Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00300-CV

SHAY MCCONNELL, Appellant

V.

JANET MCCONNELL AND STANELY MCCONNELL, Appellees

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Case No. 2001-48395

MEMORANDUM OPINION

Shay McConnell appeals the trial court's order granting specific performance of an extrajudicial visitation agreement in which he agreed to allow his parents, Janet and Stanley McConnell, to have access to his son, D.J.M. In

eight issues, Shay contends that the trial court erred by granting specific performance of the 2007 visitation agreement, by denying his request for sanctions, by granting sanctions against him, and by finding against him on his claim for fraud. We conclude that Shay's appeal of the trial court's denial of sanctions against Janet and Stanley was not preserved, that his appeal of sanctions entered by the trial court against him is moot, that he inadequately briefed his argument that the 2007 agreement is unconstitutional, that presumed findings of fact support the trial court's implied rejection of Shay's contract defenses, and that presumed findings of fact support a judgment against Shay on his fraud claim. We affirm.

Background

D.J.M lived with his father, Shay ("the father"), and his father's parents, Janet and Stanley (collectively, "the grandparents"). D.J.M.'s mother was not part of his life at any time relevant to this suit. The grandparents helped raise D.J.M.: they took him to school, fixed meals, took care of him when the father was at work or at school, and attended Grandparents Day events.

In May 2007, the father moved out of the grandparents' house, taking D.J.M. with him. The father left some of his and D.J.M.'s possessions in the grandparents' house. Janet testified that the father cut off all contact between the grandparents and D.J.M. except for one phone call. The father testified that he permitted the grandparents to speak to D.J.M. on the phone and allowed limited

contact by mail. The father testified that he reduced contact between D.J.M. and his grandparents because he "believed that it would help transition [D.J.M.] into a new home . . . [and] very much because [he] was still angry with them."

In an effort to reunite with D.J.M., the grandparents asked John Mara, the attorney who represented the father during the original custody proceedings concerning D.J.M, to serve as a mediator between the parties. Although at the time, the father believed that Mara was acting as a mediator, he now disputes whether Mara acted impartially. The father testified that the possibility of the grandparents filing a lawsuit was raised several times and that he could not afford litigation. The parties eventually executed a document titled "Agreement for Visitation and Access to the Child" on September 13, 2007 ("the 2007 agreement"). Among numerous other provisions, the document stated:

> WHEREAS, the grandparents and the father . . . acknowledge that the grandparents have had a substantial and significant past contact with the child and are persons other than foster parents who, long [sic] with the father, have had actual care, control and possession of the child for at least six (6) months; and
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> WHEREAS, the grandparents and the father desire to work out their differences regarding visitation with the child through agreement rather than filing a formal suit affecting the parent-child relationship and obtain a formal court order, for economic reasons and further due to difficulty, expense and burden of locating the biological mother for the child whom none of the parties hereto have heard from for over five years; and

> WHEREAS, the grandparents and the father agree that this Agreement for Visitation and Access to the Child . . . is in the best interest of the child.

The 2007 agreement was never made part of a formal court visitation order. After the 2007 agreement was signed, the father reclaimed his and D.J.M.'s possessions that had remained in the grandparents' house.

The father and the grandparents performed in accordance with this document until January 2009, when the father informed the grandparents that he would no longer abide by the 2007 agreement. He gave the grandparents a document that stated in total:

> This is to notify Bruce and Janet McConnell that I, Shay McConnell, am of the belief that it is no longer nor was it ever at any time beneficial to continue with visitation between [D.J.M.] and his grandparents (Bruce and Janet) as decreed in the written contract reached on September 13th, 2007. It is from my priorly [sic] mentioned belief that I base my decision to end mine and my son's involvement in the visitation outlined in the contract. With my decision to end the visitation I do offer Bruce and Janet McConnell the opportunity to re-establish relations with my son and family in a more average grandparent capacity. Where-in they will be able to interact with [D.J.M.] and the rest of my family as is convenient for all involved parties. As a requirement of the re-establishment of a more average grandparent relationship I do require that Bruce and Janet relinquish, in writing, the visitation given to them in the contract reached on September 13th, 2007.

After giving the grandparents this document, the father allowed the grandparents two supervised visits with D.J.M. The grandparents brought the present lawsuit, seeking a modification of the original custody order or, in the alternative, specific

performance of the 2007 agreement. The father answered, asserting a number of contract defenses against the 2007 agreement as well as counterclaims for fraud and conspiracy.

After the father informed the grandparents that he would no longer abide by the 2007 agreement, the parties attempted mediation. The mediation resulted in an agreement dated March 5, 2009, that permitted the grandparents to see D.J.M. for four hours on the first Sunday of every month ("the mediated agreement"). The copy of the agreement in the record shows that the parties modified the title from the original "Binding Mediated Settlement Agreement" to "Mediated Settlement Agreement as to A Contract Only." The parties also struck the boldface, all-capitals paragraph that declared that the mediated agreement was irrevocable and that either party was entitled to judgment on the agreement under the Family Code.

During the pendency of the litigation, the father moved to dismiss and for sanctions against the grandparents. The trial court dismissed the modification action and gave the grandparents a deadline of April 14, 2009 "to amend their contract claim, if any." The trial court's order stated, "[A]ll other matters are held over." The grandparents submitted a "Second Amended Petition to Modify Parent-Child Relationship" on April 14. This pleading included a claim for breach of contract with a request for specific performance of the 2007 agreement.

The grandparents sought to depose the father, who responded to the grandparents' notice by filing a motion for protective order within three business days. The grandparents went forward with the deposition and filed a certificate of nonappearance with the trial court in which the court reporter stated that the father did not appear and that the costs to the grandparents' attorney would be $150. The appellate record includes a docket entry from the associate judge in the case that indicates a sanction of $150 was imposed against the father for his failure to appear.

The trial court held a hearing on February 22, 2010, on the grandparents' claim for specific performance. After hearing testimony from Janet and the father, the trial court granted specific performance of the 2007 agreement. The trial court concluded that an order of specific performance would not be "state action" so as to raise the constitutional presumption that a fit parent should decide what is best for his child. The trial court also observed that there were matters about the contract that the parties should amend but concluded that it did not have authority to alter a private agreement between the father and the grandparents. Finally, the court orally ordered that the previous sanction order "be satisfied as costs."

The 2007 Agreement

In his third, fourth, fifth, sixth, and seventh issues, the father raises various challenges to the trial court's order of specific performance of the 2007 agreement.

He asserts that enforcement of the 2007 agreement violates his authority as a parent, that the 2009 mediated settlement agreement functioned as a novation of the 2007 agreement, and that the trial court erred in impliedly rejecting his contract defenses to the 2007 agreement.

A. Standard of Review

Specific performance is an equitable remedy, which rests within the sound discretion of the trial court. *Smith v. Dass, Inc.*, 283 S.W.3d 537, 542 (Tex. App.—Dallas 2009, no pet.). The test for abuse of discretion is whether the trial court "acted without reference to guiding rules and principles." *Id.* (quoting *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004)). We will reverse the trial court only if its ruling is arbitrary or unreasonable. *Id.*

Because many of these contract issues require a fact-based analysis, we observe that the trial court did not enter findings of fact and conclusions of law and that the father did not request that it do so. Where the trial court does not render findings of fact or conclusions of law, we assume that it made all findings necessary in support of its judgment. *Pharo v. Chambers Cnty.*, 922 S.W.2d 945, 948 (Tex. 1996). If the trial court's implied findings are supported by the evidence, we must uphold the judgment on any theory of law applicable to the case. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). In determining whether some evidence supports the judgment and implied findings of fact, we

consider only that evidence most favorable to the issue and disregard entirely any contrary evidence. *Id.*

B. Novation

In his third issue, the father contends that the 2009 mediated settlement agreement and the 2007 agreement are "inconsistent on their face," and that "the 2009 agreement, by novation, should have replaced [the 2007 agreement] as the current agreement." The grandparents assert that we should imply a finding by the trial court that the 2009 mediated settlement agreement was only temporary, pending trial.

The essential elements of a novation are (1) a previous, valid obligation; (2) a mutual agreement of the parties to the acceptance of a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract. *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 653 at n.7 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The father does not concede that the 2007 agreement was a valid obligation; however, assuming that it was, he asserts that the evidence establishes the remaining elements. The grandparents challenge the second and third elements of novation, mutual agreement to the new contract and extinguishment of the old contract.

Mediated settlement agreements are addressed by the Texas Family Code. A mediated settlement agreement is binding only where it "provides, in a

prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation[.]" TEX. FAM. CODE ANN. § 153.0071(d)(1) (West 2009). Here, the grandparents emphasize that the boldfaced term "Binding" was crossed out of the heading of the 2009 mediated settlement agreement as was the boldfaced paragraph stating that each party understood that the 2009 mediated settlement agreement was not subject to revocation. Further, the grandparents observe that the trial court said to their attorney, "your position is that MSA from March 5th, 2009 is at best and intended to be a Temporary Order in this lawsuit and that all of the boldface language is crossed out in the agreement. So, I take it . . . your position or your client's position is that they are revoking this agreement[.]" The grandparents contend, therefore, that the trial court necessarily found that the 2009 mediated settlement agreement was intended to be temporary and not a permanent replacement for the 2007 agreement.

The father does not address the written alterations to the 2009 mediated settlement agreement. Because we imply all findings necessary to support the judgment, we conclude that the trial court must have found that the alterations to the 2009 mediated settlement agreement indicated that the grandparents did not agree that the 2007 agreement should be extinguished or that the 2009 mediated settlement agreement should form a new contract. *Pharo*, 922 S.W.2d at 948. We

hold that the father has not established all elements of novation. *Beal Bank*, 124 S.W.3d at 653, n.7.

We overrule the father's third issue.

C. Contract Defenses

In his fourth and fifth issues, the father asserts a number of contract defenses against the 2007 agreement. Specifically, in his fourth issue, he asserts "unclean hands, including duress, fraudulent inducement, mistake, and novation." In his fifth issue, he asserts that the 2007 agreement was "on its face unconscionable and against public policy." In his combined discussion of these two issues, he also asserts that the 2007 agreement lacked consideration and was a result of coercion.

1. Unclean Hands

The father mentions the equitable defense of "unclean hands" in his brief to this court, but the case he cites does not discuss the doctrine, and we cannot discern any argument applying the doctrine of unclean hands to the facts of this case. We hold that the father's bare assertion of "unclean hands" does not present anything for our review and thus is waived as a sub-issue to his contract challenges. *See* TEX. R. APP. P. 38.1(i).

2. Duress and Coercion

The father asserts two forms of duress: economic duress, in that he could not afford to defend against the grandparents' threatened lawsuit, and duress of

property, in that the parents threatened to withhold his and D.J.M.'s property if he did not signed the 2007 agreement. The father also asserts that he was coerced into signing the 2007 agreement because the grandparents threatened to sue him when, according to the father, they lacked standing to do so.

The father's economic duress and coercion defenses are based solely on the grandparents' alleged threats to sue and his contentions that the suit was improper because the grandparents lacked standing. A threat to sue is neither duress nor coercion. *Cont'l Cas. Co. v. Huizar*, 740 S.W.2d 429, 430 (Tex. 1987); *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116, 1120 (Tex. Civ. App.—San Antonio 1917, writ ref'd). This is so even if the claim asserted is wrongful or unlawful. *Wright v. Sydow*, 173 S.W.3d 534, 544 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *Cont'l Cas. Co.*, 740 S.W.2d at 430; *Ward v. Scarborough*, 236 S.W. 434, 437 (Tex. Comm'n App. 1922)). We hold that as a matter of law, the trial court did not abuse its discretion by impliedly rejecting these defenses. *See Cont'l Cas. Co.*, 740 S.W.2d at 430; *Wright*, 173 S.W.3d at 544.

The father's duress of property defense is based entirely on his assertion that the grandparents refused to turn over his and D.J.M.'s property until he signed the 2007 agreement. While this claim comports with the father's testimony, D.J.M.'s grandmother told the trial court that the father could have claimed the items at any time had he made prior arrangements. Because we imply all findings of fact

necessary to support the trial court's judgment, we will presume that the trial court credited the grandmother's testimony and did not believe the father. *See Pharo*, 922 S.W.2d at 948. Having concluded that the trial court did not credit the sole evidence in favor of the father's duress of property defense, we hold that the trial court did not abuse its discretion in impliedly rejecting that defense.

3. Fraud and Mistake

On appeal, the father asserts that the 2007 agreement was invalid on grounds of fraudulent inducement and fraud by non-disclosure or avoidable based on mutual mistake or unilateral mistake. He contends that either the grandparents misrepresented their standing to sue him or they were mistaken. Having asserted that the grandparents lacked standing to sue him in September 2007, he contends that the primary consideration for the 2007 agreement was "meaningless" and was, therefore, "voidable" by his communication to the grandparents in January 2009.

The elements of fraud as a defense to breach of contract are: (1) a material representation was made (2) that was false, (3) that when the representation was made, the speaker knew it was false or made it as a positive assertion recklessly without any knowledge of the truth, (4) that the representation was made with the intention that it be acted upon by the other party, (5) that the other party acted in reliance upon the representation, and (6) that the other party suffered injury. *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524

(Tex. 1998). Non-disclosure fraud is a species of fraud where a party has a duty to disclose that renders the failure to do so as misleading as a positive misrepresentation. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997).

"Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be avoided." *Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n*, 300 S.W.3d 746, 751 (Tex. 2009) (quoting *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990)). "The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the [contract]." *Id.* Alternatively, we may set aside a contract based on a unilateral mistake where "(1) the mistake is of so great a consequence that to enforce the contract would be unconscionable; (2) the mistake relates to a material feature of the contract; (3) the mistake occurred despite ordinary care; and (4) the parties can be placed in status quo, i.e., the rescission must not prejudice the other party except for the loss of the bargain." *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 175 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (internal quotation omitted).

The only evidence supporting the father's claim that he misunderstood the merits of a potential lawsuit at the time the 2007 agreement was negotiated is his own testimony. Presuming that the trial court made all factual findings necessary in support of its judgment, we conclude that the trial court did not credit the father's testimony. *See Pharo*, 922 S.W.2d at 948. Without the father's testimony that he did not know about the grandparents' standing to file a suit for possession or access, there is no evidence of misrepresentation, omission, or mistake respecting a material fact. We, therefore, hold that the trial court did not abuse its discretion by impliedly rejecting the father's fraud and mistake defenses.

4. Unconscionability

In his fifth issue, the father asserts that the 2007 agreement is "incredibly one-sided, giving the grandparents extensive rights and possession and access while giving [the father] substantially nothing." He further asserts that Mara's participation in the negotiation of the 2007 agreement tainted the entire process. Thus, he contends that the 2007 agreement was both substantively and procedurally unconscionable.[1]

"Unconscionability" has no precise legal definition, and it is to be determined on a case-by-case basis. *Arthur's Garage, Inc. v. Racal-Chubb Sec.*

[1] In his statement of his fifth issue, the father also suggests that the 2007 agreement is "against public policy." He has briefed no public policy argument, and we, therefore, do not address that issue.

Sys., Inc., 997 S.W.2d 803, 815 (Tex. App.—Dallas 1999, no pet.); *Besteman v. Pitcock*, 272 S.W.3d 777, 788 (Tex. App.—Texarkana 2008, no pet.). In general, "unconscionability" describes a contract that is unfair because of its overall one-sidedness or the gross one-sidedness of its terms. *Arthur's Garage*, 997 S.W.2d at 815. "Although no single test exists to determine if a contract is unconscionable, we begin with two questions: (1) How did the parties arrive at the terms in controversy; and (2) Are there legitimate reasons which justify the inclusion of those terms?" *Id.* at 815–16. The first question, which describes procedural unconscionability, is concerned with assent and focuses on facts surrounding the bargaining process. *Id.* at 816. The second question, which describes "substantive unconscionability," is concerned with the fairness of the agreement itself. *Id.* "[A] contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Besteman*, 272 S.W.3d at 789 (quoting *Anaheim Indus. v. GMC*, No. 01-06-00440-CV, 2007 WL 4554213, at *9, (Tex. App.—Houston [1st Dist.] Dec. 20, 2007, pet. denied)).

Whether a contract is unconscionable is a question of law. *Arthur's Garage*, 997 S.W.2d at 815. However, the determination of the facts that supposedly illustrate unconscionability is a question for the trial court. *Besteman*, 272 S.W.3d

at 788. The party asserting unconscionability must prove both procedural and substantive unconscionability. *In re Green Tree Servicing, L.L.C.*, 275 S.W.3d 592, 603 (Tex. App.—Texarkana 2008, no pet.).

The father asserts that procedural unconscionability is shown by the participation in the negotiation of Mara, his former attorney from the original suit establishing custody of D.J.M.[2] The father's testimony was the only evidence supporting a finding of inequitable conduct in the process by which the 2007 agreement was reached. We conclude that the trial court must have disbelieved the father when he claimed that Mara's role was anything other than a mediator. There is, therefore, no evidence in support of the procedural prong of our unconscionability analysis. *Arthur's Garage*, 997 S.W.2d at 815. Because the father was required to establish both prongs to be entitled to a judgment that the 2007 agreement was unconscionable, *see In re Green Tree*, 275 S.W.3d at 603, we

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[2] The father also asserts on appeal that the grandparents have more money and education than he does, facts which have both been identified as possible considerations in a procedural unconscionability analysis. *See El Paso Natural Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 61 (Tex. App.—Amarillo 1998), rev'd, 8 S.W.3d 309 (Tex. 1999). We note that *El Paso Natural Gas* does not hold that financial or educational imbalance are necessary or sufficient factors but only that they may be considered by the court. We have found no evidence in the trial record of the parties' respective financial status or education level.

hold that the trial court did not abuse its discretion by impliedly rejecting the father's unconscionability defense.[3]

5. Lack of Consideration

The father contends that the grandparents lacked standing to sue for access to D.J.M. at the time the 2007 agreement was executed and that because they lacked standing, their relinquishment of a right to sue amounts to no consideration.

The existence of a written contract presumes consideration, and the burden was on the father to disprove consideration. *Blockbuster, Inc. v. C-Span Entm't, Inc.*, 276 S.W.3d 482, 488 (Tex. App.—Dallas 2008, pet. granted) (citing *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)). The 2007 agreement stated that "in consideration of Ten ($10.00) Dollars which is acknowledged as paid by the grandparents and which is further acknowledged as received by the father, and the further consideration of the mutual

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[3] We do not reach the substantive prong of the unconscionability test. However, we note that while the trial court did not issue findings of fact or conclusions of law, it did state for the record its rejection of the father's unconscionability argument:

> Really it's a bit disingenuous for the [father] to present that he was victimized by this process, because if anybody was victimized by it, it was the grandparents. They're the ones that agreed to go along with this contractual process, and you could make the argument that they put their legal rights and interest more in jeopardy than he did by entering into this kind of an agreement.

representations, agreements and promises contained herein and other good and valuable consideration which is acknowledged as received by the parties hereto, the grandparents and the father agree[d]" to the terms of the agreement. The agreement further states that the parties "desire to work out their differences regarding visitation with the child through agreement rather than filing a formal suit affecting the parent-child relationship . . . for economic reasons." However, the only evidence that the father misunderstood the possible merits of any potential suit that the grandparents could bring was the father's own testimony. The trial court was within its discretion to disbelieve the father's testimony, and because of the lack of findings of fact, we presume that it did so. *See Pharo*, 922 S.W.2d at 948. Thus, we conclude that the trial court credited the recitations of consideration in the 2007 agreement, and we hold that the trial court did not abuse its discretion in rejecting the father's defense of lack of consideration. *See Blockbuster*, 276 S.W.3d at 488 (citing *Simpson*, 724 S.W.2d at 107).

Having held that none of the father's contract-defense sub-issues shows an abuse of discretion by the trial court, we overrule the father's fourth and fifth issues.

D. Parental Presumption

In his seventh issue, the father contends that the trial court erred by ordering specific performance because the 2007 agreement "circumvent[ed]" his "parental

presumption." He directs our attention to the U.S. Supreme Court's decision in *Troxel v. Granville*, a grandparent visitation case. 530 U.S. 57, 120 S. Ct. 2054 (2000). He argues that the trial court failed to "accord at least some special weight to the parent's own determination" and that only he was empowered to determine when the grandparents should have access to his child. *See id.* at 70, 120 S. Ct. at 2062.

Beyond merely stating the general holding of *Troxel* and citing one case from the El Paso court of appeals, *see Roby v. Adams*, 68 S.W.3d 822, 828 (Tex. App.—El Paso 2002, pet. denied), the father has neither briefed any argument nor cited any case applicable to the particular issues in this case. Specifically, he has not attempted to explain with citations to the record and relevant authority why an order of specific performance of an extrajudicial visitation agreement crafted by the parties should be subject to the same constitutional analysis applied to a statutory visitation order crafted by the courts. We hold, therefore, that the father's seventh issue is waived due to inadequate briefing. *See Stephens v. Dolcefino*, 126 S.W.3d 120, 126 at n.5 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

The portion of the father's brief referring to the "parental presumption" purports to be a combined analysis of his sixth and seventh issues. The father's sixth issue asserts that the trial court erred by ordering specific performance of the 2007 agreement because the father "lawfully rescinded" it. The father provides no

argument or authorities relating to rescission. His sixth issue, therefore, presents nothing for our review. TEX. R. APP. P. 38.1(i).

We overrule the father's sixth and seventh issues.

Sanctions

In his first and second issues, the father challenges the trial court's refusal to grant sanctions against the grandparents and its order granting sanctions against him.

A. Sanctions Against the Father

In his first issue, the father contends that the trial court erred by adopting the associate judge's award of sanctions. Specifically, the father contends that he timely filed a motion for protective order objecting to the time and place of the deposition, thereby automatically staying the deposition. Thus, he asserts that he should not have been sanctioned for failure to attend the deposition. The grandparents contend that the absence of a transcript of the hearing at which sanctions were imposed and the lack of any objection to the trial court's adoption of the associate judge's award constitute a failure to preserve this issue for appellate review. The grandparents further argue that sanctions are discretionary and may be appropriate even when there is a timely filed motion for protective order. Finally, the grandparents assert that in the absence of findings of fact and conclusions of law, we must imply all facts necessary to support the court's ruling.

The trial court's "Order In Suit For Specific Performance Of Agreement" contains no mention of sanctions against the father and further states that "all relief requested in this case and not expressly granted is denied." On the other hand, in the transcript of the February 22 hearing, the trial courts states, "The Court is finding that there was a previously ordered sanction in this case, and I'm ordering that that be satisfied as costs and paid on or before March 15th." In a civil case, when the oral pronouncements of the trial court conflict with its written judgment, the written judgment prevails. *Nine Greenway Ltd. v. Heard, Goggan, Blair & Williams*, 875 S.W.2d 784, 787 (Tex. App.—Houston [1st Dist.] 1994, writ denied). The trial court's written judgment does not award sanctions. Thus, although the father's first issue challenges the trial court's award of a $150 sanction against him, there is no order of sanctions before us for our review. *See Morton v. Paradise Cove Property Owners Ass'n*, No. 11-08-00022-CV, 2009 WL 2841208 at *2 (Tex. App.—Eastland Sept. 3, 2009, no pet. hist.) (mem. op., not designated for publication).

We overrule the father's first issue as moot.

B. The Father's Motions to Dismiss and for Sanctions

In his second issue, the father contends that the trial court erred by failing to dismiss the grandparents' Second Amended Motion to Modify the Parent Child Relationship and by declining to sanction the grandparents. He contends that he

was entitled to sanctions under the Rules of Civil Procedure and the Civil Practice and Remedies Code. While the father's second issue purports to include a challenge to the trial court's refusal to grant his motion to dismiss, his discussion of that issue contains no argument or authorities relating to that motion. *See* TEX. R. APP. P. 38.1(i). We, therefore, will only address the father's challenge to the trial court's ruling as to sanctions.

The father urges us to find that the trial court should have sanctioned the grandparents under Rule 13 of the Rules of Civil Procedure and under sections 9 and 10 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011, 10.001–2 (West 2002); TEX. R. CIV. P. 13. We review a trial court's decision whether to impose sanctions under the foregoing provisions for abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 582–83 (Tex. 2006); *Cire*, 134 S.W.3d at 838. The test for whether a trial court abused its discretion is whether it acted without reference to guiding rules or principles. *Cire*, 134 S.W.3d at 839.

In the father's analysis, he relies solely on documents that are not before us on appeal. The father directs our attention to "Shay McConnell's First Amended Motion for Sanctions Including Dismiss [sic] and Enforcement of Binding Agreement, attached in Appendix A and part of the supplemental record." The record contains no such document, the father has not provided this Court with any

appendix to his brief, and even if the father had filed an appendix, we may not consider documents that are not formally included in the record on appeal. *See Sowell v. Kroger Co.*, 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The father also refers to events at a February 25, 2009 hearing for which there is no transcript; the father cites only to the trial court's handwritten docket entry as his record citation. This Court has held that a docket entry "forms no part of the record we may consider; it is a memorandum made for the trial court and clerk's convenience." *Miller v. Kendall*, 804 S.W.2d 933, 944 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citing *Energo Int'l Corp. v. Modern Indus. Heating, Inc.*, 722 S.W.2d 149, 151–52 (Tex. App.—Dallas 1986, no writ)). Further, the father describes events at a court-ordered mediation for which there is no record; he directs our attention to the mediated agreement, which does not mention sanctions; and finally, he refers to the court's "refus[al] to dismiss or sanction Appellees," citing again to the trial court's docket sheet.

The only document in the record evidencing the father's motions to dismiss and for sanctions is the court's order of May 1, 2009, that dismisses the grandparents' suit in part.[4] The father does not refer to this document under his

[4] The trial court's order states, in relevant part:

> On April 8, 2009 the Court considered the Movant Shay McConnell's Motion to Dismiss and Motion for Sanctions and

second issue. Furthermore, the document does not describe the father's motion. The record, therefore, contains nothing that shows that the father presented the trial court with the arguments he now raises before this Court. The record fails to show the trial court abused its discretion by declining to sanction the grandparents.

We overrule the father's second issue.

Fraud

In his eighth issue, the father contends that the trial court erred by ruling against his affirmative fraud claim. The father does not present any argument or authorities for this issue but instead references his fourth and fifth issues, which present his contract defenses to the 2007 agreement. Where an appellant's brief "does little more than summarily state his point of error, without citations to legal authority or substantive analysis, it is not sufficient to acquaint the Court with the

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> ORDERS that Motion to Dismiss is GRANTED in part as detailed below and all other matters are held over.
>
> IT IS ORDERED that the Suit to Modify the Parent Child Relationship is dismissed, leaving only Petitioner's potential contract claims. IT IS FURTHER ORDERED that Petitioners have until 5:00 p.m. on April 14, 2009 to amend their contract claim, if any.
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> IT IS FURTHER ORDERED that discovery response time for discovery propounded by Petitioners to Respondent Shay McConnell will not begin to run until and unless Petitioners amend their contract claims.

The grandparents filed their second amended petition on April 14, as directed by the trial court.

issue and does not present an argument that would allow the court to decide the issue." *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 646 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also* TEX. R. APP. P. 38.1. We hold that the father has inadequately briefed his eighth issue and that it is waived. *See Wheeler*, 95 S.W.3d at 646.

We overrule the father's eighth issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.