

Emergency Motion for Stay Denied, Motion to Consolidate Granted, Petitions for Writ of Mandamus Denied, and Majority and Dissenting Opinions filed March 3, 2011.



In The

Fourteenth Court of Appeals

**NO. 14-11-00132-CV
NO. 14-11-00156-CV**

IN RE MICHELE LE, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
125th District Court
Harris County, Texas
Trial Court Cause No. 2008-41349**

DISSENTING OPINION

On this record, I agree with the trial court that relator committed discovery abuse and that sanctions are warranted— but the trial court’s death penalty sanction is not just, and therefore, I respectfully dissent.

As to the monetary portion of the award, I would stay the case to allow relator to present her argument to the trial court that the imposition of these large monetary sanctions (payable before judgment with a \$500 per day fine for any day late in payment)

threatens her ability to continue the litigation. In *Braden*, the Supreme Court held that the imposition of \$10,000 in sanctions threatened the ability of the relator to continue the litigation. *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991). This sanction, against an individual, is almost three times that amount, increasing daily and includes a future payment of an additional \$8500.

I would grant the mandamus on the death penalty sanctions, because plaintiff did not show in the motion for sanctions or at the oral hearing that relator's discovery abuse justified the presumption that the relator's claims or defenses lack merit or that it would be unjust to allow relator to present her defenses to the jury. See *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992).

Plaintiff presented no evidence that any missing documents were crucial to his case or that he could not present his case to the jury because of the missing documents. In his supplement to the motion for sanctions, he identified only three documents that relator failed to produce. In an affidavit attached to the original motion, plaintiff's counsel merely states that the discovery abuse prejudiced the plaintiff "by causing a delay in discovery and by failing to provide discoverable documents and information." The conclusory affidavit does not identify what discovery the plaintiff lacks or how that missing discovery impacts the case. This one conclusory sentence cannot justify death penalty sanctions.

Relator has been deposed once and presumably will appear again for her deposition. Relator has produced boxes of documents. Relator has paid the outstanding \$500 fine. Relator has provided the missing bank account numbers, answered all outstanding document requests and has responded to Plaintiff's contention for the non-production of three documents.

Sanctions must be just. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917-18 (Tex. 1991). A just sanction, if more than monetary sanctions are appropriate, would only prevent relator from making any claim or defense that relates to

any undisclosed documents—it would not strike her pleadings and prevent her from offering *any* evidence or giving *any* testimony. The punishment should fit the crime. *Smith v. Nguyen*, 855 S.W.2d 263, 266 (Tex. App.—Houston [14th Dist.] 1983, writ denied).

I would grant the mandamus in part, strike the death penalty portion of the trial court’s order, and stay the trial to allow relator to present the argument to the trial court that immediate payment of the sanctions would threaten her ability to continue with the litigation.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher. (Frost J., Majority).