

**AFFIRMED; Opinion Filed November 3, 2016,**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-15-00516-CV**

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**ROBERT ELLIOTT AND ROBERT ELLIOTT CUSTOM HOMES, LLC, Appellants  
V.  
LYNN O'NEIL DAUTERMAN, Appellee**

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**On Appeal from the 192nd Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-14-10954**

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**MEMORANDUM OPINION**

Before Justices Bridges, Lang-Miers, and Stoddart  
Opinion by Justice Stoddart

Robert Elliott and Robert Elliott Custom Homes, LLC appeal the trial court's order denying their post-judgment motion for sanctions. In three issues, appellants assert the trial court erred by failing to provide sufficient findings of fact and conclusions of law and by denying their request for sanctions. We affirm the trial court's order denying the motion for sanctions.

**FACTUAL BACKGROUND**

Appellants and appellee own adjoining properties. A dispute arose between them when appellants began building a wall between the properties. Appellee sued appellants, asserting appellants failed to obtain the proper permits to build the wall and the wall created "a life safety condition on the [appellee's] property." Appellee sought a temporary restraining order and

alleged causes of action for nuisance, violation of the Texas Water Code, and trespass. Appellants filed special exceptions.

On September 30, 2014, the trial court entered a temporary injunction enjoining appellants from, among other things, continuing any construction, grading, or landscaping work on their property. On October 13, 2014, appellants filed an emergency motion to dissolve the temporary injunction. The motion stated that the parties' experts worked together to prepare an alternative plan for the wall, and the City of Dallas issued permits for implementation of the experts' plan. Therefore, appellants asserted, the change in circumstances necessitated a dissolution of the injunction. Three days later, appellee responded that she did not oppose the dissolution of the injunction and appellants' performance of repair work. The trial court lifted the injunction and work continued on the wall. On October 30, 2014, appellee's counsel received an email from one of the experts who stated that the wall was stabilized and structurally acceptable and there was no danger the wall would collapse.

On November 7, 2014, appellee filed a document titled "Plaintiff's First Amended Petition and Emergency Application for Temporary Restraining Order," which stated appellee sought a temporary restraining order precluding appellants from continuing construction on their property and asserted a cause of action for nuisance. Ten days later, appellee filed disclosures pursuant to Texas Rule of Civil Procedure 194.2. To explain the legal theories and general factual bases of her claims, appellee's disclosures state: "Plaintiff refers Defendants to the allegations in her live pleading. More specifically, Plaintiff responds that Defendants constructed an unsafe wall that constituted a nuisance without obtaining proper permits and other City approvals, and that the unsafe wall prevented her from using and enjoying her property." As to the amount and method of calculating damages, appellee stated she "is still in the process of calculating her economic damages" and reserved the right to supplement her response.

The parties appeared for a bench trial on December 10, 2014. When the court instructed appellee's counsel to call his first witness, counsel announced he would not call any witnesses or present other evidence. The parties each rested. The trial court's judgment recites that after the attorneys made opening statements, "Plaintiff presented no evidence, informed the Court that there were no triable issues, and rested." The trial court rendered judgment in favor of appellants and other defendants who are not parties to the appeal, and ordered appellee to reimburse all costs incurred by defendants.

On February 6, 2015, appellants filed a post-judgment motion for sanctions pursuant to Texas Civil Practice and Remedies Code Chapter 10 and Texas Rules of Civil Procedure 13. The motion asserts that when appellee filed her amended petition on November 7, 2014, she knew that the wall was structurally sound and no longer at the risk of collapse. However, the amended petition includes numerous allegations that the wall is cracking, creates a life safety condition on appellee's property, and is not structurally sound. The amended petition alleges that appellants' actions in "constructing an unnecessary and unstable retaining wall to support significant amount of fill constitutes a nuisance." It also states that the balance of equities favors entry of a temporary restraining order against appellants because "they are unlawfully manipulating the grade of real property in a manner that creates a substantial risk of harm." Appellants' motion for sanctions alleges these factual allegations were untrue when they were made, and those false allegations were reiterated in appellee's Rule 194.2 disclosures.

The trial court conducted a hearing on the sanctions motion. Counsel for appellants began the hearing by informing the trial court that their "basic complaint is a series of false statements in pleadings and violation of a Court order." Counsel for appellee responded that the amended petition was the same as the original petition, minus claims for violation of the water code and trespass because appellee decided not to pursue those claims. However, he stated, at

the time he filed the amended petition, appellee had a viable nuisance claim that she later opted not to pursue at trial.

Victor Lissiak, an expert hired by appellee, testified at the sanctions hearing about the wall built between the parties' properties. He explained that he reviewed proposed plans for building the wall created by another expert and determined the plans were sound. Lissiak testified he sent an email to appellee's counsel on October 30, 2014, stating the wall, as built, was structurally sound and acceptable from an engineering standpoint.

Counsel for appellee, Mark Josephs, testified about the allegations in the amended petition. He told the trial court that he filed the amended petition to avoid a hearing on appellants' special exceptions. He stated a hearing on special exceptions was to occur the week after he filed the amended petition and "rather than waste the Court's time on a special exception hearing on a claim that we had chosen not to pursue at that point, we amended to delete the subjects of the special exceptions." Josephs explained that the amended petition was exactly the same as the original petition, minus claims for trespass and violations of the Texas Water Code. Even though the amended petition was filed after Lissiak concluded the wall was structurally sound and acceptable from an engineering standpoint, Josephs conceded the amended petition did not allege appellants' bad acts in the past tense. Josephs was cross-examined about numerous allegations in the amended petition, which he admitted were carried over from the original petition and no longer accurate when the amended petition was filed. He also conceded that although the amended petition included a request for a temporary restraining order and a temporary injunction, appellee no longer sought that relief on November 7, 2014. Rather, the requests were a "repeat of the request that was originally made when the case was filed."

However, Josephs maintained that appellee had a viable nuisance claim at the time he filed the amended petition and she could have gone to trial on that claim. He stated that on the date it was filed “various” factual allegations in the amended petition were true.

Following the hearing, the trial court denied the motion for sanctions and this appeal followed. After the appeal was filed, this Court ordered the trial court to make findings of fact and conclusions of law with respect to its order denying sanctions. The trial court complied.

#### LAW & ANALYSIS

Appellants’ first issue argues that we should disregard the trial court’s findings of fact and conclusions of law because they are conclusory, unclear, and not supported by the record. When “reviewing sanctions orders, appellate courts are not bound by the trial court’s findings of fact and conclusions of law; rather, appellate courts must independently review the entire record to determine whether the trial court abused its discretion.” *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006). We will examine the entire record, not merely the trial court’s findings of fact and conclusions of law, to determine whether the denial of appellants’ motion for sanctions was an abuse of discretion. *See id.*

We may reverse the trial court’s ruling on a motion for sanctions only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *See id.* The trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). The party moving for sanctions bears the burden of overcoming a presumption that pleadings and other papers are filed in good faith. *See id.*

In their second and third issues, appellants assert the trial court erred by denying their post-judgment motion for sanctions pursuant to Rule 13 and Chapter 10. Appellants primarily argue that appellee and Josephs knew that the factual allegations in the amended petition were

not true at the time that the amended petition was signed and filed, they repeated those false allegations via their Rule 194.2 disclosures and, therefore, sanctions are appropriate.

Rule 13 provides that a person who signs a pleading certifies that (1) he has read the pleading, and (2) to the best of his knowledge, information, and belief formed after reasonable inquiry, the pleading is not (i) groundless and brought in bad faith or (ii) groundless and brought for the purpose of harassment. TEX. R. CIV. P. 13. It is not enough, however, to support Rule 13 sanctions that the pleading was groundless; the movant must also prove that the signor acted in bad faith or for the purpose of harassment. TEX. R. CIV. P. 13; *O'Donnell v. Vargo*, No. 05-14-00404-CV, 2015 WL 4722459, at \*3 (Tex. App.—Dallas Aug. 10, 2015, no pet.) (citing *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 191 (Tex. App.—Texarkana 2011, no pet.)). “Bad faith [under Rule 13] is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose[s].” *O'Donnell*, 2015 WL 4722459, at \*3 (citing *Keith v. Solls*, 256 S.W.3d 921, 916 (Tex. App.—Dallas 2008, no pet.)). The non-movant’s intent is an element of bad faith and may be shown by direct or circumstantial evidence. *See id.* (citing *Keith*, 256 S.W.3d at 919).

Chapter 10 of the civil practice and remedies code provides, in part, that the signing of a pleading required by the rules of civil procedure constitutes a certificate by the signatory that to the signatory’s best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

...

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

...

TEX. CIV. PRAC. & REM. CODE ANN. § 10.001.<sup>1</sup> If a court determines a person has signed a pleading that violates Chapter 10, it may impose a sanction on the person, a party represented by the person, or both. *Id.* § 10.004(a). Chapter 10 allows, but does not require, trial court to impose sanctions. *Malouf v. Elana Spitzberg Trust*, No. 05-15-00824-CV, 2016 WL 4158890, at \*3 (Tex. App.—Dallas Aug. 5, 2016, no. pet.) (citing *Rogers v. Walker*, No. 13-12-00048-CV, 2013 WL 2298449, at \*10 (Tex. App.—Corpus Christi May 23, 2013, pet. denied)).

As stated above, Josephs testified he filed the amended petition to avoid “wast[ing] the Court’s time” on an unnecessary hearing. He explained that the amended petition recited the same allegations, minus a trespass claim and allegation of violation of the Texas Water Code, as were presented in the original petition and he failed to change relevant language to the past tense to reflect that the wall was structurally sound when the amended petition was filed. Josephs also maintained that appellee had a viable nuisance claim at the time he filed the amended petition and she could have gone to trial on that claim as pleaded.

While Josephs may have been remiss in his failure to change the factual allegations in the amended petition to reflect that the wall was made structurally sound and acceptable from an engineering standpoint, the trial court could have concluded that the evidence would not support a finding of bad faith or an improper purpose such as harassment. *See* TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. § 10.001; *O’Donnell*, 2015 WL 4722459, at \*3. As the trial court noted, appellee had a cause of action for nuisance, but opted not to go to trial on the claim. The trial court stated he did not “think it’s a sham trial.”

Based on the evidence in the record, we conclude the trial court did not abuse its discretion by concluding appellants did not meet their burden to overcome the presumption that

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<sup>1</sup> Because appellee was a represented party, the trial court could not award monetary sanctions against her for violating section 10.001(2). TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(d). Therefore, only sections 10.001(1) and 10.001(3), as well as Rule 13, were potential bases for any sanction.

the amended pleading and rule 194.2 disclosures were filed in good faith and did not abuse its discretion by denying their motion for sanctions. We overrule appellants' second and third issues.

CONCLUSION

We affirm the trial court's order denying appellants' motion for sanctions.

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/Craig Stoddart/  
CRAIG STODDART  
JUSTICE





**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

ROBERT ELLIOTT AND ROBERT  
ELLIOTT CUSTOM HOMES, LLC,  
Appellants

No. 05-15-00516-CV      V.

LYNN O'NEIL DAUTERMAN, Appellee

On Appeal from the 192nd Judicial District  
Court, Dallas County, Texas  
Trial Court Cause No. DC-14-10954.  
Opinion delivered by Justice Stoddart.  
Justices Bridges and Lang-Miers  
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is  
**AFFIRMED.**

It is **ORDERED** that appellee Lynn O'Neil Dauterman recover her costs of this appeal  
from appellants Robert Elliott and Robert Elliott Custom Homes, LLC.

Judgment entered this 3rd day of November, 2016.