court observed that the facts in *Johnson-Todd* were "similar to those presented here" and proceeded to discuss them in detail, noting that as in that case, this Court's decisions in *Nath I* and *Nath II* "significantly limited the issues remaining to be determined in the underlying proceeding" to examine (1) the extent to which Respondents caused the expenses they accrued during the litigation and (2) "for further proceedings in light of *Rohrmoos*." 2021 WL 451041, at *7. The Fourteenth Court then held that, as was the case in *Johnson-Todd*, consistent with the limited remands here, the trial court had no authority to consider Nath's TCPA motion as it "did not address (1) if and how [Respondents'] conduct in the underlying litigation contributed to their attorney's fees or (2) the reasonableness and necessity of [Respondents'] fees" and instead addressed the separate issue of "the propriety of sanctioning Nath's conduct in the litigation." 2021 WL 451041, at *8.

Nath's arguments for why his TCPA motion was not beyond the scope of the remand each fail. First, he cites to *In re Henry*, 388 S.W.3d 719, 727-28 (Tex. App.—Houston [1st Dist.] 2012, mand. and pet. denied) for the proposition that if a court remands a case without including limiting instructions in the mandate, the trial court can proceed to consider "all issues *of fact*, and the case is reopened in its entirety." BOM42. Of course, as this Court has held numerous times, when interpreting a mandate, courts are to look not only to the mandate itself but also to the opinion of the court. *E.g.*, *Hudson*, 711 S.W.2d at 630. And *In re Henry*

undermines Nath's argument. 388 S.W.3d at 727-28 (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).

Nath's suggestion that Respondents attempted to "narrow" the *Nath II* mandate (BOM42) is misleading. After it became clear that Nath's position was that the remand was unlimited in scope, Respondents filed a motion to recall and amend the mandate, and asked the Court to clarify (not narrow) the mandate in an attempt to stop Nath from repeating the same aggressive tactics he employed after the first remand. 4SCR136; *see also* 4SCR147 (Nath's August 12, 2019 letter to the Hospital stating that "TCH is back to square one and has to actually put on admissible evidence to prove sanctions against Dr. Nath, individually, are appropriate....").

Nath also claims that the Fourteenth Court erroneously relied on *Johnson-Todd* because that court did no more than review its own prior instructions to the trial court and made no "categorical pronouncement that a TCPA motion can never be reviewed if it is filed on remand." BOM42-43. In *Johnson-Todd* (again, discussed in detail by the Fourteenth Court), the Beaumont Court's mandate following the first appeal "instructed the trial court to conduct further proceedings consistent with this Court's opinion." 2018 WL 6684562, at *2. It then concluded that those instructions "did not allow the trial court to consider Johnson-Todd's post-remand motion to dismiss Morgan's 2017 motions for sanctions under the TCPA."

Id. Thus, *Johnson-Todd* adhered to this Court's directive that the mandate be construed with reference to the accompanying opinion, which is precisely what the lower courts did here in determining that Nath's TCPA motion was beyond the scope of the remand.

Nath's final argument—that Respondents "***had to file new motions for sanctions***," and because this "Court did not preclude" Nath "from filing anything responsive to the actions taken by Respondents on remand," his TCPA motion was within the scope of the remand (BOM42) (emphasis added)—is a bridge too far. Respondents did not need to, nor did they, file "new" or "renewed" motions for sanctions following either remand. Doing so was unnecessary because ***whether*** Nath should be personally sanctioned was no longer an issue; the issue was only the amount of the sanctions—as Nath later, in a separate context—concedes. BOM47. Indeed, Respondents made clear in their respective Fee Applications that they were not asking the trial court to determine whether Nath should be sanctioned because that determination had already been made. The Hospital's Fee Application stated:

> ***Because this Court has already found that Nath is liable to the Hospital and Baylor for sanctions***—a conclusion upheld by the Texas Supreme Court—the only issue remaining in this remand is proof of the amount of reasonable and necessary attorneys' fees caused by Nath's sanctioned conduct.

2SCR9 (emphasis added); *see also* 2SCR344 (similar statement by Baylor). Respondents' remand filings thus properly and consistently focused on the only

remaining issue on remand—***the amount*** of sanctions. 2SCR4-19, 339-52. It follows that Nath's TCPA motion was not in fact responsive to "actions taken by Respondents" on remand in 2019; it was responsive to motions for sanctions filed by Respondents *in 2010*. Which brings Respondents to the next reason that Nath's TCPA motion was properly denied.

B. The TCPA Is Inapplicable

Respondents filed their sanctions motions in 2010. 2SCR995, 1057. The TCPA was enacted in 2011 and it is not retroactive. *See* Acts 2011, 82nd Leg. R.S., ch. 341 ("The change in law made by this Act applies only to a legal action filed on or after the effective date of this Act."); *see also TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, 611 S.W.3d 24, 28 (Tex. App.—Corpus Christi 2020, no pet.) (examining when a new pleading, filed after the Act's effective date, will be subject to the TCPA and noting that there must be either a new legal action alleged or new defendants added).

Aware that the TCPA went into effect after Respondents filed their sanctions motions, and thus does not apply, Nath again intentionally mischaracterizes Respondents' Fee Applications as "new" or "renewed" motions for sanctions. BOM35-36. For the reasons stated above (*see supra*), they are not. Likewise, for the reasons stated below, Nath's reliance on the Hospital's claim for conditional appellate fees as grounds for his TCPA motion (BOM37) also fails.

Anticipating this Court will reject his artifice, Nath argues that the filing of the Fee Applications triggered a new 60-day period to file a TCPA motion. BOM36 n.4. But because the Fee Applications did not (1) add new parties, (2) allege new essential facts to support previously asserted claims, or (3) assert new legal claims or theories, this argument also fails. *Montelongo v. Abrea*, 622 S.W.3d 290, 293-94 (Tex. 2021).

Equally meritless is Nath's assertion that, by ***amending*** their Fee Applications to comport with *Rohrmoos*, or by adding a request for conditional appellate fees (BOM36, n4), Respondents triggered a new 60-day filing period. Respondents' request for sanctions has remained unchanged since 2010. Respondents have never alleged a new legal theory or asserted new facts for why Nath should be sanctioned. Nath himself treated the 2010 sanctions motions as the operative motions by specially excepting to them and having those special exceptions heard ***after*** Respondents filed their Fee Applications in 2019. 4SCR935, 3RR4; *see supra* n.6.

Nath's statement that "Respondents' sanctions motions were based on the core conduct that the TCPA protects" (BOM36) only underscores that the TCPA does not apply here. The sanctions motions (2SCR995, 1057) were directed to Nath's litigation conduct in the four years preceding their filings (2006-2010). Therefore, both the filing of the sanctions motions and the conduct that Nath claims is protected by the TCPA occurred *before* the TCPA was enacted. Indeed, each of

Nath's alleged constitutionally "protected activities" are based on statements set forth in Respondents' 2010 sanctions motions or in his own pre-2011 pleadings on which Respondents obtained summary judgment. For example, Nath's TCPA motion cited to Dr. Shenaq's surgical activities (CR106), a subject which informed his baseless petitions and triggered the sanctions levied against him. *See Nath I*, 446 S.W.3d at 365-67. He cites to his campaign contributions as protected activities (CR106-07), but again, like his other accounts of purported TCPA-protected activities, the Hospital mentioned those activities in a 2010 filing (2SCR997), before the TCPA was in effect.

Simply put, the TCPA, enacted in 2011 after Respondents filed their actual motions for sanctions (in 2010) does not apply and for that reason alone, the trial court properly denied Nath's TCPA motion.

C. Sanctions Motions Do Not Qualify as "Legal Actions"

1. This Case Does Not Present this Issue

Because Respondents' sanctions motions were filed before the TCPA was enacted, deciding whether a sanctions motion qualifies as a "legal action" will not resolve any issue between the parties in this case. If that issue merits this Court's attention, it should be addressed in a case where the answer to that question would actually affect the parties' substantive rights.

2. The Better-Reasoned Cases Correctly Decided that Motions for Sanctions Are Not "Legal Actions"

If reached, the Court should resolve the conflict among the appellate courts by holding that sanctions motions do not qualify as a "legal action." (Under the pre-amended TCPA, a legal action was defined as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." TCPA § 27.001(6).) *See*, *e.g.*, *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 Chapter 10 was not a "legal action" subject to dismissal under the TCPA); *Barnes v. Kinser*, 600 S.W.3d 506, 510-11 (Tex. App.—Dallas 2020, pet. denied) (sanctions motion does not qualify as a "legal action"); *contra KB Home Lone Star Inc. v. Gordon*, 629 S.W.3d 649, 655 (Tex. App.—San Antonio 2021, no pet.); *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 224 (Tex. App.—Austin 2018, no pet.).[13]

The Fourteenth and Fifth Courts' reasoning on this issue is sound. For example, in *Patel*, after applying settled rules of construction, including the doctrine of *ejusdem generis*, the Fourteenth Court held that a sanctions request is not "a procedural vehicle for the vindication of substantive causes of action or rights of relief." 2020 WL 2120313, at *5. It also reasoned that "[t]o hold [that the TCPA

[13] Except for *KB Home*, cited by Nath (BOM34), these cases were decided under the pre-amended TCPA.

applies to sanctions requests] would alter one of the purposes of the TCPA from being intended as a weapon against lawsuit abuse, to being ***a weapon against weapons against lawsuit abuse***." *Id*. at *6 (emphasis added).

The recent statutory amendments cited by Nath (BOM35), which identified exclusions to the definition of "legal action," are of no help to him. First, they do not apply. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 129 (Tex. 2019) (prior version of the statute controls cases filed before September 1, 2019). Second, Respondents' Fee Applications are not motions for sanctions. *See supra*. But even if they were, the 2019 amendments expressly exclude from the "legal action" definition "a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief." TCPA § 27.001(6)(A). Sanctions motions fall squarely within this exclusion. Nath's characterization of the Fee Applications as "the only live claims" at the time he filed his TCPA motion (BOM35-36) does not help him avoid this exclusion, as it renders the exclusion meaningless. Every motion asks for some relief, and thus every motion could, under Nath's view, be the basis of a TCPA motion.

3. That Respondents Filed their Sanctions Motions After Summary Judgment Was Granted Makes No Difference to Whether the Motions Are "Legal Actions"

Nath conceded below that *Patel* and *Barnes* were dispositive although, in his opinion, wrongly decided. Nath's Appellate Ct. Reply Br. at 6-8. Nath now claims

that *Patel* and *Barnes* are distinguishable because the sanctions and TCPA motions in those cases were filed early in the litigation. BOM36-37. But this argument makes no sense. Whether a pleading meets a statutory definition cannot depend on when the pleading was filed. And what constitutes early or late? Nath proposes an unworkable rule to salvage his TCPA argument. Also, this Court has repeatedly held that sanctions motions may be filed after the merits of a case are resolved. *E.g.*, *Pressley v. Casar*, 567 S.W.3d 327, 333 (Tex. 2019) (per curiam); *Lane Bank*, 10 S.W.3d at 311. To demand that sanctions motions be filed early in the case would threaten a litigant's right to due process—the very flag which Nath so earnestly waves in support of his claims.

4. Nath's TCPA Motion Was Extraordinarily Untimely

While the timing of Respondents' sanctions motions does not meaningfully distinguish this case from *Patel* and *Barnes*, the timing of Nath's TCPA motion is dispositive. That is because the TCPA has consistently required the motion to dismiss be filed within 60 days of "service of the legal action." TCPA § 27.003(b). Here, Nath's TCPA motion was filed more than nine years after the service of the "legal action" (Respondents' sanctions motions), making Nath's TCPA motion obviously untimely. CR99; 2SCR995, 1057.

D. Respondents Met Their TCPA Burden

According to Nath, Respondents did not satisfy their TCPA burden for three reasons: (1) Respondents submitted no evidence in response to his TCPA motion; (2) Respondents presented no evidence of what portion of their fees were caused by Nath as opposed to being caused by Respondents; and (3) Respondents presented no evidence of Nath's personal involvement in the sanctionable conduct or evidence that satisfied *TransAmerican*'s due process requirements. BOM38-41.

1. Respondents Presented Evidence

Nath's assertion that Respondents submitted "no evidence" with their joint response (BOM38-39; *see also id*. 32) is untrue. Respondents attached and incorporated 13 separate exhibits to their joint response and asked the trial court to take judicial notice of the entire record in the case, including its prior factual findings, which the trial court did. 2SCR978-79 (listing exhibits incorporated); RR23, 332.

2. Respondents Were Not Required to Present Evidence Regarding *TransAmerican* or *Low* Factor (n)

To defeat Nath's TCPA motion, Respondents were required to "establish by clear and specific evidence a prima facie case for each ***essential element*** of the claim in question." TCPA § 27.005(c) (emphasis added). The "essential elements" of Respondents' requests for sanctions under Chapter 10 are: (1) a pleading or motion that either (a) was brought for any improper purpose, including for harassment,

unnecessary delay, or needless increases in costs, or (b) lacks evidentiary support. TEX. CIV. PRAC. & REM. CODE §§ 10.001(1), (3), 10.002(a); *Nath I*, 446 S.W.3d at 362.

Nath's argument that Respondents failed in their TCPA burden because they presented no evidence of Nath's personal involvement in satisfaction of *TransAmerican* (again claiming that he did nothing more than entrust his case to his lawyers' judgment) and presented no evidence that a lesser sanction would have been ineffective (BOM40-41) presumes away *Nath I*. With deafening silence, Nath never explains how *Nath I*'s holding that he was the "true offender" and properly personally sanctioned is not the law of the case (and as noted above, in the context of a separate argument (BOM47), Nath agrees it is). Additionally, Respondents' attachment and incorporation of 13 exhibits, including their motions for sanctions and Fee Applications, and the trial court's judicial notice of those filings and of the entire record, satisfies any burden on Respondents to show that a lesser sanction would have been ineffective. 2SCR978-79.

Finally, contrary to Nath's assertion, the degree to which Respondents caused any of their attorney's fees (*Low* factor (n)) is not an "essential element" of Respondents' sanction claims (BOM39); rather, it is just one factor courts use to determine *the appropriate amount* of the requested sanctions. *See Nath I*, 446 S.W.3d at 371-72 ("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. … We set forth these ***guiding rules and principles for assessing the amount of pleadings sanctions*** in *Low*.") (emphasis added).

Nath's Issue III should be overruled.

IV. Respondents Met Their Remand Burdens

Section IV of Nath's merits brief lodges three complaints: (1) Respondents failed to come forward with non-conclusory evidence regarding their own conduct under *Nath I*; (2) Respondents' billing records were "too heavily redacted" for the trial court to conduct a meaningful review under *Rohrmoos*; and (3) the trial court erroneously excluded evidence "concerning to what extent Dr. Nath engaged in conduct warranting sanctions" and failed to examine whether the sanctions were "just," *i.e.*, not excessive, and visited upon the true offender. BOM43-54. Nath's arguments are again meritless.

A. Non-Conclusory Evidence Established That Respondents Did Not Cause the Awarded Fees

Contrary to Nath's assertion (BOM44-46, 47-48), ample, probative, non-conclusory evidence supported the trial court's finding that no behavior by Respondents "caused the fees for which recovery is sought" (*Low* factor (n)). 4SCR1096-97. Mizell and Clark testified that all of the fees sought as sanctions were directly attributable to Nath's frivolous lawsuit because they personally

segregated any fees that were not directly attributable to Nath from their fee request. RR53-55, 78-79, 207-08, 222.[14] For example, Respondents did not seek to recover for fees related to other defendants' special exceptions, and they did not seek to recover fees for Nath's baseless recusal motions. RR53-54, 207-08. The record also shows that the Hospital incurred $1,000,043.61 in fees, $802,498 were attributed directly to Nath, and the Hospital only sought to recover $726,000. RR58-59. Similarly, Baylor incurred $688,000 in fees but only sought to recover $644,500.16. RR266-67.

Nath's assertion that Respondents "offered no explanation for waiting almost half a decade to move for summary judgment on limitations" (BOM44-45) is again refuted by the record. Mizell and Clark explained that the case was stayed for two of the four years while jurisdictional issues related to other defendants were resolved. RR64-65, 189-90. They also explained that, when the case became active, Respondents had to fight to obtain the information necessary to move for summary judgment. RR65-66, 118-20, 193-97, 216.

As defendants moving for summary judgment on limitations, Respondents were required to "conclusively establish the elements of that defense, including when the cause of action accrued." *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex.

[14] Nath cannot simply cherry pick Mizell and Clark's conclusions from a record of over 200 pages of direct and cross-examination testimony (RR43-267) and complain that the testimony as a whole is conclusory. BOM44-45.

2019). And because Nath pleaded the discovery rule, Respondents were also required to "conclusively negate" its application and any other "tolling doctrines pleaded as an exception to limitations." *Id.* The record shows that Respondents did not have the evidence they needed to meet their burdens until after Nath's second deposition and Nath's fifth amended petition—both of which occurred in July 2009 (three years after the original petition was filed in February 2006). RR193 ("We didn't [move] before then because we didn't have the information and the reason we didn't have the testimony is because Dr. Nath wouldn't allow us to."); RR81-82, 88-89, 196-97, 247-48.

Prior to July 2009, Mizell and Clark established that Nath's various petitions "were not specific" and lacked the basic factual allegations necessary to establish summary judgment. RR81-82, 196-97. While Nath's expert, A.G. Crouch, did not review anything filed after 2006 (RR300, 303-04), he agreed with Respondents' witnesses that Nath's original petition lacked specificity. RR302. Mizell further testified that Nath's non-specific allegations were also constantly changing. RR119-120. Indeed, by the time Nath filed his fifth amended petition, he had pleaded 23 distinct claims. RR95.

Faced with non-specific allegations and an uncooperative plaintiff, Respondents had to fight for very basic disclosures regarding what was said, who said it, who it was said to, and when it was said. RR118-20, 191-95. For example,

Respondents deposed Nath twice. RR193-95. The first deposition was taken September 30, 2008 (2CR93)[15] and lasted only 20 minutes because Nath refused to provide any information regarding the business losses he allegedly suffered. RR65, 193. Respondents had to compel the information. RR65, 193-194. After being compelled, Nath simply dropped his claims for pecuniary loss instead of providing the requested information. RR65-66.

Only after Nath was deposed again in July 2009[16] did Respondents have the evidence necessary to move for summary judgment. RR89. The Hospital filed its motion for summary judgment on December 30, 2009 (TCH Ex. 9) and Baylor filed its motion in early January 2010. RR202. The hearing on the motions did not occur because Nath filed, and the trial court granted, an emergency motion for continuance allowing Nath to obtain additional discovery. RR66, 199-200.[17] After conducting additional discovery, Nath filed a second motion for continuance. 2SCR251-52. The trial court denied Nath's second motion for continuance, and Nath filed extensive responses to Respondents' motions for summary judgment. 2SCR251-52;

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[15] The reporter's record only contains every other page of some of Respondents' double-sided exhibits. Respondents submitted nearly unredacted fee statements as exhibits, however, this citation is to the previously-redacted fee statements because the corresponding unredacted pages were omitted from the reporter's record.

[16] 2CR123. Clark explained that it was difficult to schedule Nath's deposition because Nath was very busy and always in surgery. RR194-95.

[17] Mizell opined that given that this motion for continuance would have likely been granted had Respondents filed their summary judgments any time earlier. RR97.

RR66, 95-96, 201. The trial court did not hear the motions because Nath fired his counsel, nonsuited his 23 claims, and filed a baseless claim for intentional infliction of emotional distress. RR66, 95-96, 201. Respondents then quickly filed new motions for summary judgment to dispose of Nath's new claim. RR96-97, 203.

As discussed below, Nath's complaints about excluded evidence should be rejected. The evidence Nath sought to introduce went to the already decided question of whether he should be sanctioned personally. Nath did not attempt to, and was not prevented from, presenting any evidence relevant to whether Respondents caused any of the fees they sought. Nath was permitted to present an expert, Crouch, on that very issue.[18] The issue of *Low* factor (n) was vigorously litigated, and ample, non-conclusory evidence supports the trial court's finding that "no behavior by [Respondents] caused the fees for which recovery is sought." 4SCR1096-97.

B. Respondents' Minimal Redactions Do Not Render Their Evidence Insufficient

One issue that arose at the December 10, 2019 evidentiary hearing related to redactions Respondents made to their fee invoices. Respondents explained that,

[18] Nath's expert Crouch did not dispute the reasonableness of Respondents' rates. RR275-76. While Crouch ultimately believed Respondents should have chosen a different strategy, the trial court rightfully discredited his testimony because he did not review anything filed after 2006, including Respondents' summary judgment motions. RR300, 303-04. Crouch also discounted his own testimony by admitting that his strategy probably would not have disposed of the whole case (RR279), acknowledging his strategy might not have been successful (RR281), and recognizing that every lawyer in Texas has a different opinion as to the appropriate strategy (RR280).

following the second remand, they first produced redacted fee records but then, prior to Respondents' counsel's depositions, produced amended fee records containing only minimal redactions. RR37, 51-59, 216-18. Redaction in the claimed fees was very minimal.

While acknowledging that the redacted time entries represented fees Respondents were ***not*** seeking, Nath incongruously complains that redactions of entries for which Respondents did not seek to recover prevented the trial court from conducting a meaningful review of the nearly-unredacted fees for which Respondents did seek to recover. BOM52.[19] This argument fails because there is no requirement that the trial court conduct a meaningful review of the fees which Respondents did not seek to recover. *Rohrmoos*, 578 S.W.3d at 502 (a litigant must prove its reasonable and necessary attorneys' fees with sufficient evidence and encouraging litigants to satisfy those evidentiary requirements and "prove that ***the requested fees*** are reasonable and necessary" with contemporaneous billing records) (emphasis added).

This leaves Nath to argue, without authority, and illogically, that reviewing the redacted time entry work product for which Respondents did not seek to recover

[19] Nath's assertion that Mizell and Clark did not have knowledge of the redacted fee entries (BOM53) is baseless. Each testified that they personally performed the original segregation of attorney's fees and that as the billing attorneys on the Nath matter they were both personally familiar with the work performed. RR52, 111, 180, 228-29.

is necessary to understand the "case in context" and that some of the entries might reveal Respondents could have resolved the case "more efficiently." BOM52-53; *see* TEX. R. APP. P. 38.1(i). Unsought fees, however, were irrelevant to the question before the trial court, which was whether Respondents caused any of the fees they sought to recover. To the extent any redacted time entry might show that Respondents spent too much time on a given task, Respondents did not seek to recover for that additional time. The records Respondents submitted allowed the Court to conduct a meaningful review of the ***fees requested*** and thereby allowed the court to determine that ***those fees*** were reasonable and necessary. Thus, the Fourteenth Court correctly determined that "[b]ecause 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" and that "the unredacted billing records constitute legally sufficient evidence supporting the trial court's sanctions award." *Nath*, 2021 WL 451041, at *11.

For the entries shifted to Nath, Respondents' billing records are largely unredacted, and those unredacted entries provide evidence of the time spent on specific tasks. TCH Ex. 1-2, Baylor Ex. 1-2. Nath rightfully does not complain about the very minimal redactions on these time entries. *See* BOM53. Moreover, the billing records were supported by testimony from Mizell (RR43-171) and Clark (RR171-266), and numerous summaries (TCH Ex. 1-3, 1-4, Baylor Ex. 1-3, 1-4).

Furthermore, the trial court's ability to conduct a meaningful review is shown by the fact that the record reflects over 100 pages of Nath's counsel cross-examining Mizell and Clark on the work performed and specific time entries. RR98-170, 226-64.[20] Also, Respondents' uncontroverted declarations and affidavits (TCH Ex. 1; Baylor Ex. 1) provide "sufficient evidence," as a matter of law, to support the trial court's finding that the amount charged was reasonable and the services were necessary. *See* TEX. CIV. PRAC. & REM. CODE § 18.001(b); *see also Petrello v. Prucka*, 415 S.W.3d 420, 431 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Unless a controverting affidavit is filed, an affidavit as to the amount of attorney's fees is presumed reasonable."). Additionally, Nath never requested an *in camera* review of the redactions (RR51), and the trial court has discretion to make relevancy decisions.

Thus, the evidence submitted by Respondents fully supported the trial court's award of fees. *See also Nath*, 2021 WL 451041, at *10-12 (reviewing substantial evidence admitted during the December 10 hearing, including more than 350 pages of billing records and substantial and detailed testimony, holding it was *Rohrmoos*-compliant, and overruling Nath's legal insufficiency challenge).[21]

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[20] To the extent Nath complains about redacted invoices, courts routinely uphold a lodestar award where, as here, the record evidence consists of redacted billing records, summaries of those records, and testimony from counsel. *Sentinel Integrity Sols., Inc. v. Mistras Grp., Inc.*, 414 S.W.3d 911, 928-29 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[21] A trial court does not abuse its discretion even where only ***some*** evidence supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (no abuse of discretion where evidence is conflicting and some evidence supports the decision).

C. If Considered, Although Not Preserved, the Trial Court Correctly Excluded Evidence About Whether Nath Was the True Offender

As noted above, this argument should not be considered because it was not raised by Nath in his petition for review and therefore was waived. *Supra* xvii (citing TEX. R. APP. P. 55.2(f); *Ramos*, 228 S.W.3d at 673). But if reached, it is meritless.

All the evidence that Nath complains was erroneously excluded was designed to show "to what extent Dr. Nath engaged in conduct warranting sanctions." BOM46-48. For example, Nath's counsel was not permitted to cross-examine Respondents' counsel about whether Nath made an untrue statement in his affidavit (RR102-106) and whether Nath personally wrote discovery requests regarding Dr. Shenaq's health (RR135-36). Both questions were designed to elicit testimony relating to the issue of whether Nath—as opposed to his lawyers—should have been sanctioned for the frivolous pleadings in this lawsuit. Indeed, when making his offer of proof, Nath's counsel explained that the excluded evidence would show that Nath signed no pleadings, did not appear at the courthouse, did not involve himself in the strategy and deferred to his lawyers, which evidence he claimed was probative of "***whether or not sanctions should be imposed in the first place and as to whom they should be imposed***." RR107-09, 287 (emphasis added).

The trial court did not abuse its discretion in excluding this evidence for two reasons. First, as noted above, this Court affirmed the trial court's decision to sanction Nath personally in 2014 and Nath's personal liability for sanctions is now

the law of this case. *Nath I*, 446 S.W.3d at 361, 365-67, 373; *see also Briscoe*, 102 S.W.3d at 716; *Hudson*, 711 S.W.2d at 630; *In re United Servs. Auto. Ass'n*, 521 S.W.3d 920, 928 (Tex. App.—Houston [1st Dist.] 2012, mand. denied) (orig. proceeding) ("'[R]eview 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 at 727-28.

The "direct nexus" and "true offender" arguments Nath raises (BOM46-51) were unequivocally addressed in *Nath I*:

> 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.***
>
> 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.
>
> ***Sanctioning Nath for pleadings related to Shenaq's health was demonstrably just.*** First, there was a direct nexus between this portion of the trial court's sanction and the offensive conduct.
>
> The trial court made various findings of fact regarding Nath's direct involvement in the case, particularly noting his effort to seek information related to Shenaq's health, and the record supports these findings. … 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.***

> Thus, ***under the true-offender inquiry, we must uphold the trial court's decision to sanction Nath personally*** because some evidence supports the sanction.

446 S.W.3d at 373, 361, 365, 366, 367 (emphasis added).

In an unusual moment of candor, Nath recognizes that this Court already decided that due process permits Nath to be sanctioned personally. BOM47 (acknowledging that *Nath I* resolved that question of "whether" Nath could be sanctioned and that the further litigation was to be focused on the "amount"). And notably missing from *Nath I* is any indication that *Nath's conduct*—as distinct from Respondents' conduct—should be revisited. It follows that Nath's attempts to shoehorn his "true offender" evidence into the limited scope of the remand by arguing it is relevant to determining (1) whether Respondents caused any of the fees sought (BOM46-49) and (2) whether the sanctions were "just" (BOM49-51) are futile. Indeed, in another rare moment of candor, Nath admits that "[w]hatever expenses [Respondents] did not cause logically would have to be attributable to Dr. Nath (or his counsel)." BOM47.

Second, *Nath II* set the standard for reviewing excessiveness by holding that the *Rohrmoos* reasonableness finding was necessary to determine "that the sanction is 'no more severe than necessary' ***to fairly compensate the prevailing party***." *Nath II*, 576 S.W.3d at 709 (emphasis added). The excessiveness question, therefore, turns on whether Respondents were fairly compensated for Nath's bad-faith

litigation tactics, not on whether Nath would have been deterred by a lesser sanction.[22] And as to whether Nath would have been deterred by a lesser sanction, the proof is in the pudding. *Despite* two large sanctions awards, Nath has not been deterred from frivolous litigation conduct. *Supra* 11-14 (recounting baseless motions Nath filed following remand, including his TCPA motion).

Simply put, the Fourteenth Court correctly held that 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*," and that "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." 2021 WL 451041, at *10.

Nath's Issue IV should be overruled.

[22] Nath cites five cases to argue that the trial court erred by awarding attorneys' fees as sanctions before considering something lesser. BOM50. None of those cases require a trial court to consider something lesser than the fees incurred in defending against the sanctionable conduct. Four of the cases suggest that incurred fees would be the proper lesser sanction. *See TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (suggesting attorney's fees as a lesser sanction to striking a potentially meritorious claim); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992) (noting that "reimbursement of those [attorney's fees and] expenses would appear better calculated to remedy such prejudice than would death penalty sanctions"); *Low*, 221 S.W.3d at 621 (noting that while Chapter 10 penalties do not have to be based on attorney's fees, a penalty should start with the incurred fees as "a monetary guidepost of the impact of the conduct on the party seeking sanctions and the burdens on the court system."); *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (finding that a penalty assessed under Chapter 10 was excessive where it was "unrelated to any reasonable attorney fees incurred by any party").

V. The Conditional Fee Award to the Hospital Is Proper

Nath complains that the Fourteenth Court improperly affirmed the Hospital's conditional appellate fee award because (1) the Hospital failed to plead for an award of future appellate fees and the issue was not tried by consent, (2) the fee award exceeds the scope of the remand, and (3) no evidence supports the fees. BOM54-57. These arguments lack merit.

A. Conditional Appellate Fees Were Tried by Consent

As a threshold issue, Nath relies on inapposite non-sanction fee shifting cases in support of his argument that parties are required to plead for fee-shifting sanctions. BOM55 (citing *Wells Fargo Bank N.A. v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015) (declaratory judgment); *Shaw v. Lemon*, 427 S.W.3d 536, 540 (Tex. App.—Dallas 2014, pet. denied) (Theft Act); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 660 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (contract provision). Requiring attorney's fees recovered as a sanction to be "pleaded" is contrary to Chapter 10, which provides that "[a] party may make a motion for sanctions." TEX. CIV. PRAC. & REM. CODE § 10.002. Accordingly, the Hospital included a request for conditional appellate fees as one component of its Fee Application. 2SCR5, 13-14; *see* 4SCR1129-30 (showing actual notice).

Even if there had been a pleading deficiency—and there was not—by failing to object to the Hospital's testimony regarding conditional appellate fees at the

evidentiary hearing on the Fee Application, Nath tried the issue by consent. RR74-78. Nath's objection to Mizell's testimony for lack of foundation was not based on a lack of pleading, but rather on his alleged lack of knowledge regarding appellate fees. BOM56. Once the Hospital established that foundation, Nath concedes he made no further objection. *Id*.; RR74-78. *Mansfield v. Mansfield*, No. 04-18-00551-CV, 2019 WL 6138984, at *4 (Tex. App.—San Antonio Nov. 20, 2019, pet. denied) (mem. op.) (failure to object to the absence of pleading tried attorney's fees issue by consent). Neither of Nath's cases advance his argument. In *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.), the court held the issue was tried by consent. In *Greene v. Young*, 174 S.W.3d 291, 301 (Tex. App.—Houston [1st Dist.] 2005, pet. denied), the court found that the issue was not tried by consent, but only because the evidence was relevant to a separate issue. Thus, Nath's failure to object to the Hospital's request for conditional appellate fees waives any pleading deficiency, or alternatively Nath allowed the issue to be tried by consent. *See also Nath*, 2021 WL 451041, at *12-13 (holding that "it was within the trial court's discretion to conclude the issue of the Hospital's future appellate attorney's fees was tried by consent").

B. The Conditional Appellate Fee Awards Do Not Exceed the Scope of the Remand

Also meritless is Nath's claim that the Hospital's request for conditional future appellate fees exceeded the scope of the limited remand. BOM54-55. That

this case was remanded twice does not alter the legal principle that appellate fees may be considered as part of a Chapter 10 sanctions award. (BOM56 (citing *Wein v. Sherman*, No. 03-10-00494-CV, 2013 WL 4516013, at *11 (Tex. App.—Austin Aug. 23, 2013, no pet.) (mem. op.); *In re Kristina S.*, No. 14-10-00955-CV, 2010 WL 4293122, at *1 (Tex. App.—Houston [14th Dist.] Oct. 28, 2010, no pet.) (mem. op.); *Loeffler v. Lytle Indep. Sch. Dist.*, 211 S.W.3d 331, 351 (Tex. App.—San Antonio 2006, pet. denied)). The first remand was limited to reassessing the amount of the sanctions award by considering an omitted *Low* factor, and the second remand clarified the evidentiary standards for reassessing the amount of the sanctions award. Neither remand limited the trial court to reassessing the sanctions up to the amount previously awarded.

In sum, because future appellate fees are merely part of a Chapter 10 sanction award, the trial court did not act beyond the scope of the remand when it reassessed the amount of the sanctions award to include conditional future appellate attorney's fees.

C. Legally Sufficient Evidence Supports the Conditional Appellate Fee Award, As Remitted

Nath's no evidence challenge claims Mizell's testimony consisted of "conclusory statements" and was devoid of *Rohrmoos*-required detail. BOM57. The record shows otherwise. Mizell testified that he has handled 35 to 40 appeals over his 30-year career and that he is familiar with reasonable and necessary

appellate fees charged by lawyers in Harris County. RR75-76. Nath's complaint that Mizell did not show "any familiarity at this Court" (BOM57) ignores that Mizell specifically testified about the intricacies of Supreme Court practice—explaining the petition phase, merits briefing, and typical preparation for Supreme Court oral argument. RR76-78; *see also* 2SCR26. Furthermore, Nath never objected to Mizell's alleged "lack" of qualifications to testify regarding Supreme Court appellate attorney's fees. RR74-78.

Nath's *Rohrmoos*-based complaint is equally unavailing. Mizell estimated the number of hours that would be spent for each phase of the appeal, who would bill those hours, and the rates of those billing attorneys. RR76. He then outlined the tasks that would be performed in each phase of the appeal. RR76-78; *see also* 2SCR26-27. Mizell's testimony and declaration also addressed the application of the *Arthur Andersen* factors. RR69-74, 2SCR27-29. This evidence satisfies *Rohrmoos* and is legally sufficient evidence to support the conditional appellate attorney's fees award. *See Nath*, 2021 WL 451041, at *13-14 (reviewing the record evidence and rejecting Nath's evidentiary sufficiency complaint except as to $50,375, for which it suggested a remittitur).

Nath's Issue V should be overruled.

PRAYER

Respondents ask that the Court deny Nath's Petition.

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 14,979 words, excluding the words that need not be counted under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Joy M. Soloway
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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, Respondents served a copy of this Respondents' Brief on the Merits by electronic service upon the following counsel of record:

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NO. 21-0547

In The Supreme Court of Texas

RAUL K. NATH,
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

APPENDIX TO RESPONDENTS' BRIEF ON THE MERITS

APPENDIX A

No. 14-11-00127-CV

In the Court of Appeals

For the Fourteenth District of Texas

At Houston

Rahul K. Nath, M.D.,
Appellant
vs.

Baylor College of Medicine,
Appellee

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

BRIEF OF APPELLANT, RAHUL K. NATH M.D.

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ORAL ARGUMENT REQUESTED

Legislature in that statute.

Section 41.002(c) of the Texas Civil Practice & Remedies Code Annotated states: "Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict." Since neither subdivision (b) nor (d) applies to this case, the provisions of Chapter 41 of the Texas Civil Practice & Remedies Code Annotated prevail over both Rule 13 of the Texas Rules of Civil Procedure and Chapter 10 of the Texas Civil Practice & Remedies Code Annotated.

Dr. Nath's trial counsel objected to the trial court's award of $644,500.16 in sanctions in the trial court– CR127 at 406– and does so again in this Court, because BCM failed to prove by clear and convincing evidence and obtain a finding by clear and convincing evidence that the harm with respect to which the BCM seeks recovery of exemplary damages results from fraud, malice or gross negligence by Dr. Nath, as those terms are defined in section 41.001 of the Texas Civil Practice & Remedies Code Annotated. Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a).

Dr. Nath's trial counsel objected to the trial court's award of $644,500.16 in sanctions in the trial court– CR127 at 406– and does so again in this Court,

because such award was not the product of a unanimous finding by a jury in regard to finding liability for sanctions and the amount of sanctions. Tex. Civ. Prac. & Rem. Code Ann. § 41.003(d).

Dr. Nath's trial counsel objected to the trial court's award of $644,500.16 in sanctions in the trial court– CR127 at 406– and does so again in this Court, because damages other than nominal damages were not awarded in addition to such punitive monetary sanction. Tex. Civ. Prac & Rem. Code Ann. § 41.004(a).

Dr. Nath's trial counsel objected to the trial court's award of $644,500.16 in sanctions in the trial court– CR127 at 406-07– because the trial court failed to break out the portion of such award that was intended to "punish Nath" from that part of the award that was intended to "compensate Baylor College of Medicine." As such, it is impossible for this appellate court (or any other appellate court, for that matter) to assess the excessiveness of the punitive aspect of the award under Texas Civil Practice & Remedies Code Annotated 41.008 ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.") (emphasis added).

Dr. Nath's trial counsel objected to the trial court's award of $644,500.16

APPENDIX B

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Cause No. 2006-10826

Rahul K. Nath, M.D.	§	**In the District Court of**
	§	
vs.	§	**Harris County, Texas**
	§	
Texas Children's Hospital	§	**215th Judicial District**

ON COMPLETE REVERSAL BY THE TEXAS SUPREME COURT WITH ALL COSTS AWARDED TO DR. NATH

Jury Demand

Comes now Dr. Rahul K. Nath, M.D., pursuant to Rule 216, Tex.R.Civ.P., and makes a timely jury demand as to all issues and tenders the jury fee.

I. Texas Children's Hospital Seeks Injunctive Relief

While normally a jury would be unavailable to decide an issue of sanctions, no reported sanctions case has been found which had an injunction issued pending a redetermination of the sanctions issue.[1]

On September 12, 2019, this Court issued an injunction against Dr. Nath at the urging of Texas Children's Hospital without pleadings to support an injunction, without an affidavit or sworn testimony to support an injunction, without stating the reasons for its issuance, without setting a trial date in the order itself, and without setting a bond. This injunction was also issued at a time when Dr. Nath owed no one

1 Tex. Const. Art. I, § 15 ("The right of a trial by jury shall remain inviolate.") We agree that a litigant is entitled to a jury trial when injunctive relief is sought. *See State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 70 (Tex. App.—San Antonio 2011, no pet.).

a single penny as part of any judgment.

II. *Rohrmoos*

In the case at bar, and despite the mandate of the Texas Supreme Court, this Court has claimed that the sanctions imposed on Dr. Nath, and twice reversed, are not punitive in nature, but, instead, are in fact compensatory as described in the two sets of purported "findings of fact."[2] Thus, because the award of attorney's fees is being treated as compensatory, and the United States judicial system does not use the "English rule" of "loser pays," Dr. Nath is clearly entitled to a jury's factual determination of the amount, if any, in "compensatory" attorney's fees Texas Children's Hospital or Baylor College of Medicine should be awarded.[3] Further, the Supreme Court reversed *Nath II* citing the recent *Roohmoos* decision where the issue of attorney's fees is and was for the jury to determine, just as it is here as well.[4]

III. Nothing Ever Happens Until It Happens the First Time

To preserve error and preserve the possibility of having a higher court revisit

---

2 The "findings of fact" have been signed despite there never being an actual evidentiary hearing at which exhibits were marked, offered, and admitted into evidence or where even a single witness was sworn, examined, and cross-examined.

3 "Whether attorney's fees are reasonable and necessary are fact issues that must be submitted to a jury." *Bocquet v. Herring,* 972 S.W.2d 19, 21 (Tex. 1998). Failure of the party seeking fees to request a jury submission "regarding the reasonableness and necessity of" attorneys' fees waives that recovery. *RDG P'Ship v. Long*, 350 S.W.3d 262, 277 (Tex. App.—San Antonio 2011, no pet.).

4 "The trial court awarded UTSW attorney's fees in the amount determined by the jury totaling $1,025,000...." Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex.2019). The Supreme Court then stated "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." *Nath II.*

an issue that may be presently foreclosed, a party is mandated to first make its argument in the trial court, re-urge it on appeal, and then request that the supreme court give the issue a "fresh look." In other words, it is not a frivolous argument if the requirement is one of preservation. *See Batson v. Kentucky*, 476 U.S. 79 (1986);[5] *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, (1991);[6] and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[7]

Finally, and in the firm belief that if the supreme courts of Texas and the United States can conclude that party in a $200.00 car crash has jury trial protections, how could they not conclude that the Seventh Amendment and the Equal Protection Clause are implicated when two parties are trying to take a million

---

[5] *Batson v. Kentucky* is the case in which the United States Supreme Court ruled that a prosecutor's use of peremptory challenges in a criminal case may not be used to exclude jurors based solely on their race. The Court ruled that this practice violated the Equal Protection Clause of the Fourteenth Amendment. The case gave rise to the term *Batson* challenge, an objection to a peremptory challenge based on the standard established by the Supreme Court's decision in this case. Subsequent jurisprudence has resulted in the extension of *Batson* to civil cases and cases where jurors are excluded on the basis of sex.

[6] *Edmonson v. Leesville Concrete Company* is the United States Supreme Court case which held that peremptory challenges may not be used to exclude jurors on the basis of race in civil trials. *Edmonson* extended the court's decision in *Batson v. Kentucky*. The Court applied the equal protection component of the Due Process Clause of the Fifth Amendment, as determined in *Bolling v. Sharpe*, in finding that such race-based challenges violated the Constitution.

[7] *Apprendi v. New Jersey* is the landmark United States Supreme Court decision with regard to aggravating factors in crimes. The Court ruled that the Sixth Amendment right to a jury trial, applied to the states through the Fourteenth Amendment, prohibited judges from enhancing criminal sentences based on facts other than those decided by the jury beyond a reasonable doubt. The decision has been a cornerstone in the modern resurgence in jury trial rights. As Justice Scalia noted in his concurring opinion, the jury-trial right "has never been efficient; but it has always been free."

and a half dollars (twice reversed) from a citizen or the fact that one party obtained injunctive relief that interfered with the real property rights of another party (and his non-party spouse) with the assistance of the trial judge's order when there was no final judgment in place.

Respectfully submitted,
/s/ Brad Beers

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