NUMBER 13-23-00581-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE PRESTON J. DUGAS III AND DUGAS & CIRCELLI, PLLC F/K/A PRESTON DUGAS LAW FIRM, PLLC

ON PETITION FOR WRIT OF MANDAMUS

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Tijerina
Memorandum Opinion by Justice Tijerina[1]

Relators Preston J. Dugas III and Dugas & Circelli PLLC f/k/a PJD Law Firm PLLC contend that the trial court[2] abused its discretion by sanctioning them $1,000 each day until they deposit insurance settlement proceeds that belong to a non-party into the registry of the court. Relators assert that the trial court erred by: (1) issuing sanctions

[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case."); *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number 2020CCV-61370-4 in the County Court at Law No. 4 of Nueces County, Texas, and the respondent is the Honorable Mark H. Woerner. *See id.* R. 52.2.

based on the trial court's inherent power without sufficient facts to establish "willful non-compliance" with the trial court's orders, and (2) issuing sanctions that are not based on the law or guiding principles. Relators further assert that they lack an adequate remedy by appeal to address the trial court's error. We conditionally grant the petition for writ of mandamus.

I. BACKGROUND

On September 30, 2020, Lubbock BW Properties #5, LLC (Lubbock) filed an interpleader petition against South Wind Public Adjusters (SWPA) and SWPA's former employees Mario Garcia and Monty Stone. *See* TEX. R. CIV. P. 43. Lubbock asserted that it had filed an insurance claim for wind, rain, and hail damage sustained by commercial property that it owned, but its insurance company disputed the amount of its losses. Lubbock thus hired a public adjuster and retained the relators to represent it regarding its insurance claim. Ultimately, Lubbock received an appraisal award, and Lubbock's insurance company issued payment of the appraisal award in the amount of $2,504,924.09. The public adjusters who provided services regarding Lubbock's claim were to be paid a percentage of the appraisal award for their services. However, a dispute arose over the division of the public adjusting fees between SWPA, Garcia, and Stone. Lubbock asserted that neither it nor relators had any interest in the public adjuster fees and requested the trial court to order the fees to be deposited into the registry of the court. Lubbock thus made "an unconditional tender" of $250,492 to be placed into the registry of the court.

On November 4, 2020, Garcia and Stone filed a pleading in which they, *inter alia*, claimed an interest in 70% of the $250,492 public adjusting fees, or $175,344.40.

According to this pleading, Garcia and Stone on one side, and SWPA on the other side, had pending claims against each other regarding the appropriate division of the disputed funds.

On December 3, 2020, the trial court signed an "Order Acknowledging Interpleader and Granting [Lubbock's] Request[ ]to Deposit Funds into the Registry of the Court." This order states:

> The Court, being apprised of the parties' agreement, hereby orders that [Lubbock] deposit the sum of $250,492.00 into the Court's registry.
>
> The Court also hereby orders that all funds potentially due to [SWPA, Garcia, and/or Stone] from the insureds listed in the attached exhibit are to be deposited into the Court's registry within five days of [relators'] receipt of said funds.

The order states that it is approved as to form and substance by the parties. The attached exhibit, entitled "Public Adjuster Files," listed eighteen names, including as the eighteenth, "Ben Fitzgerald dba Marshall Mall."[3] This exhibit contains no other information regarding the identity of the insured parties referenced therein.

On February 3, 2021, the trial court signed an "Order Holding Interpleader Action Valid." This order concluded that "the interpleader action filed by [Lubbock] is valid and appropriate" because there was "a reasonable doubt" as to ownership of the disputed funds as between SWPA, Garcia, and Stone. The order discharged Lubbock from liability to SWPA, Garcia, and Stone "and from this lawsuit, while maintaining all other causes of action or claims asserted" by and between SWPA, Garcia, and Stone.

More than two years later, on October 3, 2023, SWPA filed a "Motion to Enforce Rule 11 and Motion for Sanctions." SWPA asserted that relators had agreed to be bound

[3] As indicated elsewhere in the record, "Marshall Mall" is properly named as "Marshall Mall Investors, LP (Marshall Mall).

by the court's December 3, 2020 order regarding "the continuing obligation to tender funds from eighteen listed public adjuster files to be placed into the [c]ourt's registry" and that relators had previously complied with this obligation. SWPA asserted that "only the Marshall Mall insurance claim (Item #18 in the Public Adjuster File list) remains to be distributed." SWPA alleged that relators failed to follow this procedure with regard to the Marshall Mall claim and instead sent the settlement check directly to Marshall Mall; SWPA asserted that this action "violated the parties' Rule 11 Agreement and the Court's order." SWPA requested the trial court to order relators to either retrieve the check from Marshall Mall and deposit it into the court's registry, or to have the settlement check canceled and reissued payable to the district clerk and to deposit the reissued settlement check into the court's registry. SWPA requested that relators "be sanctioned for [their] conduct in an amount to be assessed by the Court." As an exhibit to its motion, SWPA included an email sent from its lawyers to relators regarding the "Marshall Mall Lawsuit." The email, dated August 10, 2023, requested relators to inform SWPA's counsel of the amount of Marshall Mall's settlement and requested that relators "send the Marshall Mall public adjuster funds to [SWPA's counsel] for further handling." SWPA's motion also included an exhibit entitled "Acknowledgment and Letter of Direction" executed by Garcia, Stone, and SWPA, in which Garcia and Stone disclaimed any interest in funds due to SWPA on the "Marshall Mall claim[]," and "direct[ed]" relators "to send all funds" to counsel for SWPA "to be held in trust, and distributed pursuant to the Settlement Agreement."

On October 16, 2023, Lubbock filed a pleading entitled "Non-Party [Lubbock's] Motion to Dismiss and Response to Motion to Enforce Rule 11 and Motion for Sanctions." Lubbock asserted that SWPA's motion should be denied because, *inter alia*, the court

lacked jurisdiction and SWPA's motion constituted "a baseless attempt at forum shopping." Lubbock asserted, in part:

> First, there has been no violation of the parties' Rule 11 Agreement, which destroys the required subject matter jurisdiction for this Court to hear SWPA's claims for relief. Further, to the extent the Rule 11 Agreement can be complied with at this time, [Lubbock] and its attorney[s], [relators], complied by depositing the disputed public adjuster fees from [Lubbock's] insurance claim into the Court's registry. Here, SWPA seeks to force other insureds, ***who were never parties to this interpleader action*** and who have an active lawsuit in another forum with SWPA regarding the amount of fees allegedly due and who do not agree to deposit disputed public adjuster fees into the Court's registry. SWPA's Motion fails because this Court lacks jurisdiction to issue a binding order over non-parties to a lawsuit and cannot enforce a void order which SWPA asks this Court to do.
>
> SWPA's true intention behind its Motion to Enforce and for Sanctions is to circumvent a lawsuit now pending in an East Texas court between SWPA and Marshall Mall. Marshall Mall filed its lawsuit against SWPA disputing the amount of public adjuster fees owed to SWPA. The undersigned counsel are not involved in that dispute and do not represent Marshall Mall in that other action. In response to Marshall Mall's lawsuit SWPA filed these baseless Motions to try and strong arm the [relators] to go take [their] client's insurance proceeds and forfeit the full amount of the public adjuster fees by depositing the fee[s] into the Court's registry despite Marshall Mall's pending litigation. Because of SWPA and its attorney's bad faith actions to circumvent justice, its Motions should be denied, and sanctions should be entered against both SWPA and its attorney.

(Internal footnote omitted). Lubbock further asserted that the court's December 3, 2020 order contained language that was "not consistent with the Rule 11 ordering other insureds that were never a party to the interpleader action" to deposit funds into the registry of the court. As exhibits, Lubbock included the Rule 11 agreement, the December 3, 2020 order, the February 3, 2021 order, correspondence affirming that Lubbock had been discharged from the case, a "Stipulation to Release Funds" dated September 1, 2021, allowing the court to release some of the settlement funds held in the registry of the court to counsel for SWPA, and pleadings from the lawsuit between Marshall Mall and

SWPA. The December 1, 2020 Rule 11 agreement provides, in relevant part, that SWPA, Garcia, and Stone "agree to allow [relators] and the clients listed in the attached Exhibit B to deposit public adjusting funds into the Registry of the Court." The petition filed by Marshall Mall against SWPA in cause number 23-0785 in the 71st District Court of Harrison County, Texas, was filed on August 23, 2023. According to the petition, the agreement between the parties stated that SWPA's public adjusting fee constituted "'10% of the amount adjusted above and beyond' certain undisputed, previously paid, or agreed amounts." Marshall Mall asserted that the parties disagreed regarding whether SWPA's public adjusting fees were to be calculated based on 10% of settlement proceeds or 10% of the "amount adjusted." Marshall Mall also claimed an offset against SWPA for additional expenses that it had incurred "due to [SWPA's] inadequate services."

On October 18, 2023, relators filed a "Supplemental Exhibit to [Lubbock's] Motion to Dismiss and Motion for Sanctions." This exhibit consisted of an unsworn declaration from Jerry Tate, part owner and authorized representative of Marshall Mall. Tate stated, in relevant part:

> 5. In March of 2020 an insurance claim, Claim No. 345401-GK (the "Claim"), was filed for covered damage at the Property.
>
> 6. To assist in handling the Claim[,] Marshall Mall retained [SWPA].
>
> 7. No money was paid on the Claim and Marshall Mall subsequently retained legal counsel, [relators,] to represent Marshall Mall in a lawsuit arising out of Marshall Mall's insurance Claim. A lawsuit was subsequently filed regarding the Claim in federal court in Harrison County.
>
> 8. This lawsuit was resolved in July of 2023.
>
> 9. Marshall Mall did not consent to any funds or public adjuster fees to be deposited in any Court's registry, in Nueces County or otherwise, and Marshall Mall did not authorize [relators] to do so.

10. There is a lawsuit between Marshall Mall and SWPA currently being litigated in the 71st District Court of Harrison County, Cause Number 23-0786 regarding SWPA's public adjuster fees. The Parties dispute how those fees should be calculated and the resulting division of funds as between Marshall Mall and SWPA.

On October 18, 2023, SWPA filed a reply to Lubbock's "Motion to Dismiss and Response to Motion to Enforce Rule 11 and Motion for Sanctions." SWPA asserted that the trial court had the authority to enforce its orders, that relators had previously deposited three checks into the court's registry, and that relators had the power to comply with the court's order by virtue of their attorney-client contracts. In support of its contentions, SWPA provided, among other items, an exemplar "Power of Attorney and Contingent Fee Contract" between relators and a non-party client.

On October 19, 2019, the trial court held a non-evidentiary hearing on the foregoing motions. Counsel for SWPA informed the court that it was "asking the Court to enforce its orders." Relators' counsel asserted that Marshall Mall settled its insurance claim in July and the settlement was funded in September; however, "in the course of that, Marshall Mall and [SWPA] got into a separate dispute." Relators' counsel reminded the trial court that the interpleader action before it was based on the dispute between SWPA, Garcia, and Stone, and advised the court that Marshall Mall had filed a separate lawsuit against SWPA regarding the amount it owed SWPA for public adjusting services. Relators informed the court that they were not involved in that separate litigation and contended that the dispute between Marshall Mall and SWPA was not foreseeable when relators agreed to the December 3, 2020 order. Relators further advised the court that Marshall Mall was not a party to the Rule 11 agreement, that it did not agree to the terms of the December 3, 2020 order, and that it had not agreed to make an appearance in the

underlying lawsuit. Relators asserted that they could not put the settlement proceeds into the registry of the court at present "because we don't know what the public adjuster fees are that are going to be due." Relators represented that "the second we know the amount of money that will [be] due [to SWPA], the money will be deposited into the registry of the Court."

On October 19, 2023, the trial court signed an order granting SWPA's motion to enforce and motion for sanctions. This order required relators to, within five days, "retrieve the check from the insured Marshall Mall and cause the funds to be deposited into the Court's registry or alternatively, cause the settlement check to be cancelled by the insurance company and reissued for the exact same amount to the order of the 'Nueces County District Clerk' and deposited into the Court's registry."

On October 30, 2023, SWPA filed a "Motion to Enforce Court Order, Signed on October 19, 2023, and Motion for Sanctions." SWPA asserted that relators failed to comply with the court's order and requested the trial court to order relators to pay $1,000 per day commencing on Thursday, October 26, 2023, "until such time as [relators] have complied with the Court's Order and deposited the subject funds into the Court's registry."

On November 2, 2023, relators filed a petition for writ of mandamus in this Court. Relators sought to compel the trial court to vacate the October 19, 2023 order or alternatively, to vacate one portion of the December 3, 2020 order. *See In re Dugas*, No. 13-23-00472-CV, 2023 WL 8292472, at *1 (Tex. App.—Corpus Christi–Edinburg Nov. 30, 2023, orig. proceeding) (mem. op.).[4] After requesting and receiving a response to the

[4] By four issues, relators contended that mandamus should issue because the trial court lacked jurisdiction, Marshall Mall's claims were not ripe, SWPA failed to file a breach of contract action or motion for summary judgment, and the trial court ordered "mandatory injunctive relief." *See* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=e80492dc-d16c-45ba-8613-42d07f3c18b

petition for writ of mandamus from SWPA, we denied relief on November 30, 2023. *See id.*

On December 11, 2023, relators filed a "Request to Stay Enforcement of Court Order Signed October 19, 2023." Relators requested the trial court to stay the enforcement of its October 19, 2023 order because the parties were "discussing a potential resolution that will see the disputed funds deposited into the registry of this Court pending the outcome of a motion to transfer venue which SWPA has filed" in the Harrison County litigation, and "Marshall Mall has not agreed to release the funds and [relators] cannot force them to do so." In support of their motion, relators attached two letters dated December 8, 2023, as exhibits. In the first letter, Marshall Mall's counsel advised relators that he had received their request to deliver the check to them for deposit into the registry of the court, and that Marshall Mall was responding to this request as follows:

> Marshall Mall declines to deliver the check to you, for several reasons including the following three.
>
> First, as you know, Marshall Mall did not consent to any funds being deposited into the registry of the Nueces County Court, and did not authorize Mr. Dugas to do so.
>
> Second, Marshall Mall was not a party to the proceeding that resulted in the referenced order, and did not participate in any hearing.
>
> Third, Marshall Mall and SWPA dispute how the check should be divided as between Marshall Mall and SWPA, and that dispute is pending under the above-referenced cause number before the 71st District Court of Harrison County, Texas. If these disputed funds are to be deposited in the registry of a Court, it should be the Court that is presiding over the dispute.

In the second letter, Marshall Mall's counsel advised relators and SWPA that Marshall Mall's settlement check, issued on July 17, 2023, contained a warning that the settlement

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6&coa=coa13&DT=Brief&MediaID=ce585e16-e6dd-4bf3-b13a-2dffea990e70. Relators did not assail the trial court's ability to enforce its orders.

check would be rendered void if it was not cashed within 180 days, and advised them that this deadline was fast approaching. This letter stated that:

> Marshall Mall and SWPA dispute how the check should be divided as between Marshall Mall and SWPA, and I understand that [relators do] not claim any interest in the check. But so far, SWPA has not agreed to my suggestion from August that we deposit the check into my firm's trust account for safekeeping until this dispute is resolved. Instead, SWPA has filed a motion to transfer venue of the Harrison County lawsuit to Nueces County. That motion has not been set for hearing, and any hearing would not occur until after the check expires on January 13, 2024 (my client is entitled to at least 45 days' notice of hearing).
>
> [SWPA's counsel] has shared the trial court order from Nueces County, directed at [relators], as well as the Memorandum Opinion from the 13th Court of Appeals denying their mandamus petition. As you know, Marshall Mall did not consent to any funds being deposited into the registry of the Nueces County Court, and did not authorize [relators] to do so. I assume [relators] may pursue a mandamus petition to the Supreme Court of Texas.
>
> All this to say—we have plenty to argue over but we all risk the check expiring before those arguments are resolved. I have two alternative solutions.
>
> The first is to simply have everyone endorse the check and deposit the funds into my firm's trust account as originally suggested. If the 71st District Court denies SWPA's motion to transfer venue, then the funds would remain in my trust account until the pending lawsuit is resolved. If, however, the 71st District Court transfers venue to Nueces County, then we would transfer the funds to the registry of the Nueces County Court for safekeeping until the lawsuit is resolved.
>
> The second option is to agree to deposit the check into the registry of the 71st District Court. If the 71st District Court denies the venue motion, the funds will remain in its registry until resolution of the lawsuit; if the 71st District Court transfers venue, then the funds may be transferred to the registry of the Nueces County Court along with the case.
>
> Under either option, [relators] would agree not to pursue a mandamus petition to the Supreme Court of Texas, and SWPA would agree not to pursue further litigation against [relators] in Nueces County regarding this matter. Moreover, regardless of which option is selected, Marshall Mall and SWPA will not use that fact as a basis to maintain or transfer venue of their pending lawsuit.

> I believe either solution is fair to all involved. Please promptly advise whether you will agree to either solution.

On December 11, 2023, the trial court held a hearing on SWPA's motion for sanctions and enforcement. Relators admitted that "it was an error on our part to include Marshall Mall as part of that Rule 11. We did not anticipate a dispute."

On December 11, 2023, the trial court signed the order at issue in this original proceeding: "Order Granting Enforcement and For Sanctions." This order requires relators to comply with the trial court's previous orders and provides:

> It is further ordered that, pursuant to this Court's inherent power to address abuse of the judicial process and to preserve the integrity of Texas' judicial system, and finding willful non-compliance with its Orders by [relators] to date, [relators] shall pay as sanctions, jointly and severally, to [SWPA] the sum of $1,000.00 per day, commencing on October 26, 2023[,] and continuing to accrue until full compliance with the Court's Orders is achieved.

Relators subsequently filed this petition for writ of mandamus and a motion to stay the trial court's December 11, 2023 order. This Court granted relators' motion to stay and requested and received a response to the petition for writ of mandamus from SWPA. *See* TEX. R. APP. P. 52.4, 52.8, 52.10. Relators filed a reply to SWPA's response, and SWPA filed a sur-reply thereto. *See id.* R. 52.5.

II. SANCTION OR CONTEMPT

The parties present different views regarding the trial court's December 11, 2023 order. Relators contend that the trial court's order is a sanction issued under the trial court's inherent authority; however, SWPA contends that the trial court's order constitutes a coercive civil contempt order. According to SWPA, "[a] court need not find bad faith to assert [its] civil contempt power against an attorney who fails to comply with a court order."

"Contempt of court is broadly defined as disobedience to or disrespect of a court

by acting in opposition to its authority." *In re Luther*, 620 S.W.3d 715, 721 (Tex. 2021) (orig. proceeding) (per curiam) (quoting *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding)). "Contempt is strong medicine—the alleged contemnor's very liberty is often at stake—and so it should be used only as a last resort." *Id.* (quoting *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex. Crim. App. 1988) (cleaned up)). When a contemnor fails to obey a court order, the situation is considered indirect or constructive contempt of court and in such cases the contemnor is entitled to notice and a hearing that complies with due process requirements. *In re Reece*, 341 S.W.3d 360, 365–66 (Tex. 2011) (orig. proceeding); *Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (orig. proceeding). Constructive contempt "requires greater adherence to the traditional notions of due process such as (1) notice of the alleged violations, (2) notice of hearing, and (3) an ample opportunity to prepare for and respond to the allegations." *In re Hesse*, 552 S.W.3d 893, 898 (Tex. App.—Amarillo 2018, orig. proceeding). "A contempt fine is not payable to a private litigant." *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669 (Tex. App.—Fort Worth 2001, pet. denied).[5]

Here, SWPA filed a "Motion to Enforce Court Order, Signed on October 19, 2023, and Motion for Sanctions." In this motion, SWPA asked the court to require relators to pay $1,000 per day until they deposit the disputed funds into the registry of the court. The notice of hearing on SWPA's motion references the motion's title and does not include other information about the hearing. The "Order Granting Enforcement and for Sanctions"

[5] We further note that in order to support a judgment of contempt, the underlying order "must clearly, specifically, and unambiguously state the conduct required for compliance," and otherwise, "[a] court order that fails to meet these requirements is not 'definite and certain enough to support a finding of contempt.'" *In re Luther*, 620 S.W.3d 715, 722 (Tex. 2021) (orig. proceeding) (per curiam) (quoting *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981) (orig. proceeding)).

does not mention contempt and instead expressly provides that relators "shall pay as sanctions, jointly and severally, to [SWPA] the sum of $1,000.00 per day."

Here, examining the substance of SWPA's motion, we determine that SWPA sought sanctions against relators and did not seek to hold them in contempt of court. *See Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011) (per curiam) (stating that "courts should acknowledge the substance of the relief sought"); *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex.1980) (orig. proceeding) ("We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it."); *Ealy v. EVC Engage, LLC*, 679 S.W.3d 697, 701 (Tex. App.—Houston [1st Dist.] 2022, pet. denied) (stating that we examine "the substance of the document rather than its title or caption" which is "gleaned from the body of the instrument and the prayer for relief"); *see also* TEX. R. CIV. P. 71. The notice provided to relators did not include a show cause provision and did not indicate that relators might be held in contempt. *See In re Reece*, 341 S.W.3d at 365; *In re Hesse*, 552 S.W.3d at 898. And, unlike a contempt order, the order at issue provided for the monetary fine to be paid to SWPA, a private litigant. *See Cadle Co.*, 50 S.W.3d at 669. Based on the foregoing, we reject SWPA's contention that the trial court's December 11, 2023 order should be reviewed as a contempt order and proceed instead to review it as a sanction order.

III. INHERENT AUTHORITY TO SANCTION

The trial court's order sanctioning relators is premised on its "inherent power to address abuse of the judicial process and to preserve the integrity of Texas' judicial system." Trial courts may use their inherent powers to "aid the exercise of their jurisdiction, facilitate the administration of justice, and preserve the independence and integrity of the

judicial system." *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 718 (Tex. 2020); *see In re E.M.*, 665 S.W.3d 832, 836 (Tex. App.—Houston [14th Dist.] 2023, no pet.); *In re Guardianship of Browning*, 642 S.W.3d 598, 606–07 (Tex. App.—Eastland 2022, pet. denied). The trial court also has inherent "power to discipline an attorney's behavior." *Brewer*, 601 S.W.3d at 718 (quoting *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (per curiam)); *see Thuesen v. Scott*, 667 S.W.3d 467, 474 (Tex. App.—Beaumont 2023, no pet.). A court's inherent power to sanction "necessitates a finding of bad faith." *Brewer*, 601 S.W.3d at 719. The supreme court has described this "bad faith" standard as follows:

> With the understanding that inherent powers must be used sparingly, our appellate courts have consistently held that a court's inherent power to sanction "exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process . . . ." Bad faith is not just intentional conduct but intent to engage in conduct for an impermissible reason, willful noncompliance, or willful ignorance of the facts. "Bad faith" includes "conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose." Errors in judgment, lack of diligence, unreasonableness, negligence, or even gross negligence—without more—do not equate to bad faith. Improper motive, not perfection, is the touchstone. Bad faith can be established with direct or circumstantial evidence, but absent direct evidence, the record must reasonably give rise to an inference of intent or willfulness.

Id. at 718–19 (internal footnotes omitted); *see Thuesen*, 667 S.W.3d at 474; *In re E.M.*, 665 S.W.3d at 836; *In re Guardianship of Browning*, 642 S.W.3d at 606–07.

IV. STANDARD OF REVIEW

A sanction order must be "just." *Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577, 589 (Tex. 2023) (quoting *TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding)). We apply a two-part test to determine whether a sanction

is just.[6] *Schindler*, 670 S.W.3d at 589; *TransAm. Nat. Gas Corp.*, 811 S.W.2d at 917. First, there must be a direct relationship between the offensive conduct and the sanction imposed. *Schindler*, 670 S.W.3d at 589; *Altesse Healthcare Sols., Inc. v. Wilson*, 540 S.W.3d 570, 572 (Tex. 2018) (per curiam); *TransAm. Nat. Gas Corp.*, 811 S.W.2d at 917. This requires the court to "attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." *Schindler*, 670 S.W.3d at 589 (quoting *TransAm. Nat. Gas Corp.*, 811 S.W.2d at 917). "To meet this requirement, a sanction must be directed against the wrongful conduct and toward remedying the prejudice suffered by the innocent party." *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 489 (Tex. 2014); *see TransAm. Nat. Gas Corp.*, 811 S.W.2d at 917. Second, a sanction must not be excessive, which means it should not be more severe than necessary to satisfy its legitimate purpose. *Schindler*, 670 S.W.3d at 589; *Altesse Healthcare Sols.*, Inc., 540 S.W.3d at 574; *TransAm. Nat. Gas Corp.*, 811 S.W.2d at 917. This part of the test requires the trial court to consider the availability of lesser sanctions and, "in all but the most exceptional cases, actually test the lesser sanctions." *Petroleum Sols., Inc.*, 454 S.W.3d at 489 (quoting *Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004)). Thus, in conducting our analysis, we make "two distinct determinations: (1) whether conduct is sanctionable and (2) what sanction to impose." *Brewer*, 601 S.W.3d at 716.

We review a trial court's ruling on a motion for sanctions for an abuse of discretion. *Id.* at 717; *Altesse Healthcare Sols., Inc.*, 540 S.W.3d at 573; *Cire*, 134 S.W.3d at 838.

[6] SWPA contends that the traditional *TransAmerican* analysis does not apply in this case because *TransAmerican* applies only to sanctions based on discovery transgressions. *See TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding)). However, the supreme court has expressly held that the *TransAmerican* analysis applies to sanctions issued under the trial court's inherent authority, as in this case. *See Altesse Healthcare Sols., Inc. v. Wilson*, 540 S.W.3d 570, 574–75 (Tex. 2018) (per curiam); *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) (per curiam).

The trial court abuses its discretion if its ruling is not based on some evidence or is contrary to the only permissible view of properly admitted, probative evidence. *See Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam); *Westview Drive Invs., LLC v. Landmark Am. Ins.*, 522 S.W.3d 583, 610 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). A decision lacking factual support is arbitrary and unreasonable and must be set aside. *Brewer*, 601 S.W.3d at 717. We review the evidence in the light most favorable to the trial court's ruling, and we draw all reasonable inferences from the evidence in favor of the ruling. *Duncan v. Park Place Motorcars, Ltd.*, 605 S.W.3d 479, 488 (Tex. App.—Dallas 2020, pet. withdrawn); *Darnell v. Broberg*, 565 S.W.3d 450, 460 (Tex. App.—El Paso 2018, no pet.); *Kutch v. Del Mar Coll.*, 831 S.W.2d 506, 512 (Tex. App.—Corpus Christi–Edinburg 1992, no writ).

V. ANALYSIS

Relators argue that the trial court abused its discretion by awarding sanctions because they did not act in bad faith and "[t]he record is void of evidence sufficient to support that [relators'] actions amounted to a conscious effort to engage in wrongdoing rather than [a] simple mistake in judgment." Relators contend that the sanction is excessive, and the trial court did not consider if lesser sanctions would remedy their alleged transgression. Relators assert that the trial court did not enter a sanction directly related to any wrongdoing because the "daily reoccurring monetary sanction bears no connection to [relators'] alleged one-time violation." Relators assert that they were ordered to deposit "all funds potentially due to" SWPA, Stone, and Garcia, and because the exact amount is unknown, there is no evidence linking the amount awarded to any

harm sustained; thus, the daily sanction of $1,000 to be paid to SWPA constitutes "an impermissible arbitrary fine."

In contrast, SWPA argues that the record supports a finding of bad faith. SWPA contends that relators' contract with Marshall Mall included a power of attorney that granted relators the authority to place the disputed funds in the registry of the court. SWPA thus asserts that "[w]ith such a broad power of attorney, there is no plausible argument [that relators] could not comply" with the trial court's orders. SWPA further asserts that relators "admit they could comply with the order." SWPA contends that relators' contentions that they made a mistake by not depositing the funds are inconsistent with their assertion at the October 19, 2023 hearing that "we're not there yet."

Assuming without deciding that relators' contract with Marshall Mall contains the same language that the exemplar contract in the record does, and similarly assuming that Marshall Mall did not revoke that contract, we disagree that it grants relators the authority to handle Marshall Mall's settlement check in a manner contrary to its instructions. The exemplar contract provides:

> Attorney is hereby granted a power of attorney so that Attorney may have full authority to prepare, sign and/or file all correspondence, legal instruments, pleadings, drafts, settlement checks, authorizations and papers, on behalf of the Attorney and/or Client, as shall be reasonably typical and necessary to conduct this representation including settlement subject to paragraph 7 above and/or reducing to possession any and all monies or other things of value due to Client as fully as the Client could do so in person. This section specifically allows Attorney to endorse, on behalf of Client and/or Attorney, any drafts or checks in settlement of the Claim of the Client after the Client has approved of the settlement. Attorney is also authorized and empowered to act as Client's negotiator in any and all settlement negotiations concerning the subject of this contract; however, nothing in this paragraph shall terminate the obligations of Attorney stated in paragraph 7 above.

There are several problems with SWPA's contentions. The contract between Marshall Mall and relators pertained to Marshall Mall's lawsuit against its insurance company, not Lubbock's lawsuit regarding intervention. Further, the contract limits relators' authority to that which was "reasonably typical and necessary to conduct this representation." This authority palpably does not extend to the intervention, or a lawsuit between Marshall Mall and SWPA. More significantly, SWPA fails to discuss or acknowledge the evidence presented by relators that Marshall Mall was not a party to the proceeding, that it did not consent to placing its settlement check into the registry of the court, and that it refused to return the check to relators for that purpose.

Reviewing the record evidence in the light most favorable to the trial court's ruling, *see Duncan*, 605 S.W.3d at 488, the evidence does not give rise to an inference that relators committed the "conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose" *See Brewer*, 601 S.W.3d at 719. At the sanctions hearing, no evidence was presented to show that the relators acted for an impermissible reason, were willfully non-compliant, or willfully ignorant. *Id.* To the contrary, the evidence before the trial court showed that Marshall Mall, who was not a party to the underlying lawsuit, did not consent to allow relators to deposit the disputed funds into the registry of the court, and that Marshall Mall refused to return the settlement check to relators. In hindsight, relators' agreement to entry of the December 3, 2020 order was improvident insofar as it encompassed non-parties and separate lawsuits pending in other courts. However, relators should not be faulted for failing to predict that Marshall Mall would sue SWPA in a different court raising claims unrelated to the apportionment of the public adjuster fees

between SWPA, Garcia, and Stone.[7] Because the record evidence fails to reasonably give rise to an inference of intent or willfulness as to support a bad faith finding, the trial court abused its discretion by assessing sanctions against relators. *See id.* Having so concluded, we need not address relators' additional contentions regarding the trial court's abuse of discretion. *See* TEX. R. APP. P. 47.4.

VI. REMEDY

In their second issue, relators contend that they lack an adequate remedy by appeal because sanctions were issued against then individually rather than as a party to the lawsuit. SWPA does not present any argument or authority in support of the contrary position. Ordinarily, there is an adequate remedy by appeal from an order awarding sanctions. *In re Preventative Pest Control Hous., LLC*, 580 S.W.3d 455, 461–62 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding); *In re RH White Oak, LCC*, 442 S.W.3d 492, 503 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding [mand. denied]) (per curiam). However, with some exceptions that are not applicable here, an appeal is generally available only to parties of record. *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 723 (Tex. 2006) (orig. proceeding); *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 754–55 (Tex. 2003); *In re Marriage of Dilick*, 550 S.W.3d 766, 772 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). Thus, when a court's order is issued against a non-party to a lawsuit, mandamus is appropriate because the party has no adequate remedy by appeal. *In re Berry*, 578 S.W.3d 173, 182 (Tex. App.—Corpus

[7] We further note that while SWPA contended vociferously in the trial court and in this proceeding that the trial court's December 3, 2020 order required relators to deposit Marshall Mall's settlement check funds into the registry of the court, SWPA instead and inconsistently directed relators to send the settlement check directly to its counsel in its August 10, 2023 email and in the "Acknowledgment and Letter of Direction" executed by Garcia, Stone, and SWPA.

Christi–Edinburg 2019, orig. proceeding); *In re White*, 227 S.W.3d 234, 236 (Tex. App.—San Antonio 2007, orig. proceeding [mand. denied]).[8] Here, relators are not parties to the underlying trial court proceeding, and they lack a remedy by appeal for the trial court's order.

VII. CONCLUSION

The Court, having examined and fully considered relators' petition for writ of mandamus, SWPA's response, the additional briefing provided by the parties, and the applicable law, is of the opinion that relators have met their burden to obtain relief. Accordingly, we lift the stay previously imposed in this original proceeding. *See* TEX. R. APP. P. 52.10. We conditionally grant the petition for writ of mandamus and direct the trial court to vacate its December 11, 2023 order. Our writ will issue only if the trial court fails to act promptly in accordance with this memorandum opinion.

JAIME TIJERINA
Justice

Delivered and filed on the
22nd day of March, 2024.

[8] Because a party who seeks to alter a trial court's judgment must file a notice of appeal, an attorney who seeks to appeal sanctions imposed against the attorney individually must either join the client's notice of appeal or file a separate notice of appeal. *State ex rel. Durden v. Shahan*, 658 S.W.3d 300, 304 (Tex. 2022) (per curiam). However, Lubbock is no longer a party to the underlying proceeding, Marshall Mall has never been a party, and there is no otherwise appealable order.