Opinion issued October 23, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00051-CV

DR. RICHARD GOTT AND WANDA GOTT, Appellants

V.

RICE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, SUPERINTENDENT MICHAEL LANIER, BETTY SCHIURRING, JOE LEE PEREZ, VIVIAN SPANIHEL, and CAROLYN BAIRD, Appellees

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On Appeal from the 25th District Court
Colorado County, Texas
Trial Court Cause No. 21,464

MEMORANDUM OPINION

Appellants, Dr. Richard and Wanda Gott, appeal the trial court's judgement dismissing their claims against Rice Consolidated Independent School District ("RCISD"), Superintendent Michael Lanier, Betty Schiurring, Joe Lee Perez, Vivian

Spanihel, Carolyn Baird (collectively, "the Individual Defendants," and collectively with RCISD, the "School Defendants").[1] The trial court dismissed the Gotts' claims against the School Defendants, with prejudice, after the Gotts failed to amend their pleadings pursuant to an agreed order granting the School Defendants' special exceptions. We determine whether (1) the Gotts preserved their complaints regarding the trial court's rendering of a dismissal "with prejudice," and its denial of the Gotts' motion for new trial and (2) whether the trial court abused its discretion in not granting relief on the Gotts' motion for temporary stay under Texas Rule of Civil Procedure 5(b) and dismissing the Gotts' claims. We affirm the judgment.

Background

A. The Original Petition

Richard Gott served as the Superintendent of RCISD from 1994 until 2004. Wanda Gott was employed as an administrative secretary for RCISD during the same time period. In 2004, Richard Gott was terminated from his position and Wanda's employment with RCISD also ended.[2] On February 3, 2006, the Gotts sued RCISD,

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[1] Betty Schiurring, Joe Lee Perez, Vivian Spanihel, and Carolyn Baird were all members of the RCISD Board of Trustees. The Gotts also sued JR3 Education Associates, L.L.P., but the claims against that party are not part of this appeal and were severed after the court's dismissal of the Gotts' claims against the School Defendants.

[2] The petition stated that Wanda was "constructive[ly] discharge[d]."

individual members of the Board of Trustees, the Superintendent of the school district, and JR 3 Education Associates, L.L.P., alleging that the RCISD board had illegally terminated Richard's employment and that all defendants "had failed to abide by the law or terms of the agreement with Richard." The petition also alleged that the School Defendants had engaged in discriminatory practices and noted that the Gotts had filed charges of discrimination and had received notices of dismissal and the right to sue.

B. The Special Exceptions and the Agreed Order

On April 12, 2006, the School Defendants filed special exceptions to the Gotts' original petition, asserting that the Gotts (1) failed to provide the proposed discovery level; (2) failed to plead sufficient facts so that the defendants had fair notice of the claims against them; (3) failed properly to state causes of action in breach of contract, employment discrimination, or retaliation; (4) failed to state a claim against the Individual Defendants; (5) improperly pleaded for punitive damages against RCISD; and (6) failed to state the maximum amount of damages for which the Gotts were suing. The School Defendants requested that the Gotts be ordered to replead and to cure the defects within 14 days of the court's order and that the Gotts' "pleading be stricken and this case dismissed, with prejudice, if [the Gotts] fail to comply with the Court's order and cure these pleading defects by the Court-imposed deadline."

The Gotts did not file any response to the special exceptions, but entered into an agreed order with the School Defendants, signed by the trial court on July 17, 2006. In the order, the trial court granted all of the special exceptions, ordered the Gotts to replead in accordance with the special exceptions within 30 days of the order, and ordered that the amended petition omit all claims against the Individual Defendants, except those alleged against Lanier in his official capacity as Superintendent of RCISD.

C. The Motion to Dismiss, the Response, and the Motion for Temporary Stay

The Gotts failed to file amended pleadings by the required date,[3] and, on August 29, 2006, the School Defendants filed a motion to strike the petition and to dismiss all claims against them. The School Defendants averred that the Gotts had been given an opportunity to amend the pleading, but had failed to do so, and that dismissal was therefore appropriate. The School Defendants did not specifically request, in that motion, that the dismissal be with prejudice.

That same day, the Gotts filed a response to the motion, which included a motion for temporary stay. The response explained that the Gotts' attorney, a solo practitioner, had been having health issues and had recently suffered the death of a

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[3] The amended pleadings were due August 16, 2006. The Gotts did not file any amended pleadings before the trial court dismissed their claims against the School Defendants.

close family member. It further detailed that the attorney had been advised by his doctor not to engage in contested matters or trials and noted that the attorney "had moved and is moving for a temporary stay in all pending court appearances, state and federal." Attached as an exhibit was a letter from the attorney's cardiologist, dated July 21, 2006, recommending that the attorney "significantly reduce his immediate work-related activities during the next 90 days, and refrain from trial and/or contested court appearances during that time in order that [the doctor] might further evaluate his medication and condition." The Gotts prayed that all deadlines in the action "existing prior to or at the time of July 21, 2006" be continued and stayed until October 15, 2006 and that all deadlines be rescheduled. The motion did not make any reference to the required amended pleadings, nor did it contain any request for leave to file late amended pleadings. It also did not include either an affidavit or a valid verification.[4] There is no record of any hearing or ruling on the motion for stay.

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[4] The attorney signed a verification statement, but there is nothing indicating that it was sworn to before any authorized officer. A place for a notary signature appears on the document, but there is no signature or seal present. *See Andrews v. Stanton*, 198 S.W.3d 4, 8 (Tex. App.—El Paso 2006, no pet.) (citing Black's Law Dictionary for definition of verification as "formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document"); *Uvalde Constr. Co. v. Waggoner*, 159 S.W.2d 203, 205 (Tex. Civ. App.—Fort Worth 1942, no writ) (defining sworn pleading as "one verified by affiant under the sanction of an oath taken before some person authorized to administer it").

On September 7, 2006, the trial court held a hearing on the motion to strike pleadings and to dismiss claims. The Gotts did not appear at the hearing either in person or by counsel. The court granted the motion to dismiss on that day, dismissing all of the Gotts' claims against the School Defendants with prejudice.

D. The Motion for New Trial

The Gotts filed a motion for new trial on October 10, 2006. In the motion, the Gotts referenced their counsel's medical difficulties and attempt to present a motion to stay and argued that the trial court should grant a new trial because it erred in dismissing the Gotts' claims

> (1) "when the only and agreed action pursuant to the Agreed Order on Defendants' Special Exceptions was that individual claims against individual defendants would be dismissed by Plaintiffs" and
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> (2) when "even though the court did not make an express finding, the court seemingly and implicitly found that [the School Defendants'] Motion to Dismiss should be granted dismissing claims against ***all District defendants, even those who were not to benefit from the agreed order*** **(the District and Sup't Lanier officially)** wherein Plaintiff on July 12, 2006, agreed to replead on or before August 13, 2006, specifically during the hiatus of [the Gotts'] counsel's medical downtime."

(Emphasis in original.)

The Gotts concluded that it was "manifestly unjust" for their "claims to be dismissed for failure to amend to dismiss various individual defendants in their individual capacity . . . during a time when [the Gotts'] counsel was medically

incapacitated" and such fact was known to counsel for the School Defendants.

The motion included two exhibits: an affidavit from the Gotts' attorney, which attached the same letter from counsel's cardiologist that had been attached to the motion to stay, and a document entitled "Plaintiffs' First Amended Original Petition."[5]

After a hearing on the motion for new trial, the trial court denied the motion without specifying a particular basis for its ruling.

The Challenges on Appeal

On appeal, the Gotts complain of the trial court's (1) implied denial of their motion for temporary stay, (2) grant of the School Defendants' motion to dismiss, and (3) denial of the Gotts' motion for new trial. The Gotts challenge all three rulings in each of their three issues on appeal. They also advance the same three arguments in support of their challenges to each of the three rulings. Specifically, the Gotts assert that the trial court erred in its disposition of each of the three motions because (1) the Gotts pleaded good cause to enlarge the time and to stay the deadlines to allow amendment of the pleadings under Texas Rule of Civil Procedure 5(b); (2) the motion to strike was an unauthorized procedural mechanism to substantively attack the Gotts' pleadings, and the trial court improperly dismissed the pleadings without giving the

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[5] The "amended petition" does not contain a file-mark and was not filed in the trial court apart from this filing as "Exhibit B" to the motion for new trial.

Gotts an opportunity to amend and when the petition stated a valid cause of action; and (3) it was an abuse of discretion for the trial court to impose the "death penalty" sanction of dismissal of the claims with prejudice in its ruling on the motion to strike.

We will address the Gotts' complaints by reviewing each challenged ruling in turn and considering the arguments advanced in each of the three issues raised as they may apply to the ruling being challenged.

The Trial Court's Implicit Denial of the Motion for Temporary Stay

Before considering the Gotts' arguments as to this "ruling," we first note that the trial court never actually rendered either a written or an oral ruling on the motion for temporary stay. The Gotts did not lodge any written or oral objections to the trial court's failure to rule on their motion for temporary stay. The Gotts do not assert on appeal that any implied ruling was made, nor do they address how they preserved any error given the absence of a ruling on this motion.

Nevertheless, an implicit ruling is sufficient to preserve error, TEX. R. APP. P. 33.1(a)(2)(A), and when a trial court's express ruling on one motion necessarily implies a contrary ruling on an opposing motion, the trial court may be deemed to have implicitly ruled on the opposing motion. *See Salinas v. Rafati,* 948 S.W.2d 286, 288 (Tex. 1997). In the present case, the trial court's granting of the motion to dismiss, premised on the fact that the Gotts had not filed amended pleadings by the

required deadline, necessarily implied a denial of the Gotts' motion for temporary stay, which requested a continuation of all deadlines that existed prior to July 21, 2006—which would have included the deadline for the filing of amended pleadings. *Cf. In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003) (holding that trial court's act of proceeding to trial without issuing requested bench warrant was implicit denial of request). We therefore review the Gotts' complaint as to the implicit denial of their motion for temporary stay.

The Gotts argue on appeal that the trial court erred in denying their motion for temporary stay because (1) they pleaded good cause to enlarge the time and to stay the deadlines to allow amendment of the pleadings under Texas Rule of Civil Procedure 5(b); (2) the motion to strike was an unauthorized procedural mechanism to substantively attack the Gotts' pleadings and the trial court improperly dismissed the pleadings without giving the Gotts an opportunity to amend and when the petition stated a valid cause of action; and (3) it was an abuse of discretion for the trial court to impose the "death penalty" sanction of dismissal of the claims with prejudice in ruling on the motion to strike. Because the last two arguments relate exclusively to the trial court's ruling on the motion to strike, we consider here only their first argument which relates to the denial of their motion for temporary stay.

In their "good cause" argument on appeal, the Gotts rely on Texas Rule of Civil Procedure 5, specifically subsection (b), which gives the trial court discretion to permit an act to be done after the expiration of a specified period for action when good cause is shown for the failure to act, and *Woods v. Woods*, 193 S.W.3d 720 (Tex. App.—Beaumont 2006, pet. denied), which they cite to as providing the standard for evaluating whether a party has established good cause. The Gotts argue that they met the elements of good cause set out in *Woods* because (1) the "verified pleadings, the notarized affidavit of Larry Watts and the July 21, 2006 correspondence of [counsel's physician], all support that [the Gotts'] failure to timely file [amended pleadings] was not because [the Gotts] did not care or the result of conscious indifference, but because [the Gotts'] counsel was ill"[6] and (2) "allowing the late response will occasion no undue delay . . . [and] [the School] Defendants did not plead or prove with sufficient evidence that . . . [the Gotts'] failure to amend resulted in any delay or injury to the Defendants."

The applicable portion of Texas Rule of Civil Procedure 5 reads as follows:

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[6] The Gotts did not actually present "verified pleadings" or "the notarized affidavit of Larry Watts" to the trial court in support of their motion for temporary stay; the motion for temporary stay was not verified, and the affidavit of Larry Watts was not attached to the motion for temporary stay, but was instead attached to the later filed motion for new trial.

Rule 5. Enlargement of Time

> When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. . . .

TEX. R. CIV. P. 5.

Assuming, without deciding, that the motion for temporary stay put the trial court on notice that the Gotts were really seeking relief under rule 5,[7] we hold that the trial court did not abuse its discretion in implicitly denying such relief. If the motion for temporary stay was an attempt to invoke rule 5, it asked only for the relief obtainable under subsection (a)—an enlargement of time—rather than the relief

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[7] The Gotts never advanced a rule 5 argument before the trial court, nor did they request from the trial court the relief that subsection (b) permits. The Gotts did not cite to rule 5 in their motion, did not state that they were asking for leave to file late amended pleadings, did not attempt to file any late pleadings along with the motion, and did not assert that they had demonstrated good cause to permit a late filing. The trial court was not asked to permit the late filing of an amended pleading, with a showing of good cause why such late filing should be permitted, nor was any concurrent attempt made to file a late amended pleading. Rather, the Gotts simply requested and argued for a stay and continuance of the deadlines in the case. The Gotts' complaint on appeal, therefore, relies on a different legal assertion from that argued to the trial court, one which would provide for different relief from that requested of the trial court in the motion for temporary stay. The School Defendants, in their response to the motion for temporary stay, however, did mention rule 5, interpreting the Gotts' request as one for extension of time under rule 5.

proper to subsection (b)—leave to perform the act, despite the expiration of the deadline, or in this case, leave to file the amended pleadings, even though the deadline had passed. The trial court could not have abused its discretion in not granting an enlargement of time under subsection (a) because the time period originally prescribed had already expired. Likewise, the trial court could not have abused its discretion in not granting leave to file late amended pleadings under subsection (b), upon a showing of good cause for failing to have timely filed the pleadings, because no request for leave to file was ever made and no pleadings were actually presented to the court for late filing.[8] *Woods,* relied on by the Gotts, illustrates this point, holding, "If a party files [a pleading] late, Rule 5(b) authorizes the trial court 'upon motion' to permit the late filing, if the movant shows good cause for the failure to act." *Woods,* 193 S.W.3d at 722 (holding same in case in which party had filed objections late and trial court subsequently implicitly determined party had not established good cause for late filing); *see also Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685–88 (Tex. 2002) (relied upon by *Woods;* discussing rule 5 and what constitutes good cause in context of motion for leave to file untimely response, after party had filed motion for leave to file untimely response

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[8] The only arguable attempt to file a late amended pleading came more than a month after the motion to dismiss was granted, when the Gotts attached a "First Amended Original Petition" as an exhibit to their motion for new trial. Even then, no request for leave to file a late amended petition was made.

with proposed response attached).

Subsection (b) of rule 5 would have given the trial court in the present case the authority to permit the late filing of amended pleadings, if the Gotts had so requested and the court had found good cause for the Gotts' failure to file the pleadings in a timely fashion. However, unlike the applicable parties in *Woods* and *Carpenter*, the Gotts did not actually file a late pleading or seek leave to file a late pleading; all they asked for was a temporary stay and continuance. Subsection (b) of rule 5 was inapplicable to the motion that was actually filed and the relief that was actually requested, and accordingly we hold that there was no abuse of discretion by the trial court in not having granted relief under rule 5.

The Trial Court's Grant of the Motion to Dismiss

The Gotts also contend that the trial court erred in granting the School Defendants' motion to dismiss the Gotts' pleadings, challenging this ruling on the same three legal grounds asserted for their other complaints, averring that the trial court should not have granted the motion to dismiss because (1) the Gotts pleaded good cause to enlarge the time and to stay the deadlines to allow amendment of the pleadings under Texas Rule of Civil Procedure 5(b); (2) the motion to strike was an unauthorized procedural mechanism to substantively attack the Gotts' pleadings and the trial court improperly dismissed the pleadings without giving the Gotts an

opportunity to amend and when the petition stated a valid cause of action; and (3) it was an abuse of discretion for the trial court to impose the "death penalty" sanction of dismissal of the claims with prejudice in ruling on the motion to strike.

In considering the Gotts' arguments, we note that the first contention is actually a complaint as to the trial court's implied ruling on the motion for temporary stay. Only the last two arguments pertain to the trial court's ruling granting the motion to dismiss, and it is those two, therefore, that we consider in reviewing that ruling.

"The standard of review of a trial court's dismissal upon special exceptions is *de novo* on the legal question of whether the pleading stated a cause of action," and the reviewing court accepts "as true all of the factual allegations set forth in the pleading." *Sanchez v. Huntsville Indep. Sch. Dist.*, 844 S.W.2d 286, 288 (Tex. App.—Houston [1st Dist.] 1992, no writ.). In such a review, we first consider, under an abuse-of-discretion standard, whether the trial court properly granted the special exceptions. *Id.*; *see also Cole v. Hall*, 864 S.W.2d 563, 566 (Tex. App.—Dallas 1993, writ dism'd w.o.j.). If the trial court did not abuse its discretion in granting the special exceptions, and the plaintiff does not amend the petition after being given an opportunity to do so, the trial court does not abuse its discretion in dismissing the plaintiff's action. *Sanchez*, 844 S.W.2d at 291–92; *Cole*, 864 S.W.2d at 566.

In the present case, because the Gotts agreed to the granting of the special exceptions, we do not review the correctness of the trial court's ruling on the special exceptions. *See* TEX. R. APP. P. 33.1(a)(1)(A) (requiring complaint to have been made to trial court in order for complaint to have been preserved for appeal); *Counts v. Counts*, 358 S.W.2d 192, 199 (Tex. Civ. App.—Austin 1962, writ dism'd w.o.j.) (holding that party who agreed to order sustaining special exception could not complain of the sustaining of special exception on appeal). By agreeing to the trial court's granting of all of the special exceptions, including exceptions pertaining to the failure of the petition to state a cause of action,[9] the Gotts' are estopped now from asserting that their original petition did, in fact, state a cause of action. *See Counts*, 358 S.W.2d at 199. We accordingly consider only (1) whether the trial court abused its discretion in dismissing the Gotts' claims after the Gotts' failure to replead by the given deadline and, if not, (2) whether the court abused its discretion in ordering a dismissal with prejudice, rather than without prejudice.

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[9] The Gotts asserted in their motion for new trial that their only agreement as to the special exceptions was to dismiss the claims against the individual defendants. However, the agreed order granting the special exceptions, which was approved by both parties as to form and content, is not so limited. Although the order does note that the amended petition "shall dismiss all claims asserted against the individual school defendants except those claims asserted against defendant Michael Lanier in his professional capacity as Superintendent," it also states plainly that "all of the School Defendants' Special Exceptions are granted" and orders the Gotts to "replead in accordance with the School Defendants' Special Exceptions" within 30 days.

A. Dismissal for Failure Timely to Replead

The Gotts aver that the trial court erred in granting the motion to dismiss because the motion was an unauthorized procedural mechanism to substantively attack their pleadings, citing to *Gallien v. Washington Mut. Home Loans, Inc*., 209 S.W.3d 856 (Tex. App.—Texarkana 2006, no pet.), and assert that their petition should not have been dismissed without giving them an opportunity to amend their pleadings.

We conclude that the posture of the instant case is readily distinguishable from that of the case before the court of appeals in *Gallien*. In *Gallien,* defendant Washington Mutual filed special exceptions to the Galliens' original petition. *Id.* at 859. After the hearing on that motion, but before an order was signed, the Galliens filed an amended petition. *Id.* The trial court granted the special exceptions to the original petition, and Washington Mutual filed additional special exceptions acknowledging the filing of the first amended petition. *Id.* The trial court never sustained those exceptions. *Id.* Another party, MSV, also filed special exceptions to the first amended petition, which were purportedly granted orally, but no written order was ever entered. *Id.* The Galliens then filed a second amended petition. *Id.* No party ever filed any special exceptions to the second amended petition. *Id.* Washington Mutual and another party then filed a joint motion to strike the second

amended petition, arguing that the secondamended petition was untimely and the amended pleadings did not comply with MSV's special exceptions to the first amended petition. *Id.* at 862. The trial court dismissed the second amended petition without ever having any special exceptions filed or ruled on regarding that petition and without giving the plaintiffs any opportunity to amend their amended pleadings. *Id.* The court of appeals condemned such a summary dismissal. *Id*. The *Gallien* court, in terming the motion to strike filed in that case an "improper procedural mechanism," contrasted it to the "established mechanism" provided in the Texas Rules of Civil Procedure, namely, that of special exceptions. *Id.* at 861–62.

It was precisely this established mechanism of special exceptions that was followed in the case before us. The School Defendants first filed special exceptions, which the trial court sustained upon the parties' agreement. The trial court then provided the Gotts an opportunity to amend their pleadings. The Gotts did not amend their pleadings, and the School Defendants then filed a motion to dismiss based on the Gotts' failure to amend the petition as ordered upon the sustaining of the School Defendants' special exceptions. The mechanism utilized in the present case, rather than being prohibited, is well-established in Texas jurisprudence. *See Tex. Dep't of Corr.v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974) (holding that special exception, not summary judgment, is proper procedure when plaintiff failed to state cause of action

and that court may dismiss case when special exceptions are sustained, plaintiff is given opportunity to amend, and plaintiff still fails to state cause of action).[10] The trial court in the instant case gave the Gotts an opportunity to amend their pleadings, allowing them 30 days from the date of the agreed order granting the special exceptions in which to amend. The Gotts failed to do so.

The Gotts nevertheless contend on appeal that the trial court did not give them an opportunity to amend before striking their pleadings, noting that they requested a stay of the missed original deadline so that they could amend their petition. They cite no authority that would support the proposition that a trial court fails to provide a plaintiff an "opportunity to amend" when it does not grant a plaintiff additional opportunities to amend after the plaintiff fails to amend during the original opportunity given by the court. We find no authority that requires a trial court to extend its original deadline for the amendment of pleadings for such length of time as plaintiffs may request, in order for a plaintiff to have had an "opportunity to amend."

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[10] However, a trial court may grant a summary judgment after special exceptions are sustained and a plaintiff refuses to amend, the amended pleading fails to state a cause of action, or the pleading deficiency is one which could not be remedied by amendment. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

The Gotts failed to amend their petition to comply with the sustained special exceptions after having been given an opportunity to do so.[11] We hold, therefore, that the trial court did not abuse its discretion in dismissing the Gotts' claims. *See Herring*, 513 S.W.2d at 10; *Sanchez*, 844 S.W.2d at 291–92; *Cole*, 864 S.W.2d at 566.

B. Dismissal with Prejudice

The Gotts further complain that the trial court abused its discretion in dismissing their claims "with prejudice," arguing that, in doing so, the trial court imposed "'death penalty' sanctions" when "there was not a direct relationship between the imposed sanction and the offensive conduct." They further allege that the imposed "sanction was severe and excessive and did not satisfy the legitimate purpose to obtain compliance for filing the pleading late" and contend that the Gotts "did not demonstrate a callous disregard for the rules or flagrant bad faith." Finally, they assert that the trial court did not consider "lesser sanctions" and that "lesser

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[11] We do not consider the "amended" petition attached as an exhibit to the subsequently filed motion for new trial in determining the correctness of the trial court's ruling on the motion to dismiss because that document was not before the trial court at the time that the court made the ruling being challenged. *See Stephens Co. v. J.N. McCammon, Inc.*, 144 Tex. 148, 154, 52 S.W.2d 53, 55 (1932) (holding that appellate court reviews ruling of trial court based on record before trial court at that time ruling is made). At the time of the ruling dismissing their claims, the Gotts had not filed any amended petition.

sanctions [would] have been effective" and contend that the case was not exceptional and that there was no showing that such a sanction was "clearly justified." The Gotts rely on *Gallien* and *Kutch v. Del Mar College*, 831 S.W.2d 506 (Tex. App.—Corpus Christi 1992, no writ), for support and argue that the appropriateness of the dismissal with prejudice should be reviewed under the two-part test set out in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). The Gotts also refer us to *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004), and cases cited therein.

We first observe that the Gotts did not complain to the trial court that the dismissal "with prejudice" was an excessive and inappropriate "death penalty" sanction, suggest that lesser sanctions should be imposed, or request the trial court to modify its order of dismissal from one "with prejudice" to one "without prejudice."[12] In general, a party cannot raise for the first time on appeal an issue that was not presented to the trial court by way of a timely request, motion, or objection. TEX. R. APP. P. 33.1(a)(1); *McCain v. NME Hosps., Inc.*, 856 S.W.2d 751, 755 (Tex. App.—Dallas 1993, no writ) (complaint that dismissal of case with prejudice was not appropriate sanction was not preserved for appellate review because it was not raised in trial court)*; Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568–69 (Tex.

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[12] Nor do the Gotts request this Court to reform the dismissal order to delete the words "with prejudice," as occurred in *Kutch v. Del Mar College,* 831 S.W.2d 506 (Tex. App.—Corpus Christi 1992, no writ).

App.—Houston [14th Dist.] 1990, writ denied) (op. on reh'g) (holding that appellant failed to preserve complaint that trial court improperly dismissed claim "with prejudice" by not presenting alleged error first to trial court). The Gotts did file a motion for new trial complaining of the dismissal of their pleadings, but their sole argument was that the trial court should not have dismissed the Gotts' claims against all of the School Defendants for the Gotts' failure to amend the pleadings pursuant to the special exceptions when the Gotts had actually agreed only to amend the pleadings to dismiss the claims against the individual defendants. Such contentions would not have alerted the trial court to complaints that the order of dismissal "with prejudice" was an inappropriate and excessive sanction because there was no showing that such a sanction was clearly justified, that the case was not exceptional, that the sanction did not satisfy the legitimate purpose to obtain compliance for filing the pleading late, that there was not a direct relationship between the imposed sanction and the offensive conduct, and that the Gotts did not demonstrate a callous disregard for the rules or flagrant bad faith. *Cf. D/FW Commercial Roofing Co. v. Mehra,* 854 S.W.2d 182, 189 (Tex. App.—Dallas 1993, no writ) (holding that appellant's motion for new trial, which alleged that evidence was insufficient to support damages awarded, did not alert trial court to complaint of double recovery asserted on appeal). We therefore hold that the Gotts failed to preserve this complaint for appellate

review.[13]

The Trial Court's Denial of the Motion for New Trial

The Gotts also challenge the trial court's denial of their motion for new trial on the same three legal bases as their challenges to the trial court's rulings on the motion for temporary stay and the motion to dismiss, arguing that the trial court should have granted the motion for new trial because (1) the Gotts pleaded good cause to enlarge the time and to stay the deadlines to allow amendment of the pleadings under Texas Rule of Civil Procedure 5(b); (2) the motion to strike was an

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[13] Even if this issue had been preserved, *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991), and *Cire v. Cummings,* 134 S.W.3d 835 (Tex. 2004), would be inapplicable to our review because the dismissal did not involve sanctions imposed under rule 215.2(b)(5) of the Texas Rules of Civil Procedure, nor was it a sanction for the abuse of the discovery process. Rather, the dismissal in this case was based on the Gotts' failure to amend their petition to state a cause of action after special exceptions were granted. There is a long line of authorities that holds that when special exceptions alleging that the petition fails to state a cause of action are sustained, and the plaintiff thereafter fails to amend the petition, the trial court may properly dismiss the plaintiff's case with prejudice. *Lentworth v. Trahan*, 981 S.W.2d 720, 722–23 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.));*Coleman v. Hughes Blanton, Inc.*, 599 S.W.2d 643, 645–46 (Tex. App.—Texarkana 1980, no writ); *Gottlieb v. Hofheinz*, 523 S.W.2d 7, 14 (Tex. App.—Houston [1st Dist.] 1975, writ dism'd) (op. on reh'g); *Farias v. Besteiro*, 453 S.W.2d 314, 318 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.); *accord Kutch,* 831 S.W.2d at 506 (distinguishing between pleadings that state a valid cause of action and those that do not and holding that a trial court cannot dismiss a case with prejudice "*if the pleadings state a valid cause of action*, but are vague, overbroad, or otherwise susceptible to valid special exceptions") (emphasis added).

unauthorized procedural mechanism to substantively attack the Gotts' pleadings and the trial court improperly dismissed the pleadings without giving the Gotts an opportunity to amend and when the petition stated a valid cause of action; and (3) it was an abuse of discretion for the trial court to impose the "death penalty" sanction of dismissal of the claims with prejudice in ruling on the motion to strike.

In their motion for new trial, the Gotts did not assert any of those arguments. Rather, their sole argument was that the trial court should grant a new trial because the agreed order on special exceptions was intended only to be an agreement to remove any claims against defendants in their individual capacities, and, therefore, the claims against RCISD, and Michael Lanier in his capacity as superintendent, should not have been struck or dismissed.

The grounds asserted on appeal for the grant of the motion for new trial are different from the grounds asserted to the trial court below. The Gotts may not now enlarge their complaint on appeal to include grounds never raised before the trial court. *See C.M. Ashfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 797 (Tex. App.—Houston [1st Dist.] 2004, no pet.). We will not find an abuse of discretion for failure to grant a new trial on grounds that were never presented to, and so were never considered by, the trial court. *See Gerdes v. Kennamer*, 155 S.W.3d 523, 532 (Tex. App.—Corpus Christi 2004, pet. denied) (declaring that motion for new trial that

states one legal theory cannot be used to support a different legal theory on appeal and holding that issue was waived); *D/FW Commercial Roofing*, 854 S.W.2d at 189 (noting that trial court could not have been expected to address specific complaint when motion for new trial did not assert such complaint and holding that complaint not preserved for review).

Conclusion

We overrule all of the Gotts' issues on appeal and affirm the judgment of the trial court.

Tim Taft
Justice

Panel consists of Justices Taft, Keyes, and Alcala.