REVERSE and REMAND; and Opinion Filed December 21, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01375-CV

NRG & ASSOCIATES, LLC, Appellant
V.
SERVICE TRANSFER, INC., Appellee

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-16-01376-E

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Boatright

This appeal arises from a final judgment assessing a "death penalty" sanction against a defendant who failed to appear at a court-ordered mediation. The appellant, NRG & Associates, LLC (NRG), contends that the trial court abused its discretion in imposing the sanction. We reverse the judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

The appellee, Service Transfer, Inc. (Service Transfer) sued NRG in March of 2016 for breach of contract. NRG appeared in the suit *pro se* through an answer signed by its managing member, who is not a lawyer.[1] On May 2, 2016, the trial court signed a mediation order that

[1] NRG's answer asserted a general denial as well as several specific denials, verified denials, and affirmative defenses.

appointed Dallas County Dispute Resolution Center (DCDRC) as the mediator and that required the parties to participate in a mediation to occur by August 14, 2016.[2] The mediation order warned that "[f]ailure or refusal to attend the mediation as scheduled may result in the imposition of sanctions, as permitted by law, which may include dismissal or default judgment." On the next day after the trial court signed the mediation order, Service Transfer filed a motion to strike NRG's answer on the basis that the answer was signed by a non-attorney. The motion requested that "[NRG] be given a specified period of time in which to re-file its [a]nswer with counsel designated to represent it in this action." The trial court never ruled on Service Transfer's motion to strike.

DCDRC thereafter sent an e-mail to Service Transfer's counsel advising that the mediation was scheduled for June 21, 2016.[3] The e-mail also stated: "NO GOOD CONTACT FOR DEFENDANT[;] SENDING CERTIFIED LETTER TO DEFENDANT." The record contains no certificate of mailing nor any return receipt that would reflect when the letter was sent or when NRG received it.

Service Transfer and its counsel attended the mediation, but NRG did not attend. Service Transfer filed a motion for sanctions based on NRG's failure to attend the mediation. The motion was verified by counsel and contains the following summary of the mediation:

> A representative from the DCDRC indicated that [NRG] ha[d] been notified of the mediation and placed a call to [NRG's] offices to inquire as to [NRG's] attendance at mediation. The representative of DCDRC left a message as he received only an answering machine. . . . [Service Transfer's] counsel and its representative waited for 30 minutes to see if anyone representing [NRG] would appear. No one from [NRG] appeared for the Court ordered mediation. Nor did [NRG] at any time contact the DCDRC about the mediation or [NRG's] inability to attend. To [Service Transfer's] knowledge the voice message left by a representative of the DCDRC with [NRG] has not been returned.

[2] The mediation order at issue is identical to the standard mediation order available on the Dallas County website. *See* Standard Mediation Order, accessed Dec. 20, 2017, *available at* https://www.dallascounty.org/Assets/uploads/docs/adr/STANDARD-MO.pdf.

[3] The DCDRC e-mail does not reflect when it was sent, but Service Transfer's counsel represents that the e-mail was sent on May 23, 2016.

The motion for sanctions requested that the trial court (i) award Service Transfer its attorney's fees and costs incurred in attending the mediation, (ii) strike NRG's answer, and (iii) render a default judgment against NRG in the amount of Service Transfer's alleged damages, fees, and costs.

On August 26, 2016, the trial court held a hearing on Service Transfer's sanctions motion. NRG did not attend the hearing. The record contains no reporter's record from the hearing.[4] Following the hearing, the trial court on August 26 signed an order granting Service Transfer's motion for sanctions and separately rendered judgment in favor of Service Transfer. The sanctions order awarded Service Transfer $3,184.85 in attorney's fees and other expenses incurred in attending the mediation. The order also provided that, as an additional sanction, judgment would be rendered in favor of Service Transfer against NRG in "[a] form of Final Judgment [to] be entered separately by the Court." The separately-rendered judgment stated that the trial court had "sanctioned [NRG] for its failure to attend [c]ourt ordered mediation." The judgment incorporated the expenses and fees awarded in the sanctions order and also awarded the "Principal Amount" of $10,242.48 that Service Transfer's original petition had alleged it was owed by NRG. The judgment awarded additional sums for pre-judgment interest, attorney's fees, and other expenses.

NRG thereafter retained counsel who timely filed a motion for new trial.[5] On November 4, 2016, the trial court held a hearing on the motion. The court at the hearing explained that its rendition of final judgment as a sanction against NRG was based on the court's conclusion that no lesser sanctions were available. Specifically, the court concluded that NRG's refusal to retain

[4] While this Court has previously reversed death penalty sanctions based on the absence of a reporter's record, *see Nelson v. Britt*, 241 S.W.3d 672, 677–79 (Tex. App.—Dallas 2007, no pet.), NRG does not raise this issue as a basis for reversal in this case.

[5] NRG's motion for new trial attached an affidavit by its managing member, Michael Haller, in which Haller averred that he did not receive notice of the sanctions hearing. Haller also claimed that he had used "Craigslist" to locate and retain a lawyer to represent NRG and to keep the company informed of all hearings in the case. As it turned out, the person that Haller retained was not a lawyer, and Haller contends that "it was because of this mistake" that NRG did not appear at the sanctions hearing. In contrast to Haller's affidavit, Service Transfer's opposition to NRG's motion attached documents reflecting that, in the days before the August 26 hearing, Service Transfer's counsel had engaged in settlement discussions by e-mail with an NRG customer service employee. One such e-mail from Service Transfer's counsel, dated August 22, refers to an upcoming "hearing on Friday [August 26]." The record also contains an August 15 letter from Service Transfer's counsel addressed to Haller that advised that the trial court had rescheduled the sanctions hearing for August 26. The letter reflects that it was sent by certified mail.

counsel had stalled the case given that NRG, a corporation, could not appear in court without counsel. Under this circumstance, the court determined that no lesser sanction was available to move the case forward other than to order the parties to a mediation so that NRG would have an opportunity to resolve the dispute without having to incur the expense of hiring counsel.[6] The court explained that to ensure the parties' attendance at the mediation, the mediation order had warned that a party's failure to attend could result in a dismissal or a default judgment against it. The court denied NRG's motion for new trial on the record.

This appeal followed.

ANALYSIS

NRG raises three issues that challenge the imposition of a "death penalty" sanction against it. NRG contends that (i) the trial court failed to make the requisite findings to justify the court's exercise of its inherent power to sanction, (ii) the sanction was unjust, and (iii) the final judgment amounted to a post-answer default judgment rendered in contravention of the notice and proof requirements applicable to such judgments. We review a trial court's imposition of sanctions for an abuse of discretion. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). We will reverse if the trial court acted without reference to any guiding rules and principles, making its ruling arbitrary or unreasonable. *Id.* We review the entire record to determine whether the imposition of sanctions was an abuse of discretion. *Shops at Legacy (Inland) Ltd. P'ship v. Fine Autographs & Memorabilia Retail Stores, Inc.*, 418 S.W.3d 229, 232 (Tex. App.—Dallas 2013, no pet.).

NRG's second issue contends that the trial court's death penalty sanction was excessive. A "death penalty" sanction is one that "terminate[s] the presentation of the merits of a party's claims." *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 845 (Tex. 1992). Our resolution of NRG's

[6] The court noted that "the mediator is not going to say you can't argue because you don't have counsel."

second issue is dispositive of this appeal. We begin by observing that a trial court possesses all inherent powers necessary for the enforcement of its lawful orders. *Wal–Mart Stores, Inc. v. Butler*, 41 S.W.3d 816, 817 (Tex. App.—Dallas 2001, no pet.). A trial court may therefore impose appropriate sanctions for violations of its pre-trial orders. *Id.* (citing *Koslow's v. Mackie*, 796 S.W.2d 700, 703–04 & n.1 (Tex. 1990)). In *Koslow's*, the Texas Supreme Court upheld the trial court's striking of the defendants' pleadings and the rendition of a default judgment against them after they failed to engage in an attorney or party conference or to submit a joint pretrial status report, as had been ordered by the court. *Koslow's*, 796 S.W.2d at 704. The supreme court based its holding on record evidence that entitled the trial court to find that the defendants had acted willfully or with conscious indifference in disobeying the pre-trial order. *Id.* at 701, 704 & n.2; *see also GQ Enters. Corp. v. Rajani*, No. 05-12-01353-CV, 2014 WL 2152000, at *1–3 (Tex. App.—Dallas May 22, 2014, no pet.) (mem. op.) (affirming order striking corporation defendant's answer and rendering default judgment against corporation based on its failure to comply with pre-trial order requiring it to file an answer signed by an attorney); *Phan v. Le*, No. 05–09–01277–CV, 2010 WL 4485921, at *1–2 (Tex. App.—Dallas Nov. 10, 2010, no pet.) (mem. op.) (affirming dismissal of plaintiffs' case for want of prosecution based on its failure to appear at two court-ordered mediations or at the hearing on defendant's second motion for sanctions).

Subsequent to *Koslow's*, the supreme court in *TransAmerican Natural Gas Corporation v. Powell* articulated a standard for determining whether a sanction is "just." 811 S.W.2d 913, 917 (Tex. 1991). Under *TransAmerican*, (i) a "direct relationship must exist between the offensive conduct and the sanction imposed," and (ii) "[the] sanction must not be excessive," which means that it "should be no more severe than necessary to satisfy its legitimate purposes." *Id.* at 917. While *TransAmerican* was a discovery sanction case, this Court has applied the same standard in determining whether death penalty sanctions are appropriate following violations of a pretrial

order. *See Wal-Mart*, 41 S.W.3d at 817–18 (applying *TransAmerican* standard and reversing death penalty sanction assessed by trial court for defendant's violation of pre-trial mediation order). We will therefore apply the *TransAmerican* standard to this case.

No Direct Relationship

We first examine the relationship between NRG's conduct and the death penalty sanction assessed against NRG. A just sanction "must be directed against the abuse and toward remedying the prejudice caused the innocent party." *TransAmerican*, 811 S.W.2d at 917. The final judgment rendered against NRG, while premised on its failure to attend the court-ordered mediation, was not directed toward remedying the prejudice caused Service Transfer. *See Am. Flood Research Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam) ("[T]he court should examine whether [the] punishment was . . . tailored to remedy any prejudice [the] . . . abuse caused."). Namely, Service Transfer was prejudiced in the form of the fees and expenses that it incurred in attending the mediation. This prejudice was remedied by the assessment of a monetary sanction that required NRG to reimburse these fees and expenses. *Cf. Chrysler*, 841 S.W.2d at 849–50 (concluding that prejudice in the form of fees and expenses incurred by innocent party in pursuing motions to compel discovery and sanctions was better remedied by a sanction ordering reimbursement, as opposed to a death penalty sanction). For this reason, the record fails to establish the existence of a direct relationship between NRG's conduct and the death penalty sanction imposed against NRG.

Excessiveness

We next examine whether the death penalty sanction was excessive. As described previously, a sanction should be no more severe than necessary to satisfy its legitimate purpose. *TransAmerican*, 811 S.W.2d at 917*; see also Chrysler*, 841 S.W.2d at 849 (noting that the legitimate purposes of a sanction include securing compliance, deterring other litigants from similar misconduct, and punishing violators). This means that "in all but the most egregious and

exceptional cases, the trial court must test lesser sanctions before resorting to death penalty sanctions." *Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004). *Accord GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993); *Gunn v. Fuqua*, 397 S.W.3d 358, 366 (Tex. App.—Dallas 2013, pet. denied).

The trial court in this case did not first test a lesser sanction before imposing the death penalty sanction. Specifically, the monetary sanction against NRG, given that it was imposed simultaneously with the death penalty sanction, "provide[d] no test of the effectiveness of lesser sanctions first." *In re Polaris Indus.*, 65 S.W.3d 746, 753 (Tex. App.—Beaumont 2001, orig. proceeding). The facts here are similar to *Wal–Mart Stores, Inc. v. Butler*, in which we held that a trial court abused its discretion in striking a defendant's answer without first testing lesser sanctions. *Wal-Mart*, 41 S.W.3d at 817–18. The trial court in that case signed a form mediation order that required the parties to participate in mediation and that cautioned that a party's failure to attend could result in sanctions, including dismissal or a default judgment. *Id.* at 817. The defendant notified the mediator that it would not attend the mediation because its attorney was in trial, and in fact it did not attend the mediation. *Id.* Based on the defendant's violation of the mediation order, the trial court struck the defendant's answer and also ordered a monetary sanction. *Id.* On appeal, this Court reversed the death penalty sanction on the basis that the trial court had not first tested lesser sanctions. *Id.* at 817–18 (citing *Chrysler*, 841 S.W.2d at 849). As in *Wal-Mart*, we conclude that the trial court in this case did not first test lesser a sanction.[7]

[7] Our sister courts are split on whether an order to compel, when coupled with a warning that noncompliance will result in sanctions, itself constitutes a lesser sanction. *Compare Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 161 S.W.3d 531, 539 (Tex. App.—San Antonio 2004, pet. denied) ("[A]n order to compel discovery joined with a statement by the court that noncompliance with the order would result in dismissal does constitute the type of lesser sanction which must be imposed prior to a trial court's imposition of an ultimate sanction."), *HRN, Inc. v. Shell Oil Co.*, 102 S.W.3d 205, 218 (Tex. App.—Houston [14th Dist.] 2003), *rev'd on other grounds*, 144 S.W.3d 429 (Tex. 2004) (concluding that second discovery order included a lesser sanction in the form of a warning that non-compliance would result in dismissal), *and Andras v. Mem'l Hosp. Sys.*, 888 S.W.2d 567, 570, 572–73 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (upholding as lesser sanction an order to compel coupled with warning that noncompliance would result in dismissal), *with In re Polaris Indus.*, 65 S.W.3d at 753 (concluding that "[n]either . . . a threat nor the intent to sanction constitute[s] a sanction"), *and Williams v. Akzo Nobel Chems., Inc.*, 999 S.W.2d 836, 844 (Tex. App.—Tyler 1999, no pet.) (concluding that threat of dismissal for noncompliance, without more, was not a sanction). The mediation order in this case cautioned that noncompliance *may* result in a dismissal or default judgment. We conclude that this equivocal warning in a single mediation order was not itself a lesser sanction under the circumstances of this case. *Cf. Chrysler*, 841 S.W.2d at 850 (holding that potential exposure to substantial fine was not

The record also does not show that a lesser sanction would have been ineffective had it been utilized in this case. *See GTE*, 856 S.W.2d at 729 ("Here, the order . . . stated that lesser sanctions would have been ineffective, but the court did not explain why, and the record does not indicate why."). The trial court did not wait to see whether the monetary sanctions imposed against NRG would themselves have been sufficient to promote compliance with the court's mediation order. Nor does the record show that the rendition of a final judgment was necessary to remedy NRG's failure to retain counsel, which the trial court stated was its underlying reason for ordering the parties to mediation in the first place. Instead of a final judgment, the trial court could have stricken NRG's answer while allowing the company a reasonable period of time to retain counsel who could file another answer on its behalf. *Cf. KSNG Architects, Inc. v. Beasley*, 109 S.W.3d 894, 896–99 (Tex. App.—Dallas 2003, no pet.) (holding that trial court, upon striking corporation's answer that was defective because it was filed by non-attorney, abused its discretion by not allowing corporation a reasonable time to hire counsel who could remedy the defect). Had NRG failed to file such an answer within the allowed time, the trial court at that point could have rendered a default judgment against NRG under the rules applicable to default judgments. *See* Tex. R. Civ. P. 239–41, 243; *cf. GQ Enters.*, 2014 WL 2152000, at *1–4 (holding that trial court did not abuse its discretion by striking corporation defendant's answer and rendering no-answer default judgment against corporation following its failure to comply with court order that had given it thirty days to file a proper answer signed by counsel).

We finally consider whether the trial court could have found that NRG's conduct justified a presumption that its defenses lack merit. *See Hamill v. Level*, 917 S.W.2d 15, 16 (Tex. 1996) (per curiam) ("[T]he court may not use death penalty sanctions to deny a litigant a decision on the

lesser sanction*); Hernandez v. Polley*, No. 03-15-00384-CV, 2016 WL 6068259, at *5 (Tex. App.—Austin Oct. 13, 2016, no pet.) (mem. op.) (concluding that trial court's oral statement that noncompliance with order would "more than likely" result in dismissal was "substantially different from an order—or even an oral warning—expressly stating that the result of noncompliance *will* be dismissal").

merits of the case unless the court finds that the sanctioned party's conduct 'justifies a presumption that its claims or defenses lack merit.'" (quoting *TransAmerican*, 811 S.W.2d at 918)). Death penalty sanctions are not appropriate "'absent a party's flagrant bad faith or counsel's callous disregard,'" *Chrysler*, 841 S.W.2d at 849 (quoting *TransAmerican*, 811 S.W.2d at 918), nor may a trial court bypass the usual requirement of first testing a lesser sanction unless the sanctioned party's conduct justifies a presumption that its claims or defenses lack merit, *Cire*, 134 S.W.3d at 842.

By way of example, a pattern of discovery abuse, including a party's refusal to comply with a trial court's discovery orders to produce material evidence, can give rise to a presumption that the party's claims or defenses lack merit. *See, e.g., id.*, 134 S.W.3d at 843; *5 Star Diamond, LLC v. Singh*, 369 S.W.3d 572, 579 (Tex. App.—Dallas 2012, no pet.); *Palau v. Sanchez*, No. 03-08-00136-CV, 2010 WL 4595705, at *12 n.10 (Tex. App.—Austin Nov. 10, 2010, pet. denied) (mem. op.). *Cf. In re Farmers Tex. Cty. Mut. Ins. Co.*, No. 04-13-00644-CV, 2013 WL 6730094, at *3 (Tex. App.—San Antonio Dec. 20, 2013, orig. proceeding) (mem. op.) (holding that record did not reflect conduct that justified a presumption that relator's claims or defenses lacked merit: no party had refused to produce material evidence in the face of lesser sanctions, nor had the trial court previously imposed any lesser sanctions in an effort to gain the compliance of a party who had refused or objected to producing documents).

At most, the record here shows that NRG, an unrepresented party at the time, received notice of both the mediation order and the sanctions hearing but chose not to attend either the mediation or the hearing. While we do not condone NRG's conduct, the record does not show that this conduct went to the merits of NRG's defense or otherwise justified a presumption that its defenses lacked merit. *Cf. Knoderer v. State Farm Lloyds*, No. 06-13-00027-CV, 2014 WL 4699136, at *8–9 (Tex. App.—Texarkana Sept. 19, 2014, no pet.) (mem. op.) (plaintiff's

destruction of photographs did not justify presumption that plaintiff's claims lacked merit where destroyed evidence did not go to ultimate issues in the lawsuit, but was, instead, impeachment evidence); *Lanfear v. Blackmon*, 827 S.W.2d 87, 91 (Tex. App.—Corpus Christi 1992, orig. proceeding) (holding that "[t]he statement of relator, whether perjurious or not, does not go to the heart of the controversy here" and therefore "d[oes] not justify the conclusion that relator's claim lacked merit so that he should be precluded from his day in court"). In sum, based on the record before us, we cannot conclude that this is an exceptional case in which death penalty sanctions are clearly justified, nor is it apparent that lesser sanctions would not have promoted compliance with the court's pre-trial mediation order. Accordingly, the trial court abused its discretion in imposing a death penalty sanction.

Reversible Error

The trial court's assessment of a death penalty sanction against NRG precluded it from presenting the merits of its case. We therefore conclude that the error was reversible. *See Olmos v. Olmos*, 355 S.W.3d 306, 312 (Tex. App.—El Paso 2011, no pet.) (concluding that referring court's error in striking defendant's counter-petition for divorce probably caused the rendition of an improper judgment because it inhibited defendant's ability to present his case); *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 879 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that trial court's erroneous imposition of death penalty sanction in form of striking party's fact witnesses unjustifiably prohibited such party from presenting a defense and constituted reversible error); TEX. R. APP. P. 44.1(a)(1), (2) (providing that an error is reversible if it "probably caused the rendition of an improper judgment," or if it "probably prevented the appellant from properly presenting the case to the court of appeals"). We sustain NRG's second issue.[8]

[8] We need not resolve NRG's first and third issues given our resolution of this appeal based on its second issue.

CONCLUSION

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NRG & ASSOCIATES, LLC, Appellant	On Appeal from the County Court at Law No. 5, Dallas County, Texas
No. 05-16-01375-CV V.	Trial Court Cause No. CC-16-01376-E.
	Opinion delivered by Justice Boatright.
SERVICE TRANSFER, INC., Appellee	Justices Lang-Miers and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant NRG & ASSOCIATES, LLC recover its costs of this appeal from appellee SERVICE TRANSFER, INC.

Judgment entered his 21st day of December, 2017.