Affirmed and Memorandum Opinion filed November 24, 2009.

In The

Fourteenth Court of Appeals

———————

NO. 14-08-00129-CV

———————

SUSAN MCGEE MULLINS, Appellant

V.

BRIARWICK CONDOMINIUM OWNERS ASSOCIATION, INC. AND KRJ MANAGEMENT, INC., Appellees

---

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2006-28722

M E M O R A N D U M O P I N I O N

In this personal-injury case, appellant Susan McGee Mullins appeals from an order by which the trial court struck her pleadings and dismissed her case with prejudice as a discovery sanction. Concluding the trial court did not abuse its discretion by imposing a case-determinative ("death-penalty") sanction, we affirm.

I

On May 8, 2006, Mullins sued appellees Briarwick Condominium Owners Association, Inc., and KRJ Management, Inc. (collectively, "Briarwick"). She alleged she was injured when a piece of siding from a Briarwick condominium building blew off the building, striking her head and face. She claimed damages for past and future medical-care expenses, past and future pain and suffering, past and future physical impairment, past and future loss of earnings, past and future disfigurement, and past and future mental anguish.

On June 20, 2006, Briarwick sent Mullins requests for disclosure, interrogatories, and requests for production. On August 11, 2006, Briarwick filed a motion to compel and a motion for sanctions. Briarwick alleged (1) Mullins's responses to its June 20 request were due on or before July 24, 2006;[1] (2) on August 1, 2006, Briarwick's counsel sent a letter to Mullins's counsel requesting responses be provided by August 4, 2006, or that Mullins's counsel contact him to discuss reasons for the delay; and (3) Mullins's counsel had not contacted him. On September 5, 2006, the trial court granted Briarwick's motion, ordered Mullins to "furnish full and complete responses" within seven days of the order, and imposed sanctions of $500 for Briarwick's expenses incurred in obtaining the order. Briarwick subsequently sent Mullins additional discovery requests.

On January 26, 2007, the court again entered an order granting Briarwick's motion to compel.[2] The court ordered Mullins "to provide full and complete responses to [Briarwick's] Request for Disclosure part (d) (j) and (k), Interrogatory numbers 7, 9, 10, and 18, [and] First Set of Request [sic] for Production numbers 1–3, 12–16, 18–20, 29–31, and

[1] *See* Tex. R. Civ. P. 194.1, 196.2, 197.1.

[2] The appellate record does not contain a separate motion that would have prompted this order. In its brief to this court, Briarwick describes the order as resulting from a second hearing on its August 11, 2006 motion.

41" within seven days of the order. The court denied Briarwick's request for monetary sanctions.

Between January 31 and February 22, 2007, Briarwick's counsel sent Mullins's counsel three letters. In the first, he included the January 26 order and the new docket-control order. In the second, he referred to the then-overdue responses. In the third, he wrote, "I appreciate that you have been working diligently with your client to obtain responses, and I fear that perhaps your client has not been as cooperative as you had hoped." He advised opposing counsel that, if he did not hear from him by the following day, he would again seek sanctions.

On March 1, 2007, Briarwick filed a Second Motion to Compel and Motion for Sanctions. Although the motion was set for submission on March 12, 2007, the record does not contain an order ruling on the motion.[3] Briarwick subsequently sent Mullins at least two additional discovery requests.

On October 16, 2007, Briarwick filed a motion for summary judgment and a Third Motion to Compel Discovery Responses and Motion for Sanctions. In the latter, Briarwick alleged, in part,

> Plaintiff provided Supplemental Answers to Interrogatories and Requests for Production on March 8, 2007. Unfortunately, however, even in those responses, [Mullins] did not fully respond, but instead stated that she would supplement with some additional important information . . . . In response to requests 12, 16, and 27, [Mullins] stated that she would supplement. The responses to 12 and 16 are particularly important to [Briarwick's] evaluation, because they seek documents or other tangible things reflecting lost wages or loss of earning capacity information. [Briarwick has] been hampered

[3] In its Third Motion to Compel Discovery Responses and Motion for Sanctions, Briarwick alleged it withdrew submission of the second motion after Mullins's counsel agreed to provide full and complete responses. The court did grant Briarwick's motion to compel Mullins to submit to a medical examination, and Mullins apparently complied.

> throughout this case by the inability to evaluate those elements of damages because [Mullins] has refused to produce supporting documents.

Briarwick then requested the court alternatively (1) to strike Mullins's pleadings and to dismiss the case with or without prejudice; (2) to strike Mullins's pleadings for lost wages, loss of earning capacity, and past and future medical expenses; or (3) award Briarwick monetary sanctions of not less than $3,000.

On November 15, 2007, the trial court signed an order striking Mullins's petition in its entirety and dismissing the case with prejudice. Mullins filed a motion for reconsideration and for reinstatement or, alternatively, for new trial. Briarwick responded, listing five discovery requests (including interrogatories, requests for admission, and requests for production) to which Mullins had never replied. Briarwick further listed eighteen specific categories of requests to which Mullins had not fully responded. Briarwick also cited medical records and documents that contradicted statements in Mullins's deposition about whether she had seizures or other injuries of the type involved in the incident alleged in this case.

On January 15, 2008, the trial court signed an order "imposing death penalty sanctions" and denying Mullins's motion for reconsideration and for reinstatement or, alternatively, for new trial.[4] The court stated it based its order on the following factual findings:

> 1. Plaintiff Susan Mullins is responsible for egregious discovery abuse, requiring Defendants [Briarwick] to file multiple motions to compel. Indeed, this Court entered prior Orders compelling Plaintiff to respond to various discovery requests. Plaintiff also has failed to provide complete responses to many of the requests either in written discovery

[4] Briarwick submitted the order with its response to Mullins's motion for reconsideration and for reinstatement or, alternatively, for new trial. The trial court modified the proposed order by handwritten notation.

or in deposition, based upon evidence set forth by the materials that are part of this Court's record.

2. There is a direct relationship between the sanction imposed by this Order and the offensive conduct of Plaintiff. Plaintiff has failed to provide information necessary for Defendants to evaluate Plaintiff's alleged damages. Accordingly, Plaintiff should not be allowed to seek or recover any damages.

3. The Court considered the availability of less stringent sanctions, but finds that such lesser sanctions would not promote full compliance with the discovery rules. Indeed, the Court's prior Orders compelling complete discovery responses and issuing monetary sanctions has [sic] not deterred the discovery abuse.

4. Plaintiff's hindrance of the discovery process justified a presumption that her claims lack merit.

5. This sanction is imposed upon Plaintiff Susan Mullins, because the Court finds that Plaintiff actively participated in the discovery abuse, as she verified Interrogatories and failed to furnish requested information.

II

Mullins raises two issues on appeal. She argues the trial court abused its discretion and violated her due-process rights by determining (1) Mullins was responsible for the alleged discovery violations, and (2) Mullins's alleged hindrance in the discovery process justified a presumption that her claims lacked merit.

We review a trial court's imposition of sanctions for an abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)). We will reverse the ruling only if the trial court acted "'without reference to any guiding rules and principles,'" so that its ruling was arbitrary or unreasonable. *Id.* (quoting *Cire*, 134 S.W.3d at 839).

In determining whether the trial court abused its discretion, we must ensure that the sanctions were appropriate or just. *Id.* (citing *TransAmerican Nat. Gas Corp. v. Powell*, 811

S.W.2d 913, 916 (Tex. 1991)). To make this determination, we conduct a two-part inquiry. *See id.* (citing *TransAmerican*, 811 S.W.2d at 917). First, we must ensure there is a direct relationship between the improper conduct and the sanction imposed; that is, we should examine whether punishment was imposed on the true offender and tailored to remedy any prejudice the discovery abuse caused. *Id.* Second, we must make certain less severe sanctions would not have sufficed to promote compliance. *Id.*

In reviewing sanctions orders, we are not bound by a trial court's findings of fact and conclusions of law. *Id.* Instead, we independently review the entire record to determine whether the trial court abused its discretion. *Id.*

Striking a party's pleadings for discovery abuse is "the most devastating" sanction a trial court may impose. *TransAmerican*, 811 S.W.2d at 917–18. Such action implicates due-process concerns. *See id.* at 918. Absent a party's flagrant bad faith or counsel's callous disregard for the rules, due process bars merits-preclusive sanctions. *See Wheeler v. Green*, 157 S.W.3d 439, 443–44 (Tex. 2005) (per curiam); *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883 (Tex. 2003) (per curiam); *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729–30 (Tex. 1993); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 846, 850 (Tex. 1992); *TransAmerican*, 811 S.W.2d at 918–19.

Thus, striking a party's pleadings is not justified unless a party's hindrance of the discovery process justifies a presumption its claims or defenses lack merit. *See TransAmerican*, 811 S.W.2d at 918. Nevertheless, "if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it." *Cire*, 134 S.W.3d at 839 (quoting *TransAmerican*, 811 S.W.2d at 918).

A

In her first issue, Mullins challenges the trial court's determination she was responsible for the alleged discovery violations. Therefore in this issue, she is challenging a component of the first prong of the *TransAmerican* test. *See Am. Flood Research*, 192 S.W.3d at 583 (citing *TransAmerican*, 811 S.W.2d at 917); *Butan Valley, N.V. v. Smith*, 921 S.W.2d 822, 827 (Tex. App.—Houston [14th Dist.] 1996, no writ).[5]

The supreme court has directed the trial court to "determine whether sanctions should be imposed on the party, its counsel, or both." *Am. Flood Research*, 192 S.W.3d at 583 (citing *TransAmerican*, 811 S.W.2d at 917). A trial court may abuse its discretion when the record contains no evidence the sanctions were visited against the offender and the trial court does not discuss whether counsel or his client was responsible for the discovery abuse. *See Spohn Hosp.*, 104 S.W.3d at 883. A party, however, must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the violation of discovery rules. *TransAmerican*, 811 S.W.2d at 917.

The trial court in the present case found Mullins was "responsible for egregious discovery abuse." Based on our independent review of the entire record, discussed below, we cannot conclude the trial court abused its discretion in imposing a death-penalty sanction on Mullins. *See Am. Flood Research*, 192 S.W.3d at 583.

The accident occurred in July 2004 and allegedly caused Mullins to experience memory loss. During her April 2007 deposition,[6] Mullins testified she did not remember her

---

[5] She is not challenging whether the punishment was tailored to remedy any prejudice the discovery abuse caused. *See Am. Flood Research, Inc.*, 192 S.W.3d at 583 (stating under the first *TransAmerican* prong, "the court should examine whether punishment was imposed upon the true offender and tailored to remedy any prejudice discovery abuse caused").

[6] The parties refer to an April 14, 2007 deposition, but the only deposition excerpts in the appellate record indicate the deposition was taken April 12, 2007.

childhood, her twenties, or her wedding in the 1990s. Her only memories of those times were through pictures. Nevertheless, she did remember she and her husband had a successful business in 2003 and 2004 in Houston.

Additionally, Briarwick represents that, when deposed in April 2007, Mullins testified she could not remember the name of her employer at the time of the incident.[7] In Mullins's March 8, 2007 response to Briarwick's request for disclosure, however, Mullins had listed Dr. Leon Belcher as her employer at the time of her injury.

In her deposition, Mullins also testified she never had a seizure before the incident and repeatedly testified she had never been in a "car accident." She testified the only time she remembered going to a doctor was when she was pregnant, and the following interchange then occurred:

> Q. Are you – but you are pretty sure that –
> A. I have never been in a car accident or anything, no.
> Q. Or any other injuries of that type?
> A. No.

Mullins subsequently testified, "I have never been in an accident and I never had a seizure." Mullins's medical records , however, indicated she had experienced a seizure in 1995, and a 2006 social summary indicated she had been in a motorcycle accident.

On March 8, 2007, after at least two motions to compel and two orders granting such motions and with little more than one month for Briarwick to join additional parties, Mullins filed a first supplemental response to Briarwick's request for production and a response to Briarwick's request for disclosure. In the former, Mullins provided no response other than "[w]ill supplement," to requests for (1) documents and tangible items supporting her claims

---

[7] In support, Briarwick does not cite Mullins's deposition, but cites only Briarwick's allegation to that effect in its third motion to compel. Mullins, however, did not dispute this contention.

for past and future loss of earnings; (2) copies of payroll, personnel, or union records from ten years before the incident through the present; and (3) authorizations to release medical, personnel, income tax, and social security records. She further indicated that, at that time, she had no documents or tangible items supporting her contentions (1) Briarwood was negligent, (2) there was a defective or dangerous condition, (3) there was an unreasonable risk of harm, (4) Briarwood failed to inspect, (5) Briarwood failed to warn or make safe, and (6) Briarwood's lack of care probably caused her injuries. In response to the latter, she provided no response other than "[w]ill supplement" to Briarwood's requests she disclose (1) the amount and method of calculating economic damages and (2) medical records and bills. She indicated she was in the process of collecting medical records and bills from thirty "listed medical experts."

On October 16, 2007, in its third motion to compel discovery, Briarwick alleged Mullins had failed to respond to a second set of requests for production, served November 17, 2006; a second set of interrogatories and a request for admissions, served January 19, 2007; a third set of requests for production, served March 12, 2007; and a fourth set of requests for production, served May 8, 2007. Mullins did not deny this allegation.

Given the preceding facts, especially Mullins's evasive and arguably false testimony during deposition,[8] the trial court did not abuse it discretion in concluding Mullins was responsible for "egregious discovery abuse." Accordingly, we overrule her first issue.

[8] Briarwick also points to Mullins's verification of "grossly inadequate" interrogatory answers. In support, it cites a verification page to Mullins's March 8, 2006 answers and objections to interrogatories. The page is part of the appendix to Briarwick's brief, but is not part of the appellate record. *See Cherqui v. Westheimer St. Festival Corp.*, 116 S.W.3d 337, 342 n.2 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[W]e cannot consider documents attached as appendices to briefs and must consider a case based upon the record filed."). The trial court, however, found "Mullins actively participated in the discovery abuse, as she verified [i]nterrogatories," and Mullins does not dispute this finding.

B

In her second issue, Mullins primarily challenges the trial court's determination that Mullins's hindrance of the discovery process justified a presumption her claims lacked merit. Within this issue, Mullins also contends the trial court failed to consider lesser sanctions, the death-penalty sanction was too severe, and Briarwick did not establish the evidence it sought existed. In this issue, she is therefore challenging components of the second prong of the TransAmerican test. *See Butan Valley*, 921 S.W.2d at 827, 831.

A sanction should not be used to adjudicate the merits of the case unless the party's actions justify a presumption that the case lacks merit. *TransAmerican*, 811 S.W.2d at 917. A party's refusal to produce material evidence, despite imposition of lesser sanctions, may, however, warrant the presumption an asserted claim or defense lacks merit and permit the trial court to dispose of it. *See Cire*, 134 S.W.3d at 839 (quoting *TransAmerican*, 811 S.W.2d at 918).

In its September 5, 2006 order, the trial court imposed a $500 sanction.[9] Nine months later and after the trial court had granted an additional motion to compel, Mullins still had not provided substantive answers to disclosure and production requests material to calculating damages. As set forth in more detail above, she also indicated she had no documents or tangible items supporting elements of liability. The trial court was warranted in presuming Mullins's claim lacked merit.

In addition to imposing a lesser sanction at one point in the proceedings, the trial court considered lesser sanctions before finally imposing the death-penalty sanction. In its motion, Briarwick alternatively requested lesser sanctions of dismissal without prejudice, striking only Mullins's pleadings for lost wages, loss of earning capacity, and past and future medical expenses, or awarding Briarwick monetary sanctions of not less than $3,000. In its January

[9] As of October 16, 2007, Briarwick had not sought enforcement of this sanction.

15, 2008 order imposing the death- penalty sanction, the court stated, "The Court considered the availability of less stringent sanctions, but finds that such lesser sanctions would not promote full compliance with the discovery rules. Indeed, the Court's prior Orders compelling complete discovery responses and issuing monetary sanctions has [sic] not deterred the discovery abuse."

Although citing other cases, Mullins relies mainly on the following three to argue the death-penalty sanction was too severe: *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844; *Butan Valley, N.V. v. Smith*, 921 S.W.2d 822; and *Zappe v. Zappe*, 871 S.W.2d 910 (Tex. App.—Corpus Christi 1994, no writ). In each of these cases, the death-penalty sanction was the initial sanction the court imposed. *See Chrysler Corp.*, 841 S.W.2d at 850; *Butan Valley*, 921 S.W.2d at 826–27; *Zappe*, 871 S.W.2d at 912, 913. In other words, unlike the trial court in the present case, the trial court in these had not tested other sanctions before imposing a case-determinative sanction. The cases are therefore distinguishable.

Mullins also quotes *Butan Valley* for the proposition that "a party cannot be sanctioned for failing to produce documents when there is no evidence that they exist." 921 S.W.2d at 830. She contends "Briarwick has failed to sufficiently establish that much of the discovery complained of actually exists and is Mullins's possession, custody or control, requiring her to disclose it to Briarwick." The sanctioned party in *Butan Valley* responded to a discovery request by stating it had produced all documents responsive to the request and responded to a subsequent discovery order by arguing it could not be required to produce documents it did not have. *See id.* at 826. On appeal, it identified the requested documents that it contended it did not have or that did not exist. *See id.* at 829–30. In contrast, Mullins points to no place in the record where she advised Briarwick or the trial court she was resisting discovery because she did not have the requested documents. She does not tell this court what requested documents were non-existent or not in her possession, custody, or control. In addition, Briarwick sought death-penalty sanctions, not solely because of

Mullins's failure to produce documents, but because of a pattern of discovery abuse. Again, *Butan Valley* is distinguishable.

In sum, we conclude Mullins's hindrance of the discovery process justified a presumption her claims lacked merit, the trial court did test and consider lesser sanctions, the sanction was not too severe given the circumstances of the case, and the sanction was not based solely on Mullins's failure to produce documents. Accordingly, we overrule Mullins's second issue.

* * *

Having overruled Mullins's two issues, we affirm the judgment of the trial court.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Seymore, Brown and Sullivan.