Affirmed and Memorandum Opinion filed February 11, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00334-CV

THE ESTATE OF MICHAEL G. PURGASON, MICHELE PURGASON AND THOMAS PURGASON, M.D., INDIVIDUALLY Appellants

V.

JACK HOBERT GOOD, JAMES GASWINT, DEBRA GASWINT AND GASWINT TRUCKING, LLC, Appellees

---

On Appeal from the 335th District Court
Washington County, Texas
Trial Court Cause No. 35179

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

Appellants, The Estate of Michael G. Purgason, Michele Purgason and Thomas Purgason, M.D., Individually, and their counsel, Robert R. Cole, Jr. a/k/a Bob Cole and Roger Hurlbut ("the Purgasons"), challenge two trial court orders following their voluntary nonsuit of claims: (1) granting a motion for sanctions;

and (2) taxing costs pursuant to Texas Rule of Civil Procedure 162. *See* Tex. R. Civ. P. 162. We affirm.[1]

I. Background

The Purgasons brought this lawsuit in 2013 against appellees, Jack Hobert Good, James Gaswint, Debra Gaswint and Gaswint Trucking, LLC ("the Gaswint defendants"). Prior to trial, the Gaswint defendants filed a motion for sanctions arising from pretrial misconduct alleged against the Purgasons' counsel. The trial court held a hearing on the motion for sanctions on April 1, 2014. During the hearing, the Purgason' counsel requested time to mark exhibits. The trial court recessed to allow them that opportunity. Apparently, the recess ended when the trial court came to order stating, "The [Purgasons'] counsel has come before the Court and you may proceed with what you have, sir." The Purgasons' counsel advised "Judge, we filed a notice of nonsuit" and then asked "are we released?" The trial court responded, "Yes, sir." On April 21, 2014, the trial court convened a hearing on entry of orders on the Gaswint defendants' motion for sanctions and costs, and the Purgasons' nonsuit. At the conclusion of the hearing, the trial court signed an order (the "April 21 order") awarding sanctions and an order of nonsuit taxing costs against the Purgasons. This appeal timely followed.

II. Analysis

The Purgasons urge multiple errors in the order granting sanctions:

(1) The trial court refused to permit the Purgasons to offer evidence on April 21 before assessing sanctions;

[1] We have carried with the case the Purgasons' motion to direct the trial court clerk to file exhibit and allow filing of supplemental appendix of transcript and brief, which requests we allow supplementation of the record. We overrule the motion.

(2) The trial court failed to provide a complete record of the sanctions hearing;

(3) The trial court made the award without sufficient evidence to support sanctions and failed to make the requisite finding of groundlessness; and,

(4) The trial court failed to consider lesser sanctions.

Because we determine that the Purgasons failed to challenge the sanctions order on the basis of Texas Rule of Civil Procedure 215.2, an independent ground upon which the sanctions were based, we affirm the sanctions order. *See* Tex. R. Civ. P. 215.2.

The Purgasons also urge the trial court erred by granting costs under Texas Rule of Civil Procedure 162, alleging the costs are not recoverable and the trial court erred by assessing taxable court costs after a nonsuit "because the cause has been refiled and pursued." *See* Tex. R. Civ. P. 162. First, we determine that the Purgasons waived their complaint about the specific costs for failure to adequately brief the issue. However, because we determine that Rule 162 authorizes the award of all of the specific costs sought and authorizes such award without regard to whether the same claims are refiled, we overrule the Purgasons' challenge to the order taxing costs.

A. Appellants failed to challenge an independent basis for the sanctions order

In their first through fourth and sixth issues, the Purgasons urge that the trial court erred by assessing sanctions. The Purgasons state that "[i]t is clear from the language of the April 21, 2014 order that the trial court relied solely upon Rule 13 and Chapter 10 in making its ruling." *See* Tex. R. Civ. P. 13; Tex. Civ. Prac. & Rem. Code Ann. § 10.001–.006 (West 2002). They do not challenge the sanctions order on any other basis. The Gaswint defendants point to Texas Rule of Civil

Procedure 215 as an additional basis for the trial court's award of sanctions. *See* Tex. R. Civ. P. 215.2(b).[2] We agree with the Gaswint defendants.

In its sanctions order, the trial court explicitly stated that "[g]ood cause does exist for the award of sanctions in this matter against Plaintiffs' attorneys under TRCP 215.2(b)." *See* Tex. R. Civ. P. 215.2(b). In their motion for sanctions, the Gaswint defendants explicitly urged a pattern of discovery abuse and violation of discovery duties under Texas Rule of Civil Procedure 193.1 (duty to fully respond), Texas Rule of Civil Procedure 193.5 (duty to amend and supplement), and Texas Rule of Civil Procedure 193.6 (responding to a motion to strike with a false statement). *See* Tex. R. Civ. P. 193.1, .5, .6. The Gaswint defendants explicitly sought sanctions under Texas Rule of Civil Procedure 215 for the Purgasons' counsel's (a) late designation of witness Macias and the false statement about when counsel learned of his identity, (b) obstructive discovery responses, and (c) failure to cooperate in scheduling depositions. The trial court determined the Gaswint defendants' motion was "well-founded" and thus held it to be "in all things [ ] GRANTED."

An appellant must challenge all independent grounds supporting the judgment or legal conclusion under attack. *Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Where there is an unchallenged, alternate basis for the appealed order, any error in the challenged basis for the order is rendered harmless. *See Riley v. Cohen*, No. 03-08-00285-CV, 2009 WL 416637, at *1 (Tex. App.—Austin Feb. 19, 2009, pet. denied) (mem. op.); *see also In re Hansen*, No. 05-06-00585-CV, 2007 WL 824587, at *1 (Tex. App.—Dallas Mar. 20, 2007, no pet.) (mem. op.).

---

[2] Texas Rule of Civil Procedure 215.2(b) provides, *inter alia*, that a court may make an "order charging all or any portion of the expenses of discovery of taxable court costs or both against the disobedient party or the attorney advising him." Tex. R. Civ. P. 215.2(b).

On strikingly similar facts, in *In re Hansen*, the Dallas Court of Appeals determined the trial court's alleged error awarding sanctions under Texas Rules of Civil Procedure 13 and 215.2 was rendered harmless by Appellants' failure to challenge the independent basis for the award stated in the order, Chapter 10 of the Texas Civil Practices and Remedies Code. *See In re Hansen*, 2007 WL 824587, at *1. Similarly, in *Riley*, our sister court in Austin determined that the trial court's alleged error awarding sanctions under the Texas Rules of Civil Procedure was rendered harmless by appellants' failure to challenge the independent basis for the award stated in the order, Chapter 9 of the Texas Civil Practices and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 9.001–.014 (West 2002); *Riley v. Cohen*, 2009 WL 416637, at *1.

We agree with these courts' application of the general principle that an appellant must challenge all independent grounds supporting the order or judgment at issue. We conclude, therefore, that the Purgasons' failure to challenge the trial court's sanctions order on the independent basis of Texas Rule of Civil Procedure 215 renders harmless the errors alleged in their challenge of the order. *See* Tex. R. Civ. P. 215. Thus, we overrule the Purgasons' first through fourth and sixth issues challenging the April 21 sanctions order.

B. The trial court properly assessed costs under Texas Rule of Civil Procedure 162

In their fifth issue, the Purgasons assert that the trial court erred in assessing costs after they filed a nonsuit because (1) the costs are not recoverable and (2) costs could not and should not be taxed where, following a nonsuit, the claims are refiled.

"Costs" generally include fees and other charges required by law to be paid to the court, including filing and service fees. *See Hatfield v. Solomon*, 316

S.W.3d 50, 66 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Whether a particular expense is recoverable under statute or rule as court costs is a question of law and reviewed *de novo*. *See City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 748 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). But, the allocation of costs is reviewed for abuse of discretion. *Id.*

Texas Rule of Civil Procedure 162 provides:

> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. . . .
>
> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

Tex. R. Civ. P. 162.

The Gaswint defendants filed a request for award of costs and a notice of taxable court costs prior to the April 21 hearing to enter orders. The Gaswint defendants requested the following costs: the jury fee; the fee for a hearing transcript; the mediation fees; the fees for deposition on written questions for medical, hospital, investigation and educational records, fees for original deposition transcripts, and subpoenas fees.

1. The Gaswint defendants' costs are recoverable

During the hearing on costs, the Purgasons simply urged, without further argument or specificity, that "[t]he costs are not well founded." In their opening brief, the Purgasons urge that "many of the costs recited" are not recoverable; but, they do not identify any. Again in their reply brief, the Purgasons suggest, without

further elaboration, that the "vast majority of the costs in the Shiver affidavit are not assessable costs." We agree with the Gaswint defendants that the Purgasons have waived the challenge for failure to adequately brief it. *See* Tex. R. App. P. 38.1(i).

Even if the Purgasons had not waived their challenge to the costs specifically awarded, we would conclude that the trial court properly awarded such costs. Texas Civil Practice & Remedies Code section 31.007(b) permits a court to include the following in an award of costs:

> (1) fees of the clerk and service fees due the county;
>
> (2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
>
> (3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
>
> (4) such other costs and fees as may be permitted by these rules and state statutes.

Tex. Civ. Prac. & Rem. Code Ann. § 31.007(b) (West 2015). Fees for court-ordered mediation are recoverable. *See id.* § 154.054 (West 2011); *see also Spears v. Huber*, No. 07-11-0193-CV, 2012 WL 933780, at *4 (Tex. App.—Amarillo Mar. 12, 2012, no pet.) (mem. op.). Costs for fees associated with records obtained by depositions on written questions are also recoverable. *See* Tex. R. Civ. P. 203.4; *see also Ferry v. Sackett*, 204 S.W.3d 911, 913 (Tex. App.—Dallas 2006, no pet.). Original deposition transcripts and subpoena fees are also taxable court costs. *See Schreiber v. State Farm Lloyds*, 474 S.W.3d 308, 320 (Tex. App.—Houston [14th Dist.] 2015, pet. filed); *see also Maguire Oil Co.*, 342 S.W.3d at 749; *Operation Rescue-Nat'l v. Planned Parenthood of Houston and Se. Tex., Inc.*, 937 S.W.2d 60, 87–88 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified on other grounds*, 975 S.W.2d 546 (Tex. 1998). We conclude that the trial court properly awarded the costs listed.

2. The Purgasons' nonsuit and refiling does not affect the taxing of costs

The Purgasons filed a notice of nonsuit pursuant to Texas Rule of Civil Procedure 162 during the hearing on the Gaswint defendants' motion for sanctions. *See* Tex. R. Civ. P. 162. The Purgasons subsequently refiled the suit. Here, they first contend that Rule 162 authorizes the clerk to tax costs only if the dismissal "terminates" the case, and by refiling the claim, they deprived the trial court of the ability to award the costs. In other words, the Purgasons argue that the trial court *could not* award the costs as the nonsuit in this case did not "terminate" the case because it was refiled. We disagree.

A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' . . . ; the only requirement is 'the mere filing of the motion with the clerk of the court.'" *Univ. of Tex. Med. Branch at Galveston v. Estate of Darla Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006). Nothing in the language of Rule 162 supports the Purgasons' contention. Rule 162 provides that a dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." Tex. R. Civ. P. 162; *see Blackmon*, 195 S.W.3d at 101. The nonsuit terminated the case upon its filing. *See Blackmon*, 195 S.W.3d at 100. Finally, from a policy standpoint, the construction of the rule proposed by the Purgasons would permit gamesmanship in the process for awarding costs by rendering an award of costs contingent upon subsequent actions of the nonsuiting parties. We reject the Purgasons' suggested limitation on the trial court's authority to tax costs.

The Purgasons also argue that the trial court *should not* have awarded these costs. Specifically, they state that "[w]hen part of all of a lawsuit is nonsuited by the Plaintiffs but refilled [sic] in the future, court costs should not be assessed against the Plaintiffs and in favor of the nonsuited defendants if those nonsuited

defendants are sued again."[3] For the proposition that the trial court *should not* tax these costs, the Purgasons cite a single case, *Scott & White Memorial Hospital v. Schexnider*, 940 S.W.2d 594 (Tex. 1996). In *Schexnider*, the Supreme Court of Texas held that a trial court retains plenary jurisdiction to grant a motion for sanctions, in the form of attorneys' fees or other costs, under Texas Rule of Civil Procedure 13, though the motion for sanctions was not pending when a nonsuit was filed. *Id*. at 595–596. *Schexnider* does not hold or suggest in any way that the trial court cannot or should not award costs following a nonsuit. *See id*. *Schexnider* did not implicate a refiling. *See id*. at 595. *Schexnider* does not support the Purgasons' argument. We conclude that the trial court did not abuse its discretion by taxing costs. We overrule the Purgasons' fifth issue.

We affirm both of the trial court's orders.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, McCally, and Donovan.

[3] The Purgasons suggest that to award costs following a nonsuit and refiling operates as a windfall to the party seeking costs. However, the Purgasons do not suggest that the Gaswint defendants have sought or been awarded the same costs in the subsequent suit. Further, to the extent that the Purgasons are implicitly suggesting that the trial court should have reduced the award of costs based upon the refiling, or that the trial court's calculation is incorrect, we conclude that they have waived such argument by their failure to file a motion to retax the costs or otherwise make this argument to the trial court. To complain of errors in a list of costs, a party should file a motion to retax costs. *See Jackson v. LongAgriBusiness, L.L.C.*, No. 14-11-01073-CV, 2013 WL 84921, at *6 (Tex. App.—Houston [14th Dist.] Jan. 8, 2013, no pet.) (mem. op.) (concluding that a party may only correct errors in specific items of costs with a motion to retax costs).