Reversed and Remanded and Memorandum Opinion filed January 7, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00788-CV

EXERGY DEVELOPMENT GROUP OF IDAHO, LLC AND JAMES CARKULIS, Appellants

V.

HIGHER POWER ENERGY, LLC, Appellee

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

M E M O R A N D U M O P I N I O N

Exergy Development Group of Idaho, LLC and James Carkulis pursue a restricted appeal from a judgment signed in favor of Higher Power Energy, LLC following the imposition of death penalty sanctions. Appellants contend that the trial court abused its discretion by imposing death penalty sanctions in this case. We conclude that there is no error on the face of the record with respect to the imposition of

death penalty sanctions; we reverse and remand because of error based on the manner in which the determination of unliquidated damages occurred following the imposition of death penalty sanctions.

BACKGROUND

Exergy became interested in 2001 in purchasing a wind energy project known as the "Baker Project" being developed by Higher Power. The parties signed a purchase agreement regarding the project.

Higher Power sued Exergy and its alleged principal Carkulis on November 9, 2012, alleging causes of action for fraudulent inducement, fraud by non-disclosure, common law fraud, fraud in a real estate transaction, breach of contract, and business disparagement. Higher Power also asked for declaratory relief regarding its rights and Exergy's rights in the Baker Project and the assets of the Baker Project.

Higher Power propounded numerous discovery requests during the litigation. On July 2, 2013, Higher Power served its Seventh Set of Requests for Production on Exergy; responses to these requests were due in early August 2013. Higher Power served its Eighth Set of Requests for Production on Exergy on July 10, 2013; responses to these requests were due in mid-August. Higher Power also served a Ninth Set of Requests for Production on Exergy on August 7, 2013, and responses to these requests were due in early September 2013. When Exergy failed to tender complete responses to these production requests in compliance with applicable Rules of Civil Procedure, Higher Power filed a motion to compel discovery responses from Exergy.

The trial court held a hearing on the motion to compel on September 23, 2013; it signed an order on October 1, 2013, ordering Exergy to supplement responses to Higher Power's Seventh and Eighth Sets of Requests for Production. Exergy's trial counsel Joshua Davis agreed that the trial court's ruling regarding the Seventh and Eighth Sets

of Requests also extended to the Ninth Set of Requests for Production, and agreed to provide supplemental responses. Davis did not provide supplemental responses; instead, he filed a motion to withdraw as Exergy's counsel. The trial court held a hearing on Davis's motion to withdraw on October 28, 2013, and granted the motion. At that time, the trial court also imposed a November 7, 2013 deadline on Exergy to provide supplemental responses. Higher Power's counsel informed Exergy's new lead trial counsel Angelo Rosa via email on October 28, 2013, that the trial court had imposed the November 7 deadline; Higher Power's counsel informed Rosa in that same email that the "Court also said that if these supplemental responses are not provided I should file a Motion for Sanctions."

Higher Power filed its first motion for sanctions against Exergy on November 8, 2013, because Exergy never tendered responses to the Seventh, Eighth, and Ninth sets of requests for production that "comply with the letter and spirit of the applicable Rules."

On November 13, 2013, Exergy served via email "a ZIP file containing documents responsive to the requests for production contained in [Higher Power]'s Seventh and Eighth Requests for Production contemplated by the Court's Order to Compel;" Exergy also stated that it is "enclosing the raw files" but would follow up "with a set of Bates numbered PDF file(s)."

The trial court considered Higher Power's sanctions motion on November 18, 2013. In its order granting Higher Power's sanctions motion, the court (1) stated that Exergy was in violation of the October 1, 2013 order; (2) awarded $3,250 in monetary sanctions pursuant to Texas Civil Procedure Rule 215 against Exergy to be tendered to Higher Power by December 2, 2013; and (3) ordered Exergy to provide supplemental responses to Higher Power's Seventh, Eighth, and Ninth Sets of Requests for Production by December 2, 2013.

Higher Power filed its second motion for monetary sanctions on December 9, 2013. Higher Power sought monetary sanctions against Carkulis and contended that (1) Exergy tendered late supplemental responses to its Eighth Set of Requests for Production on December 4, 2013; (2) Exergy failed to provide long overdue responses to Higher Power's October 17, 2013 Second Set of Interrogatories; (3) Higher Power conferred with Exergy's counsel "at length about these past due discovery responses" but Exergy did not provide any responses; and (4) "Defendants have thumbed their noses at the Plaintiff for years, and Defendant Exergy, which is owned and controlled by Defendant Carkulis, has done so to the court repeatedly."

Exergy's trial counsel Angelo Rosa filed a motion to withdraw on December 26, 2013, in which he contended that (1) "[t]he attorney-client relationship has become unhealthy and cannot be continued due to the clients' failure to fully cooperate in discovery, failure to honor certain financial obligations, including those which have resulted in personal liability to Movant for certain costs in this action;" (2) good cause existed for his withdrawal because "continued representation is likely to result in continued frustration of the purposes of Movant's representation and will result in an unreasonable financial burden on Movant;" and (3) Exergy and Carkulis consented to his withdrawal "pursuant to the terms of [his] engagement."

Higher Power filed a supplement to its second motion for monetary sanctions on January 7, 2014. Higher Power stated that Carkulis tendered responses to its October 17, 2013 Second Set of Interrogatories two days after Higher Power had filed its second sanctions motion; many of the filed responses were incomplete or non-responsive, and no verification for these interrogatory responses was provided even though Carkulis's counsel agreed to provide verification by December 13, 2013. Higher Power also contended that no responses were tendered to its Third Set of Requests for Production served upon Carkulis on September 24, 2013.

The trial court considered Higher Power's second motion for monetary sanctions on January 13, 2014. At the hearing, the trial court noted with regard to certain propounded discovery requests that Appellants' trial counsel had made "every effort" to "speak with his clients and try to extract that information from his clients and it seems to the Court however that there is some break down in that communication, i.e., that the clients are not at this point performing or not responding adequately enough to discovery that's been sent. We have tried with two prior sanctions orders from this court to try to get everyone's attention and get them focused on this litigation."

Higher Power's counsel Howard Klatsky informed the trial court that Carkulis had agreed to come to Houston for deposition on January 14, 2014. Although the parties had agreed to this deposition date back on December 2, 2013, Klatsky expressed concern that Carkulis was "going to try to get out of it and not show." Higher Power stated its intention to file a motion for death penalty sanctions if Carkulis failed to appear for the scheduled deposition; the trial court stated that it would consider such a motion. The trial court then gave Appellants' counsel another opportunity to reschedule the deposition to another day, stating: "If we are sitting here right now and Mr. Rosa you know that your client is not going to be there tomorrow, I am willing to let y'all agree on a date but that date will be set in stone, so to speak; and if that's missed then we will come down and I am sure I will be brought a motion for death penalty sanctions and at that time I will have to entertain the motion."

Rosa stated that he did not "believe that [his] client is going to appear in person in Houston tomorrow. . . . I am offering him telephonically tomorrow but if in-person deposition is what is demanded . . . then I think we are going to need to agree on an alternate date and I will go back to my client and say this is the final stage before death penalty sanctions." In light of a hearing set on Rosa's pending motion to withdraw as Appellants' counsel for January 27, 2014, the parties agreed that Carkulis's deposition

would be taken on January 26, 2014, so as to ensure Carkulis would have representation at the deposition.

The trial court then granted Higher Power's second motion for monetary sanctions. The trial court found that Appellants "have abused the discovery process as alleged" by Higher Power in its sanctions motion; ordered Appellants to pay Higher Power $4,020.50 in monetary sanctions by January 26, 2014; ordered Carkulis to tender documents responsive to Higher Power's Third Set of Requests for Production of Documents; and ordered Carkulis to appear for deposition in Houston on January 26, 2014.

Higher Power filed its third motion for monetary sanctions on January 23, 2014, alleging that, although Carkulis tendered responses to its Third Set of Requests for Production, he included untimely objections in some responses and failed to produce documents responsive to certain production requests.

During the afternoon of January 23, 2014, Rosa informed Klatsky via email that he had rescheduled the hearing on his motion to withdraw as Appellants' counsel from January 27, 2014 to February 17, 2014. That same afternoon, Klatsky responded to Rosa's email; Klatsky stated that he had cancelled family plans, bought a plane ticket, booked a hotel room and rental car, and expected Carkulis to appear for his court-ordered deposition on January 26, 2014.

During the evening of January 24, 2014, Rosa informed Klatsky via email that Carkulis would not appear for the court-ordered deposition on January 26, 2014, because (1) the medical condition of Carkulis's sister had rapidly deteriorated in the past week; and (2) "Carkulis himself has been undergoing extensive test[s] for a number of medical conditions." Rosa attached a January 9, 2014 letter from Dr. Fiddler, who is treating Carkulis's sister, Melissa Carkulis, for cancer. In the letter, Dr. Fiddler stated that Melissa had been diagnosed with cancer on December 15, 2012; he also stated that:

> Melissa's status continues to decline despite aggressive therapy. She does have inoperative and incurable disease. I do not feel that she will survive more than six months although Melissa has been interested in proceeding with therapy up to this point. I fear that treatment as well as the disease may be taking a toll on her and she may opt for hospice care in the near future. Melissa's only remaining relative is her brother, James Carkulis. Given Melissa's tenuous condition[,] I feel it is important for her brother to be nearby and I would [sic] that he stay as near to Melissa as able. In the upcoming future I believe that Melissa will require more support from her brother.

Rosa attached to his email a January 15, 2014 letter from Dr. Fiddler, in which he stated:

> Melissa has metastatic incurable squamous cell carcinoma at the base of the tongue. Although she continues to seek medical care in the form of palliative chemotherapy, I do not believe her life expectancy is going to be longer than six months. With that being said, I do not have a crystal ball in which I can predict negative outcomes. Melissa is in a very tenuous situation. She could have a rapid demise at any point in time. I believe that it is reasonable to have a family member close by to give her the needed support if the tragic and acute event is to occur. Individuals with metastatic squamous cell carcinoma of the neck with a large degree of tumor burden such as what Melissa is experiencing, can have a rapid demise and there can be no prediction to this. This further supports the rationale to have James nearby.

Rosa also attached a January 22, 2014 letter from Dr. Michel, in which he opined regarding Carkulis's health status as follows:

> I am composing this letter for Mr. James Carkulis. The patient and I met in the emergency department in early January. At that time, he was having intermittent difficulty with mental processing, short-term memory and concentration. He was also experiencing headaches and was evaluated in the emergency department including a CAT of his head followed by an MRI and laboratories. He states that after this workup he has continued to have difficulty with attending to daily tasks and his typical mental processing activities. This is creating a progressive incapacitation with his daily business and activities. As a result, he has been referred for neurology, cardiology, internal medicine and neuropsychological

> evaluations which are pending at this point.
>
> I was requested to make a statement concerning this medical evaluation and his clinical status which is making him increasingly dysfunctional attending to his daily concerns. A tentative evaluation would be concerning for endocrine dysfunction, episodic transient global amnesia or some other intermittent delirium from an undefined medical condition. While I am not speaking to the patient's competence or capacity, I was requested to speak to my initial evaluation and subsequent ongoing evaluation history with this patient for your information.
>
> Further statements concerning his ongoing evaluation of his neuropsychiatric and medical status can be obtained from his primary care provider, neuropsychologist and neurologist.

After Carkulis failed to appear on January 26, 2014, for his court-ordered deposition, Higher Power filed its fourth motion for monetary sanctions, including death penalty sanctions, on January 27, 2014.

In its motion, Higher Power argued that (1) it had to file three motions for sanctions because of Appellants' abuse of the discovery process; (2) Appellants failed to pay $4,020.50 in sanctions by January 27, 2014, as ordered by the trial court; (3) Higher Power had told the trial court at the January 13, 2014 hearing that it would seek death penalty sanctions if Carkulis failed to appear at his court-ordered deposition, and the trial court indicated that it would consider to such sanctions; (4) Higher Power's counsel made travel arrangements to attend Carkulis's court-ordered deposition in Houston; (5) Higher Power's counsel was told via email two days prior to the scheduled deposition that Carkulis would not attend; (6) the attached doctors' letters do not support the "contention that the deposition of Carkulis should not be taken;" and (7) death penalty sanctions were warranted because "they are clearly justified, and because it is apparent that no lesser sanctions would promote compliance with the Rules and the Orders of this Court."

The trial court signed an order granting Rosa's motion to withdraw as Appellants'

trial counsel on March 3, 2014. The trial court's order states that good cause exists for Rosa's withdrawal and instructs that "all further notices and pleadings in this case be served on Defendants Exergy Development Group of Idaho, L.L.C. and James Carkulis at their last known address: 40 W. 14th Street, Suite 4A, Helena, Montana 59601 in accordance with the Texas Rules of Civil Procedure."

The trial court signed an order granting Higher Power's fourth motion for monetary sanctions and death penalty sanctions on March 6, 2014. The trial court ordered Appellants to pay $9,072.86 in additional monetary sanctions to Higher Power and ordered that all of Appellants' pleadings and affirmative defenses be stricken and dismissed with prejudice.

Higher Power filed a motion for entry of final judgment on March 21, 2014; it attached evidence to the motion to support its request for actual damages and attorney's fees. On the same day, Higher Power also filed a "notice of hearing" on its motion for entry of final judgment; the notice states that the motion will be heard by the trial court "by submission on Monday, April 7, 2014 at 8:00 a.m."

Appellants did not file a response or objection to Higher Power's motion for entry of final judgment. The trial court signed a final judgment on April 8, 2014, stating that (1) Exergy materially breached the "Amended and Restated Asset Purchase Agreement" it entered into with Higher Power; (2) Exergy and Carkulis committed fraudulent inducement, fraud by non-disclosure, common law fraud, and statutory fraud in a real estate transaction; (3) Exergy and Carkulis unlawfully disparaged Higher Power; (4) Higher Power has proven by clear and convincing evidence that Exergy and Carkulis committed the fraud and disparagement with malice; (5) Carkulis is the alter ego of Exergy and Carkulis is individually liable for the wrongful actions and conduct of Exergy; and (6) Higher Power shall recover from Exergy and Carkulis, jointly and severally, $14,532,615.00 in actual damages, $1,009,319.97 in pre-judgment interest,

$13,093.36 in outstanding unpaid monetary sanctions, $1,000,000.00 in exemplary damages, and $217,500.00 in reasonable and necessary attorney's fees.

Appellants appeal the trial court's judgment by restricted appeal.

ANALYSIS

A restricted appeal is a procedural device available to a party who did not participate, either in person or through counsel, in a proceeding that resulted in a judgment against the party. *See* Tex. R. App. P. 30. It constitutes a direct attack on a default judgment. *See Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 943 (Tex. 1991).

An appellant filing a restricted appeal must demonstrate that: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *See Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *see also* Tex. R. App. P. 26.1(c), 30.

Review by restricted appeal entitles an appellant to the same scope of review as an ordinary appeal, except that the error must appear on the face of the record, which for purposes of a restricted appeal consists of all the documents on file. *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). In this case, the record shows that Appellants appealed within six months after the judgment was rendered; Appellants were parties to the underlying suit; and Appellants did not participate in the hearing, if any, that resulted in the final judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law. Therefore, we address only whether Appellants have shown error

on the face of the record.

Appellants argue on appeal that there is error on the face of the record because the trial court's imposition of death penalty sanctions constituted an abuse of discretion under *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). The motion for death penalty sanctions and the order granting death penalty sanctions for discovery abuse refer only to Texas Rule of Civil Procedure 215. And the appellate briefing refers only to Rule 215.2(b) as the basis for the trial court granting sanctions for discovery abuse. Therefore, we focus on Rule 215.2(b) in analyzing the propriety of death penalty sanctions.

Before addressing Appellants' arguments, we begin by outlining the applicable standard of review and law governing an inquiry into whether the trial court's death penalty sanctions were warranted.

I. Standard of Review and Governing Principles

Discovery sanctions serve three legitimate purposes: (1) securing compliance with the rules; (2) deterring abuse; and (3) punishing abuse. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). We review a trial court's imposition of sanctions for an abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam). "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 actions, but 'whether the court acted without reference to guiding rules and principles.'" *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985)). The ruling will be reversed only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Id*. at 839. "In conducting our review, we are not limited to a review of the 'sufficiency of the evidence' to support the trial court's findings; rather, we make an independent inquiry of the entire record to

determine if the court abused its discretion by imposing the sanction." *Elgohary v. Tex. Workforce Comm'n*, No. 14–09–00108–CV, 2010 WL 2326126, at *4 (Tex. App.—Houston [14th Dist.] June 10, 2010, no pet.) (mem. op.); *see Am. Flood Research, Inc.*, 192 S.W.3d at 583.

Rule 215.2(b) lists the following sanctions a court may impose: (1) disallowing any further discovery of any kind; (2) charging all or a portion of the expenses of discovery against the disobedient party; (3) determining designated facts shall be taken to be established; (4) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting designated evidence from being introduced into evidence; (5) striking pleadings or parts thereof, staying the action until the order is obeyed, dismissing the action with or without prejudice, or rendering judgment by default; (6) imposing a contempt order; and (7) requiring the disobedient party to pay reasonable expenses, including attorney's fees, caused by the sanctionable conduct. Tex. R. Civ. P. 215.2(b).

TransAmerican Natural Gas Corp. v. Powell announced a two-part test for courts to apply when determining whether a sanction is "just." 811 S.W.2d at 917. First, there must be a direct nexus among the offensive conduct, the offender, and the sanction imposed. *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003) (citing *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. *Id.*

Second, just sanctions must not be excessive. *TransAmerican*, 811 S.W.2d at 917. "When discussing excessiveness, [the supreme court has] said that 'the punishment should fit the crime' and that the sanction 'should be no more severe than necessary to satisfy its legitimate purposes.'" *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 187 (Tex. 2012) (quoting *TransAmerican*, 811 S.W.2d at 917).

"Moreover, discovery sanctions are primarily intended to remedy discovery abuse and should be tailored to serve their remedial purpose." *Id.* For this reason, the supreme court requires courts to consider less stringent sanctions and whether such lesser sanctions would fully promote compliance. *TransAmerican*, 811 S.W.2d at 917; *see also Cire*, 134 S.W.3d at 839; *Spohn Hosp.*, 104 S.W.3d at 882.

The imposition of severe sanctions is further limited by constitutional due process. *TransAmerican*, 811 S.W.2d at 917. "When a trial court strikes a party's pleadings and dismisses its action or renders a default judgment against it for abuse of the discovery process, the court adjudicates the party's claims without regard to their merits but based instead upon the parties' conduct of discovery." *Id*. at 918. "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id*. (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958)). Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *TransAmerican*, 811 S.W.2d at 918; *GTE Commc'n Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993). "Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *TransAmerican*, 811 S.W.2d at 918.

A trial court "must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed;" thus, a trial court is "required to consider the availability of lesser sanctions before imposing death penalty sanctions." *Cire*, 134 S.W.3d at 840 (citing *Tanner*, 856 S.W.2d at 729). And, in all but the most egregious and exceptional cases, a trial court is "required to test the effectiveness of lesser sanctions by actually implementing and ordering each sanction

that would be appropriate to promote compliance with the trial court's orders in the case." *Id*. at 842 (citing *Chrysler*, 841 S.W.2d at 849).

II. Propriety of Death Penalty Sanctions

Appellants argue that the trial court's "issuance of discovery sanctions in this case fails the *TransAmerican* test" because the court (1) "failed to make any inquiry as to the basis of the alleged discovery delays in this case;" and (2) "erroneously applied death penalty sanctions to exclude Exergy from the damages hearing in this case."

A. Discovery Delays

With regard to the first argument, Appellants contend that the imposition of death penalty sanctions fails the *TransAmerican* test because 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," and "whether the alleged discovery delays were a product of bad faith." Appellants contend that the trial court "was presented with evidence that confirmed Mr. Carkulis was suffering from health problems, [and] that he was dealing with difficulties associated with the final stages of his sister's terminal illness." According to Appellants, "[h]ad 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."

The record does not support Appellants' contention that the trial court failed to inquire as to whether the discovery delays in this case were the fault of Appellants or their trial counsel and were a product of bad faith.

The trial signed an order to compel Appellants' compliance with Higher Power's discovery requests on October 1, 2013. When Appellants failed to comply with the order, the trial court granted Higher Power's first motion for sanctions on November 18,

2013; imposed monetary sanctions against Exergy; and ordered Appellants to comply with discovery requests. After Appellants failed to comply with various discovery requests, Higher Power filed a second motion for monetary sanctions on December 9, 2013.

Appellants' trial counsel, Angelo Rosa, filed a motion to withdraw as Appellants' counsel on December 26, 2013, because "[t]he attorney-client relationship has become unhealthy and cannot be continued due to the clients' failure to fully cooperate in discovery" and honor financial obligations.

Thereafter, Higher Power filed a supplement to its second motion for monetary sanctions because Appellants still had failed to comply with several discovery requests. Appellants' counsel filed a "Declaration of Angelo L. Rosa in Opposition to [Higher Power]'s Motion for Sanctions" on January 9, 2014. This declaration stated:

> As I have stated in a prior Declaration filed with this Honorable Court, I have personally worked diligently to ensure my clients tender responses to outstanding discovery in this matter and to comply with the recent discovery rulings made by this Court. Without waiving the attorney-client privilege or protection of the attorney work-product doctrine, my personal efforts have included (a) preparing draft responses for review and input; (b) providing initial drafts, instructions and examples to assist the client; and (c) multiple reviews of 14,000+ pages of document production. This process has been hindered by a lack of timely and complete cooperation by my clients, the reasons for which I do not entirely understand.
>
> I have undertaken all reasonable efforts to facilitate my clients' cooperation in responding to outstanding discovery requests in this matter and I reiterate my intent to continue doing so for as long as I serve as counsel in this matter.

An email exchange between Rosa and Higher Power's counsel Klatsky reveals that, after being advised that deficiencies still existed in Appellants' amended responses to several interrogatories, Appellants declined to correct the deficiencies.

The trial court heard arguments on Higher Power's second motion for sanctions

on January 13, 2014, granted the motion, ordered Appellants to pay $4,020.50 in monetary sanctions, and ordered Appellants to comply with outstanding discovery requests. The trial court also had "a discussion off the record" with Rosa about certain propounded discovery requests, after which the court stated, "I wanted to go on the record because I wanted the record to be clear about what the Court is dealing with right now. It appeared to the Court or seemed to the [C]ourt that in response to this motion for sanctions, motion to compel that has been filed by the plaintiff, . . . the defendant's counsel has made every effort . . . to speak with his clients and it seems to the Court however that there is some breakdown in that communication, i.e., that the clients are not at this point performing or not responding adequately enough to discovery that's been sent. We have tried with two prior sanctions orders from this court to try to get everyone's attention and get them focused on this litigation."

The trial court also heard about Higher Power's concern that Carkulis might not appear in person for a January 14, 2014 deposition to which the parties' had agreed weeks before on December 2, 2013. Higher Power's concern was triggered by a January 6, 2014 note from Rosa advising that "the sister of Mr. Carkulis is ending her battle with cancer and propos[ing] two things. Either we postpone the deposition of Mr. Carkulis until later this month or February or that we do the deposition telephonically." Higher Power presented the court with the doctor's report Rosa had sent to Higher Power; the report indicated that Carkulis's sister Melissa would not live more than six months and is proceeding with therapy. Higher Power told the court that it is "always dealing with delay tactics and we feel like this is simply another one." It also told the court that it would file a motion for death penalty sanctions if Carkulis failed to appear at the deposition, and the court was receptive to entertaining such a motion.

The trial court agreed that the letter estimating Melissa's life expectancy at six months did not justify cancelling the scheduled January 14, 2014 deposition.

Nonetheless, the trial court gave the parties another opportunity to agree on a new deposition date: "If we are sitting here right now and Mr. Rosa you know that your client is not going to be there tomorrow, I am willing to let y'all agree on a date but that date will be set in stone, so to speak; and if that's missed then we will come down and I am sure I will be brought a motion for death penalty sanctions and at that time I will have to entertain the motion."

Rosa said that he was "a bit surprised to see a prognosis of six months in the physician's report" considering Carkulis's representations to Rosa regarding his sister's condition. Rosa further stated, "I do not believe that my client is going to appear in person in Houston tomorrow. . . . I think we are going to need to agree on an alternate date and I will go back to my client and say this is the final stage before death penalty sanctions."

The trial court acknowledged that "[s]ometimes you have clients that for whatever reason don't feel as though they need to participate." Based upon the parties' new agreement, the trial court ordered Carkulis to appear for deposition in person on January 26, 2014, and stated that, "if the defendant fails to appear[,] then that's going to weigh substantially on the Court's judgment with respect to any follow up motions." The trial court further ordered Appellants to file responses to overdue interrogatories and requests for production by January 21, 2014, after Rosa told the court: "I have about half of the documents responses to those requests. I received them a day or two ago. I have been hammering my client to get me the rest of those documents so that we can present a full original response. I am happy to send along the first half today. I was trying to keep things nice and clean but, again, this is one of the things I have been hammering my client about for sometime now."

The record shows that Higher Power filed a third motion for monetary sanctions on January 23, 2014, after Appellants again failed to comply with discovery requests.

A day later, Higher Power received an email from Rosa stating that Carkulis would not appear for the court-ordered deposition on January 26, 2014, because Melissa's medical condition had rapidly deteriorated and Carkulis had been undergoing tests for certain medical conditions. The email included letters that Carkulis had provided to Rosa. The two letters written by Melissa's doctor, dated January 9 and 15, 2014, did not state that her condition had rapidly declined; instead, the letters stated that she had a life expectancy of approximately six months. These letters did not provide any information about Melissa's condition other than the information the trial court had already considered at the January 13, 2014 hearing and rejected as a justification for Carkulis not appearing at a deposition.

A third doctor's letter written on January 22, 2014, regarding Carkulis's health status stated that Carkulis had undergone testing because he was having "intermittent difficulty with mental processing, short-term memory and concentration;" the letter specifically declined to opine about Carkulis's "competence or capacity" and instructed that further "statements" could be obtained from Carkulis's primary care provider, neuropsychologist, and neurologist.

When Carkulis failed to appear for the court-ordered deposition on January 26, 2014, and failed to pay $4,020.50 in monetary sanctions on January 27, 2014, Higher Power filed its fourth motion for monetary sanctions, including death penalty sanctions. Rosa filed a "Declaration" in response to Higher Power's motion for death penalty sanctions on February 13, 2014, in which Rosa stated: "I have repeatedly advised Mr. Carkulis that his and Exergy's discovery obligations in this matter are mostly Court-ordered and that supplementation of existing responses is required, as is the payment of outstanding sanction awards. I do believe that my clients intend to provide additional discovery responses and comply with all other Court orders. However, the timing of

this compliance is something that I have been unable [.]"[1]

The trial court granted Higher Power's fourth motion for monetary sanctions, including death penalty sanctions, on March 6, 2014. In its order, the trial court stated that monetary and death penalty sanctions are "clearly justified (based upon the [Appellants'] 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 [Appellants'] failure/refusal to abide by prior orders of this Court and the applicable Texas Rules of Civil Procedure."

Contrary to Appellants' assertion on appeal, the evidence discussed above establishes that the trial court addressed whether the discovery delays were the fault of Appellants or their trial counsel and whether the discovery delays were a product of bad faith. The evidence establishes that, despite orders to compel, multiple impositions of monetary sanctions, the resetting of depositions to accommodate Carkulis, and warnings that death penalty sanctions will be considered, Appellants — and not their trial counsel — failed to comply with their discovery obligations and demonstrated bad faith conduct.

Based on our review of the entire record, we conclude that there is ample evidence that the trial court acted within its discretion when it assessed death penalty sanctions against Appellants in this case. Accordingly, we conclude that there is no error on the face of the record with respect to the imposition of death penalty sanctions. We reject Appellants' first argument.

[1] In Rosa's Declaration, this sentence is incomplete.

B. Damages Hearing

Appellants next contend that the trial court "erroneously applied death penalty sanctions to exclude [Appellants] from the damages hearing in this case." Appellants do not challenge the (1) sufficiency of notice of the hearing on Higher Power's "Motion For Entry Of Final Judgment With Exhibits;" (2) evidence supporting the claim for damages; or (3) amount of damages awarded. Appellants argue only that they were excluded from participating in the "damages phase of the litigation" contrary to the Texas Supreme Court's pronouncements in *Paradigm Oil, Inc. v. Retamco Operating Inc.*, 372 S.W.3d 177 (Tex. 2012).

The trial court granted Higher Power's "Motion For Entry Of Final Judgment With Exhibits." In this motion, Higher Power erroneously asserted that the granting of death penalty sanction meant that Appellants had "no right/ability to contest" the relief sought in the motion, consisting of a money judgment in Higher Power's favor for unliquidated damages. It is unclear whether there was a hearing on unliquidated damages in this case as contemplated by Texas Rule of Civil Procedure 243. Regardless of whether there was a hearing, Higher Power's request for damages was premised on the contention that unliquidated damages could not be contested following the imposition of death penalty sanctions. This contention is erroneous under *Paradigm*.

Paradigm held that "a defaulted party may participate in the post-default damages hearing." *Id*. at 185. Although the supreme court agreed that a trial court should have discretion to bar a party's participation in a damages hearing if such a sanction is necessary to remedy discovery abuse, "such an extreme sanction must be carefully tailored to comport with the requirements of *TransAmerican* and due process." *Id*. at 186. The justification for barring a defaulted party from an ensuing evidentiary hearing on damages must go beyond a presumption that an asserted claim or defense lacks merit; this is so because the damages issue is "materially different." *Id*. "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." *Id*.

The supreme court noted that discovery sanctions are primarily intended to remedy discovery abuse and should therefore be tailored to serve that remedial purpose. *Id*. at 187. The court cautioned that "[C]ompensatory damages awarded post-default should compensate the injured party for its loss, not penalize the wrongdoer or allow the plaintiff a windfall." *Id*. The court stated that the "destruction of evidence that directly and significantly impairs a party's ability to prove damages might reasonably justify a sanction" barring a defaulted party's participation at a hearing on unliquidated damages. *Id*. at 186. There is no evidence of spoliation in this record.

In light of *Paradigm* and the record before us, we conclude that the trial court's damages award constitutes error on the face of the record because it was predicated on a motion erroneously asserting that Appellants could not contest the relief sought in that motion consisting of unliquidated damages. We therefore sustain Appellants' issue in that regard.

CONCLUSION

We reverse the trial court's judgment and remand this case to the trial court for a hearing on unliquidated damages under Texas Rule of Civil Procedure 243.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Brown.