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DOES THE PUNISHMENT FIT THE CRIME?

The death penalty sanction for discovery-related abuses is probably the most severe sanctions that a trial judge can order against a party. For a Plaintiff, death penalty sanctions usually means dismissing the Plaintiff's case. For a Defendant, it can mean striking the Defendant's Answer.

In a recent Eleventh Court of Appeals case, *Min Rong Zheng and Fa Wu Ma v. Bridgestone Firestone North American Tire, L.C., et al*, the Court of Appeals looked at the trial court's decision to strike the Plaintiff's pleadings. The Court of Appeals determined that the punishment did not fit the crime and reversed and remanded the case back to the trial court.

FACTS OF THE CASE

Plaintiffs, Min Rong Zheng and Fa Wu Ma, filed a lawsuit against Bridgestone Firestone North American Tire L.L.C.; Honda Motor Company, Ltd.; American Honda Motors Co., Inc.; Isuzu Motors America, Inc.; and Chui Fong Chan for damages related to a motor vehicle accident.

The issues in this case dealt with discovery disputes between the Plaintiffs and the Defendants. There were various Orders compelling the Plaintiffs on discovery matters before the major discovery issue. The major issue at hand dealt with depositions in the case. The chronology of events are as follows:

1. On February 21, 2007, Plaintiffs' counsel sent notice to Defendants that Plaintiffs would be available for deposition on April 5 and 6, 2007;
2. On February 27, 2007, at approximately 2:52 p.m., Plaintiffs' counsel sent another notice to the Defendants saying that the Plaintiffs would be available on April 12 and 13, 2007;
3. On February 27, 2007, at 4:46 p.m., Bridgestone's (one of the Defendants) attorney sent a deposition notice of the Plaintiffs for March 28 and 29 2007. This notice was served at 4:46 p.m.;
4. On March 20, 2007, Plaintiffs' counsel informed Bridgestone's counsel that he would not be able to appear at the depositions set for March 28 and 29, 2007, and neither would his clients;
5. On March 23, 2007, Plaintiffs' counsel filed a Motion to Quash the depositions. However, this was too late because the Motion to Quash was not filed within three (3) business days of receiving the deposition notice.

Bridgestone's attorney informed Plaintiffs' counsel that he would seek sanctions if the Plaintiffs failed to attend their depositions on March 28 and 29, 2007. Neither the Plaintiffs nor their counsel appeared at the scheduled depositions. As such, Bridgestone's counsel scheduled a hearing and asked that Plaintiffs' case be dismissed.

On May 3, 2007, the hearing was held. The Plaintiffs did not attend, but the Plaintiffs' counsel did. The trial court apparently had "difficulty reconciling" the arguments of Plaintiffs' counsel "with the facts" and granted a Motion to Dismiss. As a result, Plaintiffs' case was dismissed against all Defendants.

THE COURT OF APPEALS' DECISION

The Court of Appeals noted that discovery between the parties in this case was contentious. In reviewing this case, the Court of Appeals stated that when the discovery process is abused, the trial court may order sanctions as provided for by TEX. R. CIV. P. 215. Such sanctions are discretionary and are reviewed on appeal for abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W. 3d 581, 583 (Tex. 2006). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W. 2d 238, 241-42 (Tex. 1985). When imposing sanctions for discovery abuses, a trial court must look at the Texas Rules of Civil Procedure for guiding rules and principles. *Id.* at 242.

The main part of Rule 215.2 requires that the sanction imposed be "just." See *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W. 2d 913, 917 (Tex. 1991).

The Court of Appeals reiterated what the Texas Supreme Court noted in *TransAmerican*. First, a direct relationship must exist between the offensive conduct and the sanction imposed. Second, "just" sanctions must not be excessive. Essentially, the punishment should fit the crime.

The Court of Appeals noted that the sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. Additionally, a "just" sanction must be directed against the abuse and toward remedying the prejudice caused by the innocent party. For example, the trial court is supposed to look and determine whether the offense of conduct is attributable to counsel only, the party only, or to both.

The Court of Appeals noted that nothing in the record suggested that any of the discovery abuses were attributable to the Plaintiffs themselves. The record from the May 3, 2007, hearing revealed that the Plaintiffs themselves were not present. In fact, nothing in the record indicated that the Plaintiffs themselves were even aware of the deposition notices or that their failure to attend was in anyway their fault. The Court of Appeals also noted that the record did not indicate that the trial court attempted to determine whether the offensive conduct was attributable to the Plaintiffs or only to the Plaintiffs' counsel. Additionally, the trial court made no findings as to the fault of the Plaintiffs, just their counsel.

Under these circumstances, the death penalty sanction was not "just" or appropriate and constituted an abuse of discretion. Thus, the Court of Appeals reversed the trial court's ruling.

WHAT TO TAKE AWAY

First, and most importantly, every party should understand that discovery is **very** important. Trial courts do not generally like to hear disputes about discovery. More importantly, discovery abuse is not looked upon kindly. Whether it be document production or attending depositions, know that this is an important part of the legal process that can have severe consequences if taken lightly or neglected.

Second, as a party moving for sanctions, make sure that the punishment fits the crime. If the discovery abuse is being done by the Plaintiffs' or Defendants' counsel, the sanction should probably fine the parties' counsel, not the parties themselves. If on the other hand the party and the parties' counsel are committing the discovery abuse, then the death penalty sanction may be warranted. If the punishment does not fit the crime, there is a likelihood that it will be reversed, causing more headaches and costing money to all involved.

Third, if the death penalty sanction is levied against you, it is important to preserve your appeal. Make sure that everything is contained in the court's record as the Court of Appeals will only note and read what is in the court's record.

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