Supreme Court of Texas

No. 21-0547

Rahul K. Nath, M.D.,

Petitioner,

v.

Texas Children's Hospital and Baylor College of Medicine,

Respondents

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

JUSTICE DEVINE filed an opinion dissenting to the denial of the petition for review, in which Justice Busby joined.

As a foundational principle of governance, Texans have resolutely declared that the right to trial by jury is "sacred" and "inviolate."[1] More than a sesquicentenary ago, our state's Declaration of Independence described this right as a "palladium of civil liberty, and [the] only safe

[1] TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate."); *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (referring to the right to a jury trial as "one of our most precious rights" and as holding a "'sacred place'" in our history (quoting *White v. White*, 196 S.W. 508, 512 (Tex. 1917))).

guarantee for the life, liberty, and property of the citizen."[2] The right to a jury trial is so fundamental and so sacred that the Texas Constitution twice guarantees it.[3] But despite our charter's repeated assurance that our citizens may, at their election, be judged by their peers, Dr. Rahul Nath's jury-trial demand was denied. The Court should grant his petition for review to determine whether this denial was constitutional error.

This is the third time Dr. Nath has appealed the unprecedented $1.4 million attorney-fee-shifting sanction the trial court assessed against him for frivolous and improper legal filings in his long-running dispute with Texas Children's Hospital and Baylor College of Medicine. The first two times the Court reviewed the matter, we reversed the sanctions award.[4] In 2014, we acknowledged that Nath's pleadings were groundless and sanctionable, but we remanded to the trial court to

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[2] The Declaration of Independence (Repub. Tex. 1836), at 5, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 1065 (Austin, Gammel Book Co. 1898).

[3] *Matter of Troy S. Poe Tr.*, 646 S.W.3d 771, 778 (Tex. 2022); *see also id.* at 783 (Busby, J., concurring). The provisions state:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.
>
> TEX. CONST. art. I, § 15.
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> In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury[.]
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> TEX. CONST. art. V, § 10.

[4] *Nath v. Tex. Children's Hosp.* (*Nath II*), 576 S.W.3d 707, 708 (Tex. 2019); *Nath v. Tex. Children's Hosp.* (*Nath I*), 446 S.W.3d 355, 372 (Tex. 2014).

reassess the amount awarded, expressly requiring the trial court to consider "the degree to which the Hospital and Baylor caused their attorney's fees."[5] On remand, the trial court imposed the exact same sanction—$1.4 million—evidently taking as true the Hospital's and Baylor's conclusory affidavits declaring they had done nothing to increase their fees or prolong the suit.[6] Nath appealed again, and in 2019, we again reversed and remanded to the trial court to allow the Hospital and Baylor to present "either billing records or other supporting evidence," which are necessary "to shift attorney's fees to the losing party."[7] Once again, the trial court awarded the exact same sanction—$1.4 million.

For the third time, the court of appeals has affirmed the sanctions award,[8] and Nath once again seeks relief from this Court. Among other complaints, Nath contends he is entitled to a jury finding on the amount of attorney's fees the Hospital and Baylor reasonably and necessarily incurred. This Court has repeatedly held that reasonableness and necessity of an opposing party's attorney fees are fact questions that must be determined, if so requested, by a jury.[9] Without explanation, it

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[5] *Nath I*, 446 S.W.3d at 372.

[6] *Nath II*, 576 S.W.3d at 708.

[7] *Id.* at 710 (citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019)).

[8] Nos. 14-19-00967-CV & 14-20-00231-CV, 2021 WL 451041, at *14 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021) (subst. mem. op).

[9] *Rohrmoos Venture*, 578 S.W.3d at 489 ("When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. Both elements are questions of fact to be determined by the fact finder[.]" (citations omitted)); *City*

refuses to enforce that command here. The Court's inaction is a disservice to Dr. Nath and repugnant to our constitutional safeguards.

Nath raised the jury-trial issue in his first appeal, but the court of appeals ruled adversely to him, and he did not pursue the issue on further appeal to this Court. For this reason, the Hospital and Baylor argue that the law-of-the-case doctrine bars Nath from renewing his request for a jury trial on the reasonableness and necessity of the attorney's fees they incurred in defending against Nath's suit. Further, and in the alternative, they contend that in the current appeal, Nath has inadequately briefed, and thus waived, this complaint. From my perspective, neither argument presents an impediment to the Court's consideration of the important constitutional issue raised in this case.

Sanction awards are subject to heightened due-process protection[10]—especially when they involve shifting attorney's fees. And for at least two reasons, the law-of-the-case doctrine should not dissuade the Court from granting Nath's petition for review to determine whether he was entitled to exercise his fundamental right to a jury trial on remand. First, the Court has discretion to forgo the doctrine's application as to clearly erroneous rulings.[11]

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of Garland v. Dall. Morning News, 22 S.W.3d 351, 367 (Tex. 2000) (plurality op.) ("In general, the reasonableness of statutory attorney's fees is a jury question"); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) ("In general, '[t]he reasonableness of attorney's fees, the recovery of which is authorized by . . . statute, is a question of fact for the jury's determination.' . . . The second limitation, that fees must be necessary, is likewise a fact question." (alterations in original) (quoting *Trevino v. Am. Nat'l Ins. Co.*, 168 S.W.2d 656, 660 (Tex. [Comm'n Op.] 1943))).

[10] *Nath I*, 446 S.W.3d at 358.

[11] *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-17 (Tex. 2003).

Second, and more importantly, the doctrine doesn't even apply because "[t]he long-standing majority rule is that when an appellate court remands all or part of a case without limitation, a party who waived a jury before the original trial may nevertheless demand a jury on the remanded issue or issues."[12] While Nath's petition for review in his first appeal did not encompass the jury-trial issue, he timely renewed his jury demand in the trial court after twice obtaining a reversal and remand from this Court. That is all that was required to claim the constitutional privilege. Nath's petition merits this Court's attention because it provides a prime opportunity to clarify an open question of law that is fairly, properly, and adequately presented here[13] and that implicates fundamental due-process concerns.

Chapter 10 of the Texas Civil Practice and Remedies Code—the statute under which the challenged fees were awarded—authorizes the imposition of "reasonable attorney's fees" as a sanction for bad-faith filing of pleadings, including pleadings lacking factual support or those

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[12] *In re Hulcher Servs., Inc.*, 568 S.W.3d 188, 190-91 (Tex. App.—Fort Worth 2018, orig. proceeding) (collecting cases reflecting the "majority rule" that a party may demand a jury trial on remand despite a prior waiver of the right).

[13] In my view, Nath's appellate briefing is more than adequate, but if there were any doubt about that, this Court has been loath to impose forfeiture of a merits-based disposition on the basis of inadequate appellate briefing. *See Rohrmoos Venture*, 578 S.W.3d at 480-81 ("We have long rejected any form-over-substance approach that leads to a rigid application of our preservation rules."); *Ditta v. Conte*, 298 S.W.3d 187, 190 (Tex. 2009) (construing a party's briefing broadly so as to "see that 'a just, fair[,] and equitable adjudication of the rights of the litigants' is obtained" (alteration in original) (quoting *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989))); *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) ("Appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver.").

filed to harass or needlessly increase the cost of litigation.[14] While this Court has determined that attorney's fees awarded as sanctions require proof that the fees are reasonable and necessary, we have never considered whether, under Chapter 10, a party has a right to a jury finding on these disputed questions of fact.[15] Resolution of this question is particularly compelling because the statute leaves *individual litigants* vulnerable to monetary sanctions for mistakes their attorney could and should have prevented.[16]

To determine whether a party may demand a jury finding on the reasonableness and necessity of attorney's fees, we must consider the

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[14] TEX. CIV. PRAC. & REM. CODE §§ 10.001, .004.

[15] *Nath II* explained that, "[b]efore a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness because without such proof a trial court cannot determine that the sanction is 'no more severe than necessary' to fairly compensate the prevailing party." 576 S.W.3d at 709 (quoting *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex. 2008)). However, *Nath II* also noted that in *Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984), the Court had opined that "a party complaining about an award of attorney's fees as a sanction does not have the right to a jury trial on the amount of the sanction." *Id.* Nath's right to a jury trial was not at issue in *Nath II*, so the Court clarified *Brantley* solely to correct a misunderstanding perpetuated by some court of appeals' opinions that evidence of reasonableness of attorney's fees is not required to shift attorney's fees imposed as a sanction. *See id.* The jury-trial issue is now squarely before the Court, and because Chapter 10 was enacted after *Brantley* issued, *see* Act of May 8, 1995, 74th Leg., ch. 137, § 1, 1995 Tex. Gen. Laws 977 (codified at TEX. CIV. PRAC. & REM. CODE §§ 10.001–.006), I believe it is proper to consider whether Nath is entitled to a jury trial to determine the reasonableness and necessity of attorney's fees awarded as sanctions under that statute.

[16] *Nath I*, 446 S.W.3d at 372; *see also* TEX. CIV. PRAC. & REM. CODE § 10.004(d) (precluding an award of monetary sanctions against a represented party for advancing unsupportable legal contentions but otherwise allowing the court to impose monetary sanctions on represented parties for pleadings filed in violation of Section 10.001).

statute's plain language.[17] Chapter 10 does not explicitly provide a right to a jury, but we have construed statutes with similar language as authorizing a jury to determine the reasonableness and necessity of compensatory attorney's fees.[18] Like Chapter 10, the statutes our precedent has examined are silent regarding the arbiter of these matters. Like Chapter 10, language employed in these statutes is to the effect that "a court" "may" assess "reasonable" or "necessary" attorney's fees without dictating how to determine the amount.[19] As we have repeatedly acknowledged, the general rule is that both limitations—reasonableness and necessity—are questions of fact for the jury's determination.[20]

The only express constraints on attorney-fee sanctions imposed under Chapter 10 are that they "must be limited to what is sufficient to deter repetition of the conduct," limited to those expenses "incurred by the other party because of the filing," and "reasonable."[21] Applying our case law, Chapter 10 may logically be construed as providing a sanctioned individual with the opportunity to request a jury of his peers

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[17] *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 228 (Tex. 2010).

[18] *See id.* at 227-32 (construing the Workers' Compensation Act); *City of Garland*, 22 S.W.3d at 367-68 (plurality op.) (construing the Public Information Act); *Bocquet*, 972 S.W.2d at 20-21 (construing the Declaratory Judgments Act).

[19] *See supra* n.18.

[20] *Transcon. Ins.*, 330 S.W.3d at 230-31; *City of Garland*, 22 S.W.3d at 367 (plurality op.); *Bocquet*, 972 S.W.2d at 21; *accord Rohrmoos Venture*, 578 S.W.3d at 489.

[21] TEX. CIV. PRAC. & REM. CODE § 10.004.

to assess the reasonableness and necessity of the fee award.[22] In this case, the trial court has repeatedly imposed an exorbitant and unprecedented sanction of attorney's fees against an individual litigant based on claims made in pleadings filed by his attorney. A clarification of the law is warranted because "few areas of trial court discretion implicate a party's due process rights more directly than sanctions."[23]

Recently, the Court observed the historic importance of the constitutional guarantees of a trial by jury,[24] with members of the Court emphasizing that "the meaning and implementation of our vital constitutional guarantees of trial by jury" are worthy of the Court's attention.[25] The Court nonetheless declines the opportunity to clarify our jurisprudence and safeguard this fundamental right. For this reason, I respectfully dissent.

John P. Devine
Justice

OPINION FILED: September 2, 2022

[22] Chapter 10 does not use the term "necessary," but the limitation is inherent in the requirement that an award of reasonable attorney's fees extends only to those fees "incurred . . . because of the filing." *Id.* § 10.004(c)(3).

[23] *Nath I*, 446 S.W.3d at 358.

[24] *Matter of Troy S. Poe Tr.*, 646 S.W.3d at 778.

[25] *Id.* at 790 (Busby, J., concurring).