



NUMBER 13-17-00440-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ACCURATE VALVE SERVICE, INC.,

Appellant,

v.

MICHAEL GILMORE,

Appellee.

**On appeal from the County Court at Law No. 3
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Longoria**

Appellee Michael Gilmore sued appellant Accurate Valve Services, Inc. ("Accurate Valve") and multiple other defendants for injuries sustained in a workplace injury. On the day the trial was to begin, Gilmore nonsuited Accurate. After the jury returned a verdict finding Accurate partially liable as a responsible third party, Accurate filed a motion for

sanctions against Gilmore. The trial court denied the motion. On appeal, Accurate claims that the trial court erred in denying its motion for sanctions. We affirm.¹

I. BACKGROUND

The underlying facts are undisputed. In 2011, Gilmore was injured while working at an oil drilling site controlled by Unit Texas Drilling, LLC (“Unit”). Unit contracted Gilmore’s employer, Accurate Valve, to replace seals on the door of the blow out preventer. Employees on site had Gilmore stand on a wooden pallet that was raised in the air by a forklift to perform his duties. While Gilmore was standing on the forklift, the forklift operator went in reverse and severed a cable wire on the ground, causing an industrial-sized metal pulley to fall and crush Gilmore’s right hand. Gilmore sued Accurate Valve and Unit.

Accurate Valve filed a no-evidence motion for summary judgment, which the trial court denied. During the discovery period, Gilmore filed an affidavit, stating:

In addition, there is a tool called “lifting eyes” that would have allowed me to make the same repairs without having to be elevated at all. I have personally used this tool in the past and have seen many other companies using it at drilling sites. Had Accurate Valve Service, Inc. provided me with this tool, I could have done all my work from the ground, I would not have needed a forklift, and my injury would not have occurred.

In March of 2017, on the morning of trial, Gilmore agreed to non-suit Accurate Valve. Accordingly, Accurate Valve was dismissed from and did not participate in the

¹ On April 4, 2019, this Court issued a memorandum opinion and judgement affirming the trial court’s denial of Accurate Valve’s motion for sanctions. See *Accurate Valve Serv., Inc. v. Gilmore*, No. 13-17-00440-CV, 2019 WL 1474508, at *1 (Tex. App.—Corpus Christi Apr. 4, 2019, no pet. h.). On April 23, 2019, Accurate Valve filed a motion for rehearing. Having considered Accurate Valve’s motion for rehearing, the Court is of the opinion that the motion should be denied. However, even though the final disposition of the case remains the same, we withdraw our memorandum opinion and judgment of April 4, 2019 and issue this memorandum opinion and judgement in their place to correct a mistake.

trial. However, Unit Texas named Accurate Valve as a responsible third party. During the first day of trial, Unit's counsel cross-examined Gilmore as follows:

[Counsel for Unit]: And then you go on to say here, had they done so, I would not have made use of a forklift and my injury would not have occurred, we looked at that. In addition, there is a tool called lifting eyes that would have allowed me to make the same repairs without having to be elevated at all, correct? Do you see where I'm reading?

[Gilmore]: I see.

[Counsel]: And, sir, the truth is you actually had those lifting eyes in your truck, correct?

[Gilmore]: Yes, ma'am.

...

[Counsel]: Sir, can we agree that you had lifting eyes in your truck?

[Gilmore]: Yes.

[Counsel]: It was your decision not to use them?

[Gilmore]: I used the lifting eyes.

[Counsel]: But here—and you may have used it at other times, but what you're saying here is—these are my words, you are blaming them for this accident based on your words, your sworn affidavit, because they didn't give you a lifting eye, correct?

[Gilmore]: Yes, ma'am.

[Counsel]: And you recall that we asked you this question in your deposition, and your testimony was—and this is the last point we're gonna make here, is that you have lifting eyes and you have other equipment that's able [sic] for your use. Let me see if I can flip back here. You have wrenches, lifting eyes, and other tools in your truck for your use, correct?

[Gilmore]: Yes, ma'am.

[Counsel]: The only difference between the day of the accident and what you would normally do is on the day of the accident, according to this affidavit, you just didn't use it, correct?

[Gilmore]: You have to use lifting eyes to get the blockout, so, yes, I used it.

[Counsel]: Okay. So, maybe we're not on the same page here. Here you're saying, I'm blaming them, Accurate Valve, because I don't have a lifting eye. Do you see where we read that?

[Gilmore]: Yes.

[Counsel]: And so, the truth is you really do have lifting eyes?

[Gilmore]: Yes.

[Counsel]: So, is that false?

[Gilmore]: Yes and no.

[Counsel]: Okay. Sir, can we agree based on what you're telling this jury right now it is not true, it is not a true statement that Accurate Valve failed to give you a lifting eye, that's just not true?

[Gilmore]: I had a lifting eye.

[Counsel]: Right, so that's not true?

[Gilmore]: Yeah.

[Counsel]: It's not true?

[Gilmore]: I had lifting eyes.

[Counsel]: Okay. And I'm sorry sometimes you said yes, so I want to clarify. It is not a true statement, because you really did have lifting eyes?

[Gilmore]: Yes.

On the second day of trial, the exchange continued:

[Counsel]: So, sir, I want to make sure I understand. You just told [counsel] you used the lifting eye, but in your sworn affidavit you said you never got one and you never used it: is that a fair characterization?

[Gilmore]: Yeah.

[Counsel]: So what is it, [Gilmore]? Is the truth what you told Mr. Hunnicutt or is the truth what you did in this sworn affidavit, because I truly want to understand.

[Gilmore]: You want me to explain?

[Counsel]: I want to know what's the truth. Did you have a lifting eye or in this affidavit are you blaming Accurate Valve for not giving you that—the lifting eye?

[Gilmore]: I used a lifting eye.

[Counsel]: Okay. So, the truth is what you told [counsel] and the false statement is what we see here.

[Gilmore]: I guess if that's how you want to look at that.

[Counsel]: Okay, that's false. They gave you a lifting eye, correct?

[Gilmore]: Yeah.

[Counsel]: The last thing I want to talk to you about—and, I'm sorry. I was a little distracted. What was your final answer? I apologize.

[Gilmore]: I used a lifting eye.

The jury returned a verdict finding Gilmore 5% at fault, Unit Drilling 74% at fault, and Accurate Valve 21% at fault. In May of 2017, Accurate Valve filed a motion for sanctions, arguing that Gilmore lied in his submitted affidavits from several years ago. The trial court held a hearing on the motion on July 5, 2017; the trial court signed an order denying the motion for sanctions on July 17, 2017. This appeal ensued.

II. MOTION FOR SANCTIONS

Accurate Valve argues that the trial court abused its discretion in denying its motion for sanctions against Gilmore for filing an allegedly false affidavit.

A. Standard of Review and Applicable Law

We review a trial court's ruling on sanctions for abuse of discretion. See *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). "An appellate court may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Id.*

We presume that the pleadings and other papers are filed in good faith. See *id.* To be entitled to sanctions, the party seeking sanctions must overcome this presumption of good faith. See *Harrison v. Harrison*, 363 S.W.3d 859, 863 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

TEX. R. CIV. P. 13. Groundless means that the claim has "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." See *WWW.URBAN.INC. v. Drummond*, 508 S.W.3d 657, 676 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "Bad faith is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes; bad faith does not exist when a party merely exercises bad judgment or is negligent." *Id.* "The plaintiff's petition alone cannot establish that a case was brought in bad faith or to harass." See *Harrison*, 363 S.W.3d at 863.

Generally, in deciding whether a party filed a document in bad faith or for the purpose of harassment, Rule 13 of the Texas Rules of Civil Procedure requires that the trial court hold an evidentiary hearing to make a determination about the motives and intention of the party in question. *See Drummond*, 508 S.W.3d at 676 (“Rule 13 generally requires that the trial court hold an evidentiary hearing to make a determination about the motives and credibility of the person signing the document.”); *Alejandro v. Robstown Indep. Sch. Dist.*, 131 S.W.3d 663, 670 (Tex. App.—Corpus Christi 2004, no pet.) (noting that when a party files a motion for sanctions, it is “imperative for the trial court to convene and conduct an evidentiary hearing”); *Alejandro v. Bell*, 84 S.W.3d 383, 392 (Tex. App.—Corpus Christi 2002, no pet.) (“Without such a hearing, the trial court has no evidence before it to determine that a pleading was filed in bad faith or to harass”). However, we have also held that the trial court is not required to hold an oral hearing before *denying* a motion for sanctions. *See Santos v. Holzman*, No. 13-13-00273-CV, 2015 WL 3485418, at *11 (Tex. App.—Corpus Christi May 28, 2015, pet. denied) (citing *Breault v. Psarovarkas*, No. 01-01-00122-CV, 2003 WL 876651, at *6 (Tex. App.—Houston [1st Dist.] Feb. 28, 2003, pet. denied)).

B. Analysis

We first address Gilmore’s argument that Accurate Valve’s appeal should be dismissed as moot. Gilmore asserts that under Rule 162 of the Texas Rules of Civil Procedure, trial courts do not have jurisdiction to hear a motion for sanctions filed after a party is non-suited. However, the Texas Supreme Court refuted this exact argument. *See Scott & White Mem’l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (holding that a trial court may grant a motion for sanctions filed after a party is non-suited as long

as the trial court does so within its plenary powers, reasoning that “Rule 162 merely acknowledges that a nonsuit does not affect the trial court’s authority to act on a pending sanctions motion; it does not purport to limit the trial court’s power to act on motions filed after a nonsuit”). Therefore, Accurate Valve’s issue on appeal is not moot. *See id.* We move on to consider whether the trial court erred in not granting the motion for sanctions.

Accurate Valve asserts that there is “no other reasonable conclusion” other than that Gilmore lied and that his affidavit was not factually well-grounded. But it was Accurate Valve’s burden to overcome the presumption that Gilmore’s affidavit was submitted in good faith. *See Low*, 221 S.W.3d at 614. We conclude that Accurate Valve failed to meet its burden.

Accurate Valve paints Gilmore as a “chameleon . . . [that] changed his testimony because he shifted his focus from [Accurate Valve] to Unit Drilling who [sic] to blame for his injury.” However, the record does not support this contention. The cross-examination indeed seems to indicate an inconsistency between Gilmore’s affidavit and his testimony at court. In his affidavit, Gilmore averred that “[h]ad Accurate Valve Service, Inc. provided me with this tool, I could have done all my work from the ground, I would not have needed a forklift, and my injury would not have occurred,” this “tool” referring to a lifting eye. Yet at trial, Gilmore testified that Accurate Valve provided Gilmore with, and he used, lifting eyes at the time of his injury. When asked whether his affidavit was “false,” Gilmore gave evasive responses, such as “yes and no” and “if that’s how you want to look at it.”

It was Accurate Valve’s burden to prove that this allegedly false affidavit was a specific result of bad faith, not simply negligence or bad judgment. *See Low*, 221 S.W.3d at 614; *Drummond*, 508 S.W.3d at 676. Yet there is nothing in the evidence that suggests

Gilmore filed this affidavit with “dishonest, discriminatory, or malicious purposes.” *Drummond*, 508 S.W.3d at 676; *see Harrison*, 363 S.W.3d at 863. It arguably would have been easy for Gilmore to give an explanation as to the discrepancy between his affidavit and his testimony at trial, but once again, it was Accurate Valve’s burden to specifically demonstrate bad faith on the record. *See Low*, 221 S.W.3d at 614. Furthermore, we note that there is at least some evidence that Gilmore’s affidavit was not completely “groundless”; for example, the jury found that Accurate Valve was 21% at fault as a responsible third party, despite being non-suited. *See Tex. R. Civ. P.* 13. Thus, there is some evidence that the affidavit, and Gilmore’s claim against Accurate Valve in general, had some basis in law. *See Drummond*, 508 S.W.3d at 676.

Therefore, we conclude that Accurate Valve failed to establish that Gilmore’s affidavit was groundless and filed in bad faith. *See id.* The trial court did not abuse its discretion in denying Accurate Valve’s motion for sanctions. *See id.* We overrule Accurate Valve’s sole issue.

III. CONCLUSION

We affirm.

NORA L. LONGORIA
Justice

Delivered and filed the
9th day of May, 2019.