Reversed and Rendered and Opinion Filed October 15, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00463-CV

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Appellant
V.
GERALD FORD AND REGENERATIVE ORTHO SPINE INSTITUTE OF TEXAS, P.A., Appellees

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On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-04652

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Carlyle
Opinion by Justice Osborne

The trial court awarded appellee Regenerative Ortho Spine Institute of Texas, P.A. ("ROSIT") $1,000 in sanctions against appellant Allstate Property and Casualty Insurance Company ("Allstate"). We reverse the trial court's sanctions order and render judgment that ROSIT take nothing from Allstate.

BACKGROUND

After Gerald Ford was injured in a car accident, he sued Allstate, his insurance company, for underinsured motorist benefits. Ford and Allstate reached a settlement, and the trial court granted Ford's motion to dismiss the lawsuit on March 20, 2020.

Although Allstate has named Ford as a party to this appeal, Allstate does not challenge any trial court rulings made in Ford's favor.

Instead, this appeal arises from a discovery dispute between Allstate and ROSIT. ROSIT treated Ford for his injuries but was not a party to Ford's suit. Allstate sought ROSIT's records from Ford's treatment, using Lexitas, a records service. On August 27, 2018, Allstate filed a motion to compel and to show cause, contending that ROSIT had failed to respond to Allstate's repeated requests for the records. Allstate's motion was signed by its attorney Brad K. Westmoreland.

ROSIT responded with its own motion for sanctions against Allstate. Asserting that Allstate never made a proper request for the records in accordance with rules of civil procedure 176, 200, and 205 and federal regulations addressing patient privacy, ROSIT requested sanctions under civil procedure rule 13 and chapter 10 of the civil practice and remedies code. *See* TEX. R. CIV. P. 13 ("Effect of Signing of Pleadings, Motions and Other Papers; Sanctions"); TEX. CIV. PRAC. & REM. CODE §§ 10.001–10.006 ("Sanctions for Frivolous Pleadings and Motions"). ROSIT detailed complaints not only against Allstate but also against "Lexitas f/k/a America First, a records service and agent for Allstate." ROSIT's complaints about Allstate—and primarily Lexitas—arose from Lexitas's alleged conduct in other lawsuits as well as Ford's.

The trial court ruled on Allstate's motion to compel in an order dated October 30, 2018. Although the order recites that the motion was heard on October 12, 2018,

the appellate record does not include a reporter's record of that proceeding or any evidence offered or admitted. The trial court ruled that Allstate could obtain Ford's records from ROSIT "by complying with TEX. R. CIV. P. 176, 200, and 205, and providing a valid and enforceable HIPAA authorization to ROSIT." The order provided further logistical details for the production. The trial court expressly ruled that ROSIT's motion for sanctions "is not being decided and will be heard at a later time." The order's concluding paragraph provided:

> In issuing this Order, the Court is fashioning a resolution to the production of Gerald Ford's records from ROSIT; it is not ruling on whether Lexitas complied with Rules 176, 200, and 205 of the Texas Rules of Civil Procedure in propounding [a deposition on written questions] or otherwise complied with Texas law. The Court will decide these matters when it hears ROSIT's motion for sanctions.

Accordingly, the trial court heard ROSIT's motion for sanctions on January 10, 2019. Westmoreland appeared on Allstate's behalf, and attorney Mark Ticer appeared for ROSIT. Ford's suit against Allstate was still pending. On March 1, 2019, the trial court granted ROSIT's motion, awarding $1,000 in sanctions against Allstate. Although no documents were admitted into evidence and no witnesses testified, the trial court's seven-page order included detailed findings. The trial court ordered Allstate to pay the sanction to ROSIT "within seven (7) days of the entry of this Order."

Allstate sent a check for the amount of the sanction to ROSIT's counsel by letter of March 18, 2019, after the trial court's seven-day deadline had expired. Allstate's counsel requested, "I ask that you hold these funds in trust pending a

Motion to Reconsider that is being prepared on behalf of Allstate and other potential remedies that are being considered by the defense."

Allstate then filed both a motion for reconsideration and a mandamus proceeding in this Court challenging the sanction. Both were unsuccessful. The trial court heard Allstate's motion for reconsideration on May 10, 2019. As in the initial hearing, no documents were admitted into evidence and no witnesses testified. The trial court denied Allstate's motion for reconsideration by order dated May 24, 2019. Allstate filed a request for mandamus relief in this Court on August 2, 2019. *See In re Allstate Prop. & Cas. Ins. Co.*, No. 05-19-00912-CV, 2019 WL 4254064, at *1 (Tex. App.—Dallas Sept. 9, 2019, orig. proceeding) (mem. op.) (mandamus denied). Allstate's motion for rehearing in that original proceeding was also denied. *Id.* (Order of Oct. 15, 2019). After the trial court granted Ford's motion to dismiss the lawsuit on March 20, 2020, Allstate filed this appeal challenging the trial court's $1,000 sanctions award.

ISSUES

In three issues, Allstate contends the trial court abused its discretion by ordering sanctions. Allstate argues the trial court erred because (1) no evidence was admitted at the sanctions hearing, (2) the trial court improperly placed the burden of proof on Allstate, not ROSIT, and (3) the trial court abused its discretion by sanctioning Allstate for conduct in unrelated litigation, imposing unreasonable requirements for record subpoenas "beyond those set forth in Texas and federal

law," and failing to make the specific findings required by civil procedure rule 13 and civil practice and remedies code Chapter 10.

ROSIT responds that this Court lacks jurisdiction because Allstate's appeal is "moot and waived." In the alternative, ROSIT responds that the trial court did not abuse its discretion in awarding sanctions.

APPLICABLE LAW AND STANDARD OF REVIEW

Under civil procedure rule 13, a person who signs a pleading, motion, or other paper certifies that he has read the document and "to the best of [his] knowledge, information, and belief formed after a 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 ("rule 13"). If the pleading, motion, or other paper is signed in violation of rule 13, the trial court may sanction the person who signed the document, a represented party, or both. *Id.* The trial court "shall presume that pleadings, motions, and other papers are filed in good faith," *id.*, and the party seeking sanctions bears the burden of overcoming this presumption. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014).

Rule 13 defines "groundless" as having "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." TEX. R. CIV. P. 13; *In Interest of W.B.B.*, No. 05-16-00454-CV, 2017 WL 511208, at *6 (Tex. App.—Dallas Feb. 8, 2017, no pet.) (mem. op.). To determine if the pleading or motion is groundless, the trial court must examine the

circumstances existing when the document was filed, and objectively consider whether the party and counsel made a reasonable inquiry into the legal and factual basis of the claim at that time. *W.B.B.*, 2017 WL 511208, at *6. Rule 13 does not permit sanctions on the issue of groundlessness alone. *Nath*, 446 S.W.3d at 362–63. "Rather, the filing in question must be groundless and also either brought in bad faith, brought for the purpose of harassment, or false when made." *Id.*

"Rule 13 requires the trial court to hold an evidentiary hearing to make the necessary factual determinations about the motives and credibility of the person signing the alleged groundless [pleading]." *McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 757 (Tex. App.—Dallas 1993, no writ). "Without hearing evidence on the circumstances surrounding the filing of the pleading and the signer's credibility and motives, the trial court [has] no evidence to determine that the appellant[ ] or [its] attorneys filed the pleading in bad faith or to harass." *Id.* at 757–58. Motions and arguments of counsel are not evidence. *Id.* at 757.

Civil practice and remedies code chapter 10 ("Chapter 10") allows sanctions for pleadings filed with an improper purpose or that lack legal or factual support. *See* TEX. CIV. PRAC. & REM. CODE § 10.001; *Nath*, 446 S.W.3d at 362. Section 10.001 provides:

> The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

TEX. CIV. PRAC. & REM. CODE § 10.001. A trial court, however, may not assess a monetary sanction against a represented party for frivolous legal contentions in violation of subsection 10.001(2). *Id.* § 10.004(d). Chapter 10, like rule 13, requires the trial court to hold an evidentiary hearing to make the necessary factual determinations about the motives and credibility of the person signing the allegedly groundless pleading. *Click v. Transp. Workers Union Local 556*, No. 05-15-00796-CV, 2016 WL 4239473, at *2 (Tex. App.—Dallas Aug. 10, 2016, no pet.) (mem. op.).

To preserve a complaint for appeal, a party must make a specific and timely complaint to the trial court and obtain a ruling or object to the trial court's refusal to rule. *See* TEX. R. APP. P. 33.1(a). This rule applies to complaints about sanctions imposed by the trial court. *See Schmidt v. BPC Corp.*, No. 05-14-00653-CV, 2015

WL 6538038, at *3 (Tex. App.—Dallas Oct. 29, 2015, pet. denied) (mem. op.) (party waived complaint about sanctions imposed by failing to make specific objection and failing to ask trial court to reconsider).

We review a trial court's ruling on a motion for sanctions under rule 13 and Chapter 10 for abuse of discretion. *Nath*, 446 S.W.3d at 361. "A sanctions award will not withstand appellate scrutiny if the trial court acted without reference to guiding rules and principles to such an extent that its ruling was arbitrary or unreasonable." *Id.*

DISCUSSION

1. Jurisdiction

We first address ROSIT's assertion that we lack jurisdiction over this appeal. ROSIT argues that because Allstate paid the sanction without expressly reserving its right to appeal, Allstate has waived its complaint, this appeal is moot, and this Court lacks jurisdiction over a moot complaint. We disagree.

ROSIT relies on three cases,[1] each of which in turn relies on the supreme court's opinion in *Highland Church of Christ v. Powell*, 640 S.W.2d 235 (Tex. 1982). In *Highland Church*, the court explained:

> It is a settled rule of law that when a judgment debtor voluntarily pays and satisfies a judgment rendered against him, the cause becomes moot. He thereby waives his right to appeal and the case must be dismissed.

[1] ROSIT cites *In re Guardianship of Hood*, No. 04-11-00103-CV, 2012 WL 566094, at *3 (Tex. App.—San Antonio Feb. 15, 2012, no pet.) (mem. op.), *Thompson v. Ricardo*, 269 S.W.3d 100, 104 (Tex. App.—Houston [14th Dist.] 2008, no pet.), and *Barrera v. State*, 130 S.W.3d 253, 260 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

> The basis for this rule is to prevent a party who has freely decided to pay a judgment from changing his mind and seeking the court's aid in recovering the payment. A party should not be allowed to mislead his opponent into believing that the controversy is over and then contest the payment and seek recovery. Voluntary payment ends the controversy, and appellate courts will not decide moot cases involving abstractions.

Highland Church, 640 S.W.2d at 236 (citations omitted). The court went on to hold, however, that there was no waiver of the right to appeal where the tax in question was paid under "implied duress" and "[t]he taxing authorities could not have been misled" by the payment. *Id.* at 237. As the court later explained,

> The Texas rule is not, and never has been, simply that any payment toward satisfying a judgment, including a voluntary one, moots the controversy and waives the right to appeal that judgment. . . . We emphasized in *Highland Church* that a party should not be allowed to simply change his mind about pursuing the case or mislead his opponent into thinking the controversy is over. Thus, payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile.

Miga v. Jensen, 96 S.W.3d 207, 211–12 (Tex. 2002).

In this case we cannot conclude that ROSIT was misled into believing the controversy concerning the sanctions was over at the time the payment was made. *See Kamel v. AdvoCare Int'l, L.P.*, No. 05-16-00433-CV, 2017 WL 1149669, at *3–4 (Tex. App.—Dallas Mar. 28, 2017, no pet.) (mem. op.) (complaint about sanction was not mooted by payment). The trial court ordered Allstate to pay the sanction within seven days of the order. Allstate tendered the payment, ten days late, with an explicit request that ROSIT "hold these funds in trust pending a Motion to

Reconsider that is being prepared on behalf of Allstate and other potential remedies that are being considered by the defense." Allstate subsequently filed not only a motion to reconsider but also a request for mandamus relief and a motion for rehearing in this Court. *See In re Allstate Prop. & Cas. Ins. Co.*, 2019 WL 4254064, at *1 (reh'g denied, Oct. 15, 2019).

We conclude that through these actions, Allstate gave notice to ROSIT that it intended to exercise its right to appeal the sanction. *See Miga*, 96 S.W.3d at 211–12; *Kamel*, 2017 WL 1149669, at *4. Allstate timely filed its notice of appeal of the sanction once Ford's claims were resolved and the trial court signed the order of dismissal. For these reasons, we decline ROSIT's request to dismiss the appeal.

2. Sanctions award

The order granting sanctions recites that the trial court "heard evidence" in addition to reviewing the motion for sanctions and response and hearing arguments of counsel. The order also recites that "[a]t the hearing on ROSIT's Motion for Sanctions, Allstate was unable to show that Allstate's Motion was meritorious and not self-defeating on its face as well as not being entitled to the relief sought." The order concludes that Allstate's "sanctionable conduct" was "bringing Allstate's motion for an improper purpose, including to harass ROSIT or to cause unnecessary delay or needless increase in the cost of litigation and for filing Allstate's Motion, which was groundless and brought in bad faith."

The trial court's order does not cite either rule 13 or Chapter 10 as the basis for its sanctions award. ROSIT, however, cited both provisions in its request for sanctions against Allstate. Under both, the movant bears the burden of overcoming the presumption that pleadings and other papers are filed in good faith. *O'Donnell v. Vargo*, No. 05-14-00404-CV, 2015 WL 4722459, at *5 (Tex. App.—Dallas Aug. 10, 2015, no pet.) (mem. op.). The movant must carry that burden with competent proof. *Id.* "Incompetent evidence, surmise, or speculation will not suffice for the proof required." *Id.* (internal quotation omitted). "[M]otions and arguments of counsel are not evidence" in a sanctions hearing under either rule 13 or Chapter 10. *Click*, 2016 WL 4239473, at * 2 (citing *McCain v. NME Hosps., Inc.,* 856 S.W.2d 751, 757 (Tex. App.—Dallas 1993, no writ)).

"Before sanctions may be imposed, the trial court must hold an evidentiary hearing to make necessary factual determinations about the motives and credibility of the person signing the alleged groundless petition." *In re Lewis*, No. 05-08-01541-CV, 2010 WL 177817, at *2 (Tex. App.—Dallas Jan. 20, 2010, no pet.) (mem. op.) (citing *N.Y. Underwriters Ins. Co. v. State Farm Mut. Ins. Co.*, 856 S.W.2d 194, 205 (Tex. App.—Dallas 1993, no writ)). "Without hearing evidence on the circumstances surrounding the filing of the pleading and the signer's credibility and motives, the trial court has no evidence to determine that a party or its attorneys filed the pleading in bad faith or to harass." *McGarry v. Ins. Depot*, No. 05-00-01012-CV, 2001 WL 910932, at *2 (Tex. App.—Dallas Aug. 13, 2001, no pet.) (mem. op., not

designated for publication) (internal quotation omitted) (no evidence presented at hearing, sanction reversed).

ROSIT, not Allstate, bore the burden to present evidence in support of its request for sanctions and to overcome the presumption that Allstate's motion was filed in good faith. *See O'Donnell*, 2015 WL 4722459, at *5. And by seeking sanctions against Allstate on the basis of Lexitas's conduct, ROSIT was required to prove not only Lexitas's alleged misconduct, but also Allstate's bad faith complicity. ROSIT was required to carry that burden with competent proof. *See id.*

A. Necessity of objection

In response to Allstate's first issue asserting that there was no evidence supporting sanctions, ROSIT does not contend that any witness testimony or exhibits were admitted into evidence at the hearings. Instead, ROSIT argues that Ticer, its attorney, "provid[ed] evidentiary narratives" at the hearings and "[n]o objection was made to this approach."

ROSIT correctly argues that an attorney's unsworn statements may be considered as evidence in some circumstances, citing cases including the supreme court's opinions in *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997) (per curiam), and *Mathis v. Lockwood*, 166 S.W.3d 743 (Tex. 2005) (per curiam). As those cases explain, the oath requirement may be waived for an attorney's unsworn statements when the opposing party fails to object in circumstances that "clearly indicate[ ]" the attorney is "tendering evidence on the record based on personal knowledge on the

sole contested issue." *Mathis*, 166 S.W.3d at 745 (citing *Banda*, 955 S.W.2d at 272). But the record here is different, and equally important, neither *Banda* nor *Mathis* involved imposition of sanctions, where factual determinations about motives and credibility are required. *See In re Lewis*, 2010 WL 177817, at *2.

In *Banda*, the sole issue was whether the parties had orally agreed to extend a settlement deadline. *Banda*, 955 S.W.2d at 272. Banda's attorney (Shirley Mathis[2]) stated in a pretrial hearing that the parties had entered into an oral pre-suit settlement agreement, but Garcia's attorney (Latham) had reneged on the agreement and filed suit. *See id.* at 271. Latham did not appear at the hearing on the motion to enforce the settlement agreement, instead sending another attorney, Pruett Moore, to represent Garcia. *Id.* The court of appeals held that because the trial court had not placed Mathis under oath, her statements were not evidence. *Id.* The supreme court reversed, concluding that "Moore should have known to object to Mathis's unsworn statements":

> The record shows that Mathis was clearly attempting to prove the existence and terms of the settlement agreement, including the agreement to extend the deadline, at the hearing. In fact, Mathis stated at the conclusion of her presentation that "as an officer of the court I can just state under oath what—what I am telling the court and what my representations were by [sic] Latham and the understanding I had." She also said that "this agreement that *I'm testifying to* today before the court as an officer of the court, if Mr. Latham felt so strongly about it, he is not present." (emphasis added). Moreover, Mathis's testimony

[2] Although the attorney in *Banda* and the appellant in *Mathis* share a surname, the cases do not reflect any connection between the two. Banda's attorney was Shirley Mathis. *See Banda*, 955 S.W.2d at 271. The appellant in *Mathis v. Lockwood* was Mary Mathis. *See Mathis*, 166 S.W.3d at 743.

> was the only available evidence of the oral agreement to extend the deadline. Mathis therefore clearly placed Garcia's attorney on notice that she was attempting to prove the existence and terms of the oral agreement. Nevertheless, Moore still did not, at any time, object to the trial court's failure to administer the oath.

Id. at 272. In sum, the attorney (1) announced that she was "testifying . . . as an officer of the court," and (2) provided "the only available evidence" of the oral agreement in question. *See id.* As we discuss below, neither circumstance occurred here.

In *Mathis*, the trial court rendered a post-answer default judgment against Mary Mathis, who had filed an answer but did not appear at trial. *Mathis*, 166 S.W.3d at 743–44. Mathis filed a sworn motion asserting that she never received notice of the trial date. *Id.* at 744. At the hearing on Mathis's motion, Lockwood's counsel stated on the record that notice was sent to Mathis. *Id.* Also on the record, Mathis denied receiving the notice. *Id.* at 744–45. Neither statement was made under oath. *See id.* at 745. Nonetheless, the supreme court concluded that "the oath requirement was waived when neither raised any objection in circumstances that clearly indicated each was tendering evidence on the record based on personal knowledge on the sole contested issue." *See id.*[3] As in *Banda*—and in contrast to this case—a single,

[3] The supreme court held that Mathis's statement was sufficient to overcome the presumption that she was notified of the trial date, requiring Lockwood to prove that notice was properly sent "according to the rule." *Mathis*, 166 S.W.3d at 745. Lockwood failed to meet this burden because "[t]estimony by Lockwood's counsel that notice was *sent* did not contradict Mathis's testimony that notice was never *received*." *Id.* Consequently, the default judgment should have been set aside. *See id.* at 746.

discrete fact within the party's or attorney's personal knowledge was at issue, not a party's motives or credibility. *See id.*

Following the supreme court's reasoning in *Banda* and *Mathis*, we examine the record to determine if the circumstances here "clearly indicated" that Ticer was "tendering evidence on the record based on personal knowledge on the sole contested issue," so that—contrary to the general rule—Ticer's narrative was an offer of evidence requiring an objection to admissibility to avoid waiver. *See Banda*, 955 S.W.2d at 272; *Mathis*, 166 S.W.3d at 745; *Click*, 2016 WL 4239473, at *2 ("arguments of counsel are not evidence in a sanctions hearing context"). We conclude Allstate did not waive its objections, for two reasons.

First, the circumstances did not "clearly indicate" that Ticer was "tendering evidence on the record." *Mathis*, 166 S.W.3d at 745. Unlike the attorney in *Banda*, he did not say he was doing so. *Cf. Banda*, 955 S.W.2d at 272 (attorney stated she was testifying "as an officer of the court"). Instead, Ticer gave an opening argument, beginning by describing his statements as "a lit[tle] bit of background." His argument consisted of general complaints about record services including Lexitas, rather than specific facts supporting why Allstate or Westmoreland had acted in bad faith or with an improper purpose when filing the motion to compel.

In contrast to *Banda* and *Mathis*, Ticer did not testify to a single, discrete fact within his personal knowledge. *Cf. Banda*, 955 S.W.2d at 272; *Mathis*, 166 S.W.3d

at 745. Instead, he made wide-ranging complaints about Lexitas's conduct in unspecified cases not necessarily involving either Allstate or Westmoreland.

Ticer argued:

> These records services were appearing at my client's clinic and place of business and dropping off these DWQs, harassing staff and everything else, and not serving the registered agent or they'd fax them or they'd mail them and they'd say, hey, where is our stuff? And instead of suing them and saying you're not even serving people, I decided let me try a different approach, and that different approach was I sent a letter around to all the record services that I could identify and said, look, I will accept service for ROSIT—I was not the registered agent at the time—
>
> THE COURT: Right. But for these purposes—
>
> MR. TICER: Yeah, for these purposes, as long as you serve them on me the second and fourth Tuesday of every month at 10:00[4] so we don't have to wait all day, it doesn't matter if I'm not there or not, and you include a medical authorization. All of them, to everyone I sent it, agreed to do that. And frankly, they just worked out very, very well, it's [sic] keeps them out of client's offices, we can keep track of what's there and we can find out if we got a compliance subpoena and all this other business, except Lexitas.

He complained that he "got so tired of writing and dealing with Lexitas and their problems, *and for purposes of this hearing we'll introduce these*, but this is—the latest round of Lexitas are *four different cases from four—from various different lawyers* dealing with these same problems of not serving a subpoena, not serving a compliance subpoena, not attaching money, not attaching the medical authori[zation]—just, you know, this is just like law school 101 stuff." (Emphasis

[4] Ticer cited no rule or statute supporting his argument that service of a subpoena may be made only twice a month on a particular day at a particular time.

added.) He then argued that in this case, "they" served a noncompliant subpoena on ROSIT. As to Westmoreland's motive in filing the motion to compel, Ticer argued,

> So they—so they do this because they want to get this matter before Your Honor. Say, well, we'll go see Judge Slaughter, she's nice, she's not going to do anything, she's going to just give us the records and all this other business, knowing that they never served a compliant discovery request to a nonparty, as the rules require. . . . The attachments to the motion do not support they relief they requested. What they wanted was to drag ROSIT up here and get the records . . . .

He acknowledged that it was another of Allstate's attorneys, not Westmoreland, who "provide[d] some smart aleck response" to ROSIT's complaints about service, but correctly argued that "I think you could properly sanction Mr. Westmoreland because he signed the motion." *See* TEX. R. CIV. P. 13 (effect of signing pleading or motion). He contended, however, that the real "object of my sanctions is not Mr. Westmoreland, but Allstate," to "get their attention about what's going on" with Lexitas. He concluded "[t]he sanctions are intended to deter future misconduct, compensate a nonparty . . . from the expenses they went through for the abuse of a groundless, frivolous motion on its face, and to hopefully get the attention of others that this won't go on . . . ."

Ticer did not contend his arguments were evidence. Instead, he expressly acknowledged that "because of a sanction here it needs to be evidentiary in nature." *Cf. Banda*, 955 S.W.2d at 272 (attorney stated she was testifying as officer of the court). Ticer stated that "[t]he first thing that I would do is I would offer Exhibits 1 through 12," recognizing the necessity of supporting his request for sanctions with

admissible evidence. And when he did, as we discuss below, Westmoreland objected.

We conclude that Ticer's general and wide-ranging complaints made in his argument—about records services in unspecified cases at unspecified times and not necessarily involving Allstate or Westmoreland—were not offered as evidence, nor did the circumstances "clearly indicate" that Ticer was "tendering evidence on the record," *see Mathis*, 166 S.W.3d at 745, triggering the necessity of an objection.

Second, when Ticer offered the exhibits, Allstate's attorney Westmoreland immediately objected. In response to Allstate's objection, the trial court directed Ticer to "prove up the documents, then." Ticer attempted to do so, but Westmoreland continued his objections, and the trial court did not admit any of ROSIT's proposed exhibits into evidence. Accordingly, the reporter's record does not include any exhibits, nor is there any sworn witness testimony.

ROSIT relies on the trial court's statement to Ticer when excluding the exhibits that "I mean, I think I've got your statements and your testimony which I will take as, you know, offer to the Court you made arrangements or agreements or tried to reach agreements with record services. I think that's all that we need to go to." ROSIT argues the trial court's statement meant it would "treat the content" of the excluded exhibits as "notice" of "Lexitas' repeated failures to properly serve process," "ROSIT's efforts" to work with records services, and "the agreement with records services to accept service of subpoenas and DWQs to make things easier for

records services and to avoid records service abuses." But ROSIT's argument is premised on the content of the exhibits, and the record clearly reflects that the trial court sustained Allstate's objections and excluded them from evidence. The trial court's comment was neither a reversal of this ruling nor a ruling that ROSIT was relieved of its burden to establish—by testimonial and documentary evidence—Allstate's bad faith or improper purpose in filing the motion to compel. *See O'Donnell*, 2015 WL 4722459, at *5 (when seeking sanctions, movant must carry burden with competent proof).[5]

In sum, as soon as the circumstances clearly indicated that Ticer was tendering evidence on the record, Westmoreland objected. His objections were sustained, and the trial court's subsequent comments did not constitute reversal of those rulings or admission of hearsay evidence for the truth of the matters asserted. Consequently, we conclude that Allstate did not waive its objection to the admission of Ticer's arguments as evidence to support imposition of sanctions.

B. Support for trial court's findings and conclusions

The sanctions here were based on an alleged long history of Lexitas's failure to comply with the requirements for serving depositions on written questions. Paragraph 9 of the trial court's sanctions order included a finding that:

[5] *See also Travel Music of San Antonio, Inc. v. Douglas*, No. 04-01-00086-CV, 2002 WL 184343, at *2 (Tex. App.—San Antonio Feb. 6, 2002, no pet.) (not designated for publication) (distinguishing *Banda* and concluding that right to a turnover order could and should have been established by testimonial and documentary evidence, not attorney's unsworn statements and allegations).

> Prior to Allstate's Motion [to Compel], ROSIT attempted to make service for DWQs on ROSIT easier by serving Ticer, ROSIT's counsel, subject to several simple and reasonable conditions including inclusion of a valid and compliant HIPPA authorization. Previously, ROSIT had entered into such agreements with numerous records services, including Lexitas, who was involved with some of the documents attached to Allstate's Motion. However, Lexitas' repeated refusal to comply with the agreement resulted in ROSIT's cancellation of the agreement as to Lexitas and, as such, no agreement existed when Lexitas supposedly served Lisa Amerson with a "subpoena." Thus, Allstate had to satisfy all legal requirements, including a subpoena and DWQs, to obtain medical records from ROSIT[.]

Without admittance of Ticer's argument and the attachments to ROSIT's motion into evidence to establish the truth of the matters asserted, however, there is no evidence to support this finding.

ROSIT argues that the trial court's judicial notice of Allstate's motion, taken at both parties' request, provided evidence of the facts ROSIT sought to prove to establish Allstate's bad faith. In its written findings, the trial court expressly found that by "examining Allstate's Motion, it is readily apparent that Allstate had not properly served and prepared compliant subpoenas . . . ," and "knew or should have known" that its motion "failed on its face" for noncompliance with the rules. Incomplete preparation and service of the subpoena, however, is not evidence of Allstate's bad faith, harassment, or improper purpose necessary to overcome the presumption that pleadings are made in good faith. *See Nath*, 446 S.W.3d at 361; *see also Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 719 (Tex. 2020) ("Errors in judgment, lack of diligence, unreasonableness, negligence, or even gross negligence—without more—do not equate to bad faith.").

ROSIT's allegations of sanctionable conduct rest on its contention that, based on a history of intentional noncompliance in *other* cases, Allstate intentionally failed to comply with the requirements for service of a subpoena and then filed the motion in bad faith, for an improper purpose, and to harass ROSIT. The trial court's findings of sanctionable conduct were based in part on this history. But Allstate's motion for sanctions with its attachments was limited to ROSIT's noncompliance with service in *this* case.

The attachments regarding Allstate's or Lexitas's conduct in other cases—including the alleged "agreement" with ROSIT—were attached to ROSIT's motion, not Allstate's. They were not judicially noticed or admitted into evidence. *See Gruber v. CACV of Colo., LLC*, No. 05-07-00379-CV, 2008 WL 867459, at *2 (Tex. App.—Dallas Apr. 2, 2008, no pet.) (mem. op.) (court's judicial notice of its file does not elevate "averments into proof," nor does it "dispense with proper foundational evidentiary requirements, or relieve a litigant of complying with other admissibility requirements").[6]

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[6] We also note the trial court's finding in paragraph 2 of the sanctions order—that Westmoreland's certificate of conference falsely stated that "many attempts to resolve these issues have been made" with ROSIT's counsel—is contrary to the trial court's discussion with Westmoreland on the subject at the hearing. Westmoreland argued, and the trial court appeared to acknowledge, that the certificate's reference was to the many attempts Westmoreland had made with *Ford*'s counsel, not ROSIT's, to obtain the necessary documents. Westmoreland argued he had "been talking to Mr. Futrell who, again, is—he's plaintiff's counsel, we're trying to get his client's records. I've been talking to him for almost a year about what do we need to do to get those records. . . . . I would never sign a certificate of conference that I knew to be untrue, Your Honor." The certificate provides in part that "many attempts to resolve these issues have been made with counsel for Plaintiff." Referencing this language, the court responded, "So I'm assuming that was conversations with Mr. Futrell." The complete certificate reads, "The undersigned counsel for Defendant Allstate hereby certifies that many attempts to resolve these issues have been made with counsel

ROSIT cites *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129 (Tex. App.—Texarkana 2000, no pet.), for the proposition that "motive and credibility for sanctions purposes may be determined by taking judicial notice of the items in the file," but the trial court in that case did not actually do so, and the court of appeals noted only that a court "[u]nder some circumstances . . . may be able" to determine the motives and credibility of the person signing the pleading "by taking judicial notice of items in the case file." *Id.* at 139. The court followed this statement with a "but see" citation to *Emmons v. Purser*, 973 S.W.2d 696, 701 (Tex. App.—Austin 1998, no pet.), in which Emmons and his lawyer were sanctioned for joining Purser in the suit and later failing to dismiss him. The trial court took judicial notice of the case file, but no witnesses testified. *See id.* at 700–01. The court of appeals concluded that despite the trial court's judicial notice of the file, "nothing in that file proves that Emmons and [his lawyer] joined Purser without first conducting a reasonable investigation." *Id.* at 701. Neither *Mecom* nor *Emmons* supports the proposition that judicial notice of a motion or pleading is sufficient evidence that the pleading was brought in bad faith or for the purpose of harassment. *See Mecom*, 28 S.W.3d at 139 (rule 13 sanctions not warranted); *Emmons*, 973 S.W.2d at 701 (imposition of sanctions was abuse of discretion).

for Plaintiff and with counsel for non-party Regenerative Ortho. No agreement has been reached." The trial court's finding number 2, however, omits the certificate's reference to "counsel for Plaintiff," quoting only the reference to ROSIT.

Nor is there evidence to support the trial court's ultimate finding that "Allstate's Motion demonstrates a conscious and deliberate end-run around the Texas Rules of Civil Procedure, was filed for an improper purpose and demonstrates purposeful noncompliance with Rules 176, 200, and 205 of the Texas Rules of Civil Procedure." In its motion and at the hearing, and as reflected in the trial court's findings and conclusions, ROSIT complained of Lexitas's "repeated refusal to comply" with an alleged agreement regarding service of depositions on written questions directed to ROSIT in this and other cases. Although the trial court cited this failure in its findings, no evidence of any such agreement was admitted.[7] Evidence that Lexitas's conduct was attributable to Allstate or Westmoreland in the "repeated refusal[s]" was also lacking. Similarly, the trial court's finding that Allstate's improper conduct "was not an aberration, but has been repeated in other litigation" is not supported by evidence. In sum, the trial court made wide-ranging findings on an alleged pattern of conduct by Allstate, Lexitas, and Allstate's counsel

[7] We also note that the letter purportedly creating this agreement, attached to ROSIT's motion, was a letter directed to seven records services from ROSIT's attorney. There is no signature block or other space for the recipients to indicate their agreement. "America First" is an addressee, and there is a handwritten circle and note next to the address "Agree & will have request served" with a patient name that is not Ford's. The handwriting was not identified, nor was any evidence offered of who may have agreed to what terms, or whether the note applied to a case in which Lexitas was seeking records on Allstate's behalf, or whether an agreement with "America First" bound Lexitas. In any event, the trial court sustained Allstate's objection to this exhibit and it was not admitted into evidence.

over the course of several years, none of which was proven by sworn testimony or by exhibits that were admitted into evidence.[8]

Sanctions are reserved for "those egregious situations where the worst of the bar uses our honored system for ill motive without regard to reason and the guiding principles of the law." *Thielemann v. Kethan*, 371 S.W.3d 286, 295 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (internal quotation omitted); *see also Elkins v. Stotts-Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.) ("Bad faith is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose."). Even if a motion is not meritorious or is ultimately unsuccessful, a trial court may not base sanctions solely on the motion's legal merit. *Thielemann*, 371 S.W.3d at 294. We conclude that the trial court abused its discretion by assessing sanctions against Allstate without the "evidentiary hearing to make the necessary factual determinations" that rule 13 and Chapter 10 require about Westmoreland's "motives and credibility" in signing the

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[8] ROSIT argues in the alternative that the trial court's order was proper under civil procedure rule 215.3, which permits a trial court to impose sanctions for abuse of the discovery process, and the trial court's inherent power. *See* TEX. R. CIV. P. 215.3 (if court finds abuse of discovery process, court may impose sanction after notice and hearing); *Cherry Petersen Landry Albert LLP v. Cruz*, 443 S.W.3d 441, 451 (Tex. App.—Dallas 2014, pet. denied) (trial judge has inherent power to sanction to extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process); *see also Brewer*, 601 S.W.3d at 718 (bad faith required to impose sanctions under court's inherent authority). ROSIT did not rely on either of these theories in the trial court, and the trial court did not address them. As with sanctions awards under rule 13 and Chapter 10, we review sanctions awards made under rule 215 or under the trial court's inherent powers for abuse of discretion, to determine if the trial court acted without reference to guiding rules and principles such that its ruling was arbitrary or unreasonable. *See Brewer*, 601 S.W.3d at 717 (inherent powers); *Medina v. Zuniga*, 593 S.W.3d 238, 244 (Tex. 2019) (rule 215). "A decision lacking factual support is arbitrary and unreasonable and must be set aside." *Brewer*, 601 S.W.3d at 717. Even assuming these alternate grounds were before the trial court, the lack of factual support—through properly-admitted evidence in the record—would lead us to the same conclusions we reach under rule 13 and Chapter 10.

motion on Allstate's behalf. *See Click*, 2016 WL 4239473, at *2. We decide Allstate's first issue in its favor. Given this disposition, we need not address Allstate's second and third issues.

CONCLUSION

We reverse the trial court's March 1, 2019 order awarding sanctions against Allstate.

/Leslie Osborne//
LESLIE OSBORNE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Appellant

No. 05-20-00463-CV   V.

GERALD FORD AND REGENERATIVE ORTHO SPINE INSTITUTE OF TEXAS, P.A., Appellees

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-04652.
Opinion delivered by Justice Osborne. Justices Myers and Carlyle participating.

In accordance with this Court's opinion of this date, the trial court's March 1, 2019 Order Granting Sanctions to Nonparty Regenerative Ortho Spine Institute of Texas, P.A. is **REVERSED** and judgment is **RENDERED** that appellee Regenerative Ortho Spine Institute of Texas, P.A. take nothing from appellee Allstate Property and Casualty Insurance Company.

It is **ORDERED** that appellant Allstate Property and Casualty Insurance Company recover its costs of this appeal from appellee Regenerative Ortho Spine Institute of Texas, P.A.

Judgment entered this 15th day of October, 2021.