In The
Fourteenth Court of Appeals

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 # 14-14-00788-CV

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EXERGY DEVELOPMENT GROUP OF IDAHO, LLC AND JAMES T. CARKULIS, Appellants
V.
HIGHER POWER ENERGY, LLC, BLUE RENEWABLE ENERGY, LLC AND BLACK MOUNTAIN FINANCIAL, CORP, Appellees

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On Appeal from the 125th District Court Harris County, Texas
Trial Court Cause No. 2012-67104

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ORAL ARGUMENT

Your Appellants request oral argument.

IDENTITIES OF PARTIES AND COUNSEL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

Secondary Source

STATEMENT OF THE CASE

Exergy Development Group and James Carkulis appeal from the grant of sanctions in favor of Higher Power Energy for alleged discovery abuses.

Higher Power Energy ("HPE") filed this lawsuit on November 9, 2012, claiming that Exergy Development Group and Mr. Carkulis breached an Amended and Restated Asset Purchase Agreement between the parties, and committed fraud and business disparagement. Throughout pre-trial discovery, Mr. Carkulis responded to discovery requests and HPE's incessant pre-trial motions, notwithstanding a medical condition that made it increasingly difficult for Mr. Carkulis to defend himself before the district court. Ultimately, Mr. Carkulis's medical condition made it impossible for him to appear for deposition or provide additional timely discovery responses, and, as a result, the district court issued death-penalty sanctions against Exergy Development Group and Mr. Carkulis.

As part of its issuance of sanctions, the district court effectively granted a default judgment in favor of HPE. HPE subsequently filed a request for a hearing on damages. Rather than scheduling the hearing, the district court entered a final order on April 8, 2014, granting HPE's alleged damages in full. Exergy and Mr. Carkulis were not given an opportunity to be heard on the issue of damages; no hearing was held, and no time for a response was provided. Total damages awarded to HPE in this case amount to approximately $20 million.

This restricted appeal was filed within six months on September 29, 2014. The claims on appeal are final and ripe for review.

ISSUE PRESENTED

Whether the District Court reversibly erred in imposing death penalty sanctions in contravention of all controlling legal standards.

STATEMENT OF FACTS

Higher Power Energy ("HPE") filed this lawsuit on November 9, 2012. CR 5. HPE claimed that Exergy Development Group and Mr. Carkulis, as its "alter ego," breached an Amended and Restated Asset Purchase Agreement between the parties, and committed fraud and business disparagement. CR 21-24. Exergy and Mr. Carkulis (hereinafter referred to collectively as "Exergy") filed a special appearance and answer, contesting the court's jurisdiction, on January 14, 2013. CR 55. The answer included affirmative defenses. *Id*. The district court did not rule on the issue of jurisdiction until September 23, 2013. CR 102. Nonetheless, between November 9, 2012, and September 23, 2013, HPE submitted nine sets of Requests for Production and filed one Motion to Compel, notwithstanding Exergy's valid responses----including over 13,000 pages---to those discovery requests. Supp. CR. 933.

As of September 23, 2013, it appeared that the only "discovery" that Exergy truly failed to produce was the identification of which documents, by bates stamp range, were responsive to particular discovery requests. Supp. CR. 935-36. While Exergy produced documents with bates stamps, HPE demanded they take the additional step of relating bates stamps to specific requests. The district court granted HPE's Motion to Compel with respect to the bates stamp ranges on October 1, 2013. Supp. CR. 936. Exergy then supplemented those responses.

Prior to the date on which Exergy was compelled to respond with bates stamp ranges, Exergy's counsel moved to withdraw, and that motion was granted on

October 28, 2013. CR 106. The trial court set a new discovery response deadline of November 7, 2013, and "told counsel . . . that if these discovery responses were not provided by that date HPE's counsel should seek sanctions." CR 106. Counsel for Exergy apparently was not present for this hearing. Supp. CR. 979. The court's rationale for this instruction is undocumented.

Subsequent to the order to compel, Exergy produced an additional 616 pages. Supp. CR. 968. During this time, Exergy's counsel was in close contact with HPE's attorney. Supp. CR. 977-85. In addition to the 616 pages, counsel provided answers to HPE's Second Set of Requests for Admission and kept HPE's counsel informed as to the status of supplemental documents and discovery responses. Supp. CR. 978. It is clear from Exergy's counsel's e- mail communications that Exergy was attempting in good faith to comply with the court's discovery order, and that it believed that HPE was requesting information that was not within the scope of that order

> On Nov 15, 2013, at 11:28AM, AngeloRosa <arosa@exergydevelopment.com> wrote:
>
> Howard:
>
> I do not believe I am aware of this agreement [regarding HPE' ninth set of Requests for Production], nor am I aware of any evidence confirming the existence of such an agreement.
>
> That said, I already informed you (see below) that I am happy to look into any potential need to supplement Exergy's responses with respect to HPE's Ninth Set of Requests for Production in light of your comments from yesterday. However, my clients' focus is currently on complying with the terms set forth in the four corners of the Court's Order to Compel. Once that is completed, my clients' shall be turning their attention to the Ninth Set.

> Both my clients and I are serious about cleaning up these outstanding discovery issues and that this is being done in a spirit of utmost good faith. I sincerely hope this is evident to you and your client.
> ALR

Supp. CR. 978-79. Nonetheless, HPE filed a motion for sanctions and, notwithstanding Exergy's compliance with the court's October 1, 2013 discovery order, the court granted the motion and imposed a new discovery response deadline of December 2, 2013. CR 112.

Leading up to the December deadline, Exergy's counsel was laboring to adequately represent Exergy in this discovery back-and-forth. HPE's counsel tried several times to contact Angelo Rosa in vain. Supp. CR. 1030. The following exchange is illustrative:

> From: Andrew Edison [mailto:andrew.edison@emhllp.com] Sent: Wednesday, November 20, 2013 6:27 AM To: Howard J. Klatsky; Angelo Rosa Subject: RE: HPE v. Exergy
>
> Angelo –
>
> What is the answer? Where are the responses? Where are the documents?
>
> Please advise ASAP.
>
> Andrew Edison
>
> . . .
>
> Angelo Rosa <arosa@exergydevelopment.com> Wednesday, November 20, 2013 6:23 PM Andrew Edison; Howard J. Klatsky RE: HPE v. Exergy
>
> Dealing with family issues. Will be responding in full tomorrow.

Supp. CR. 1030. Notwithstanding Angelo Rosa's family issues, Exergy produced "a significant amount of additional documents" on December 4, 2013, within hours of the court's deadline. CR 112.

On December 26, 2013, Angelo Rosa filed a motion to withdraw, citing an unhealthy relationship with his clients based on their failure to pay him. Supp. CR. Vol. 2 1120. At the hearing on Angelo Rosa's motion to withdraw, counsel for all parties agreed that Mr. Carkulis would sit for deposition on January 26, 2014, and that his failure to attend would likely result in death penalty sanctions. Supp. CR. Vol. 2 1209. Mr. Carkulis was not contacted prior to the court's scheduling of this deposition.

Throughout the relevant time frame identified above, Mr. Carkulis' medical condition and the medical condition of his sister were becoming increasingly critical. Mr. Carkulis' sister was diagnosed with inoperable squamous cell carcinoma on December 15, 2012, just a few weeks after this lawsuit was filed. Supp. CR. Vol. 2 1238. On January 9, 2014, Ms. Carkulis' doctor presented a letter to the court stating that her condition was tenuous and in continuous decline, that she may require hospice care in the near future, that Mr. Carkulis was her sole remaining relative. Id. Ms. Carkulis' doctor advised that, for the sake of his sister, Mr. Carkulis should not travel away from her. Supp. CR. Vol. 2 1238-39. Subsequently, on January 22, 2014, Mr. Carkulis' doctor presented a letter to the court advising it of Mr. Carkulis' own declining health. Supp. CR. Vol. 2 1240. According to his doctor, Mr. Carkulis was admitted to the emergency department

in "early January," and was suffering from intermittent difficulty with mental processing, attending to daily tasks, short-term memory and concentration. Id. As of the date of the letter, Mr. Carkulis had been referred for neurology, cardiology, and neuropsychological evaluations, the results of which were pending. Id. Mr. Carkulis' doctor's initial evaluation concerned a "progressive incapacitation with his daily business and activities," and tentatively related to endocrine dysfunction, episodic global amnesia, or other intermittent delirium. Id. Exergy's counsel presented this evidence to the Court. However, the Court found that the records presented were not sufficiently dispositive as to Mr. Carkulis' ability to appear for or give deposition testimony.

It is not surprising, then, that Mr. Carkulis was unable to travel to Houston for deposition on January 26, 2014. Still, Exergy and Mr. Carkulis were making every effort to comply with their discovery obligations, and the record shows that Exergy and Mr. Carkulis might have obtained compliance but for their attorney's apparent inability to produce information in a timely manner:

> On Feb 7, 2014, at 7:29 PM, "Angelo Rosa." wrote:
>
> I have on my calendar for today responses due to your client's third set of interrogatories and fourth set of requests for production as propounded upon Mr. Carkulis. I have received draft responses from my client and need to format them. I also need to obtain some clarification from my client regarding certain of the responses. However, I should be able to tender complete responses to you by the end of the day today.
>
> Would your client be amenable to an extension of the time to respond to 12 february?

> Please advise.
>
> Thank you, A
>
> . . .
>
> On Feb 7, 2014, at 5:37 PM, "Howard J Klatsky" wrote:
>
> No. The delays/unsubstantiated excuses/Rules violations have become tiresome, Angelo. We will consider granting future extension requests if and when we receive the long past due sanctions payment.

Supp. CR. Vol. 2 1348. In this instance, and perhaps others, the delay may not have been caused by Exergy or Mr. Carkulis, but, instead, by their attorney.

On January 27, 2014, HPE filed its motion for death penalty sanctions. On February 17, 2014, Angelo Rosa's motion to withdraw was heard by the court. Supp. CR. Vol. 2 1397. The motion to withdraw was granted on March 3, 2014. Supp. CR. Vol. 2 1398.

Subsequently, the court took into consideration HPE's motion for death penalty sanctions. The court stated as follows:

> On the 6th day of March, 2014, came on for consideration the Fourth Motion for Monetary Sanctions – Including "Death Penalty" Sanctions filed by Plaintiff Higher Power Energy LLC against Defendants Exergy Development Group of Idaho, LLC and James Carkulis. After considering the pleadings, applicable authorities, and arguments of counsel, the Court finds that all of the relief requested by the Plaintiff in this Motion should be GRANTED, including death penalty sanctions, because this Court believes that they are clearly justified (based on the Defendants' well-documented, continued failure/refusal to comply with Rule 215 of the Texas Rules of Civil Procedure and multiple orders entered by the Court) and because it is apparent to this Court that no lesser sanctions will promote compliance with the Texas Rules of Civil Procedure and orders of this Court given the Defendants' failure/refusal to abide by prior orders of this Court and the applicable Texas Rules of Civil Procedure.

> IT IS THEREFORE ORDERED that Plaintiff Higher Power Energy, LLC's Fourth Motion for Monetary Sanctions – including Death Penalty Sanctions should be and hereby is GRANTED . . . and that all of the pleadings and affirmative defenses that Defendants Exergy Development Group of Idaho, LLC and James Carkulis have filed and asserted in this case, including all of the affirmative claims for relief . . . should be and hereby are stricken and DISMISSED WITH PREJUDICE.

CR 400-01. In this order, set forth here in its entirety, the court made no finding of whether fault for the discovery delays lay with Exergy or its counsel, or both, nor did the court conduct sufficient inquiry into whether the medical conditions outlined above which were the sole basis of Exergy's inability to fully comply with their discovery obligations in the underlying matter.

Following the withdrawal of counsel and the court's issuance of death penalty sanctions, HPE quickly filed a Motion for Entry of Final Judgment (By Submission) on March 21, 2014, and filed Notice of Hearing on that motion for April 7, 2014. Exergy, which by that point was not represented by counsel, did not have an opportunity to respond to the motion for final judgment. Exergy did not participate in any hearing with regard to the motion, and it had no opportunity to present any evidence regarding actual damages in this case. The court adopted HPE's allegations of actual damages in their entirety, without question, and entered final judgment in this case on April 8, 2014. Without due examination of the facts, the court found as follows:

> [HPE] shall have and recover actual damages from and against [Defendants], jointly and severally, in the amount of $14,532,615.00, along with pre-judgment interest on this sum through March 31, 2014 in the amount of $1,009,319.97 plus $13,093.36 in outstanding, unpaid sanctions

> plus $217,500.00 for reasonable and necessary attorney's fees . . plus $1,000,000.00 in exemplary damages, which the Court finds are just and proper given the factors set forth in $41.011 of the Texas Civil practice & Remedies Code, plus post judgment interest[.]

CR 453. This restricted appeal was filed within six months on September 29, 2014, pursuant to Rule 30 of the Texas Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The judgment on appeal constitutes clear, reversible error because it was an unconstitutionally severe application of death penalty sanctions. The district court awarded HPE nearly $20 million in damages. Exergy was not present for a hearing on damages—no hearing was held whatsoever. Exergy was given no opportunity to contest damages, nor was Exergy represented by counsel on the issue of damages.

The Supreme Court's decision in *TransAmerican* set out a two-part test for determining whether a particular sanction is just. *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003); *TransAmerican*, 811 S.W.2d at 917. The judgment on appeal fails both parts of that test. The issuance of death-penalty sanctions and exclusion of Exergy from participating in the damages phase of litigation constitutes reversible error. This case must be reversed and remanded for further proceedings.

ARGUMENT

A. The Elements of Restricted Appeal Are Satisfied.

A restricted appeal is a procedural device available to a party who did not participate in a hearing, either in person or through an attorney, that resulted in a judgment against that party. TEX. R. APP. P. 30. Under Texas law, a party is eligible for a restricted appeal if it: (1) filed notice of the restricted appeal within six months after the judgment or order was signed; (2) was a party to the underlying suit; (3) did not participate in the hearing resulting in the judgment on appeal and did not file a timely post-judgment motion, request for findings of fact and conclusions of law, or notice of appeal; and (4) shows error on the face of the record. *See* TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004).

The elements in this case are satisfied. The district court entered its final judgment on April 8, 2014. Exergy filed this appeal within six months of that date, on September 29, 2014, and did not participate in the hearing resulting in the judgment on appeal. As discussed above, Exergy's attorney's motion to withdraw was granted on March 3, 2014. HPE's Motion for Entry of Final Judgment was filed on March 21, 2014, and heard on April 7. The Court entered final judgment on April 8, 2014, awarding HPE nearly $20 million in damages. Exergy was not present for a hearing on damages—no hearing was held whatsoever. Exergy was given no opportunity to contest damages, nor was Exergy represented by counsel on the issue of damages. Finally, as demonstrated below, the final judgment in

this case constitutes clear error because it was an unconstitutionally severe application of death penalty sanctions.

For these reasons, Rule 30 is satisfied here. This appeal is properly before this Court.

B. The Application of Death Penalty Sanctions Constituted an Abuse of Discretion.

1) Standard of Review

A trial court's sanctions order under Texas Rule of Civil Procedure 215.2(b) is reviewed for abuse of discretion. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted without reference to any guiding rules or legal principles. *Cire,* 134 S.W.3d at 838; *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). The trial court's discretion in imposing sanctions is limited by the standards set out in the applicable Rules of Civil Procedure and *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W. 2d 913 (Tex. 1991).

2) Basis for imposition of discovery sanctions

Rule 215.2 of the Texas Rules of Civil Procedure authorizes a trial court to sanction a party for failure to comply with a discovery order or request. Tex.R.Civ.P. 215.2. A list of possible sanctions is found in Rule 215.2(b). Pertinent to this case, an order striking pleadings is one of the sanctions available to the court. TEX. R. CIV. P. 215.2(b)(5). The Texas Supreme Court defines

"death penalty sanctions" as "sanctions that terminate a party's right to present the merits of its claims." *State v. Bristol Hotel Asset Co*., 65 S.W.3d 638, 647 (Tex. 2001). Such sanctions include striking a party's pleadings, dismissing its action, or rendering a default judgment against a party for abusing the discovery process. *Id*. Death penalty sanctions must be reserved for circumstances in which a party has so abused the rules of procedure, despite imposition of lesser sanctions, that the party's position can be presumed to lack merit and it would be unjust to permit the party to present the substance of that position before the court. *TransAmerican*, 811 S.W.2d at 918.

3) The proportionality criterion

A trial court may not impose sanctions that are more severe than necessary to satisfy legitimate purposes. *Cire*, 134 S.W.3d at 839. Further, Rule 215.2(b) explicitly requires that any sanction under this rule be "just." TEX. R. CIV. P. 215.2(b). The Supreme Court's decision in *TransAmerican* set out a two-part test for determining whether a particular sanction is just. *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003); *TransAmerican*, 811 S.W.2d at 917.

First, there must be a direct relationship between the offensive conduct and the sanction imposed. *TransAmerican*, 811 S.W.2d at 917. A just sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction should be visited upon the offender. *Spohn Hospital*, 104 S.W.3d at 882; *TransAmerican*, 811 S.W.2d at 917. The trial court

should make some attempt to determine whether fault for discovery abuse lies with the party, its counsel, or both. *Spohn Hospital*, 104 S.W.3d at 882; *TransAmerican*, 811 S.W.2d at 917.

Second, just sanctions must not be excessive. *Spohn Hospital*, 104 S.W.3d at 882; *TransAmerican*, 811 S.W.2d at 917. In assessing the second standard, the sanction should be no more severe than necessary to satisfy its legitimate purposes, which include securing compliance with discovery rules, deterring other litigants from similar misconduct, and punishing violators. *Spohn Hospital*, 104 S.W.3d at 882; *TransAmerican*, 811 S.W.2d at 917. The court must consider less stringent sanctions and whether such lesser sanctions will fully promote compliance, deterrence, and discourage further abuse. *Spohn Hospital*, 104 S.W.3d at 882; *TransAmerican*, 811 S.W.2d at 917. Discovery sanctions that are so severe as to inhibit presentation of the merits of the case should be reserved to address a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. *Spohn Hospital*, 104 S.W.3d at 883. Death penalty sanctions may be imposed in exceptional cases where they are clearly justified and it is apparent that no lesser sanctions would promote compliance with the rules. *Spohn Hospital*, 104 S.W.3d at 882.

4) The court's issuance of discovery sanctions in this case fails the TransAmerican test.

a) The court failed to make any inquiry as to the basis of the alleged discovery delays in this case, and therefore the discovery sanctions fail the *TransAmerican* test.

The record shows clearly that the trial court failed to make any inquiry as to whether the alleged discovery delays were the fault of the parties or counsel or both, as *TransAmerican* requires. 811 S.W.2d at 917 (trial court should make some attempt to determine whether fault for discovery abuse lies with the party, its counsel, or both). The court also failed to examine whether the alleged discovery delays were a product of bad faith, as *TransAmerican* requires. 811 S.W.2d at 917 (a just sanction must be directed against the abuse and the sanction should be visited upon the offender). In the instant case, the Court was presented with evidence that confirmed Mr. Carkulis was suffering from health problems, that he was dealing with difficulties associated with the final stages of his sister's terminal illness. Further, prior to his withdrawal, Exergy's trial counsel emphasized that these factors were a real and legitimate barrier to Exergy's ability to substantively participate in discovery. Had the court made sufficient inquiry in this case, it may have concluded that the discovery delays were in fact due to Mr. Carkulis' and his sister's medical conditions, or that they were in fact due to Angelo Rosa's family issues. Without any record of sufficient examination, it is impossible to determine whether the sanctions are directed against the abuse, if any. It is likewise impossible to say that, if such abuse exists, the sanctions are visited upon the actual offender. Without a record showing sufficient examination of these requisite factors, the court's issuance of death penalty sanctions necessarily constitutes an abuse of discretion.

b) The court erroneously applied death penalty sanctions to exclude Exergy from the damages hearing in this case, and therefore the discovery sanctions fail the *TransAmerican* test.

The record shows clearly that Exergy was excluded entirely from participating in the damages hearing in the case below. The District Court was on notice of Exergy's impairments yet decided to proceed forward with the imposition of substantial and punitive sanctions against an impaired party-litigant. The rule with regard to death penalty sanctions in Texas clearly states that a defendant against whom judgment on liability was entered as death-penalty sanction for discovery violations, as it was in this case, has the right to participate in trial of plaintiff's damages claims, and that barring such a defendant from participation in the damages trial serves no purpose other than punishment and thus was more severe sanction than necessary. *Paradigm Oil, Inc. v. Retamco Operating, Inc*. 372 S.W.3d 177 (Tx. Sup. 2012). As demonstrated below, the court abused its discretion in its application of death penalty sanctions to damages.

In *Paradigm Oil*, plaintiff alleged breach of contract over defendant's failure to pay royalties under purchase agreement involving numerous oil and gas leases. In a strikingly similar result to the one in this case, the *Paradigm Oil* court entered post-answer default against defendant as a "death penalty" sanction. Subsequent to the death penalty sanction, the court entered a judgment against defendant for $1.6 million after conducting trial of plaintiff's unliquidated damages claims from which defendant was excluded.

The Texas Supreme Court explained:

> [A] trial court should have discretion to bar a defendant's participation, such as at the damages hearing in this case, if such a sanction is necessary to remedy the abuse. Even so, such an extreme sanction must be carefully tailored to comport with the requirements of *TransAmerican* and due process. Sanctions that preclude the admission of evidence intrude upon the fact-finding process of a trial just as much as a default judgment on liability. In the latter instance, sanctions that adjudicate the merits of a party's claim or defense cannot be imposed as mere punishment but rather are appropriate only when the sanctioned party's conduct justifies a presumption that an asserted claim or defense lacks merit. *TransAmerican*, 811 S.W.2d at 918. The justification for also barring the defaulted party from the ensuing evidentiary trial on damages must go beyond that presumption because the damages issue is materially different.
>
> The existence, or not, of facts establishing liability lends itself to the first presumption. For instance: Did the defendant's negligence proximately cause the occurrence? *Morgan*, 675 S.W.2d at 732–33. Was the defendant indebted to the plaintiff? *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 496 (Tex.1988). Striking the defendant's answer establishes the answer to these questions. The either/or character of liability facts, however, does not translate to a claim for unliquidated damages, which cannot be determined by answering "yes" or "no." By their very nature, unliquidated damages are not susceptible to exact calculation and involve a range of possible answers. For this reason, a defaulting defendant admits facts establishing liability but not any claimed amount of unliquidated damages. *See Holt Atherton*, 835 S.W.2d at 83; *see also Thomson v. Wooster*, 114 U.S. 104, 111 (1885) (allegations that are distinct and positive are confessed by default; matters not alleged with certainty or, which by their nature require examination of details, require the complainant to present proof). So what kind of abuse would justify barring a defaulted defendant's participation at the hearing on unliquidated damages? *Dynamic Health*, the case cited by the court of appeals in this case, suggests spoliation as one example. *Dynamic Health*, 32 S.W.3d at 884.
>
> The destruction of evidence that directly and significantly impairs a party's ability to prove damages might reasonably justify a sanction like the one in this case. But the destruction of this type of evidence is not at issue in this case. The evidence needed to prove

> Retamco's damages is available. According to Retamco, the information on the various wells has been collected, but at great expense. Retamco asserts that Paradigm's discovery abuse forced it to spend hundreds of thousands of dollars to assemble the data needed to determine its damages—information that Retamco asserts Paradigm possessed and owed it under the 1984 Agreement.
>
> Although punishment may be a legitimate consequence of a discovery sanction, it cannot be excessive. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex.1992) (listing securing compliance, deterrence, and punishment as legitimate purposes of discovery sanctions). Sanctions for discovery abuse should not be dispensed as arbitrary monetary penalties unrelated to any harm. *Ford Motor Co. v. Tyson*, 943 S.W.2d 527, 534–35 (Tex.App.-Dallas 1997, orig. proceeding). When discussing excessiveness, we have said that "the punishment should fit the crime" and that the sanction "should be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican*, 811 S.W.2d at 917; *see also PR Invs. and Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex.2008); *In re SCI Tex. Funeral Servs., Inc*., 236 S.W.3d 759, 761 (Tex.2007) (per curiam). Moreover, discovery sanctions are primarily intended to remedy discovery abuse and should be tailored to serve their remedial purpose. It is not apparent that barring Paradigm's participation in the post-default damages phase of the case served any purpose other than punishment.

Compensatory damages, the Court continued, "awarded post-default should compensate the injured party for its loss, not penalize the wrongdoer or allow the plaintiff a windfall." *Id*. (citing *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848–49 (Tex.2000) (noting that the role of compensatory damages is to fairly compensate the plaintiff, not punish the defendant)). The Court concluded that the additional sanction of precluding Paradigm from the damages trial was excessive. While the plaintiff in that case may have been entitled to the post-answer default judgment, excluding the defendant from participation in the damages phase of the

case was "more severe than necessary to satisfy its legitimate purposes." *Id*. (quoting *TransAmerican*, 811 S.W.2d at 917).

A nearly identical set of circumstances is present in this case. The trial court's March 6 death-penalty-sanctions order dismissing all of Exergy's pleadings had the effect of a post-answer default judgment. The issue of liability was automatically decided in favor of HPE, and HPE was also compensated for the alleged discovery wrongdoing. As in *Paradigm Oil*, it was more severe than necessary to then exclude Exergy from the damages phase of the litigation and award HPE nearly $20 million with absolutely no examination of the factual basis for damages.[1] As a result, the final judgment in this case must be reversed and the case remanded for further adjudication.

CONCLUSION

Exergy requests that this Court hold that:

1) The elements of restricted appeal under Rule 30 are satisfied, and this appeal is properly before the Court.

[1] The unexamined award of $20 million in damages in this case is particularly egregious. New Generation Power Texas, LLC, a Texas-based renewable energy company, has begun the first phase of construction on a 400 Megawatt Wind Farm in Haskell County, supplanting the Project that is the subject of this case. The New Generation project started construction on December 11, 2013, which made the wind farm eligible for a Federal Renewable Energy Production Tax Credit (PTC). The purchase by New Generation would have a substantial mitigating effect on the alleged damages suffered by HPE in this case. This evidence was not heard, however, because the District Court excluded Exergy from the damages phase of litigation. See Windpower Engineering & Development, "New Generation Power Texas Working on a 400 MW wind farm," February 27, 2014 (available at: http://www.windpowerengineering.com/construction/new-generation-power-texas-working-400-mw-wind-farm/).

2) The trial court issuance of death penalty sanctions constitutes reversible error, and the case must be reversed and remanded for further adjudication.

3) The trial court's exclusion of Exergy from the damages hearing in this case constitutes reversible error and the case must be reversed and remanded for further adjudication.

Exergy also requests such other relief to which it may be entitled.

Dated: May 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief were served on all parties by email as indicated below on the 29th day of May 2015:

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