Petition for Writ of Mandamus Denied as Moot, Reversed in Part, Affirmed in Part, and Remanded, and Memorandum Opinion filed December 21, 2017.

In the

Fourteenth Court of Appeals

NO. 14-17-00391-CV

CENTENNIAL PSYCHIATRIC ASSOCIATES, LLC, MICHELLE DAHL, N.P., ROBERT JACK, M.D., AND MICHAEL MURPHY, M.D., Appellants

v.

RYAN CANTRELL, Appellee

On Appeal from the 164th District Court, Harris County, Texas
Trial Court Cause No. 2017-16896

NO. 14-17-00380-CV

IN RE CENTENNIAL PSYCHIATRIC ASSOCIATES, LLC, MICHELLE DAHL, N.P., ROBERT JACK, M.D., AND MICHAEL MURPHY, M.D.,

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ORIGINAL PROCEEDING
WRIT OF MANDAMUS
164th District Court, Harris County, Texas
Trial Court Cause No. 2017-16896

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

A Tennessee trial court issued a commission permitting Centennial Psychiatric Associates, LLC, Michelle Dahl, N.P., Robert Jack, M.D., and Michael Murphy, M.D. (collectively, "Centennial") to obtain discovery from Ryan Cantrell in Texas. After Centennial served a subpoena in Texas seeking documents from Ryan, Ryan filed an original petition with the Texas trial court. Ryan moved to quash the commission and the subpoena and to prohibit Centennial from seeking any discovery from himself or his wife. Ryan also requested sanctions for Centennial's alleged discovery abuse. The trial court quashed the commission and subpoena, sanctioned Centennial $10,000 for discovery abuse, and prohibited any discovery whatsoever from Ryan or his wife. Centennial filed this appeal and petition for writ of mandamus. On its own motion, this court consolidated Centennial's appeal and original proceeding.

We determine that the Texas trial court abused its discretion in quashing the commission and subpoena, sustaining objections to the fifth request attached to the subpoena, and issuing sanctions. Therefore, we reverse and vacate this portion of the trial court's order. We affirm the trial court's order sustaining Ryan's objections to the other requests attached to the subpoena. We deny Centennial's petition for writ of mandamus as moot.

I. BACKGROUND

Centennial provided healthcare to Ryan Cantrell's brother, Daniel Cantrell. In 2014, Daniel had a psychotic episode during which he stabbed his father to death. Daniel was criminally prosecuted for the murder of his father. Ryan assisted with Daniel's criminal defense. Daniel's criminal defense attorney, David Raybin, obtained a forensic image of Ryan's cellphone to assist in Daniel's defense.[1] Ryan

[1] According to Ryan, although Raybin sought permission from Ryan to preserve certain text messages, the vendor hired by Raybin made a complete forensic image of Ryan's cellphone

prepared a 20+ page narrative which included information concerning his communications with Daniel and others, Daniel's condition, and Daniel's past episodes going back to 2007. Daniel was acquitted.

After the acquittal, Daniel and his mother, Deborah O'Daniel Cantrell, filed suit against Centennial in Tennessee, alleging that the incident was caused by Centennial's medical negligence.[2] In December 2016, Centennial sought a commission from the Tennessee trial court to subpoena the deposition of and documents from Ryan Cantrell in Texas. The proposed commission did not attach a proposed subpoena.

On December 16, 2016, the Tennessee court held a two-hour hearing on a separate issue, Ryan's cellphone image. The Tennessee court had previously ordered Raybin to produce a copy of the image to Centennial, but Ryan sought a protective order to limit the production. Ultimately, the Tennessee court denied Ryan's request for a protective order, concluding that because Ryan was not a party, he did not have standing to ask for a protective order preventing production of the cellphone image.

Although the December 16, 2016 hearing was not intended to address Centennial's application for the commission, Ryan's counsel raised the issue in the midst of argument concerning Ryan's cellphone image. Ryan's counsel encouraged the Tennessee court to enter the commission in the following discussion:

> Mr. Grams [Ryan's counsel]: If [Centennial] believe[s] [the production] doesn't comply with the request, they've got other options to go through, with a motion to compel, or they can ask him in his deposition and follow up, you know, after the deposition with either a motion to compel

without Ryan's knowledge.

[2] Separate suits filed by Daniel and Deborah were consolidated in Tennessee.

or additional requests.

. . .

The Court: And no deposition has been taken yet?

Mr. Grams: No deposition has been taken.

And, in fact, Your Honor, there's—there's really an easy way to—to resolve this all too.

You know, defense counsel has applied for a commission—

The Court: I saw that.

Mr. Grams: —to Texas to subpoena Mr. Cantrell for a deposition. But they also intend to subpoena emails that he has that predate, you know, the image that's on the phone. So this [cellphone] image is really about thirteen months, from March 2013 to April of 2014.

The Court: And that's the image that attorney David Raybin—

Mr. Grams: Right.

The Court: —prepared?

Mr. Grams: Right.

The Court: And—for his defense in the criminal case?

Mr. Grams: Correct.

So they already intend to go to Texas and get a subpoena for emails that he may have elsewhere on a personal computer or something that Mr. Cantrell used to provide other information to Mr. Raybin.

The Court: Now, while you're talking about that, my assistant just showed me the order. It's not an agreed order, and under our local rules, I hold an order for three days—

Mr. Grams: Right.

The Court: —pending possibility of a competing order. The third day I think will be up Monday, and I'll be here Monday, and I'll sign that order Monday, unless you want me to sign it earlier. Or do y'all care?

Mr. Grams: No, I mean, at this point, that's what we want, Your Honor.

The Court: Okay.

Mr. Grams: We want—we want Mr. Cantrell to have the protections that are provided by the rules of civil procedure that should have been done way back when this whole issue of the image started. We want them to subpoena—to issue that subpoena so that, you know, he can have the protection of the rules of civil procedure, so . . .

The Court: So I'll go ahead and sign it?

Mr. Grams: Yeah.

The Court: All right. Good.

Mr. Grams: Yeah, that's . . .

The Court: I'll sign it when—

Mr. Haubenreich [Centennial's counsel]: There was no objection from the parties, Mr. Clayton and Mr. Cummings and Mr. Manookian.

The Court: Yeah, I saw there was no objection, there just couldn't be any agreement.

Mr. Haubenreich: My understanding was they wanted to be real careful that they—

The Court: Yes.

Mr. Haubenreich: —weren't waiving anything.

The Court: I understand.

Mr. Haubenreich: They said we don't—right, we don't oppose it, a little worried about agreeing to it. I said, that's fine. That's why we put that language in there.

The Court: Which is great. And I'll sign it today and it will be filed today.

Mr. Grams: Right. And that protects Mr. Cantrell . . . .

The Court: I understand.

Well, so your—your solution—offered solution is let the deposition take place and let all this be worked out through that deposition. Right?

Mr. Grams: Well, you've got two options: I mean, certainly, yes, you

> can let it take place through the deposition, and I can make the production of the information that has direct application to the lawsuit and they can follow up in the deposition.
>
> . . .
>
> Or, because they're issuing a subpoena for those emails, the Court can tell them that they need to go and issue the subpoena for this information and deal with it, you know, appropriately so he's got the—everything, you know, defined there as well and he's got the protections of the rules of civil procedure.
>
> The Court: Does that—the order that I said I will sign, will that take care of anything that we might or might not do today?
>
> Mr. Haubenreich: No.
>
> The Court: Okay.

The Tennessee court entered the commission.[3] The commission states, "Defendants are hereby COMMISSIONED to seek the deposition of and to subpoena documents from Ryan Cantrell in the above-captioned matter pursuant to the Tennessee Rules of Civil Procedure." Centennial subsequently issued a subpoena to Ryan in Texas seeking the production of documents. In response, Ryan filed an original petition in Texas. Without conferring with Centennial, Ryan filed a motion to quash and for protection, requesting the Texas court quash the Tennessee commission, sustain his objections to the subpoena, enter an order protecting him from responding to discovery, and award him attorney's fees. Also, without conferring, Ryan filed a supplement to his motion to quash, asking the trial court to protect him and his wife from responding to discovery and to sanction Centennial for "clear abuses of the discovery process."[4] Ryan's two-page petition did not assert

[3] Although the record does not contain a signed copy of the commission, the parties do not dispute that the Tennessee court executed the commission.

[4] The supplement requested sanctions for the first time after 5:00 pm on April 3, 2017, four

any cause of action; it simply asked the trial court to sustain Ryan's objections and grant his motion for protection.

In his motion to quash and for protection, Ryan argued that the commission and resulting subpoena should be quashed because the Tennessee commission was defective. In the alternative, Ryan asked the trial court to sustain his numerous objections to the subpoena and grant protection under rule 192.6 of the Texas Rules of Civil Procedure because "the subpoena must still be quashed on its substantive deficiencies."

On April 7, 2017, the trial court held a hearing on Ryan's motion to quash and for protection.[5] On April 18, 2017, the trial court signed an order quashing the commission and subpoena, sustaining Ryan's objections to the subpoena, sanctioning Centennial $10,000 for discovery abuse, and prohibiting any discovery whatsoever from Ryan or his wife. Specifically, the court's order states, in relevant part:

> Having considered the parties' briefing, evidence, and arguments, the Court finds Petitioner Ryan Cantrell's motion to quash commission and subpoena and motion for protection (and supplement thereto) to be meritorious and therefore grants the motion. Against [Centennial], the Court ORDERS as follows:
>
> 1. The "commission" Respondents obtained from the Tennessee court to take discovery from Petitioner in Harris County is procedurally and substantively defective for the reasons set forth in Petitioner's motion. This Court has discretion to refuse to honor the out-of-state commission and the resulting subpoena. This Court exercises that discretion here. The commission and subpoena are hereby quashed.
>
> 2. Petitioner's objections to the requests for production attached to the subpoena are sustained in full.

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days before the trial court's 9:00 am hearing on April 7, 2017.

[5] The appellate record does not contain any reporter's record from this hearing.

> 3. Respondent's conduct in seeking discovery from Petitioner, fully described in, and supported by, Petitioner's motion, supplemental motion, and supporting affidavits and exhibits, demonstrates that Respondents have clearly abused the Texas discovery process and have issued discovery requests that are unreasonably frivolous, oppressive, and harassing, all in violation of Rule 215.3 of the Texas Rules of Civil Procedure. The record here shows that, among other things fully documented in Petitioner's filings, Respondents have utilized questionable tactics to take control of Petitioner's cell phone data with little or no regard for Petitioner's basic privacy rights; they have conducted extensive discovery in Tennessee but failed to review the documents to ascertain whether, in fact, Petitioner has additional documents that they are unable to secure from other sources, including the Tennessee plaintiff; they misstated to the Tennessee court that they had reviewed the material and made a determination that Petitioner maintained specific additional information that they could not obtain from any other source; they used the generic commission to issue a discovery subpoena that the Court finds to be unreasonably frivolous, oppressive, and harassing, as fully recounted in Petitioner's filings here.
>
> 4. Therefore, pursuant to Rule 215.2(b) the Court ORDERS that Respondents shall not conduct any further discovery of any kind from Petitioner or his wife; and Respondents or their counsel shall pay Petitioner his attorney's fees in the amount of $10,000.00. These funds shall be paid within 10 days and the failure to do so will result in more sanctions.
>
> 5. The Court finds that these sanctions are the least severe sanctions available to redress Respondents' discovery abuses, which the Court finds to be severe.

Centennial filed both an appeal and a petition for writ of mandamus. On its own motion, this court consolidated Centennial's appeal (No. 14-17-00391-CV) and original proceeding (No. 14-17-00380-CV).

II. ANALYSIS

Centennial contends the trial court abused its discretion in granting Ryan's motion for protection in five issues: (1) by improperly quashing the commission, making its own judgments regarding the relevance and materiality of the discovery

sought although this was the proper role of the Tennessee court that issued the commission; (2) by sustaining Ryan's spousal privilege objections although Ryan did not comply with Texas Rule of Civil Procedure 193.3(a); (3) in issuing sanctions against it where the record does not support alleged discovery abuses; (4) by not testing less severe sanctions; and (5) by prohibiting discovery from Ryan's wife who was not a party to the proceeding below and requested no relief.

A. Appeal or mandamus

Before reaching the merits of these issues, we must determine whether we have jurisdiction to hear this matter as an appeal, and if not, whether mandamus is a proper remedy. Centennial filed both an appeal and a petition for writ of mandamus because it was not clear whether the trial court's order was a final order. The trial court's order purported to maintain "continuing jurisdiction over this Order and proceeding."

An order or a judgment is final for purposes of appeal when it determines all the legal issues and rights between the parties. *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985) (citing *Hargrove v. Ins. Investments Corp.*, 176 S.W.2d 744, 747 (Tex. 1944) ("A judgment that settles all the legal issues and rights between the parties is final and appealable 'though further proceedings may be necessary in the execution of it or some incidental or dependent matter may still remain to be settled.'")).

In this case, the only issues before the Texas trial court were the issues raised by Ryan's motion to quash and for protection, the supplement to same motion, and Centennial's responses. When the trial court entered its order on the motion to quash and for protection, it determined all the issues and rights between the parties and disposed of all the issues raised in Ryan's two-page petition. Consequently, we conclude that the court's order is a final judgment on all issues in the Texas matter

and that we have jurisdiction to review it by appeal. *See Hinde*, 701 S.W.2d at 639; *Warford v. Childers*, 642 S.W.2d 63, 65–66 (Tex. App.—Amarillo 1982, no writ) (concluding that a Texas trial court's order denying discovery sought pursuant to a Hawaii commission was a final, appealable order).

Because we address the trial court's order by appeal, we deny Centennial's petition for writ of mandamus as moot. *See In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 304 (Tex. 2016) (orig. proceeding) (per curiam) (mandamus relief will not be granted where there is a remedy by normal appeal); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (same).

B. The Tennessee commission

In its first issue, Centennial contends that the trial court erred by improperly quashing the commission. In support of its contention that the trial court improperly quashed the commission, Centennial makes several arguments. Centennial argues that "the record does not demonstrate any procedural or substantive defect of the [c]ommission itself." Centennial argues that there could not be a defect because Ryan's counsel did not object to, and actually encouraged, the issuance of the commission. Centennial argues that none of the authorities cited by Ryan authorized the trial court to find the commission defective based on speculation that the Tennessee court did not properly follow its own procedures.[6] Centennial argues that even if appellee could show a defect in the commission, the Tennessee court would be the appropriate forum to address that issue.[7] Centennial argues that it was within the Tennessee court's authority to determine the materiality and relevance of the

[6] Although Centennial did not specifically assert these grounds before the trial court, at their essence, these are jurisdictional arguments. Centennial asserts the trial court did not have authority to decide whether the commission issued by the Tennessee court was defective. Therefore, we address these arguments.

[7] *See supra* n.6.

discovery, and the Texas court should not have "usurp[ed]" that authority and substituted its own relevance determination.[8]

In response, Ryan asserts that the trial court properly refused to honor the commission because the Tennessee court was required to ensure discovery sought from Ryan was relevant and material, but failed to do so because Centennial did not present the actual subpoena to the Tennessee court. Ryan contends the Tennessee trial court relied upon the false representations of Centennial's counsel that the subpoena would be limited in scope and that documents Centennial sought from Ryan were not available from any of the parties to the lawsuit. Ryan argues that under these circumstances, the trial court had discretion to refuse to honor the Tennessee commission.

We review appeals from an order granting a protective order under an abuse of discretion standard. *See In re Issuance of Subpoenas Depositions of Bennett*, 502 S.W.3d 373, 377 (Tex. App.—Houston [14th Dist.] 2016, no pet.). A trial judge may exercise discretion in granting a protective order and in controlling the nature and form of discovery, but that discretion is not without bounds. *Id.* (citing *In re Collins*, 286 S.W.3d 911, 919 (Tex. 2009).

Few cases have addressed discovery disputes involving discovery in Texas for use in foreign jurisdictions. Nearly a century ago, the Texas Supreme Court in *Ex parte Taylor* addressed whether a Texas trial court had the authority to order compliance with letters rogatory from an Illinois court, which requested a deposition in Texas for use in an Illinois proceeding. 110 Tex. 331 (1920). The Court held that "[u]nder the general jurisdiction possessed under the Constitution by the District Courts," the trial court has the power to honor the request of the Illinois court and to

[8] *See supra* n.6.

order the deposition. *Id.* at 334. The Court explained that the power of the court to honor or refuse to honor the request was a matter of comity between states. *Id.* at 333–34.

The *Taylor* Court also addressed the roles of foreign and Texas courts in making determinations concerning discovery in Texas for use in foreign jurisdictions. The Court declared that the court with jurisdiction over the underlying case is generally charged with determining the relevancy and materiality of evidence sought by a party seeking a deposition in Texas under letters rogatory, while the Texas court has the obligation to protect the witness's legal rights, including, for example, the witness's right to avoid compelled production of privileged evidence. *Id.* at 334.

More recently, in *In re Issuance of Subpoenas Depositions of Bennett*, this court addressed whether a Texas trial court had the authority to limit deposition subpoenas which the Texas trial court issued pursuant to letters rogatory from a Wyoming court. 502 S.W.3d at 377–82. The trial court in *Bennett* had limited deposition discovery after the parties resisting discovery argued that the requested depositions were (1) irrelevant, (2) cumulative, and (3) unduly burdensome, unnecessarily expensive, harassing, annoying, or an invasion of personal, constitutional, or property rights. *Id.* at 377. On appeal, this court held that the trial court abused its discretion by limiting the deposition subpoenas. *Id.* at 377–82. Addressing the argument that the discovery sought was irrelevant, we explained that "the trial court did not have authority to quash or limit the depositions . . . based on a belief that the discovery is irrelevant." *Id.* at 378. We stated, "[t]o get relief on that basis, the [parties resisting discovery] must seek relief from the Wyoming trial court":

> Although a trial court normally has broad discretion to determine the

> relevancy of evidence sought, in this case, the Wyoming court is the appropriate court to determine the relevancy and materiality of the evidence sought and to grant the [parties] any relief that may be warranted with respect to depositions that they assert exceed the scope of permissible discovery.

Id. (citing *Taylor*, 110 Tex. at 334). We further held that "[p]resuming for the sake of argument that the Texas court had the authority to quash or limit the depositions because they were cumulative or duplicative under Texas Rule of Civil Procedure 192.4, or constituted an undue burden under Texas Rule of Civil Procedure 192.6," movants did not meet their burdens to establish those objections. *Id.* at 376, 378–81.

In the case now before us, the trial court ruled that the Tennessee commission was "defective," and therefore quashed, "for the reasons set forth in Petitioner's motion." In Ryan's motion, he argued the commission was defective because the Tennessee court was required by Texas case law, namely *Bennett* and *Taylor*, to conduct a substantive analysis to ensure that discovery sought from Ryan was relevant and material to the Tennessee litigation. Citing *Bennett*, Ryan asserted "before issuing the commission, the Tennessee court must conduct a substantive analysis to assure that the discovery sought from the Texas citizen is relevant and material to the foreign litigation." Ryan further asserted that Texas Rule of Civil Procedure 201.1(c) required the Tennessee court to ensure the commission's terms were "just and appropriate." Ryan argued that the Tennessee court could not have made these assessments because the subpoena was never presented to the Tennessee court. According to Ryan, because the Tennessee court "utterly failed to assure" the relevance, materiality, justness, and appropriateness of the discovery sought, the trial court had no obligation to honor the commission.[9] The trial court abused its

[9] Ryan further argued that the commission should be disregarded because Centennial "grossly abused" the "generic, non-descript commission" by issuing discovery requests which did

discretion by ruling the commission was defective for these "reasons set forth in the Petitioner's motion."

The cases and rules cited by Ryan in his motion to quash and for protective order did not permit the court to find the commission defective. Neither Texas rule 201.1(c), nor any other case or rule cited by Ryan, *required* the Tennessee court to assure the commission's terms were "just and appropriate." Rule 201.1(c) applies to depositions in foreign jurisdictions for use in Texas proceedings. *See* Tex. R. Civ. P. 201.1. This case does not involve discovery in a foreign jurisdiction for use in a Texas case. This case presents the opposite scenario—discovery in Texas for use in a foreign jurisdiction. The Texas Rules of Civil Procedure include a separate rule addressing discovery in Texas for use in a foreign jurisdiction. Rule 201.2 directly follows rule 201.1. Rule 201.2, which the *Bennett* court cited, addresses and is entitled "Depositions in Texas for Use in Proceedings in Foreign Jurisdictions." Tex. R. Civ. App. 201.2. Rule 201.2 includes no requirement that a commission be "just and appropriate." *See id.* It simply states, in relevant part, that if a foreign court issues a commission "that requires a witness's oral or written testimony in [Texas], the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in [Texas]." *Id.* No Texas rule conferred authority on the trial court to find the commission defective based on Ryan's argument that the Tennessee court did not assure the commission was "just and appropriate." No Texas rule required the Tennessee court to ensure the commission was "just and appropriate."

Ryan's motion similarly misconstrued and misapplied *Taylor* and *Bennett*. Neither of these cases, nor any other case or rule cited by Ryan, *required* the

not comply with Texas rules.

Tennessee court "to conduct a substantive analysis" to ensure that discovery sought from Ryan was relevant and material to the Tennessee litigation. *See generally Taylor*, 110 Tex. 331; *Bennett*, 502 S.W.3d 373. Nor did they empower the Texas court to determine whether the Tennessee court adequately addressed relevance and materiality. *See generally Taylor*, 110 Tex. 331; *Bennett*, 502 S.W.3d 373.

Ryan's arguments that *Bennett* is not applicable here are not compelling. Although *Taylor* does state that a trial court has discretion to refuse a commission from a foreign court, it does not state that such discretion is absolute or "without bounds." *See Taylor*, 110 Tex. at 334. Neither of these cases conferred jurisdiction upon the trial court to determine the Tennessee court's commission was "defective," particularly where such determination was based upon Ryan's arguments that the Tennessee court did not adequately analyze relevance and materiality. We are aware of no authority which would have conferred such jurisdiction upon the trial court.[10] Consequently, we conclude that the trial court did not have jurisdiction to decide that the Tennessee commission was defective.

Ryan's additional arguments in support of the trial court's order on the commission do not persuade us otherwise. Referring to Centennial's contention that Ryan's counsel did not object to the commission, Ryan insists that Centennial's "waiver" argument fails, but our ruling is not based on waiver.

We sustain Centennial's first issue.

C. The Texas subpoena

In addition to quashing the commission and subpoena based on its conclusion that the commission was "defective," the trial court "sustained in full" all of

[10] In *Bennett* this court concluded that a Texas court had *no authority* to grant relief from discovery for use in a foreign jurisdiction based on its own relevance or materiality assessments. *Bennett*, 502 S.W.3d at 376–80, 382.

Petitioner's objections to the requests for production attached to the subpoena.[11] In this alternative ruling, the court generally sustained the objections without specifying the grounds for its ruling as to each challenged request.

Centennial does not directly address all of Ryan's objections on appeal, and Centennial did not directly address all of Ryan's objections before the trial court. In response to request numbers one through four, Ryan objected that the requests "severely infringe[d] upon [his] privacy rights" and the "privacy rights of third parties." In his motion to quash and for protection, Ryan reiterated these objections. Centennial did not address these objections in its responses to the motion before the trial court. Centennial does not address these objections on appeal.

By failing to attack all grounds upon which the trial court decision may have been based, Centennial has failed to preserve for review any argument that the trial court erred in sustaining objections to request numbers one through four. *See Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Generally speaking, an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment."); *Estate of Purgason v. Good*, No. 14-14-00334-CV, 2016 WL 552149, at *2 (Tex. App.—Houston [14th Dist.] Feb. 11, 2016, pet. denied) (mem. op.) (same). *See also* Tex. R. App. P. 33.1, 38.1. Any error in the challenged basis for the order is rendered harmless where there is an unchallenged, alternate basis for the appealed order. *Purgason*, 2016 WL 552149, at *2 (citing *Riley v. Cohen*, No. 03-08-00285-CV, 2009 WL 416637, at *1 (Tex. App.—Austin Feb. 19, 2009, pet. denied) (mem. op.); *In re Hansen*, No. 05-06-00585-CV, 2007 WL 824587, at *1 (Tex. App.—Dallas Mar. 20, 2007, no pet.) (mem. op.)). Because Centennial did not attack all the

[11] Petitioner's Objections to Respondents' Subpoena were included in the Appendix to Centennial's Petition for Writ of Mandamus, but they were not included in the clerk's record.

grounds that would support the trial court's sustaining objections to request numbers one through four, we must accept and affirm the portion of the trial court's order sustaining objections to request numbers one through four.

Ryan did not assert any privacy objection in response to request number five, but Ryan made several other objections to Centennial's requests, some of which he generally restates in response to Centennial's appeal. Ryan asserts that Centennial's document requests seek documents which are not relevant or reasonably calculated to lead to the discovery of admissible evidence. Ryan argues Centennial's subpoena was overly broad, unduly burdensome, harassing and not reasonably restricted. Ryan argues that the document requests were harassing because Centennial could obtain, or has already obtained, the information sought from other sources.

Centennial argues that the Tennessee court had already held hearings raising similar or identical discovery issues, and Centennial had explained to the Tennessee court why direct discovery was required from Ryan: (1) Ryan's cell phone image was limited in time and incomplete; (2) evidence from other witnesses contained gaps; and (3) Daniel's voluminous document production did not include all of Ryan's relevant communications. Centennial further argues that Ryan failed to present any evidence to the trial court showing that complying with the subpoena would cause him undue burden.

Request number five seeks the following documents from Ryan:

> Any and all documents you have provided to David Raybin (excluding the forensic image of your cellular phone), and any and all documents used by you in discussions with David Raybin in 2014, and any and all documents used to draft your written recollection(s) for David Raybin, and/or referenced in your written recollection(s).

For the reasons discussed above in section II.B, Ryan's relevance objections should have been overruled. *Bennett*, 502 S.W.3d at 378 ("the trial court did not

have authority to quash or limit the depositions . . . based on a belief that the discovery is irrelevant"). Ryan's objections that the discovery requests were overly broad, unduly burdensome, harassing and not reasonably restricted should also have been overruled insofar as the determinations of these objections turned on relevance or materiality.[12] *See id.* at 379–80 (rejecting argument that deposition was cumulative insofar as determination turned on relevance). However, objections concerning overbreadth, burden, and harassment include considerations other than relevance.

For example, discovery requests are impermissibly overbroad where they require production "from an unreasonably long time period." *In re National Lloyds Ins. Co.*, 507 S.W.3d 219, 224 (Tex. 2016) (orig. proceeding) (per curiam) (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam)). A court may determine requests are unduly burdensome where the discovery sought may be more easily or cheaply obtained from another source, where the amount of controversy is not significant, or where the request puts too much strain on the parties' resources. *See* Tex. R. Civ. P. 192.4. Discovery is unnecessarily harassing where it is sought for an improper purpose. *Bennett*, 502 S.W.3d at 380.

There is no indication in the record that request number five is overly broad, unduly burdensome, harassing or not reasonably restricted. The document request

[12] Overbreadth may turn on relevance. "A request is not overbroad so long as it is 'reasonably tailored to include only matters relevant to the case.'" *In re National Lloyds Ins. Co.*, 507 S.W.3d 219, 223–24 (Tex. 2016) (orig. proceeding) (per curiam) (quotations omitted). Undue burden may also involve relevance or materiality considerations. *See* Tex. R. Civ. P. 192.4 (discovery may be limited where "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, . . . the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."). Parties may also harass one another by requesting irrelevant documents. *See Walker*, 827 S.W.2d at 843 (holding no adequate appellate remedy exists when an order compels discovery of irrelevant documents constituting harassment or imposing a burden far out of proportion to any benefit to the requesting party).

is limited in time and scope. All documents requested must have specific connections to Raybin: they must have been provided to Raybin by Ryan, used in Ryan's 2014 discussions with Raybin, used to draft, or referenced in, Ryan's written recollection (narrative) provided to Raybin. This is a targeted request aimed at obtaining documents collected by Raybin and Ryan for use in Daniel's criminal defense.

Ryan's brief identifies only one specific argument purporting to explain why request number five is overly broad, unduly burdensome, harassing and not reasonably restricted: Ryan contends Centennial can obtain, or has already obtained, the documents requested from other parties. In an affidavit, Daniel's counsel stated that his firm is in possession of Raybin's criminal file and he "personally offered to work with" Centennial to provide "those materials" to Centennial "where possible and agreeable." Centennial attaches to its reply brief July 2017 email communications between counsel for Centennial and Daniel, which show that Daniel's counsel likely does not possess documents Ryan provided to Raybin. In a July 31, 2017 email, Manookian states:

> With respect to Raybin's file, all I have are the 6 transmissions to [Middle Tennessee Mental Health Institute] and their attachments/appendices. Those are voluminous and I believe he produced those to you directly. I also have his memos regarding the Dahl and Murphy interviews he took.

There is no mention of the documents Ryan provided to Raybin, documents Ryan used in discussions with Raybin, documents Ryan used to draft Ryan's written narrative, or documents referenced therein. Ryan's narrative itself states that he did not provide Raybin all of the documents he referenced in, or used to prepare, the narrative. Consequently, we conclude the trial court erred in sustaining Ryan's objections to request number five.

D. Spousal privilege

In its second issue, Centennial argues that Ryan failed to properly invoke and prove spousal privilege. Centennial points out that Ryan did not make a withholding statement in compliance with Texas Rule of Civil Procedure 193.3. Centennial also argues that Ryan failed to prove he was entitled to the privilege because he did not submit evidence in support of the privilege.

Texas Rule of Procedure 193.2(f) discusses the invocation of privilege:

> *No Objection to Preserve Privilege.* A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

The general rule regarding spousal privilege is that "A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to the person's spouse while they were married." Tex. R. Evid. 504(a)(2). A communication is defined as "confidential" if "a person makes it privately to the person's spouse and does not intend to disclose it to any other person." *Id.* at 504(a)(1).

Ryan objected to the first two requests for production attached to Centennial's subpoena based on spousal privilege. Centennial argues on appeal that Ryan did not properly invoke the privilege because he failed to comply with rule 193.3. Centennial also complains that the two requests to which Ryan raised the privilege objection included requests for communications prior to Ryan's marriage, and Ryan did not submit evidence to support the spousal privilege for these communications. While these arguments may have merit, they are premature.

When the trial court quashed[13] the commission (albeit erroneously), the subpoena and attached document requests were rendered void. Ryan was not obligated to respond to the voided subpoena. Consequently, Centennial's arguments that Ryan failed to properly invoke and prove privilege are premature. We overrule Centennial's second issue.

E. Sanctions

Because Centennial's third and fourth issues both concern sanctions issued by the trial court, we consider them together. In its third issue, Centennial argues the trial court erred in issuing sanctions against it because the record does not support the alleged discovery abuses cited in the trial court's order. In its fourth issue, Centennial argues that the trial court erred in issuing excessive sanctions without testing lesser sanctions.

We review appeals from sanctions orders under an abuse-of-discretion standard. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). Sanctions will be reversed only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Id.* at 839. A trial court has no discretion in determining what the law is or applying the law to the facts. *See Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996).

In his April 3, 2017 supplement to his motion, Ryan sought sanctions under rules 215.2 and 215.3 of the Texas Rules of Civil Procedure. Rule 215.3 authorizes a trial court to impose sanctions on a party who abuses the discovery process in seeking, making, or resisting discovery. Tex. R. Civ. P. 215.3. If a court finds that a party is abusing the discovery process in seeking discovery or if a court finds a

[13] *See* Black's Law Dictionary 1439 (10th ed. 2014) (defining "quash" as "[t]o annul or make void; to terminate").

request for inspection or production of documents is unreasonably frivolous, oppressive, or harassing, it may impose any appropriate sanction authorized by rules 215.2(b)(1), (2), (3), (4), (5), and (8). Tex. R. Civ. P. 215.3; *see also In re Reece*, 341 S.W.3d 360, 367 (Tex. 2011) (orig. proceeding) (rules of civil procedure make available the possibility of a range of sanctions for discovery abuse).

A discretionary sanction imposed under rules 215.2 and 215.3 must be just. *See* Tex. R. Civ. P. 215.2, 215.3; *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding); *In re First Transit Inc.*, 499 S.W.3d 584, 591 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding). To determine whether an imposition of sanctions is just, courts generally follow the two-part test enunciated in *TransAmerican Natural Gas*. *See Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 489 (Tex. 2014). "First, a direct relationship must exist between the offensive conduct, the offender, and the sanction imposed." *Id.* To meet this requirement, a sanction must be directed against the offensive conduct and toward remedying the prejudice suffered by the wronged party. *Id.* (citing *TransAm.*, 811 S.W.2d at 917). "Second, a sanction must not be excessive, which means it should be no more severe than necessary to satisfy its legitimate purpose." *Id.* "This prong requires the trial court to consider the availability of lesser sanctions and, 'in all but the most exceptional cases, actually test the lesser sanctions.'" *Id*. (citing *Cire*, 134 S.W.3d at 841).

Sanctions that effectively determine a claim or preclude a decision on the merits of the case are referred to as "death penalty" sanctions. *First Transit*, 499 S.W.3d at 591; *see also GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 732 (Tex. 1993). "'Death penalty' sanctions are harsh and may be imposed as an initial sanction only in the most egregious and exceptional cases." *First Transit*, 499 S.W.3d at 591; *see also Cire*, 134 S.W.3d at 840–41. Before issuing death-penalty

sanctions, a trial court must consider lesser sanctions. *Cire*, 134 S.W.3d at 840–41; *First Transit*, 499 S.W.3d at 591. "[T]he trial court must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed." *Cire*, 134 S.W.3d at 840. "The absence of an explanation of how a trial court determined to impose an especially severe sanction is inadequate. A trial court is required to explain that it considered lesser sanctions before imposing death penalty sanctions." *First Transit*, 499 S.W.3d at 592 (quoting *Citibank, N.A. v. Estes*, 385 S.W.3d 671, 676 (Tex. App.—Houston [14th Dist.] 2012, no pet.)); *see also In re Melcher*, No. 14-16-00130-CV, 2017 WL 1103549, at *5 (Tex. App.—Houston [14th Dist.] March 23, 2017, orig. proceeding) (mem. op.) ("[T]he trial court abused its discretion by granting death penalty sanctions without offering a reasoned explanation for not considering a less stringent sanction . . . ."). Conclusory statements that lesser sanctions were considered are not sufficient to meet the standard. *See Tanner*, 856 S.W.2d at 729 (giving no deference to unsupported conclusions in the trial court's order, which stated without explanation that lesser sanctions would have been ineffective); *First Transit*, 499 S.W.3d at 592.

As sanctions against Centennial, the trial court prohibited Centennial from conducting any discovery "of any kind" from Ryan and his wife. The trial court also ordered Centennial or its counsel to pay Ryan attorney's fees in the amount of $10,000.00. Rule 215.2 authorizes courts to disallow further discovery and award attorney's fees as a sanction for abuse of the discovery process. *See* Tex. R. Civ. P. 215.2 (b)(1), (8). However, as indicated above, courts must consider the availability and possible effectiveness of less stringent sanctions before imposing severe sanctions. *TransAm.*, 811 S.W.2d at 917; *see also Tanner*, 856 S.W.2d at 729.

The trial court's prohibition against any and all discovery from Ryan or his wife equates to a death-penalty sanction. "Although death-penalty sanctions most

often are thought of in the context of striking pleadings or rendering a default judgment, any sanctions that are case determinative may constitute death-penalty sanctions, including those that exclude essential evidence." *First Transit*, 499 S.W.3d at 592 (citing *RH White Oak, LLC*, 442 S.W.3d 492, 501 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding)). The decisions of this and other courts of appeals have recognized that the striking of a witness may constitute a death-penalty sanction where the information the witness possesses is critical to the case. *See First Transit*, 499 S.W.3d at 592–93 & n.1 (citing cases). In this case, the trial court's prohibition against Centennial seeking discovery from Ryan, a witness with intimate knowledge concerning his brother's condition and actions,[14] could critically handicap Centennial's defense in the Tennessee litigation. Moreover, the ban on discovery from Ryan is completely determinative of Ryan's Texas petition. Consequently, we conclude that the trial court's sanctions order constitutes a death-penalty sanction.

Our review of the record does not reveal an analysis of available sanctions by the trial court. Nor does it reveal a reasoned explanation of the appropriateness of the sanction imposed. The sanctions order recites that the sanctions issued were "the least severe sanctions available" to address Centennial's discovery abuses, which the trial court described as "severe." The order also lists the purported discovery abuses:

- Centennial's document requests were unreasonably frivolous, oppressive, and harassing, in violation of rule 215;

[14] According to Daniel's discovery responses in the Tennessee lawsuit, Ryan has knowledge of Daniel's mental health treatment and history, employment history, and the facts and circumstances leading up to the death of his father. According to Deborah's responses, Ryan has knowledge of Daniel's mental health history. The narrative provided by Ryan to Raybin also demonstrates that Ryan was closely acquainted with Daniel's mental health history and the facts and circumstances leading up to the death of his father.

- Centennial used questionable tactics to take control of Petitioner's cell phone data with little or no regard for Petitioner's basic privacy rights;
- Centennial conducted extensive discovery in Tennessee but failed to review the documents to ascertain whether, in fact, Petitioner has additional documents that they are unable to secure from other sources, including the Tennessee plaintiff;
- Centennial misstated to the Tennessee court that they had reviewed the material and made a determination that Petitioner maintained specific additional information that they could not obtain from any other source;
- Centennial used the generic commission to issue a discovery subpoena that the Court finds to be unreasonably frivolous, oppressive, and harassing, as fully recounted in Petitioner's filings here.

These purported abuses do little to support the trial court's order.

Most of the findings cited by the trial court concern, or are based upon, discovery Centennial obtained from other parties in Tennessee. Ryan cites *Clark v. Bres*, 217 S.W.3d 501, 512 (Tex. App.—Houston [14th Dist.] 2006, pet. denied), for the proposition that, "[i]n determining whether sanctions are proper, the trial court 'may consider everything that has occurred during the history of the litigation.'"[15] But *Clark* did not involve litigation in another court or another jurisdiction. *See id.* at 505–09. The trial court was without jurisdiction to impose sanctions on Centennial for its conduct before another court. *See Greene v. Young*, 174 S.W.3d 291, 302 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (family court was "without jurisdiction to impose Rule 13 sanctions related to the signing of the Joint Motion filed in bankruptcy court"); *Mantri v. Bergman*, 153 S.W.3d 715, 718 (Tex.

[15] Ryan also cites *Clark* for the proposition that "[e]ven in the absence of an applicable rule or statute, courts have the authority to sanction parties for bad faith abuses if it finds that to do so will aid in the exercise of its jurisdiction, in the administration of justice, and the preservation of its independence and integrity." 217 S.W.3d at 512. This refers to a court's inherent power to impose sanctions, *see id.*, which is not at issue in this case. In this case, the trial court sanctioned Centennial pursuant to rule 215, not its inherent power.

App.—Dallas 2005, pet. denied) ("The only court with jurisdiction over a request for sanctions . . . under chapter 10 is the court where the allegedly frivolous litigation was pending . . . .").[16] Moreover, a direct relationship does not exist between the offensive conduct, the offender, and the sanction imposed. The sanction imposed does not have a direct relationship to the discovery permitted by the Tennessee court pursuant to Tennessee rules of civil procedure. *See TransAm.*, 811 S.W.2d at 917.

Even if the trial court could have properly relied on Centennial's conduct in Tennessee as a basis for its sanctions order, certain findings cited by the trial court are not supported by the record as sanctionable. For example, with respect to the cellphone image, far from ordering sanctions against Centennial for its "questionable tactics," the Tennessee court awarded Centennial the relief requested. The "generic commission" was granted by the Tennessee court without opposition. In addition, it is difficult to understand how the trial court could have concluded that the discovery requests were "unreasonably frivolous" without any reference to the pleadings of the Tennessee litigation, which do not appear in the clerk's record.

The subpoena duces tecum was Centennial's first attempt to obtain discovery directly from Ryan. Ryan argued that the purpose of the subpoena was to harass him, but the record establishes that Centennial was seeking discovery to defend itself in Tennessee. While Ryan may have had valid concerns regarding the breadth of document requests attached to the subpoena,[17] these could have been addressed by

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[16] *But see Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 447 (Tex. App.—Austin 2004, pet. denied) (concluding that a court may impose sanctions for conduct in another court pursuant to its inherent power to impose sanctions).

[17] We note that neither Ryan's motion for protection and to quash, nor his supplement, contained a certificate of conference. Texas Rule of Civil Procedure 191.2 specifically requires: "[a]ll discovery motions . . . must contain a certificate by the party filing the motion . . . that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed." Tex. R. Civ. P. 191.2. The purpose of rule 191.2 is to ensure that parties cooperate during the discovery process and make reasonable efforts to resolve discovery disputes

ordering Centennial to serve more narrowly tailored discovery requests so long as the order the order was not based on relevance or materiality determinations.[18] There is no evidence in the record the trial court considered such lesser sanctions.

The trial court's order stated that the sanctions issued were "the least severe sanctions available." However, the trial court offered no reasoned explanation for not considering lesser sanctions. The trial court recited its reasons for imposing sanctions, but as noted above, many of the reasons cited do not support the sanctions imposed. On this record, the trial court's monetary sanctions[19] and complete prohibition of further discovery from two witnesses with knowledge was arbitrary and unreasonable. We conclude the trial court abused its discretion by granting death-penalty sanctions without offering a reasoned explanation for not considering lesser sanctions. We sustain Centennial's third and fourth issues.

Because we conclude that the trial court's sanctions prohibiting further discovery from Ryan and his wife should be vacated for the reasons explained above, we need not address Centennial's fifth issue, that the trial court erred by prohibiting any and all discovery from Ryan's wife, who was not a party to the proceeding. *See* Tex. R. App. P. 47.1.

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without the necessity of court intervention. *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 184 (Tex. 1999) (orig. proceeding); *see also* Tex. R. Civ. P. 191.2; Harris (Tex.) Civ. Dist. Ct. Loc. R. 3.3.6 (requiring a certificate of conference on all motions except summary judgments, default judgments, agreed judgments, motions for voluntary dismissal or non-suit, post-verdict motions and motions involving service of citation). While we do not vacate the sanction order based on Ryan's failure to confer with Centennial, we note that compliance with rule 191.2 may have saved the time Ryan spent preparing his motion, the time the trial court spent considering the motion, and the time this court spent addressing it on appeal.

[18] *Bennett*, 502 S.W.3d at 377–78.

[19] Ryan contends that Centennial does not challenge the monetary portion of the trial court's sanctions, but Centennial's appellate brief states "this Court should set aside the trial court's order quashing the Commission and subpoena, sanctioning the Appellants or their counsel in the amount of $10,000."

III. CONCLUSION

We conclude the trial court abused its discretion by improperly quashing the commission, sustaining objections to the fifth request attached to the subpoena, and granting death-penalty sanctions. We affirm the trial court's order insofar as it sustains objections to request numbers one through four. Therefore, we reverse and vacate the trial court's April 18, 2017 order except for the portion of the order sustaining objections to request numbers one through four, which we affirm. We deny Centennial's petition for writ of mandamus as moot. We remand the cause to the trial court for further proceedings consistent with this opinion.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.