Motion Granted, Affirmed and Memorandum Opinion filed July 24, 2018.

In the

Fourteenth Court of Appeals

NO. 14-16-00836-CV

IN THE INTEREST OF J.P. AND J.P., MINOR CHILDREN

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 2010-81181

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

Appellant Anetria Burnett appeals the trial court's Order in Suit to Modify the Parent-Child Relationship. After Appellee Joseph Pressil filed a Petition to Modify the Parent-Child Relationship, Burnett filed a Motion to Modify the Parent-Child Relationship. Finding that Burnett had repeatedly failed to comply with discovery, the trial court sanctioned Burnett by striking her affirmative pleadings. Burnett asks this court to reverse the order striking her affirmative pleadings and remand the case for a new trial. Burnett contends the order striking her pleadings was erroneous because: (1) she complied with the trial court's final order compelling discovery and

(2) less stringent sanctions were available.

Because Burnett did not file a reporter's record to support her appeal, Pressil filed a motion to affirm the trial court's ruling without a reporter's record. We carried the motion with the case.

We grant Pressil's motion, and finding no error, we affirm.

I. BACKGROUND[1]

Burnett and Pressil have two children together. In an October 24, 2011 Order in Suit Affecting the Parent-Child Relationship, both Burnett and Pressil were named joint managing conservators of the children. Burnett was given primary custody of the children and the exclusive right to designate their primary residence. Pressil was ordered to pay Burnett child support.

In March 2015, Pressil filed a Petition to Modify the Parent-Child Relationship. In his petition, Pressil asked the trial court to appoint him as sole managing conservator, with the right to designate the children's primary residence. Pressil requested that Burnett be required to pay child support.

On August 13, 2015, the trial court found Burnett's counsel "dilatory" in filing a motion for continuance. Consequently, the trial court ordered Burnett to pay Pressil $1,000 in attorney's fees and $560 for other reimbursement.

On September 11, 2015, the trial court ordered an amicus attorney be appointed to assist the trial court in protecting the best interest of the children. The order provided, in relevant part, that the amicus attorney "shall be provided notice

[1] Because the record is largely incomplete, we partially rely on the trial court's docket sheet to unravel the procedural history of the case. Entries on docket sheets are not generally considered to be trial court orders or findings. *See N–S–W Corp. v. Snell*, 561 S.W.2d 798, 799 (Tex. 1977) (orig. proceeding); *Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 178 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Nonetheless, docket entries may be used by appellate courts as an indication of what transpired in the trial court. *See Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226, 229 (Tex. 1999); *Haut*, 376 S.W.3d at 179.

of all pleadings, hearings, and discovery in accordance with Rule 21a of the Texas Rules of Civil Procedure."

On November 27, 2015, Burnett filed Counter-Petitioner's Motion to Modify the Parent-Child Relationship. Burnett sought an increase in child support and the removal of a geographic restriction on the children's residence.

On December 10, 2015, the trial court continued the trial a second time to March 9, 2015. The trial court also ordered the parties to fully comply with discovery requests by January 8, 2016.

Subsequently, Pressil moved to compel Burnett to respond to discovery requests. The trial court ordered Burnett to respond to discovery by February 19, 2016. The trial court also ordered Burnett to pay Pressil $750 in attorney's fees.

After Pressil moved to compel a second time, the trial court ordered Burnett, on March 4, 2016, to respond to discovery by March 7, 2016. The trial court's order also required Burnett to pay an additional $500 in attorney's fees.

On the date of trial, March 9, 2016, the amicus attorney moved for a continuance because she did not receive Burnett's document production until the day before, March 8, 2016. The trial court granted the motion for continuance and ordered Burnett to reimburse Pressil for his travel.

On March 28, 2016, the trial court issued an order[2] reflecting its rulings orally issued on March 9, 2016. In addition to granting the continuance, the order stated that Burnett had "committed repeated, flagrant violations of the rules of discovery, and despite having been sanctioned for those violations, [had] continued to fail to comply with proper discovery request [sic] and failed to comply with the rule[s] of

[2] In the clerk's record, Burnett included only an unofficial copy of this order as Exhibit E to Respondent's Supplemental Motion for New Trial. Although we could supplement the clerk's record with an official copy of this order, *see infra*, we have reviewed the unofficial copy in order to avoid further delay.

discovery." As a result, the trial court sanctioned Burnett pursuant to Texas Rule of Civil Procedure 215.2. In addition to requiring Burnett to pay Pressil for his travel, the trial court struck Burnett's affirmative pleadings.

In August 2016, the case proceeded to trial, and on September 16, 2016, the trial court issued an Order in Suit to Modify Parent-Child Relationship, granting Pressil primary custody and ordering Burnett to pay child support. Burnett timely appealed.

Despite multiple opportunities, Burnett did not provide this court with a reporter's record. In addition, the clerk's record appears to be missing relevant documents. Pressil moves to affirm the trial court's ruling without a reporter's record.

II. ANALYSIS

We first address Pressil's motion. Texas Rule of Appellate Procedure 37.3(c) provides that, when no reporter's record has been filed, appellate courts may consider and decide issues that do not require a reporter's record if appellant failed to pay for the reporter's record, appellant was given notice and a reasonable opportunity to cure, and the clerk's record has been filed. Tex. R. App. P. 37.3(c). In this case, Burnett never paid the reporter's fee to prepare the reporter's record. As detailed in this court's February 28, 2017 order in this case, this court gave Burnett notice and a reasonable opportunity to cure.[3] In addition, a clerk's record has been filed. Because the requirements of rule 37.3(c)(2) are satisfied, we grant Pressil's motion and proceed to address Burnett's issues without a reporter's record.

[3] The official court reporter for the 245th District Court informed this court that Burnett had not made arrangements for payment for the reporter's record. On November 2, 2016, the clerk of this court notified Burnett that we would consider and decide those issues that do not require a reporter's record unless she, within 15 days of notice, provided this court with proof of payment for the record. Thereafter, we granted her more than 90 days of extension of time to file the reporter's record, until February 3, 2017. Burnett never filed a reporter's record.

Burnett argues that the trial court erred by striking her affirmative pleadings because (1) she complied with the trial court's final order compelling discovery and (2) less stringent sanctions were available. Pressil did not file an appellate brief in response. Pressil argued in his motion that none of the issues in this case can be decided without a reporter's record.

An appellant does not waive the appeal by failing to file a reporter's record. *In re Estate of Nunu*, 542 S.W.3d 67, 74 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). If a reporter's record is necessary, and appellee has not provided a reporter's record despite notice and opportunity to cure, then we will presume the omitted reporter's record supports the judgment. *Id.*; Tex. R. App. P. 37.3(c).

Texas Rule of Civil Procedure 215.2 allows a trial court to sanction a party for failure to comply with a discovery order or request. *See* Tex. R. Civ. P. 215.2. One of the discovery sanctions a court may impose is refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting designated matters from being introduced into evidence. *Id.* 215.2(b)(4). Sanctions that have the effect of adjudicating a claim or precluding a decision on the merits of the case are referred to as "death penalty" sanctions. *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 732 (Tex. 1993).

The decision to impose a sanction is left to the discretion of the trial court and will be set aside only upon a showing of abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006). The trial court is given the broadest discretion in imposing such sanctions and in choosing the appropriate sanctions. *White v. Bath*, 825 S.W.2d 227, 229 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The trial court is not limited to considering only the specific violation for which sanctions are finally imposed, but it may consider everything that has occurred during the history of the litigation. *Clark v. Bres*, 217 S.W.3d 501, 512 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citing *White*, 825 S.W.2d at

230).

"A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). "It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.*

"The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, or whether under the circumstances of the case, the trial court's action was arbitrary or unreasonable." *Clark*, 217 S.W.3d at 512–13. In determining whether the trial court abused its discretion, the appellate court must ensure the sanctions were appropriate and just. *Am. Flood Research, Inc.*, 192 S.W.3d at 583. "In reviewing sanctions orders, the appellate courts are not bound by a 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." *Id.*

Burnett asserts the trial court struck her affirmative pleadings for failing to comply with the March 4, 2016 order compelling discovery. Burnett claims she complied with the order as written, but the trial court issued sanctions because discovery was not timely served on the amicus attorney. Burnett also claims that the trial court's death-penalty sanctions were excessive because less stringent sanctions were available.

Because we do not have a reporter's record, we cannot look to the reporter's record to determine the trial court's reason for issuing sanctions or whether the trial court considered lesser sanctions. Due to the inadequacy of the record, we cannot "independently review the entire record to determine whether the trial court abused its discretion." *Id*. We must presume the omitted evidence of events that occurred

during the history of the litigation supports the sanctions order. *Doan v. TransCanada Keystone Pipeline, LP*, 542 S.W.3d 794, 809 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Mason v. Our Lady Star of Sea Catholic Church*, 154 S.W.3d 816, 822 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). Therefore, we cannot say the trial court abused its discretion.

With respect to the clerk's record, we note that the Texas Rules of Appellate Procedure no longer places the burden on the appellant to ensure the clerk's record includes all relevant items; instead, the trial court, the appellate court, or any party may supplement the record. *See* Tex. R. App. P. 34.5(c)(1) ("If a relevant item has been omitted from the clerk's record, the trial court, the appellate court, or any party may by letter direct the trial court clerk to prepare, certify, and file in the appellate court a supplement containing the omitted item."); *see also In re K.M.L.*, 443 S.W.3d 101, 119 (Tex. 2014) (pointing out that respondent, who knew that petitioner alleged lack of notice, failed to request its inclusion in clerk's record).

However, the limited record before us shows that the trial court's order was not based solely on any violation of the March 4, 2016 order. Burnett's admitted failure to serve documents on the amicus attorney more than 24 hours before trial may have also violated the trial court's September 11, 2015 order that the amicus attorney "shall be provided" discovery. The trial court's March 28, 2016 sanctions order states, and Burnett does not contest, that Burnett was sanctioned because she had "committed repeated, flagrant violations of the rules of discovery, and despite having been sanctioned for the violations, [had] continued to fail to comply with proper discovery request [sic] and failed to comply with the rule[s] of discovery."

The limited record before us also shows that the trial court considered lesser sanctions. The trial court's docket sheet shows that the trial court issued monetary sanctions against Burnett on at least three occasions before issuing death-penalty sanctions by dismissing her affirmative pleadings. The trial court's March 28, 2016

sanctions order explicitly references its consideration and prior implementation of lesser sanctions, stating, "despite having been sanctioned for [multiple discovery] violations, Burnett [had] continued to fail to comply with proper discovery request [sic] and failed to comply with the rule[s] of discovery." Because it is clear that the trial court's order was not based solely on any violation of the March 4, 2016 order and the trial court considered lesser sanctions, we decline to supplement the record.

Accordingly, we overrule Burnett's first and second issues.

CONCLUSION

Having granted Pressil's motion and overruled both of Burnett's issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Jamison, and Brown.