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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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STATEMENT OF THE CASE

This sanctions case has generated two opinions from this Court and three opinions from the Fourteenth Court of Appeals. That Nath was properly personally sanctioned has been conclusively litigated. Nonetheless, Nath asks that this Court let him off the hook based on his meritless claim that the lower courts and Respondents' counsel "ignored" this Court's "directives." Nath's narrative is false and his requested relief is unprecedented and unavailable. Additionally, Nath's complaint that he was wrongfully denied a jury trial on compensatory sanctions is foreclosed by precedent and is waived.

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 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 against Nath. 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. 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 re-stated that Respondents were not the cause of any fees they sought to shift to Nath, re-assessed 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.] February 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 raising 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 assess 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 Nath identifies no issue that justifies this Court exercising its jurisdiction to overturn the trial court's fee assessment. First, 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. A litigant 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.

Second, Nath waived his argument that the trial court committed reversible error by denying him a jury trial because he raised that same argument in an earlier appeal and then made the decision to abandon it when he was previously before this Court. Parties cannot save arguments in their back pocket to use them as do-overs in an endless succession of appeals. Nath also cannot decide how to frame the issue. He first argues that the Fourteenth Court's holding that he was not entitled to a jury trial conflicts with this Court's precedent (*e.g.*, PFR ix, 14, arguing that denying Nath a jury trial "conflicts with *Rohrmoos*"). Then, recognizing that this Court's precedent does not in fact support his position, Nath simultaneously argues that the

Court should use this case to hold that parties are entitled to a jury determination of the amount of fee shifting sanctions or to "clarif[y]" the law (*e.g.*, PFR x, arguing that the Court should "***clarif[y]*** that a jury should decide the amount of fees shifted as a sanction;" PFR 17, arguing that "[t]his Court ***should require*** … that a jury determines what amount of fees would be reasonable and necessary to defend against sanctionable conduct" (emphasis added)). Both arguments contradict Nath's 2019 trial court admission that under existing law (which included *Rohrmoos*, decided eight months prior), he was not entitled to a jury trial on the amount of fee-shifting sanctions. And because the lower courts remain in agreement that, consistent with this Court's decision in *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam), there is no right to a jury trial on the amount of compensatory sanctions (*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.) (no right to jury trial on whether Chapter 10 has been violated); *Neely v. Comm'n for Lawyer Discipline*, 976 S.W.2d 824, 827-28 (Tex. App.—Houston [1st Dist.] 1998, no pet.), no clarification is needed.

Nor do Nath's unbriefed issues provide any jurisdictional foothold. First, the Fourteenth Court's holding that Nath's TCPA motion to dismiss 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 2018, pet. denied) (mem. op.). Second, ample evidence supported the amount of the sanction awards, and Nath's complaint that Respondents did not meet their *TransAmerican* burden again 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 rejected by the Fourteenth Court and similarly present no issue worthy of this Court's attention. Third, 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.

This Court should allocate its scarce resources elsewhere.

STATEMENT OF ISSUES

Briefed 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 the case is returning to the Court for a third time?

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 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. 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 v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam)) based on important policy grounds and practical reasons?

Unbriefed issues

1. Whether the Fourteenth Court correctly held that Nath's TCPA motion to dismiss was outside the scope of this Court's remand?

2. If the Court grants Nath's petition and disagrees with the Fourteenth Court's basis for affirming the denial of Nath's TCPA motion, whether the Court, in the interest of justice, should consider the other bases supporting the trial court's order denying Nath's TCPA motion, including: (a) 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 motion for sanctions is not a legal action; (b) Nath's TCPA motion was untimely; (c) Respondents met their TCPA burden; and (d) Nath waived his argument that the trial court erred in denying his TCPA motion by failing to address each independent ground that supported the order? Remanding to the Fourteenth Court to have it weigh in on these issues 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).

3. Whether the trial court's reassessment of sanctions (1) comports with *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019),

and (2) is supported by sufficient evidence that Respondents were not the cause of any of the fees shifted to Nath?

4. Whether the trial court properly denied Nath's repeated efforts to re-litigate whether he was properly personally sanctioned?

5. 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 was supported by legally sufficient evidence?

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, which included an extortion attempt. The first time this Court exercised discretionary review, it wanted to ensure that no portion of the fees the trial court shifted to Nath were fees Respondents incurred because of their own conduct. 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. Nath did his best to make the remand burdensome and expensive, including seeking depositions of non-parties and moving to disqualify Respondents' counsel. Thanks to Nath, the remand process was not streamlined. Nonetheless, after considering Respondents' renewed fee applications, which were supported by supplemental affidavits attesting to the fact that none of the requested fees were incurred because of Respondents' own conduct and that any earlier attempt to bring the case to conclusion through dispositive motions would have been futile, the trial court reassessed sanctions against Nath. The Fourteenth Court affirmed. *Nath v. Tex. Children's Hosp.*, 576 S.W.3d 728 (Tex. App.—Houston [14th Dist.] 2016).

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 more detailed lodestar evidence to support their request for shifted fees. *Nath II*, 576 S.W.3d at 709-10.

Once back in the trial court, while Respondents produced billing records and sat for depositions, Nath continued his antics, filing numerous motions having nothing to do with the remanded issue. Nath's stonewalling failed, and on December 10, 2019, over Nath's objection, the trial court held a day-long evidentiary hearing.

Now, Nath wants it all to just go away or, failing that cutting edge argument, he wants a jury trial on the amount of the fees that should be awarded—an argument he previously raised and abandoned, and thus waived. Even if not waived, as Nath previously acknowledged, this Court decided in 1984 that a party is not entitled to a jury determination of the amount of compensatory sanctions. *Brantley*, 677 S.W.2d at 504. Were the Court inclined to revisit this issue, its decades-old decision remains sound.

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

STATEMENT OF FACTS[1]

I. Nath Abandons His Jury Trial Complaint

Nath's original petition in 2006 contained a jury demand. CR4, 13. After granting summary judgment for Respondents, the trial court sanctioned Nath for the costs his outrageous litigation conduct had imposed on Respondents, two nonprofit medical institutions. In his first appeal challenging the sanctions, among other complaints, Nath claimed the trial court erred when it did not have a jury decide the proper sanctions amount. Appendix A at 28-29. The Fourteenth Court disagreed. *Nath*, 375 S.W.3d at 412-13. In this Court, Nath chose to abandon his claim that a jury should decide the amount of compensatory sanctions. Brief on the Merits at 11, No. 12-0260 (stating sole issue on appeal).

II. *Nath I* and Remand Guidance

In *Nath I*, this Court affirmed the trial court's decision to sanction Nath personally for his litigation abuse, holding that the evidence supported the trial court's finding that Nath was the "true offender." *Nath I*, 446 S.W.3d at 367. This Court concluded 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. *Id*. at 361. The Court noted the trial court's assessment that Nath's

[1] The Fourteenth Court's opinion contains a comprehensive account of the case's extensive history. *Nath*, 2021 WL 451041, at *1-4.

conduct amounted to "an abuse of process" and "a form of extortion," and concluded that "the record supports" sanctioning Nath personally for this misconduct. *Id*. at 366.

However, a majority of the Court concluded that in determining the sanctions amount, the trial court failed to consider factor (n) of *Low v. Henry*, 221 S.W.3d 609, 620-21 & 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 had failed to consider *Low* factor (n) and expressed concern about remanding the case for sanctions-focused litigation. 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). This Court's unambiguous guidance on how the discrete issue should be adjudicated on remand is the jurisprudential inverse of a jury trial.

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 scorched-earth strategy, Nath attempted to derail the proceedings by filing numerous meritless 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 filings after the first remand). 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. The Fourteenth Court affirmed. *Id*. at 743.

III. *Nath II* and Remand Guidance

Nath sought review from this Court arguing that assessing the amount of fee-based sanctions requires the same type of evidence as required in other fee-shifting contexts. 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 the necessity of presenting either billing records or other supporting evidence to meet this burden. *Rohrmoos*, 578 S.W.3d at 497-99.

Nath II began by recounting *Nath I* and explaining what had occurred since. *Nath II*, 576 S.W.3d at 708. The Court then addressed Nath's appellate argument that fee-based sanctions require the same type of evidence as required in other fee-shifting contexts. *Id*. 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 prove the necessity and reasonableness of their fees with either billing records or other supporting evidence. *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.

Importantly, the Court left untouched *Brantley*'s holding that a party does not have the right to a jury trial on the amount of the sanction. *Id*. at 709.

IV. Proceedings on Second Remand

Back in the trial court, Nath continued to argue that he should not have been personally sanctioned. The vexatious filing avalanche resumed. This time, Nath filed special exceptions to motions Respondents filed in 2010, a cross-motion for sanctions, an amended cross-motion for sanctions (claiming that Respondents, not he, should be sanctioned), motions to disqualify Respondents' counsel (his second attempt to do so), a motion for continuance seeking discovery on wholly ancillary matters, a motion to certify questions to this Court (a procedure unavailable under Texas law), a TCPA motion to dismiss, and an improper and ineffective notice of interlocutory appeal filed prior to the scheduled hearing on his TCPA motion. CR99, 165, 3SCR27, 4SCR129, 437, 927, 931, 935, 1041; RR5. The trial court concluded that none of these filings had any merit, but Respondents were forced to incur more fees responding to Nath's onslaught.

On November 6, 2019, Nath demanded a jury trial. 5SCR3-6. Nath expressly acknowledged that his request was "foreclosed" by precedent. But Nath claimed his case was different because here "an injunction issued pending a redetermination of a sanctions issue," or alternatively, he was hoping this Court would "revisit" the issue of the right to a jury trial on the amount of sanctions and he was therefore

preserving the issue. 5SCR3-6; Appendix B; *see also* 4RR14-15. (Nath has since abandoned his argument that the pending injunction gave him a right to a jury trial on fee-shifting sanctions.). The trial court granted Respondents' motion to strike Nath's jury demand. 4SCR1035.

On December 10, the trial court conducted a day-long evidentiary hearing, hearing testimony from the lead counsel who defended Respondents from 2006 through 2010 (RR42-267) and Nath's expert witness (RR270-325); it also admitted several exhibits. RR3-4 (listing exhibits). During his closing argument, 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 personally five years earlier, asked the trial court to re-decide the issue of whether he or his former counsel should be sanctioned. *E.g.*, RR334 (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 the 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* evidentiary burden and also their burden of showing that their behavior did not

"cause the fees for which recovery is sought." 4SCR1090-97. On December 27, the trial court signed a final judgment. 1SCR3-6.

In a thorough and thoughtful opinion, the Fourteenth Court affirmed. *Nath*, 2021 WL 451041. Rejecting Nath's argument that the trial court erroneously denied him a jury trial, the Fourteenth Court stated as follows:

> [N]either *Nath II* nor *Rohrmoos* state that attorney's fees sought as sanctions must be tried to a jury. Moreover, the Texas Supreme Court previously has held that a party complaining about an award of attorney's fees as sanctions does not have the right to a jury trial on the amount of the sanction. *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam).

Id. at *8 (citations omitted). The Fourteenth Court cited to two appellate court decisions that, following *Brantley*, held that a party is not entitled to a jury trial on compensatory sanctions. *Id*. at *9 (citing *Cantu v. Comm'n for Lawyer Discipline*, No. 13-16-00332-CV, 2020 WL 7064806, at *41 (Tex. App.—Corpus Christi Dec. 3, 2020, no pet.) (mem. op.) and *Melasky v. Warner*, No. 09-11-00447-CV, 2012 WL 5960310, at *4 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.)). In doing so, the Fourteenth Court noted that Nath "[did] not cite any authority that warrants deviating from this precedent; instead, the cases on which Nath relies examine issues different from the one presented here." *Nath*, 2021 WL 451041 at *9.

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 nor Nath's two 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 good law and has been followed by lower courts of appeals. There is no reason for the Court to revisit the issue. Moreover, 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 would strongly discourage parties from seeking sanctions to the detriment of the legal process.

ARGUMENT

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

According to Nath, this Court should end this case because the trial court, the Fourteenth Court, and Respondents' counsel have "[o]ver the decade…ignored" this Court's instructions. PFR 6, 7-9.[2] This argument fails for many reasons. First, Nath

[2] Nath's repeated assertion that the lower courts "ignor[ed] this Court's directives" (*e.g.*, PFR ix, 4-7) is refuted by the hearing transcripts (*e.g.*, 1RR37, 2RR23-24, 4RR21, RR104-07, 250; *see*

re-writes *Nath I* and *Nath II* by stating that this Court held that Respondents "bore some responsibility for prolonging the litigation." PFR 7. 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 do so. 446 S.W.3d at 361, 372. 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, Nath contends this Court should end the case now because the lower courts keep awarding the same sanction amounts, which he hypothesizes means that his due process rights have been violated because he believes the award is allegedly excessive. PFR 8. Even if Nath's insufficiency argument had merit (and it does not for all the reasons stated by the Fourteenth Court, *Nath*, 2021 WL 451041, at *11-12), 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.*

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also 1SCR4). Furthermore, *Rohrmoos* had not been decided at the time the trial court first re-entered sanctions (in 2015). Nor had this Court yet overruled the intermediate appellate court cases which held that a different standard of proof applies for fees awarded as sanctions. At most, Respondents and the lower courts can be criticized for not predicting this Court's *Rohrmoos* holding that overruled long-standing lower court Texas precedent.

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.

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

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

As noted above, Nath's 2011 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. Nath deliberately abandoned that argument in his appeal to this Court. *See* Cause No. 12-0620.

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); *Wynne*, 578 S.W.3d at 699 (appellate court's judgment is final as to

matters actually litigated and "to all other matters 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 will not ultimately matter to the determination of a particular case. 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, he forfeited the right to litigate that issue later in this case. Concluding otherwise would be inviting litigants to reserve issues as insurance policies to mount serial appeals, striking a fatal blow to the consequential law of the case doctrine.

B. Nath Is Not Entitled to a Jury Trial

1. *Brantley Is* Controlling

Nath's assertion that *Brantley* does not prohibit a jury trial (PFR 14-15) is meritless. It does exactly that.

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 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 remains good law. That this Court recognized in *Nath II* that lower courts had misinterpreted *Brantley* as addressing the type of evidence required to prove the amount of fee-shifting sanctions has no bearing on *Brantley*'s express rejection of the right to a jury trial to determine the amount of fee-shifting sanctions. It follows that, contrary to Nath's assertion (PFR 15), the Fourteenth Court did not "read *Brantley* too broadly" and did not err in holding that the trial court did not abuse its discretion in striking Nath's jury demand. Further, that *Brantley* concerned discovery abuse is a distinction without a difference. As explained below (Section II.B.3), the policy underpinnings for why judges, not juries, should determine the amount of compensatory sanctions are agnostic to the sanction provision at issue.

2. Nath's Case Trilogy Does Not Support His Claimed Right to a Jury Trial

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" (PFR 9) misfires. First, each case (*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)) predated Nath's trial court admission that existing precedent "foreclosed" his right to a jury trial. 5SCR3-6; Appendix B. Second, if any 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 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).[3]

Tellingly, Nath also omits any discussion of *Cire v. Cummings*, 134 S.W.3d 835, 843-44 (Tex. 2004), in which this Court 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* (or *Brantley*) to sanctions awarded under Chapter 10. If sanctions for discovery abuse include reasonable expenses, including attorney's fees attributable to the failure to comply with the discovery order, and the amount of fees in that context can be decided on submission without an oral hearing, then there is no reason why a jury trial would be required for fee shifting under Chapter 10.

Finally, Nath's complaint that the Fourteenth Court failed to follow the analysis other courts used in determining the right to a jury under a particular statute (PFR 13-14) is unavailing because none of his cases concern compensatory sanctions and thus none had to contend with *Brantley*.

[3] In *Nath II*, this Court did not hold that Respondents could not submit their fee evidence by affidavit and instead only held that Respondents' affidavits were conclusory and did not comport with *Rohrmoos.*

3. Jury Trials on the Amount of Fee-Shifting Sanctions Would Be Bad Policy

Brantley remains sound; strong policy and practical reasons support leaving the amount of sanctions to the trial ***judge***. By definition, a party who finds himself in a position of being sanctioned has abused the judicial process. Putting such a party in a position to demand a jury trial on the amount of sanctions is an open invitation for further vexatious conduct. As this Court has acknowledged, "[a] request for attorney's fees should not result in a second major litigation." *Rohrmoos*, 578 S.W.3d at 503 (citation omitted). If vexatious litigants like Nath have a right to demand a jury trial on the issue of the amount of sanctions, 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, the trial court can initiate sanctions. TEX. CIV. PRAC. & REM. CODE § 10.002(b); TEX. R. CIV. P. 13. If Nath is right that a party is entitled to a jury trial on the amount of Chapter 10 sanctions as a matter of course, this 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 be imposing a greater burden on the litigant who did not engage in sanctionable conduct. 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.[4]

4. The Sanctions Amount Is Irrelevant to the Question of Who Decides (Judge or Jury)

Nath's assertion that a "jury is patently needed here" because (i) the sanctions amount is substantial, (ii) the trial court awarded the same amount it had in 2010 and 2015, and (iii) the trial court engaged in "wholesale fee-shifting" (PFR 18) is baseless. Nothing in *Nath I* or *Nath II* placed a ceiling on the sanctions amount or prohibited the trial court from awarding the same amount of sanctions if the evidence supported the award. Nath's argument 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.

Nath ends his Petition with a non sequitur, claiming 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." PFR 18. History proves otherwise. Since *Brantley* was decided (1984), parties have not flooded the trial courts with post-trial sanctions

[4] Here, for example, our experience having litigated against Nath for over 15 years leaves no doubt that Nath would seek to use a jury trial on sanctions as a vehicle to retry virtually every sanctions-related issue, including whether he personally should be sanctioned, vexatiously multiplying the expense of pursuing sanctions.

motions, secure in their knowledge that the amount sought would not be scrutinized by a jury. And of course Nath's assertion that trial courts rule by making decisions at their "whim," or by exercising "unfettered control" (PFR 18), besides being obviously untrue, does not advance his argument. The imposition of sanctions is reviewable for abuse of discretion (*e.g.*, *Nath I*, 446 S.W.3d at 361), and fee-shifting sanction awards reviewed for *Rohrmoos*-compliance (*Nath II*, 576 S.W.3d at 710). The Court should not grant review to address a problem that resides only in Nath's imagination.

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 4,494 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 September 10, 2021, Respondents served a copy of this Joint Response to Petition for Review 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 JOINT RESPONSE TO PETITION FOR REVIEW

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

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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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Certificate of Service

This pleading was served on all parties pursuant to Rules 21 and 21a on November 6, 2019.

/s/ Brad Beers

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