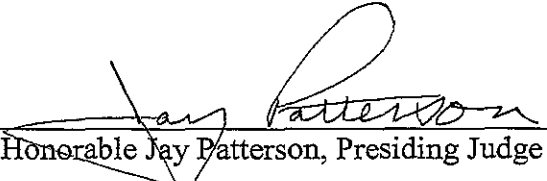


On February 22 and 23, 2005, an evidentiary hearing was conducted regarding Defendant's Motions. Plaintiffs and Defendant appeared in person and through their attorneys. Plaintiff's counsel appeared through counsel at the February 22, 2005 hearing only.

This Court has signed an Order on Sanctions, a copy of which is attached hereto and incorporated by reference, containing findings of fact and conclusions of law in favor of Defendant and against Plaintiff Bonnie L. Johnson.¹ Defendant has filed a verified Bill of Costs. The Court therefore orders the following:

1. Plaintiffs Bonnie L. Johnson and Chelsea Elizabeth Johnson shall take nothing on their claims against Defendant Charles Chesnutt.
2. Defendant shall have and recover from Plaintiff Bonnie L. Johnson individually monetary sanctions in the amount of \$114,777.50, together with postjudgment interest from the date of this Judgment until paid at the rate of six percent (6%) per annum.
3. Court costs are taxable against the Plaintiff, Bonnie L. Johnson. Defendant is awarded court costs in the amount of \$5,189.15, together with postjudgment interest from the date of this Judgment until paid at the rate of six percent (6%) per annum.
4. The parties are allowed such writs and processes as may be necessary in the enforcement and collection of this Judgment.
5. This judgment finally disposes of all claims and all parties and is appealable.
6. All relief not expressly granted in this Judgment is denied.

SIGNED on this 19th day of July, 2005.


Honorable Jay Patterson, Presiding Judge

¹ The Court granted an Agreed Order of Severance severing the request for sanctions against Plaintiff's counsel.

Copy

CAUSE NO. 03-04668

BONNIE L. JOHNSON, on Behalf of
CHELSEA ELIZABETH JOHNSON,
Beneficiary,

Plaintiff

vs.

CHARLES CHESNUTT,

Defendant.

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IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

101st JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW
~~PROPOSED ORDER~~

On January 31, 2005, Defendant filed a Motion for Contempt and Supplemental Motion for Sanctions which asked the Court to dismiss this action with prejudice and to order Plaintiff and her counsel to pay the attorney's fees and costs incurred by Defendant in defending this suit. The Court entered an Order to Show Cause on February 1, 2005. At an evidentiary hearing on February 22 and 23, 2005, the parties had the opportunity to present evidence relative to Defendant's Motion and this Court's Order to Show Cause.¹ Following the hearing, the Defendant filed his First Supplemental Motion for Contempt and Supplemental Motion for Sanctions to clarify the relief sought against Plaintiff's counsel. At the request of the Court, Plaintiff and Defendant filed Post-Hearing Briefs. Based upon the testimonial and documentary evidence in the record, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. The Trust

1. This suit is based upon a trust created on December 19, 1989 for the benefit of Chelsea Elizabeth Johnson. The Trust Agreement was signed by Vernon and Bonnie Johnson, law partners and Chelsea's biological parents, as Co-Grantors, and Charles Chesnutt as Trustee.

¹ At the February 22, 2005 hearing, the court took judicial notice of testimony and evidence presented at an evidentiary hearing regarding Plaintiff's Motion for Continuance on January 14, 2005.

2. Article VI, Section F, of the Trust Agreement defines the acts or omissions for which the Trustee can be liable. Such language provides, in part:

Trustee in carrying out its powers and performing its duties may act in its discretion and shall be personally or corporately liable only for *fraud or acts or omissions in bad faith*. . . Trustee shall not personally or corporately be liable for any act or omission of any agent or employee of trustee *unless Trustee has acted in bad faith in the selection and retention of such agent or employee*. [emphasis added]

3. Shortly after the creation of the Trust, Mr. Chesnutt allowed Chelsea's Elizabeth Johnson father, Vernon Johnson, to make stock transactions for the Trust.

4. With the fall in the value of the stock market in 2001, the value of the Trust also decreased in value.

5. In November 2002, Bonnie Johnson retained an attorney, James Alexander, to obtain a written accounting of the trust from Mr. Chesnutt, which he did. Ms. Johnson asked Mr. Alexander to represent her in litigation against Mr. Chesnutt, but he declined. Mr. Alexander admitted to Mr. Chesnutt: "You can't recover for the fall of the market."

6. Thereafter, Bonnie Johnson retained another attorney, S. George Alfonso, to obtain a written accounting of the trust and to sue Mr. Chesnutt. She never informed him that prior counsel had obtained such an accounting but had declined to file suit. Mr. Alfonso mailed a letter to Mr. Chesnutt requesting an accounting. According to Mr. Alfonso, Mr. Chesnutt did not fully respond to the request.

7. Prior to the lawsuit, no experts were consulted by Bonnie Johnson or Mr. Alfonso as to whether Mr. Chesnutt breached his fiduciary duties as Trustee or whether the Trust suffered damages as a proximate result of the acts or omissions of Mr. Chesnutt.

II. Plaintiff's Original Petition

8. This suit was filed by Bonnie Johnson, on behalf of Chelsea Elizabeth Johnson.

9. Plaintiff's Original Petition, filed on May 22, 2003, was authored and signed by Mr. Alfonso. The pleading attaches and incorporates by reference the December 19, 1989 Trust Agreement. Before filing, the pleading was reviewed and approved by Bonnie Johnson.

10. The Petition sets forth five causes of action alleging a breach of fiduciary duty. The gravamen of the pleading is that Mr. Chesnutt breached his fiduciary duty by allowing Vernon Johnson to be involved in the investment decisions for the Trust. None of the allegations expressly or impliedly alleges fraud or bad faith, as required by the exculpatory language of the Trust Agreement.²

11. Bonnie Johnson and ~~her attorney, Mr. Alfonso,~~ ^{has} have had multiple opportunities to set forth the factual and legal bases for the claims in Plaintiff's Original Petition, and to set forth a calculation of the damages claimed. Such opportunities were presented by the Petition itself, Defendant's Requests For Disclosures, Defendant's First Set of Interrogatories, the deposition of Plaintiff, the evidentiary hearing, and Plaintiff's post-hearing brief.

12. Despite such opportunities, there is no evidence in the record of any factual bases for the claim that Mr. Chesnutt breached his fiduciary duty as trustee, much less that he engaged in fraud or bad faith. Plaintiff's Original Petition contains no statement of facts. Plaintiff's Responses to Defendant's First Set of Interrogatories merely mirror the claims of Plaintiff's Original Petition. Mr. Alfonso even testified that he was frustrated by the absence of information ^{provided by Mr. Chesnutt} ~~available~~ to him before filing this lawsuit.

13. Bonnie Johnson testified that she was not accusing Mr. Chesnutt of fraud and that she was accusing him of bad faith only "to the extent that gross negligence has an element of bad faith"

² Only as part of the claim for exemplary/punitive damages did the Petition generally allege that "the Defendant acted in a fraudulent and malicious manner."

14. There is also no evidence in the record of any legitimate legal basis for this lawsuit. Plaintiff's Responses to Defendant's First Set of Interrogatories, which purport to include the legal research conducted by Mr. Alfonso before filing this suit, set forth only the general duties of a trustee under Texas law. The Responses do not address the legal import of the exculpatory language of the Trust. This omission is significant because the Responses appear to be nothing more than excerpts cut and pasted from one or more treatises on Texas trust law, one of which is *Texas Probate and Trust Administration* by Kenneth McLaughlin, Jr. Mr. McLaughlin's treatise specifically addresses exculpatory clauses and does so in language adjacent to, but conspicuously omitted from, that which is cut and pasted in the Responses.

15. Mr. Alfonso was unable to recall whether or not he read Section 113.059 of the Texas Property Code before this suit was filed.³ He was also unable to recall whether or not he read the opinion in *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002)⁴

16. Mr. Alfonso testified that he believed, at the time this suit was filed, that the exculpatory language of the Trust Agreement did not limit the ability of Mr. Chesnut to be sued for a breach of his fiduciary duty. He was unable to cite any authority for this opinion. Since Mr. McLaughlin's treatise, cited at length in Plaintiff's Responses to Defendant's First Set of Interrogatories, sets forth a contrary position which is inexplicably omitted from the Responses, the Court finds Mr. Alfonso's testimony to be without credibility.

³ As of May 22 2003, Section 113.059 of the Texas Property Code provided:

(a) Except as provided by Subsection (b) of this section, the settler by provision in an instrument creating, modifying, amending, or revoking the trust may relieve the trustee from a duty, liability, or restriction imposed by this subtitle.

(b) A settler may not relieve a corporate trustee from the duties, restrictions, or liabilities of Section 113.052 or 113.053 of this Act.

⁴ In *Grizzle*, the Texas Supreme Court upheld an exculpatory clause of a trust agreement which purported to relieve a corporate trustee for self dealing defined as the misapplication or mishandling of trust funds. *Id.* at 243.

17. After the evidentiary hearing, the Court asked the parties to brief a single issue: Was the delegation by Mr. Chesnutt of investment decision-making to Vernon Johnson in and of itself a breach of fiduciary duty? Plaintiff's Brief cited no authority to support her claim that the delegation was a breach of fiduciary.

18. Defendant offered the expert testimony of Joe Ashmore, Jr., who was qualified as an expert in trust matters and the obligations under T.R.C.P. 13 and Tex.Civ.Prac. & Rem. Code § 10.001, *et seq.* He testified that he had reviewed the Trust, Plaintiff's Original Petition, Plaintiff's deposition and the testimony of S. George Alfonso. He testified that "the lawsuit was not substantiated by anything I have seen, that I could nail down, or even close to being substantiated."

19. There is also no evidence in the record of any calculation of damages before or after the filing of this lawsuit.

III. Plaintiff's Conduct and Attempted Dismissal of this Lawsuit

20. Bonnie Johnson has been more than a mere bystander to these proceedings. She is a capable attorney who has taken an active role in the prosecution of this case. She has employed four attorneys of record – Mr. Alfonso (who was terminated in ~~January 2004~~ ^{December 2003}), James Norvelle, Richard Elliott (who was terminated in January 2005) and Timothy Sorenson. Through her succession of attorneys, she has been the only common thread and attorney.

21. On June 19, 2003, Mr. Alfonso was served with Defendant's Requests for Disclosures. He admitted that he received and read the document, but served no response thereto.

22. On August 5, 2003, Defendant served its First Set of Interrogatories. On September 11, 2003, Plaintiff's Responses to Defendant's First Set of Interrogatories were verified by Bonnie Johnson and served by Mr. Alfonso. The only signature of Mr. Alfonso was

on the Certificate of Service. He testified that this signature complied with T.R.C.P. 191.3. Plaintiff objected to the interrogatories on such grounds as “harassing” and “unintelligible” and provided none of the factual information or damage calculations requested.

23. Defendant’s First Set of Interrogatories were never fully answered. Bonnie Johnson admitted her own culpability in failing to respond to the interrogatories:

Q. Okay. And in preparing your responses to those interrogatories, did you endeavor to set out your position as best you were able?

A. No.

24. On December 3, 2004, Defendant’s Motion to Compel and Alternatively, Motion for Sanctions was filed in accordance with TRCP 215. Hearings were held regarding the Motion on January 7 and 14, 2005. At the January 7 hearing, Plaintiff’s counsel conceded: “the defendants [sic] are absolutely correct. They are entitled to a Motion to Compel.” Even with this admission, Plaintiff and her counsel made no effort at or after the January 7 or 14 hearings to produce any of the discovery requested by Defendant.

25. Pursuant to a Scheduling Order entered by the Court on July 28, 2003, Plaintiff had until November 2004 to complete discovery.⁵ During this time, Plaintiff never took the deposition of Mr. Chesnutt. Mr. Elliott testified that this omission was attributable to two reasons: First, Bonnie Johnson never provided him with the information needed to question Mr. Chesnutt. Second, she never provided him with the authority or money to take the deposition.

26. Pursuant to the Scheduling Order, Plaintiff had a deadline of November 9, 2004 within which to designate expert witnesses. No expert witness was identified by Plaintiff before the deadline. This omission was again directly attributable to Bonnie Johnson. Mr. Elliott testified that Ms. Johnson failed to provide him with the authority to hire an expert witness.

⁵ The discovery deadline was based upon an agreed trial date of February 22, 2005.

27. On December 16, 2004, Defendant Charles Chesnutt's No Evidence and Traditional Motion for Summary Judgment was filed. A hearing regarding Defendant's Motion was set for February 15, 2005.

28. Rather than appear for the February 15, 2005 summary judgment hearing, prepare for the February 22, 2005 trial date, or face the third hearing regarding Defendant's Motion to Compel, Plaintiff filed a Notice of Dismissal on January 20, 2005.

IV. Plaintiff's Violation of this Court's Mediation Orders

29. Paragraph 6 of the July 28, 2003 Scheduling Order provided, in part:

The parties shall mediate this case no later than thirty (30) days before the Initial Trial Setting, unless otherwise provided by court order.

30. On July 29, 2003, the Court also mailed to all parties an Order appointing Paula Miller the mediator in this case. An attached Mediation Order further provided, in relevant part:

This case is appropriate for mediation pursuant to Section 154.001 et seq. of the Texas Civil Practice and Remedies Code. Any objection to this Order must be filed and served upon all parties and the mediator, and a hearing must be requested, within 10 days from the date of this Order; an objection that is neither timely filed nor ruled upon before the scheduled mediation may be waived.

Mediation is mandatory . . .

Named parties shall be present during the entire mediation process . . .

The date scheduled by the mediator is incorporated into this Order as the date upon which the mediation session shall occur.

Failure or refusal to attend the mediation as scheduled may result in imposition of sanctions, as permitted by law.

No objection to the July 29, 2003 Mediation Order was filed by either party within the ten (10) day period prescribed by the Order and by Texas law. *See, e.g.,* Tex.Civ.Prac. & Rem. Code Ann. § 154.022(b). On January 14, 2005, this Court entered an Order from the bench directing the parties to mediate this case on or before January 27, 2005.

31. In accordance with the agreement of the parties, Paula Miller scheduled mediation in this case for January 25, 2005. She confirmed this schedule in writing on January 19, 2005.

32. Plaintiff thereafter filed her Notice of Dismissal. On the day before the scheduled mediation, Plaintiff filed a one-page Objection to Mediation. No ruling was made by the Court regarding the Objection before the scheduled mediation.

33. On January 25, 2005, Mr. Chesnutt and his counsel appeared at the offices of Paula Miller for mediation. No appearance was made by Bonnie Johnson or her counsel.⁶

VI. Attorney's Fees

34. At the time of the February 22-23, 2005 evidentiary hearing, Mr. Chesnutt had incurred \$114,777.50 in attorney's fees and costs in defending this action.

CONCLUSIONS OF LAW

I. Good Cause Exists for Sanctions in this Case

1. As grounds for the sanction requested, Defendant cites Plaintiff's violations of TRCP 215.3 and 13 and Chapter 10 of the Texas Civil Practice and Remedies Code

2. TRCP 215.3 authorizes sanctions where a party or her counsel abuses the discovery process in resisting discovery or provides discovery responses which are unreasonably frivolous or made for purposes of delay.

3. T.R.C.P. 13 authorizes sanctions for filing a frivolous pleading. In this regard, the Rule provides, in part:

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. . . .

⁶ Mediation subsequently occurred on February 8, 2005, but only after Defendant had filed his Motion for Contempt and Supplemental Motion for Sanctions, and Plaintiff was again ordered by the Court to appear for mediation.

"Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. Tex. R. Civ. P. 13; *Atty. Gen. of Texas v. Cartwright*, 874 S.W.2d 210, 215 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Rule 13 imposes a duty of reasonable inquiry into the facts before filing a pleading; not making such an inquiry can constitute bad faith. *Monroe v. Grider*, 884 S.W.2d 811, 819 (Tex. App.—Dallas 1994, writ denied). In determining whether Rule 13 sanctions are proper, the court must examine the circumstances when the litigant filed the pleading. *Id.* at 817. A court is permitted, however, to consider the entire history of the case. *Falk & Mayfield, L.L.P. v. Molzan*, 974 S.W.2d 821, 825 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 262 (Tex. App.—Houston [14th Dist.] 1992, no writ).

4. Similar to Rule 13, Section 10.001 of the Texas Civil Practice and Remedies Code authorizes sanctions and provides that the signing of a pleading constitutes a certificate by the signatory that to the signatory's best knowledge, information and belief, formed after reasonable inquiry:

- (1) the pleading or motion is not being presented for any improper purpose, including to harass or cause unnecessary delay or increase in the cost of litigation;
- (2) each claim . . . in the pleading . . . is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) each allegation or other factual contention in the pleading . . . has evidentiary support or, for a specifically identified allegation or contention, is likely to have evidentiary support after a reasonable opportunity for further investigation.

See In re Snider, 2000 WL 35883 *4 (Tex. App.—San Antonio 2000, pet. denied)(not designated for publication). Section 10.004 of the Texas Civil Practices and Remedies Code authorizes a trial court to impose a sanction upon a person, a party represented by the person, or both, for violating Section 10.001. *See Rudisell v. Paquette*, 89 S.W.3d 233, 238 (Tex. App.—Corpus

Christi 2002, no pet.). The only violation for which a represented party cannot be sanctioned is a violation of Section 10.001(2). *See* Tex. Civ. Prac. & Rem. Code § 10.004. In order for a party seeking sanctions to prevail, there must be little or no basis for claims, no grounds for legal arguments, misrepresentations of law or facts, or legal action that is brought in bad faith. *See Herring v. Welborn*, 27 S.W.3d 132, 143 (Tex. App—San Antonio 2000, pet. denied).

5. The Court finds that good cause exists for sanctions under each of the legal grounds asserted by Defendant.

6. Plaintiff's Original Petition was groundless within the meaning of T.R.C.P. 13 and Tex.Civ.Prac. & Rem. Code § 10.001(2) & (3). The exculpatory language of the Trust was and is plainly enforceable under Texas Trust law. Tex. Prop. Code § 113.059; *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002). Plaintiff and her counsel, Mr. Alfonso, had no factual or legal basis to support a claim that Defendant breached his fiduciary duty, much less a factual or legal basis to support the claim that he did so fraudulently or in bad faith.

7. Plaintiff's Original Petition was ~~also filed by Plaintiff and her counsel, Mr. Alfonso~~, in bad faith and for an improper purpose within the meaning of T.R.C.P. 13 and Tex.Civ.Prac. & Rem. Code § 10.001(2). This finding is based not only upon the ~~circumstances of the filing of the pleading~~, but also upon the history of this action.

8. Plaintiff ^{has} ~~and her counsel, Mr. Alfonso~~, have abused the discovery process, within the meaning of T.R.C.P. 215.3, by failing, even under the threat of sanctions, to respond to discovery duly propounded by Defendant.

II. Dismissal With Prejudice and an Award of Attorney's Fees and Costs are Appropriate Sanctions.

9. Sanctions may be imposed for a variety of reasons upon a party, her counsel, or both, and their function can be compensatory, punitive or deterrent in nature. *See TransAmerican*

Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1996). Sanctions need only be just. *Id.*

Whether a sanction is just is generally measured by two standards:

First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. . . .

Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction . . . should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.

Id. See also *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004).

10. Case determinative sanctions are limited not only by the two standards set forth above, but also by constitutional due process. *TransAmerican Natural Gas Corp.*, 811 S.W.2d at 918. Such sanctions should be imposed only in “exceptional cases” where they are “clearly justified” and it is “fully apparent that no lesser sanctions would promote compliance with the rules.” *Cire*, 134 S.W.3d at 840-41. An exceptional case exists where a party’s hindrance of the discovery process justifies a presumption that her claims lack merit. *Id.* at 841; *TransAmerican Natural Gas Corp.*, 811 S.W.2d at 918. A case determinative sanction is also justified where a party or her counsel shows flagrant bad faith or callous disregard for the responsibility of discovery under the rules. *Id.* at 842.⁷

11. TRCP 215.2(b) authorizes the following sanctions against a party and/or her counsel for discovery abuse under TRCP 215.3:

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him; . . .

(5) an order striking out pleadings or parts thereof . . . or dismissing with or without prejudice the action or proceedings or any part thereof . .

⁷ In *Cire*, the Texas Supreme Court imposed a case determinative sanction under these standards without first testing the effectiveness of lesser sanctions.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Dismissal with prejudice and an award of attorney's fees and costs are thus sanctions within this Court's power to assure compliance with discovery and deter those who might be attempted to abuse discovery in the absence of a deterrent. *See Cire*, 134 S.W.3d at 839.

12. As to available sanctions for a violation of Rule 13, the Rule provides, in part:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215.2(b), upon the person who signed it, a represented party, or both.

See T.R.C.P. 13. The chief purpose of sanctions under Rule 13 is to deter further abuses in the pleading process. *See Monroe v. Grider*, 884 S.W.2d at 818. A finding that Plaintiff's Original Petition was groundless and filed in bad faith empowers this Court not only to dismiss this action with prejudice but also to order Plaintiff and counsel to reimburse Defendant for the attorney's fees and costs incurred in defending this action. *See, e.g., Randolph v. Walker L.L.P.*, 29 S.W.3d 271 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)(upholding trial court's sanctions of striking claims from pleadings and dismissing with prejudice under Rule 13); *Attorney General of Texas v. Cartwright*, 874 S.W.2d 210 (Tex. App.—Houston [14th Dist.] 1994, writ denied)(upholding trial court's dismissal of case for filing a frivolous and groundless notice of delinquency and motion for new trial in violation of Rule 13); *Monroe v. Grider*, 884 S.W.2d 811 (upholding trial court's finding that plaintiff's claims were groundless and brought in bad faith and sanction of plaintiff and plaintiff's attorney each paying fifty percent of the defendant's attorney's fees).

13. Section 10.002(c) of the Texas Civil Practice and Remedies Code provides that a court may award, as a sanction for a violation of Section 10.001, “the reasonable expenses and attorney’s fees incurred” in presenting the motion and “if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.” *See also* Tex.Civ.Prac. & Rem. Code § 10.004(c)(3)(authorizing “an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of a pleading . . . including reasonable attorney’s fees.”).

14. Of all the sanctions available to the Court in this action, only dismissal with prejudice and an order requiring that Plaintiff and ~~her counsel, Mr. Alfonso~~, reimburse Defendant’s attorney’s fees and costs bear any relationship to their conduct. *See Chasewood Oaks Condominium Homeowner’s Association, Inc.*, 977 S.W.2d 840, 845 (Tex.App.-Fort Worth 1998, pet. denied); *see also Magnuson v. Mullen*, 65 S.W.3d 815, 828 (Tex.App.- Fort Worth 2002, no pet.).

15. Defendant has incurred considerable expense as a direct result of the abuse of Plaintiff and ~~her counsel, Mr. Alfonso~~. Taking into consideration the manner in which this case was prosecuted by Plaintiff and ~~her counsel~~, the skill required to perform the legal services, the experience, reputation and ability of the attorneys, and the time and labor required, all of the services rendered by Defendant’s counsel were reasonable and necessary. Therefore, the court finds that an award of \$114,777.50 in attorney’s fees would be equitable and just.

16. The lesser sanction of a monetary award only has been fully considered and rejected by the Court. The actions by Plaintiff and ~~her counsel, Mr. Alfonso~~, in litigating this case makes this an exceptional matter which calls for a sanction of dismissal with prejudice.

Here, there is no arguable basis for the claims brought by the Plaintiff. Plaintiff admitted under oath that she has no claim for fraud and effectively admitted there is no bad faith on the part of the Defendant. Furthermore, Plaintiff's Post-Hearing Brief, which provided the Plaintiff one last opportunity to show some legitimacy to her claims of breach of fiduciary duty, only demonstrated that Plaintiff has no grounds for the claims brought against Defendant. Justice would not be served by allowing Plaintiff to prosecute her claims anew in a second litigation.

17. The conduct of Plaintiff ~~and her counsel, Mr. Alfonso~~, during this litigation offer further proof that this lawsuit violates Rule 13 and Tex.Civ.Prac. & Rem. Code § 10.001(1) & (3) and was groundless and was brought in bad faith. ^{She} ~~They~~ actively frustrated Defendant's legitimate efforts to define the claims and damages alleged in Plaintiff's Original Petition and to investigate potential defenses. Indeed, ^{her} ~~their~~ hindrance of Defendant's discovery was so persistent and so successful as to warrant the presumption that there is absolutely no merit to the claims and damages being alleged; certainly, if her claims had merit, she ~~or her counsel~~ would have responded fully to Defendant's discovery rather than face the prospect of case determinative sanctions. If her claims had even a scintilla of proof, she would have filed a response to the motion for summary judgment instead of dismissing the claims.

18. The sanctions requested by Defendant are also not excessive. Plaintiff ~~and her counsel, Mr. Alfonso~~, ^{now} ~~have~~ shown flagrant bad faith and callous disregard for their discovery responsibilities under the rules. *See, e.g. TransAmerican Natural Gas Corp.*, 811 S.W.2d at 918. The failure of Plaintiff ~~and her counsel~~ to respond to Defendant's discovery is also not the only callous disregard which they have demonstrated for this Court and their responsibilities as litigants.

19. The threat of sanctions in two hearings before this Court regarding Defendant's Motion to Compel and Alternatively, Motion for Sanctions, moreover, did not prompt Plaintiff to comply with her discovery obligations. By filing a Notice of Dismissal, Plaintiff has also now effectively mooted many of the lesser sanctions which are available under TRCP 215.2(b). Accordingly, this is an "exceptional case" where lesser sanctions are neither available nor effective in promoting compliance with the rules. *Cire*, 134 S.W.2d at 842. Only a dismissal with prejudice with attorney's fees and costs taxed against Plaintiff ~~and her counsel, Mr. Alfonso~~, would effectively punish ^{her} ~~them~~ ^{her} for ~~their~~ ^{her} frivolous pleading and discovery abuse, and deter similar abuse by ~~them~~ ^{her} and other litigants in the future.

20. The sanctions imposed by this Order are proper even though the sanctioned persons purported to represent a minor in these proceedings. *Jolet v. Garcia*, 2000 WL 276906 (Tex.App. Dallas 2000)

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Defendant's Motion for Contempt and Supplemental Motion for Sanctions, is GRANTED, as follows:

1. IT IS ORDERED that the above-styled action is hereby dismissed with prejudice to the Plaintiff, Bonnie Johnson, on behalf of Chelsea Elizabeth Johnson, Beneficiary and Chelsea Elizabeth Johnson, Individually, from refile same.
2. IT IS FURTHER ORDERED that the Defendant is hereby awarded a sanction in the amount of \$114,777.50, representing Defendant's reasonable attorney's fees and costs in defending this action; and
3. IT IS FURTHER ORDERED that Bonnie Johnson and ^{individually's} ~~S. George Alfonso~~ are ~~jointly and severally~~ liable for the monetary sanction.

SIGNED on this 8th day of July, 2005.


JUDGE PRESIDING