Affirmed and Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00272-CV

OSCAR GREER, Appellant

V.

YOLANDA E. MARTINEZ-GREER, Appellee

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Cause No. 98-48570

O P I N I O N

Appellant Oscar Greer (Oscar) appeals a final decree of divorce granted after Oscar's pleadings were stricken for discovery abuses. In four points of error, Oscar contends the trial court's imposition of death penalty sanctions constituted an abuse of discretion. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 1998, Appellee Yolanda Greer (Yolanda) filed for divorce. Yolanda served Oscar, through his attorney of record, a request for production. Oscar failed to respond to Yolanda's request for production. Yolanda filed her first motion to compel

discovery and for sanctions on March 23, 1999. The trial court held its first discovery/sanctions hearing on April 8, 1999, and granted Yolanda's motion to compel discovery and for sanctions and ordered Oscar to pay Yolanda's attorney's fees and costs in the amount of $525.66. The trial court's order included a warning to Oscar that "in the event that Oscar . . . fail[ed] to fully and completely respond to the Request for Production . . . all pleadings filed by Oscar . . . in this cause may be stricken."

On April 16, 1999, Oscar served his responses to Yolanda's request for production. Oscar's responses were evasive and incomplete. Oscar consistently responded that he did not have the requested records, but he would give permission for Yolanda to obtain them. On September 20, 1999, Yolanda filed a second motion to compel discovery and for sanctions because Oscar refused to correct the deficiencies in his original responses to Yolanda's request for production. The trial court held its second discovery/sanctions hearing on October 20, 1999, and granted Yolanda's motion to compel discovery.

Because Oscar failed to comply with the trial judge's instructions given to him at the October 20th hearing by not giving full responses to Yolanda's discovery requests, on November 10, 1999, Yolanda filed her third motion for sanctions. On November 15, 1999, at the third hearing on Oscar's discovery abuses, Yolanda identified numerous deficiencies in Oscar's responses. For example, Oscar claimed he had no tax returns post-1993 even though he had been employed during at least four of the years in question. Oscar also denied having any records or writings relating to any bank accounts. In sum, the only responsive documents Yolanda received were two certificates of title to two cars in Oscar's name, even though he owned at least six vehicles.

On the day of the death penalty sanction hearing, Oscar was able to produce a summary of checking account deposits for the months of December 1998 to November 1999, four months of regular share drafts account summaries, regular savings account figures, and copies of his driver's license and social security card. However, Oscar did not produce any tax documents, real property records, statements for retirement accounts, or titles for the

other vehicles that were in his name. Through her own efforts, Yolanda uncovered at least four additional vehicles in Oscar's name and a Merrill Lynch account that Oscar failed to disclose.

Pursuant to its prior warning, the trial court granted Yolanda's motion for sanctions and struck Oscar's pleadings. Trial proceeded as if Oscar had not filed an answer. Oscar was permitted to cross-examine the witnesses called by Yolanda, but was not allowed to testify or call his own witnesses or present independent evidence regarding the value of community assets or debts. As a result, the divorce was granted and Yolanda was awarded all property in her possession and control, a vehicle, $5000 from a Merrill Lynch account, 65% of Oscar's DuPont pension, and the residence at 9221 Pembrook, Houston. Oscar was awarded all remaining vehicles, all furniture and personal effects in his possession, any businesses in his name in which he owns any interest, the remaining balance of the Merrill Lynch account, the remaining 35% of his DuPont pension account and any financial accounts in his name, including his credit union account.

Oscar filed a motion for new trial that was heard by an associate judge. After notice and a hearing, the motion was denied. Oscar appealed that ruling to the presiding judge. After notice and another hearing, the order striking Oscar's pleadings was upheld and Oscar's motion for new trial was denied.

II. POINTS OF ERROR PRESENTED ON APPEAL

Oscar asserts four points of error in his brief. However, Oscar's points of error do not directly correspond to the arguments contained in his brief. Therefore, we will address the gravamen of Oscar's argument, which is the trial court abused its discretion in striking Oscar's pleadings, and disregard his points of error.[1]

[1] Furthermore, Oscar's third and fourth points of error allege error in the trial court's denial of Oscar's motion for new trial. However, Oscar cites no authority in support of this contention. *See* TEX. R. CIV. P. 38.1. Accordingly, Oscar waives these points of error. *Id.*; *see also Novostad v. Cunningham*, 38 S.W.3d 767, 771 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.) (holding the issue is waived when a party cites no authority and makes no legal argument in support of its point of error).

III. STANDARD OF REVIEW

Discovery sanctions imposed by a trial judge will be set aside only when the court clearly abused its discretion. *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986); *Cellular Marketing, Inc. v. Houston Cellular Telephone Co.*, 838 S.W.2d 331, 333 (Tex. App.–Houston [14th Dist.] 1992, writ denied). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles, or whether the act was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *see also White v. Bath*, 825 S.W.2d 227, 229 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

In reviewing a sanctions order, we ordinarily look to the trial court's formal findings of fact. *McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 756 (Tex. App.—Dallas 1993, no writ). The purpose of a trial court making findings of fact to support its imposition of sanctions is to aid appellate review, to assure judicial deliberation, and to enhance the deterrent effect of the order. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex. 1992). Thus, findings of fact in the discovery context should not be treated like findings in nonjury trials. *Id*. (citing *United States Fidelity & Guar. Co. v. Rossa*, 830 S.W.2d 668, 672 (Tex. App.—Waco 1992, writ denied). On appeal, we are not limited to a review of the sufficiency of the evidence to support the trial court's findings. *Rossa*, 830 S.W.2d at 672. We review the entire record, including arguments of counsel, written discovery on file, evidence presented to the trial court, and the circumstances surrounding the alleged discovery abuse to determine whether the court abused its discretion in imposing the sanction. *Id*. In the absence of formal findings, we will look to the trial court's statement in the sanctions order. *Monroe v. Grider*, 884 S.W.2d 811, 816 (Tex. App.—Dallas 1994, writ denied). In this case, formal findings of fact were not requested, but the trial court's order recites facts and findings supporting the imposition of sanctions.

When sanctions are so severe as to preclude presentation on the merits, the trial court's discretion is limited by the requirement that the sanctions be just. TEX. R. CIV. P.

215(2)(b). Thus, we review the trial court's actions under the abuse of discretion standard, using the four factors set out in *Transamerican* to determine whether the sanctions are just, and by examining the entire record before us to determine whether the trial court's findings are supported by the record. *See Transamerican Nat'l Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

IV. DISCUSSION: *TRANSAMERICAN* FACTORS

In *Transamerican*, the Texas Supreme Court set out four factors to use in determining whether a sanction is just. *Transamerican*, 811 S.W.2d at 917; *see also Daniel v. Kelley Oil Corp*., 981 S.W.2d 230, 234–35 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). "First, a direct relationship must exist between the offensive conduct and the sanction imposed." *Transamerican*, 811 S.W.2d at 917. This means the sanction must remedy the prejudice caused the innocent party and punish the actual offender, whether that be the party or its counsel. *Id*. Second, the sanction must not be excessive. *Id*. The punishment must fit the crime. *Id*. Third, trial courts must consider lesser sanctions before using the death penalty, for ultimate sanctions violate due process absent a party's flagrant bad faith or counsel's callous disregard for the discovery process. *Id.* at 918. Lastly, "discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit" or it would be unjust to permit the party to present the substance of the position which is the subject of the withheld discovery. *Id*.; *see also Blackmon*, 841 S.W.2d at 850 (citing *Transamerican*, 811 S.W.2d at 918; *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding)).

We will examine the entire record in light of those four factors to determine whether the trial court abused its discretion in striking Oscar's pleadings.

1. Sanction must bear direct relationship to the offensive conduct.

As mentioned above, the first *Transamerican* factor requires a direct relationship

between the offensive conduct and the sanctions imposed. *Transamerican,* 817 S.W.2d at 917. This requirement means that the sanction must remedy the prejudice caused the innocent party and punish the actual offender. *Id*. Oscar contends it was his attorney who violated the discovery orders of the court and not Oscar himself. In order to resolve this issue, we must examine the testimony that was elicited at the hearing on Oscar's motion for new trial.

Oscar testified Mr. Harris, his attorney during the pendency of the divorce action and while the discovery abuses occurred, did not go over Yolanda's discovery requests with him. In fact, Oscar testified that Mr. Harris specifically and exclusively asked him to bring to Mr. Harris' office a copy of only one car's title, bank statements from 1998 through 1999, house deeds, insurance information and addresses for Oscar's children. Oscar also testified Mr. Harris never asked him to bring in any wage statements or any information regarding Oscar's pension, both of which Oscar could have produced. Oscar further stated that Mr. Harris did not inform him of the hearing on Yolanda's motion for sanctions.

Mr. Harris also testified at both hearings on Oscar's motion for new trial. Mr. Harris testified that his usual procedure after receiving discovery requests was to call his client into his office and go over the request. Contrary to Oscar's testimony, Mr. Harris stated that he did sit down with Oscar to go over Yolanda's discovery requests. In fact, Mr. Harris testified that he went over Yolanda's request for production with Oscar several times. Mr. Harris said that he gave Oscar copies of the various discovery requests, including the requests for disclosure. Mr. Harris also stated that Oscar knew about the hearings on Yolanda's motion for sanctions.

When a judge sits as a finder of fact, he is entitled to judge the credibility of the witnesses and weigh their testimony accordingly. *Tate v. Commodore County Mut. Ins. Co.*, 767 S.W.2d 219, 224 (Tex. App.—Dallas 1989, writ denied) (citing *Bormaster v. Henderson*, 624 S.W.2d 655, 659 (Tex. App.--Houston [14th Dist.] 1981, no writ) which held that in a nonjury trial the judge is the trier of fact and it is his prerogative and responsibility to weigh

the credibility and the proof of the evidence). He may believe all, part, or none of a witness' testimony because he has the opportunity to observe a witness' demeanor. *Tate*, 767 S.W.2d at 22. From the testimony described above, the trial court found that Oscar, not his attorney, engaged in continuous and repeated abuse of the discovery process. The trial court did not abuse its discretion in determining there was a direct relationship between the offensive conduct and the sanctions imposed. *See Transamerican*, 817 S.W.2d at 917 (emphasizing sanctions should be imposed upon the offender, whether that be the attorney, the client, or both).

2. Sanction must not be excessive.

The second *Transamerican* factor requires that the sanction not be excessive. The most important factors to consider in determining whether a sanction is excessive are (1) whether the court considered and/or tested lesser sanctions to see if lesser sanctions would promote compliance and deterrence and discourage further abuse, (2) whether the sanctions are no more severe than necessary to satisfy the legitimate purposes of a sanction (i.e., to secure compliance, to deter others and to punish), and (3) whether the party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *Butan Valley, N.V. v. Smith*, 921 S.W.2d 822, 831 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Blackmon*, 841 S.W.2d at 849; *Transamerican*, 811 S.W.2d at 917).

The court's order states that lesser sanctions were ineffective to cause Oscar's compliance. From this statement, it can be inferred the trial court found further imposition of lesser sanctions would have been futile. The record supports the trial court's finding that lesser sanctions would not have promoted compliance or have been a more commensurate punishment for Oscar's discovery abuse. The trial court twice ordered Oscar to produce the requested documents and ordered Oscar to pay Yolanda's attorney's fees. The record shows Oscar produced incomplete documents in direct violation of the court's orders and failed to rectify the violations even after being informed of the possible consequences of not doing so. Therefore, we find the record supports the trial judge's finding that the second factor of

the *Transamerican* test had been satisfied.

3. Court must first impose a lesser sanction.

The third factor of *Transamerican* requires the trial court to test lesser sanctions before striking a party's pleadings in order to determine whether they are adequate to secure the compliance of the offender. *Blackmon*, 841 S.W.2d at 849. Prior to striking Oscar's pleadings, the trial court issued two orders to compel Oscar's compliance and ordered Oscar to pay Yolanda's attorney's fees. Oscar argues an order to compel does not constitute a lesser sanction within the meaning of Rule 215 of Texas Rules of Civil Procedure. Oscar cites *CRSS, Inc. v. Montanari*, 902 S.W.2d 601, 612 (Tex. App.—Houston [1st Dist.] 1995, writ denied), in support of this contention. Contrary to the facts in this case, the order at issue in *CRSS* did not contain any language warning the appellant that the trial court might strike his pleadings for non-compliance with that order to compel. *Id*. at 613 n.18.

Texas courts have recognized a distinction between a mere order to compel *without* threatening language and an order to compel *with* threatening language. Although a mere order to compel does not constitute a lesser sanction, an order to compel that contains a warning that a party's pleadings will be stricken if the order is not complied with has been held to constitute a lesser sanction. *GTE Mobilnet of South Texas, Ltd. P'ship v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 298 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (acknowledging their prior holding in *Andras v. Memorial Hosp. Sys.*, 888 S.W.2d 567, 572 (Tex. App.—Houston [1st Dist.] 1994, writ denied), that an order to compel coupled with language that noncompliance will result in dismissal does constitute lesser sanction); *see also Jaques v. Texas Employers' Ins. Ass'n*, 816 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that if a party failed to comply with an order to compel discovery with the knowledge their pleadings would be stricken for non-compliance, death penalty sanctions would be appropriate).

The first order issued by the trial court in this case contained a warning to Oscar that his pleadings might be stricken for failure to comply with the order. Therefore, the record

supports the trial judge's finding that lesser sanctions had been tested before the trial court's imposition of death penalty sanctions. The third factor of the *Transamerican* test is satisfied.

4. Sanctioned party's conduct must justify presumption its claims lack merit.

The fourth factor of *Transamerican* states that a death penalty sanction should not be imposed unless the sanctioned party's conduct justifies a presumption that its claims lack merit or it would be unjust to permit the party to present evidence regarding the substance of the position which is the subject of the withheld discovery. *Transamerican*, 811 S.W.2d at 918. The discovery requested by Yolanda was materially related to the issues of the pending divorce. In the sanction order, the trial court noted Oscar misrepresented to the court that he did not have or maintain requested documents and acted in a misleading manner so as to conceal the requested information which was necessary to determine the extent of the community estate. Oscar's repeated failure to respond to Yolanda's request supports the presumption his conduct was motivated by a desire to keep Yolanda from learning about the true nature and extent of the community estate.

Oscar's repeated failure to comply with the court's discovery orders justified the presumption Oscar's defenses lacked merit. Thus, the trial court did not abuse its discretion in determining that the fourth and final factor of the *Transamerican* test had been satisfied.

V. CONCLUSION

Because we hold the trial court did not abuse its discretion in striking Oscar's pleadings, the judgment of the trial court is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).