Affirm and Opinion Filed June 2, 2020

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00032-CV

GREG DUNCAN, FREEWOOD GROUP, LLC, AND MCGRAY GROUP, LLC, Appellants

V.

PARK PLACE MOTORCARS, LTD. D/B/A PARK PLACE MOTORCARS DALLAS, AND PARK PLACE RB., LTD. D/B/A PREMIER COLLECTION, BENTLEY DALLAS, ROLLS-ROYCE MOTOR CARS DALLAS, ET, AL., Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-08535

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Molberg

Greg Duncan, Freewood Group, LLC, and McGray Group, LLC[1] (collectively, Duncan parties) appeal the trial court's discovery sanction, which resulted in the preclusion of Duncan testifying on his alleged damages for

[1] Although Freewood Group, LLC (Freewood) and McGray Group, LLC (McGray)—businesses allegedly owned and/or operated by Duncan—are named as appellants in this case, they assert no points of error and do not request any relief in this Court. We may not modify the judgment as to Freewood or McGray when they have not asserted a point of error asking us to do so. *See Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 926 (Tex. 1998).

counterclaims he asserted in a lawsuit filed against him by his former employers, Park Place Motorcars Ltd., d/b/a Park Place Motorcars Dallas and Park Place RB, Ltd. d/b/a Premier Collection, Bentley Dallas, Rolls-Royce Motor Cars Dallas, McLaren Dallas, Park Place Maserati and Jaguar Dallas (collectively, Park Place parties). Duncan does not appeal the jury verdict against him. In a single issue, he contends the trial court's sanction order precluding him from testifying at trial about anything he testified to during his uncompleted deposition—a sanction which the trial court imposed after repeated discovery abuses during the three years leading up to trial, including not appearing for the completion of his deposition—was an abuse of discretion. Although not asserted as a distinct issue, Duncan's brief on appeal also claims in a footnote that the trial court erred by awarding the Park Place parties their appellate attorneys' fees without explicitly making those fees contingent upon success. While an award of appellate attorneys' fees should be read to implicitly require appellees' success on appeal, we nevertheless modify the judgment to make such an award explicitly contingent upon appellees' success in an appeal. As modified, we affirm the trial court's judgment.

BACKGROUND

Duncan worked for the Park Place parties—two car dealerships in the Dallas area—buying and selling cars. On August 1, 2013, the Park Place parties instituted this lawsuit. They alleged the Duncan defendants conspired with Jeremy Wiggins, Straight Line Automotive Group, LLC (Straight Line), and Crown Automotive

Group, LLC (Crown) to steal their money, car titles, and vehicles. Their claims included violations of the Texas Theft Liability Act, breach of fiduciary duty, conversion, fraud by nondisclosure, aiding and abetting, conspiracy, money had and received, and breach of contract. To establish their claims, the Park Place parties sought discovery, including communications, financial information, and monetary transfers between Duncan and Wiggins, Straight Line, and Crown. Duncan and Freewood asserted counterclaims against the Park Place parties, as well as third party claims against Kenneth Schnitzer, CEO of the Park Place parties, for breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference with current contracts and prospective business relations, aiding and abetting, joint enterprise, assisting and encouraging, participatory and vicarious liability, concert of action, declaratory judgment, and defamation. To establish defenses to the counterclaims, the Park Place parties sought discovery on information regarding Duncan's and Freewood's alleged damages, including tax and financial information.

The discovery process in this case was tortured. Beginning approximately three years before the February 20, 2017 trial date—which subsequently was reset as a result of Duncan's misconduct—Duncan took the trial court and appellees down an ugly and protracted road of time-consuming and costly failed attempts to complete his deposition and obtain discovery relevant to the claims, defenses, and counterclaims at issue; he made multiple misrepresentations to the trial court

regarding discovery, his assets, and his ability to pay court-ordered sanctions; he failed to preserve and tampered with or destroyed evidence relevant to the claims and defenses at issue; and he removed the case in bad faith to federal bankruptcy court to avoid trial and a scheduled hearing on sanctions for discovery abuse. The record reveals a morass of motions to compel, motions for sanctions, hearings, discovery orders, motions to hold Duncan in contempt of the court's orders, orders to show cause, and orders imposing sanctions—all caused by Duncan's prolific and continuing abuse of the discovery process. Among other things, Duncan failed to produce documents the trial court had ordered him to produce or he produced documents at the last minute, e.g., at or immediately prior to depositions or hearings, after fact discovery closed, and days before trial; he failed to preserve electronically-stored evidence on multiple devices; he produced a computer which no longer contained its hard drive; he failed to produce an iPad that "disappeared" after the Park Place parties sued him; and he failed to appear for the completion of his deposition, in violation of the trial court's third amended scheduling order.

The discovery debacle started after appellees served a request for production on the Duncan parties on June 18, 2014. The Duncan parties did not produce a single document in their July 18, 2014 response. On November 14, 2014, appellees filed a motion to compel. After a hearing on November 19, 2014, the trial court ordered Duncan to produce, within fourteen days, documents in response to appellees' request for production. In the following year and one-half, appellees filed several

motions for sanctions and motions to hold Duncan in contempt of the trial court's November 19, 2014 order.

On June 22, 2016, the Duncan parties filed a response to a motion for monetary and death penalty sanctions filed by the Park Place parties. In their response, the Duncan parties represented they "have produced all documents in his [sic] possession, custody or control that he is aware of after a diligent search that are responsive to Plaintiffs' discovery requests." Despite this representation, the Duncan parties continued to sporadically produce documents in response to appellees' first request for production until days before trial in 2017.

At a June 24, 2016 hearing, the trial court considered evidence of Duncan's pattern of sporadically producing documents at the "last possible moment" and attempted to compel Duncan's compliance with its November 19, 2014 order by imposing monetary sanctions. By order dated September 29, 2016, the trial court assessed $115,000 in monetary sanctions against the Duncan parties. Because Duncan represented to the trial court that he did not have the resources or ability to pay, the trial court's order allowed the sanctions to be "incorporated into the Final Judgment unless otherwise ordered by the Court."

At the June 24, 2016 hearing, the trial court also addressed Duncan's failure to produce all of his electronic devices, as agreed in a negotiated Rule 11 agreement. Ordering a complete disclosure all of his electronic devices, the trial court additionally concluded the evidence supported a finding Duncan had intentionally

destroyed evidence, including the deletion of text messages. Duncan's failure to produce electronic devices was the subject of another hearing on October 6, 2017. At that hearing, Duncan told the court he failed to produce an iPad the evidence showed he had used during the relevant time period because it "disappeared," first testifying he "traded it in," then testifying his "best answer" was that his son dropped it in the toilet. The trial court did not find Duncan's testimony credible. In another example of misconduct, Duncan removed the hard drive of a computer prior to producing it.

Pursuant to a third amended scheduling order dated August 5, 2016, the trial court extended the discovery deadline and reset the trial date for February 20, 2017, to allow the Park Place parties an opportunity to obtain discovery Duncan had failed to produce and finish taking Duncan's deposition. The third amended scheduling order did not modify deadlines for expert witness designations and expert reports set by a previous order extending discovery deadlines.

On May 9, 2016, the Park Place parties started but were not able to complete Duncan's deposition. The continuation of Duncan's deposition was scheduled for January 5, 2017. At Duncan's request, the Park Place parties agreed to re-schedule his deposition for January 16, 2017. Duncan subsequently asked to move the deposition date again to later in January, but the Park Place parties did not agree because they would be prejudiced by having to depose Duncan a week or less before the deadline to submit pretrial materials. Duncan did not appear for the January 16,

2017 deposition. At that time, the trial court's third amended scheduling order was in effect and mandated that except upon leave of court, "once noticed, [depositions] may not be rescheduled until the parties agree on a new date." At a hearing on January 27, 2017, Duncan testified he "made a conscious decision to not appear at [his] deposition as [he was] noticed to do."

On January 27, 2017, Duncan nonsuited his defamation counterclaim. On the same day, the trial court struck Duncan's damages expert after he attempted to amend his expert disclosure—which previously only addressed damages for Duncan's defamation counterclaim—to address damages on his other counterclaims, after the deadline.

Ultimately, after imposing lesser sanctions to no avail, by order dated February 1, 2017, the trial court precluded Duncan from testifying at trial to anything he testified to during his direct examination in his May 9, 2016 deposition, including his purported economic damages for his affirmative claims. The trial court found:

> - "Duncan, despite a valid deposition notice and in contempt of the Court's Third Amended Level Three Scheduling Order (entered August 5, 2017) . . . failed to appear for his deposition on January 16, 2017 without excuse or good cause for doing so."
>
> - "[I]n connection with Duncan's prior discovery abuse in this case, including his failure to comply with the Court's November 19, 2014 Order, the Court's oral Order on the Motion for Monetary and Death Penalty Sanctions, and the August 5, 2016 Scheduling Order, the court has previously imposed discovery sanctions, including monetary sanctions in the amount of $115,000 to be paid as part of the final judgment in this case."

> - "[The Park Place parties'] inability to take the deposition of Duncan . . . severely prejudices their ability to prepare for trial on the merits by denying them a fair opportunity to obtain discovery that goes to the heart of the proof needed to defend against Duncan's affirmative claims and to prosecute affirmative claims against Duncan, and because the Court's previous monetary sanctions on Duncan in the amount of $115,000 to be paid as part of the final judgment in this case has failed to deter Duncan's pattern of discovery abuse[.]"

On February 16, 2017, four days before trial and on the same day as another scheduled sanctions hearing, Duncan personally removed the case to the United States Bankruptcy Court for the Northern District of Texas. In its order of dismissal, the bankruptcy court explicitly stated Duncan's removal of the case was made in bad faith:

> [T]he debtor, Greg Duncan, and McGray Group LLC (collectively, the "Duncan Defendants") filed and prosecuted the above-captioned bankruptcy case and removed Case No. DC-13-08535 styled *Park Place Motorcars, Ltd., et al. v. State Bank and Trust Company, et al.* in bad faith.

The bankruptcy court remanded the case, ordered sanctions against the "Duncan Defendants" for removing the case to bankruptcy court in bad faith, enjoined the "Duncan Defendants and any other affiliate of Greg Duncan [from] filing for relief under title 11 of the United States Code for a period of one-year from the date of this Order," and further enjoined "the Duncan Defendants [from] any subsequent removal of case No. DC-13-08535 from State Court to any federal court."

After taking evidence—including Duncan's testimony—at a hearing in November 2017, the trial court learned Duncan previously made material

misrepresentations to the court about his inability to pay the monetary sanctions imposed on September 29, 2016 for discovery abuses. After that hearing, the trial court found and concluded in a twenty-one page order dated May 7, 2018:

> . . . imposing lesser sanctions and allowing Duncan additional time to comply with the Court's orders and the Duncan Defendants' discovery obligations would be ineffective, would unnecessarily prejudice [the Park Place parties'] development of their claims and/or defenses, and would needlessly further increase [their] expenses and fees, including attorneys' fees, defending against an abusive litigant while unfairly rewarding the Duncan Defendants' longstanding discovery abuse and removal of this case to bankruptcy court where, as here, the Duncan Defendants' discovery abuses . . . go to the heart of the proof needed for Plaintiffs to prosecute their claims and for [the Park Place parties] to defend against Duncan's affirmative claims for damages[.]

In its May 7, 2018 order, the trial court made supernumerary detailed findings and conclusions cataloguing Duncan's history of misconduct, delay tactics, and prolific discovery abuses during the litigation, including Duncan's failure to produce documents despite multiple court orders and sanctions; Duncan's failure to preserve and "deliberate efforts to tamper with and destroy" material electronic evidence from a variety of electronic devices; Duncan's failure to comply with expert disclosure requirements after having been sanctioned for discovery abuse and after the trial court's extension of discovery deadlines; Duncan's failure to appear for his deposition in violation of court order after having been sanctioned for discovery abuse; Duncan's bath faith interference with the trial court's jurisdiction and docket by removing the case to bankruptcy court prior to a sanctions hearing on February

15, 2017 and the February 20, 2017 trial; and further violations by Duncan of the trial court's scheduling order and bad faith discovery responses, including (1) his disclosure on the last day of extended fact discovery—7:50 p.m. on January 8, 2017—of more than forty previously unidentified potential witnesses having relevant knowledge of the claims and defenses in the case, but without the witnesses' addresses or telephone numbers, as required by Texas Rule of Civil Procedure 194.4, and (2) another disclosure on January 15, 2017 of previously undisclosed witnesses—also with no addresses or telephone numbers—after fact discovery had closed.

The May 7, 2018 order included citations to the record and excerpts of testimony by Duncan in affidavits and at court hearings. Paragraph two of the trial court's order, including footnotes, stated:

> Discovery has been the subject of substantial motion practice and numerous hearings, beginning approximately three years before the February 20, 2017 trial setting. As the Court noted during a January 18, 2017 hearing, Duncan over those approximately three years demonstrated a pattern "of abuse of the discovery process with the Court." [As] described herein, the Court granted Duncan multiple opportunities to change his behavior, act in good faith, comply with his discovery obligations, comply with Orders of this Court, and respond to lesser sanctions. The docket, the record in this lawsuit, and the Orders of this Court reflects that Duncan did not do so. This Court finds that Duncan[2] both through his counsel and in sworn testimony, has misrepresented facts to this Court, failed to be candid with this Court, and failed to testify credibly.

[2] Duncan pled guilty to a conspiracy to commit bank fraud count in *United States v. Duncan*, Case No. 3:15-[CR]-00484, in the United States District Court for the Northern District of Texas, Dallas Division (C.J. Lynn, presiding) (the "Criminal Case").

> In attempts to gain unfair advantage, Duncan deliberately and knowingly (i) interfered with this Court's jurisdiction, (ii) disobeyed and interfered with this Court's scheduling orders, and (iii) disregarded this Court's process for controlling its own docket. Duncan admitted under cross examination by opposing counsel that he personally removed this case to United States Bankruptcy Court four days before trial because he thought it was his "right"—an act even his own counsel concedes was in bad faith and without reasonable basis. The Court finds that this act of disregard for the Court and fundamental rules, [as] well as other actions set forth herein, resulted in prejudice to the opposing party that cannot be remedied by monetary sanctions.

The trial court found:

> 25. . . . . These untimely disclosures of numerous previously unidentified witnesses unfairly surprise and prejudice [the plaintiffs], including the loss of any opportunity to seek discovery, including depositions, from these persons that would have changed the entire complexion of and approach to discovery in this case.
>
> 26. Due to the Duncan Defendants' prior discovery deficiencies, the Court extended fact discovery. On January 8, 2017, the close of fact discovery, Duncan responded to Plaintiffs' Request for Admissions, Fifth Request for Production, and Third Set of Interrogatories. . . . Despite prior sanctions, Duncan failed to provide full, complete, and non-evasive responses and asserted general, non-specific objections to Movants' discovery requests. Duncan also failed to produce any documents responsive to Plaintiffs' request for information relating to Duncan's defamation claim and damages, including tax documents. . . .
>
> 27. Testimony during the November 3, 2017 hearing confirmed that the Duncan Defendants, to this day, still have failed to produce all relevant and material documents. For example, Duncan testified that "[t]ax returns have not been produced." [Such] information was not only relevant to Duncan's claims and defenses, but the withheld financial information was essential to Duncan's demonstration of damages.

Duncan does not challenge the legal sufficiency of the trial court's findings and conclusions on appeal.

After conducting a hearing immediately prior to commencement of trial, the trial court entered an order dismissing Duncan's remaining affirmative claims. The August 13, 2018 order explained:

> . . . the issues disposed of by virtue of [the trial court's January 27, 2017 and February 1, 2017 orders] include a material element of [Duncan's] affirmative claims for common-law fraud and breach of fiduciary duty, specifically, the material element of damages, [therefore] Duncan cannot prevail on either claim as a matter of law.

At the end of a seven-day trial that began on August 13, 2018, a jury found in favor of appellees on their claims. Duncan filed a motion for new trial, in which he argued there was no or insufficient evidence to support the damages award, contested the attorneys' fee award on several grounds, and contested the appellate attorneys' fee award "because they are not contingent upon Plaintiffs prevailing in the appellate courts." Duncan's motion for new trial did not raise the issue of death penalty sanctions, the trial court's January 27, 2017 order striking Duncan's expert witness on the damages element of his counter claims, the trial court's February 1, 2017 order precluding him from testifying about anything he testified to during his direct examination in his May 9, 2016 deposition—including his purported damages on his affirmative claims—or the trial court's August 13, 2018 order dismissing

Duncan's fraud and breach of fiduciary duty claims against the Park Place parties and Schnitzer. Duncan's motion for new trial was overruled by operation of law.

Duncan's discovery abuses continued post-trial. On September 27, 2019, after extensive, failed efforts to obtain post-judgment discovery from Duncan about his assets to satisfy the judgment, the trial court issued on order compelling him to appear at a hearing on October 17, 2017 to show cause as to why he should not be held in civil contempt for refusing to respond to discovery requests and interrogatories. Duncan did not appear at the hearing and the trial court held him in contempt and issued a capias warrant for his arrest so he could be brought to court to answer on a charge of failure to appear. In an opinion issued by this Court on May 14, 2020, we concluded, in part, the capias warrant issued by the trial court for Duncan's failure to appear remained in effect.

ANALYSIS

The Trial Court Imposed Death Penalty Sanctions

We first address whether the trial court's February 1, 2017 order[3] prohibiting Duncan from testifying at trial on the damages element of his affirmative claims was a death penalty sanction. A death penalty sanction is any sanction that adjudicates a claim or defense and precludes the presentation of the claim or defense on the

[3] Duncan's brief on appeal refers to both the trial court's January 27, 2017 order and February 1, 2017 order with respect to the court's disallowance of testimony by Duncan at trial on his purported damages for his affirmative claims. In fact, this sanction was imposed by the trial court's February 1, 2017 order.

merits. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (orig. proceeding). Any sanction that is case-determinative may constitute a death penalty sanction. *GTE Comm. Sys. Corp. v. Tanner*, 856 S.W.2d 725, 732 (Tex. 1993) (orig. proceeding). In this case, the trial court's February 1, 2017 order did not strike a single blow that eliminated Duncan's counterclaims. Rather his ongoing failure to comply with his discovery obligations caused a series of sanctions, two of which, in conjunction, ultimately disposed of his counterclaims. The trial court's January 27, 2017 order excluded Duncan's designated expert on his alleged damages because Duncan did not comply with deadlines on expert witnesses. Then, the trial court's February 1, 2017 order precluded Duncan from testifying at trial to anything he testified to during his direct examination in his May 9, 2016 deposition, including his alleged damages on his affirmative claims. On that basis, the trial court subsequently dismissed Duncan's live counterclaims with prejudice prior to commencement of trial on the grounds he could not prove the damages element of his claims. Under the particular circumstances of this case, we conclude the trial court's February 1, 2017 order constituted death penalty sanctions.

The Trial Court's Sanctions Were Not An Abuse of Discretion

Texas Rule of Civil Procedure 215.2 authorizes the trial court to impose sanctions if it finds a party is abusing the discovery process. TEX. R. CIV. P. 215.2. Among other things, permissible sanctions include disallowing further discovery, striking the offending party's pleadings, refusing to allow the offending party to

support or oppose designated claims or defenses, prohibiting the offending party from introducing designated matters into evidence, charging all or any portion of the discovery expenses or taxable court costs against the offending party, dismissing the action with or without prejudice, rendering judgment by default, and entering an order that designated facts shall be taken to be established. TEX. R. CIV. P. 215.2(b).

We review a trial court's ruling on a motion for sanctions for an 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 our opinion, the trial court's actions were appropriate under the facts and circumstances of the case. *Downer v. Aquamarine Oper., Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Rather, we determine whether the trial court acted without reference to guiding rules and principles. *Id.* We will reverse a trial court's sanctions order only if the ruling was arbitrary or unreasonable. *Id.* A ruling is arbitrary or unreasonable if the sanctions imposed do not further one of the purposes of discovery sanctions, namely, to secure the parties' compliance with discovery rules, to deter other litigants from violating the discovery rules, and to punish parties to violate the discovery rules. *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986). Moreover, there must be a direct relationship between the offensive conduct and the sanction imposed, and the sanction imposed must not be excessive. *Blackmon*, 841 S.W.2d at 849.

In the context of discovery abuse, death penalty sanctions encompass the limitation of the power of the trial court to dismiss an action without allowing a

hearing on the merits. *TransAmerican Nat'l Gas Corp. v. Powell,* 811 S.W.2d 913, 918 (Tex. 1991) (orig. proceeding). In *TransAmerican National Gas Corporation*, the Texas Supreme Court held death penalty sanctions may not be applied just to punish or deter bad behavior "absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *Id.* "Bad faith is not simply bad judgment or negligence, but the conscious doing of a wrong for dishonest, discriminatory or malicious purpose." *Armstrong v. Collin Cty. Bail Bond Bd.*, 233 S.W.3d 57, 63 (Tex. App.–Dallas 2007, no pet.). Because the effect of death penalty sanctions is to dispose of claims or defenses not on their merits but on how a party conducts discovery, a trial court should impose case-determinative sanctions only in exceptional cases when circumstances clearly justify them and it is apparent that no lesser sanctions would promote compliance with the rules. *GTE Communications Sys. Corp.*, 856 S.W.2d at 730. The offending party's discovery abuse must be such that, despite imposition of lesser sanctions, the court may presume the party's claims or defenses lack merit and it would be unjust to permit the party to present the substance of that position to the court. *TransAmerican Natural Gas Corp.*, 811 S.W.2d at 918. "*[I]f a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it*." *Id.* (emphasis added).

In our review, we consider the entire record, including the evidence, counsels' arguments, the circumstances surrounding the offending party's discovery abuse,

and all of the offending party's conduct during the litigation. *Westfall Family Farms, Inc. v. King Ranch, Inc.*, 852 S.W.2d 587, 590 (Tex. App.—Dallas 1993, writ denied); *see also Hill & Griffith Co. v. Bryant*, 139 S.W.3d 688, 694 (Tex. App.—Tyler 2004, pet. denied). We view the evidence in the light most favorable to—with all reasonable inferences drawn in support of—the trial court's ruling. *Davis v. Rupe*, 307 S.W.3d 528, 530 (Tex. App.—Dallas 2010, no pet.).

The trial court's February 1, 2017 order stated the particulars of good cause justifying the sanction imposed. The trial court found that Duncan, "despite a valid deposition notice and in contempt of the court's Third Amended level Three Scheduling order . . . . failed to appear for his deposition on January 16, 2017 without excuse or good cause for doing so." Duncan admitted to the trial court he made a conscious decision to not appear for his January 16, 2017 deposition. The order described Duncan's history of misconduct, including his deliberate and continuing violation of the court's November 19, 2014 order, the court's oral order on the motion for monetary and death penalty sanctions, and the August 5, 2016 scheduling order. The order stated that in connection with Duncan's prior discovery abuses, the court previously imposed discovery sanctions, including monetary sanctions in the amount of $115,000. The court further found that:

> [N]otwithstanding the Court's prior orders and discovery sanctions, Duncan's discovery abuse has continued undeterred, resulting in [the Park Place parties] incurring further attorneys' fees and other expenses associated with the filing of needless and wasteful motions to get information that parties are entitled to as

> part of discovery under the Texas Rules of Civil Procedure . . . . [The Park Place parties] have also been prevented from effectively preparing for trial through pre-trial discovery because Duncan's failure to appear for his deposition has denied the [Park Place parties] a fair opportunity to obtain evidence undermining Duncan's defenses and affirmative claims, including proof related to Duncan's purported economic damages (lost profits, lost earnings, etc.), while forcing the [Park Place parties] to defend against Duncan's claims for damages that they know nothing about.

The trial court precluded Duncan from testifying at trial to anything he testified to during his direct examination in his May 9, 2016 deposition only after finding the Park Place parties' inability to take Duncan's deposition "severely prejudice[d]" their ability to prepare for trial and denied them a fair opportunity to obtain discovery going to "the heart of the proof needed" to defend against Duncan's counterclaims and to prosecute their claims against Duncan; and after finding the court's previous lesser sanctions, including monetary sanctions in the amount of $115,000, failed to deter Duncan's "pattern of discovery abuse." Duncan does not challenge the legal sufficiency of any of these findings on appeal.

The record shows the trial court repeatedly ordered Duncan to produce all documents and electronic devices responsive to the Park Place parties' discovery requests, and to appear for the completion of his deposition, and Duncan deliberately did not do so. The record shows Duncan produced documents sporadically and otherwise not in compliance with rules of civil procedure or the court's scheduling orders. The record also indicates Duncan identified previously undisclosed fact

witnesses after the close of discovery, shortly before trial. Duncan also made multiple misrepresentations to the trial court, and explanations for not producing responsive discovery the court reasonably found to be not credible. Not only did Duncan interfere with the trial court's docket and appellees' discovery rights under the Texas Rules of Civil Procedure, he also interfered with the docket of a federal bankruptcy court, which found Duncan removed this case to its court in bad faith. Post-judgment, Duncan has continued to abuse the discovery process by not producing discovery related to his assets in order to satisfy the judgment and failing to appear at the related sanctions hearing.

The trial court's findings of a continuing general and specific pattern of discovery abuse and misconduct are firmly supported by the record, as are the court's findings and conclusions that Duncan's discovery abuse not only caused irreparable prejudice by preventing the Park Place parties from obtaining the information they were entitled to in order to prosecute their case and defend themselves against Duncan's counterclaims, but also caused great delay and expense suffered by the Park Place parties and the trial court.

On this record, we conclude the imposition of death penalty sanctions was just because it related directly to the conduct at issue in the case—specifically, Duncan's failure to appear for the completion of his deposition, and generally, Duncan's continuing violation of the trial court's orders and hindrance of the discovery process for appellees; the trial court imposed lesser sanctions to no avail; and Duncan's

conduct throughout the long history of the case reasonably justified a presumption his affirmative claims lacked merit. Accordingly, we conclude the trial court did not abuse its discretion in ordering death penalty sanctions in this case. We resolve Duncan's sole issue against him.

Appellate Attorneys' Fees

Although not asserted as an issue on appeal, Duncan complains in a footnote that the trial court erred by awarding appellees their appellate attorneys' fees without making those fees contingent on any such appeal being unsuccessful. Duncan preserved this question for appellate review by objecting to the lack of contingency in his motion for new trial. A trial court may not grant a party an unconditional award of appellate attorneys' fees because doing so could penalize a party for pursuing a meritorious appeal. *Tex. Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 400 (Tex. App.—Dallas 2000, pet. denied); *see also In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998). However, we recognize—as do our sister courts—that an award of appellate attorneys' fees that is not explicitly contingent upon success should be read to implicitly require success. *See Solomon v. Steitler*, 312 S.W.3d 46, 59 (Tex. App.—Texarkana 2010, no pet.); *Matter of Marriage of Reinauer*, 946 S.W.2d 853, 862 n.6 (Tex. App.—Amarillo 1997, pet. denied); *Dorman v. Arnold*, 932 S.W.2d 225, 229 (Tex. App.—Texarkana 1996, no writ); *Spiller v. Spiller*, 901 S.W.2d 553, 560 (Tex. App.—San Antonio 1995, no writ); *Robinwood Bldg. & Dev. Co. v. Pettigrew*, 737 S.W.2d 110, 112 (Tex. App.—Tyler

1987, no writ). Nevertheless, we modify the trial court's judgment to explicitly state that the award of appellate fees in the present case is contingent on the Park Place parties' success on appeal.

As modified, we affirm the trial court's judgment.

/Ken Molberg//
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GREG DUNCAN, FREEWOOD GROUP, LLC AND MCGRAY GROUP, LLC, Appellants

No. 05-19-00032-CV V.

PARK PLACE MOTORCARS, LTD. D/B/A PARK PLACE MOTORCARS DALLAS, AND PARK PLACE RB. LTD. D/B/A PREMIER COLLECTION, BENTLEY DALLAS, ROLLS-ROYCE MOTOR CARS DALLAS, ET. AL., Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-13-08535.

Opinion delivered by Justice Molberg. Justices Bridges and Carlyle participating.

In accordance with this Court's opinion of this date, we **MODIFY** the judgment of the trial court to make an award of appellate attorneys' fees in favor of appellees contingent on appellees' success on appeal. As modified, the judgment of the trial court is **AFFIRMED**

It is **ORDERED** that appellees PARK PLACE MOTORCARS, LTD. D/B/A PARK PLACE MOTORCARS DALLAS, AND PARK PLACE RB. LTD. D/B/A PREMIER COLLECTION, BENTLEY DALLAS, ROLLS-ROYCE MOTOR CARS DALLAS, ET. AL. recover their costs of this appeal from appellants GREG DUNCAN, FREEWOOD GROUP, LLC AND MCGRAY GROUP, LLC.

Judgment entered this 2nd day of June, 2020.