

CAUSE NO. 2013-05455

CARL HENRY BRUNSTING,	§	IN THE DISTRICT COURT OF
INDEPENDENT EXECUTOR OF THE	§	
ESTATES OF ELMER H. BRUNSTING	§	
AND NELVA E. BRUNSTING	§	
	§	
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
	§	
CANDACE L. KUNZ-FREED AND	§	
VACEK & FREED, PLLC f/k/a	§	
THE VACEK LAW FIRM, PLLC	§	164TH JUDICIAL DISTRICT

DEFENDANTS' MOTION FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendants CANDACE L. KUNZ-FREED and VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC (collectively "V&F") and files this Motion for Sanctions, and would respectfully show the Court as follows:

I.

INTRODUCTION & BACKGROUND

1.1 "The purpose of sanctions is to punish attorneys and litigants who purposefully abuse the judicial system." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 243 (Tex. App.—Houston [1st Dist.] 2015, pet. filed). "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Tex. Disc. R. of Prof'l Conduct pmb1. ¶ 4.

1.2 There are few things more disruptive to a person's life and livelihood than being sued—especially when, as here, the person is accused of engaging in very serious acts of malpractice and the litigation has been ongoing for several years. Attorneys practicing law in Texas have an obligation to bring lawsuits and allegations in good faith and that are likely to

have evidentiary support. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 10.001. Lawsuits should not be brought in bad faith for purposes of harassment or with the hopes that *maybe* discovery will reveal some merit to the suit's allegations. *See Rest. Teams Intern., Inc. v. MG Sec. Corp.*, 95 S.W.3d 336, 340 (Tex. App.—Dallas 2002, no pet.) (“[P]laintiffs are presumed to have investigated their case **before filing suit.**” (emphasis added)).

1.3 Bobbi Bayless, counsel for Plaintiff Carl Brunsting as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting, signed and filed her Third Amended Petition which contains dozens of very serious allegations against V&F, in short accusing V&F of sabotaging its own client for financial gain. However, as established below, Carl and Bayless brought these allegations for an improper purpose and without actual or likely evidentiary support, in violation of Texas Civil Practice and Remedies Code § 10.001. Additionally, Carl and Bayless have signed discovery responses that do not have a good faith factual basis, in violation of Texas Rules of Civil Procedure 191.3(e) and 215.3. Accordingly, V&F files this Motion for Sanctions.

II. SUPPORTING EVIDENCE

2.1 In support of this Motion for Sanctions, V&F attaches the following evidence which is incorporated herein by reference:

- Ex. A: Carl Brunsting Deposition
- Ex. B: Interrogatory Answers
- Ex. C: Amended Designation of Experts
- Ex. D: Bobbi Bayless Post-Deposition Statement Regarding Carl Brunsting
- Ex. E: Response to Requests for Disclosure
- Ex. F: Bobbi Bayless Email of December 4, 2014
- **Ex. G: Report of Temporary Administrator**

III.

BACKGROUND

3.1 Carl and Bayless filed this lawsuit on January 1, 2013. They have amended their petition three times, and the live pleading is the Third Amended Petition filed on September 30, 2013 (on file with the Court and incorporated herein by reference). Carl has alleged claims for (1) negligence, (2) negligent misrepresentation, (3) breach of fiduciary duty, (4) aiding and abetting the current trustees' breaches of fiduciary duty, (5) fraud, (6) conspiracy, and (7) violations of the DTPA stemming from their representation of Elmer and Nelva Brunsting ("Elmer" and "Nelva," respectively).

3.2 Specifically, Carl alleges that V&F, knowing that Nelva was incompetent, assisted the Current Trustees¹ in implementing a scheme to change the terms of the Family Trust, to ultimately remove Nelva from her position as trustee of the Family Trust, and to improperly remove assets from Elmer and Nelva's Estates and from the Family Trust. Carl contends that, because of the actions of V&F, the Current Trustees were able to override Elmer's and Nelva's wishes, resulting in an improper transfer of assets to Carl's detriment. As a result, Carl is seeking actual damages, exemplary damages, treble damages under the DTPA, disgorgement, and attorney's fees.

3.3 Carl suffered encephalitis in 2009 and allegedly has struggled with memory issues and has not been employed since.²

3.4 In August 2013, Bayless served on V&F three sets of interrogatory answers verified by Carl, in which he swore to the truthfulness of statements regarding V&F's purported acts and omissions, including that Nelva did not want to remove Carl as successor trustee and

¹ Anita and Amy Brunsting are the Current Trustees. However, they have not been named as parties to this litigation.

² See Ex. A: Carl Brunsting Deposition at 12:6-13:1; 16:19-17:1.

that V&F refused to take appropriate actions to correct a conflict of interest in its representation of Nelva.³ Bayless signed these interrogatory answers, thereby attesting that she believed they were accurate and made in good faith.

3.5 Bayless amended her designation of experts on December 10, 2014, adding Charles G. Kevorkian, M.D. as an expert. Dr. Kevorkian was designated to opine on “the impact encephalitis had on [Carl].”⁴ Therefore it appears that, prior to Carl’s deposition, Bayless was aware Carl had lingering effects of encephalitis. Nevertheless, Bayless never advised defense counsel prior to Carl’s deposition that there may be some question regarding Carl’s capacity.

3.6 On February 3, 2015, defense counsel took Carl’s deposition. Bayless defended the deposition on behalf of Carl. During the deposition, Carl could not provide any testimony to support the allegations he asserts against V&F. He stated he understood that his parents simply could have chosen to change how their property was distributed, and he also admitted he does not know whether his mother voluntarily requested the changes to her estate documents.⁵ When *asked* to explain what facts support his allegations, Carl repeatedly stated that the allegations must be true because of “where we’re at right now”—in other words, the fact that lawsuits are pending must mean there is truth to the allegations.⁶ Carl testified that he believed he presently had capacity and understood defense counsel’s questions.⁷ The following is an example of Carl’s testimony which wholly undermines his allegations in this lawsuit:

Q. You've also never been present for any conversations that your mother had with Ms. Freed about any of the documents she was signing, correct?

³ See Ex. B: Interrogatory Answers.

⁴ See Ex. C: Amended Designation of Experts.

⁵ Ex. A at 58:15–59:6; 62:6–23; 66:15–18. He conceded he does not know whether V&F discussed Nelva’s capacity with his sisters. Ex. A at 63:16–18.

⁶ Ex. A at 46:12–47:8; 56:9–21; 59:16–25; 64:10–14; 65:11–15; 68:1–17; 69:17–24; 77:7–10; 90:5–91:11.

⁷ Ex. A at 120:11–16.

A. No, I haven't.⁸

* * *

Q. Before you were ill, you'd never been present for any meetings or conversations your mother may have had with her attorneys at Vacek & Freed, correct?

A. Not that I remember, yeah.

Q. Okay. And since you've been ill, after your illness, you also never were present for any meetings or conversations your mother had with the attorneys at Vacek & Freed?

A. No, no.

Q. Before you were sick, you -- your mother never called you to get your input or to talk to you about any services she was receiving from Vacek & Freed?

A. Not that I remember, no.

Q. And since you were sick, your mother never called you to confer with you --

A. No.

Q. -- about any conversations she may have had with Ms. Freed or any other attorneys at her law firm?

A. No.⁹

* * *

Q. One of the claims that you've made in this in this positi- -- in this -- in this lawsuit is that Ms. Brunsting, your mother, was misled about some of the documents she was signing.

A. Um-hmm.

Q. Do you -- do you understand that to be the case?

A. Yes.

Q. Okay. What documents do you believe your mother was misled to sign?

A. I don't know.

Q. Okay. And what makes you believe your mother was misled into signing those documents?

A. I can't say specifically.

Q. Okay. Do you have any evidence that Ms. Freed or the law firm misled Ms. Brunsting into signing documents?

A. Yes, I do. They faked her signature or something like that, yeah.

Q. Okay.

A. I don't know if that's right, but yeah.

⁸ Ex. A at 35:5-8.

⁹ Ex. A at 36:22-37:16.

...

Q. Okay. So -- so you're not sure about that, correct?

A. Yeah.

Q. So then you don't have any evidence that anybody at the law firm faked Ms. Brunsting's signature, correct?

A. Let me think about that a minute.

Q. Sure.

A. Not that I can say, no.¹⁰

* * *

Q. Okay. She -- with respect to your -- your claim that she was misled and she was unduly influenced --

A. Um-hmm.

Q. -- you -- you agree with me that you weren't present during the time that she signed any of these documents, correct?

A. Right.

Q. Okay. So then you have no evidence whatsoever that that in fact occurred, correct?

A. No evidence, yes. I mean...¹¹

* * *

Q. Okay. Eventually, Anita Brunsting, your sister --

A. Um-hmm.

Q. -- became the trustee for the family trust.

A. (Nodded head.)

Q. Do you understand that to be the case?

A. Yes, yes.

Q. Okay. And in order to do that, there was a -- a document that was executed that stated such, correct?

A. Yes.

Q. And that document was executed by your mother, correct?

A. I don't know how that was done, but, yes.

Q. Okay. And the reason you don't know is because you weren't there, correct?

A. Yeah, uh-huh.

¹⁰ Ex. A at 38:14-39:21.

¹¹ Ex. A at 40:22-41:7.

Q. And you don't know what was explained to your mother at the time --

A. No.

Q. -- that she signed it?

A. No. No.

Q. You don't know what discussions she may have had with her attorneys about it, correct?

A. No, no.¹²

* * *

Q. Okay. Do you recall if -- well, strike that. Do you believe that there's any document that Candace Freed or her law firm drafted that cut you out of your inheritance?

A. Not that I know of, no.¹³

* * *

Q. One of the things you've also claimed in your lawsuit is that -- that my clients helped to implement a scheme to change the terms of the family trust.

A. Uh-huh.

Q. What scheme are -- are you referring to?

A. To get me out of it, and -- me and my adopted sister, Candy, out of it. Yeah.

Q. Okay. And what evidence do you have that my clients, Ms. Brunsting's lawyer and law firm, were involved in that scheme?

A. I don't know. I can't specifically say.

Q. Okay. Have you seen any such evidence?

A. Yes.

Q. What evidence have you seen?

A. I can't say. Sorry.¹⁴

* * *

Q. Okay. Another thing you claim is that my clients, the lawyer and the law firm, improperly removed assets from Elmer and Nelva's estates from the family trust. What evidence do you have that my clients did that, meaning the lawyer or the law firm?

A. That they helped it happen. I'm not sure -- yeah.

Q. Okay. Do you know if they helped it happen?

A. Well, where we are right now, trying to get this resolved in a good way, and...

¹² Ex. A at 45:13-46:11.

¹³ Ex. A at 53:19-23.

¹⁴ Ex. A at 54:11-25.

Q. Well, I understand that. But do you know if my client helped that happen?

A. Not that I can specifically say, no.¹⁵

* * *

Q. Okay. Do you believe that there were changes made to the trust documents that Ms. Nelva Brunsting did not want made?

A. Yeah. Yes. I think she was talked into trying to get me out of the inheritance.

Q. Okay. What changes do you -- are you talking about?

A. Nothing. I can't give you specifically, so...

Q. Okay. You weren't -- you weren't privy to any conversations Ms. Nelva Brunsting and her lawyers may have had regarding changes to those documents, correct?

A. No.

Q. So you don't know if she actually requested those changes?

A. No, uh-uh.¹⁶

* * *

Q. Another claim that you've made in this lawsuit is that Ms. Freed and her law firm made oral misrepresentations to Nelva E. Brunsting when preparing documents that -- that she signed.

A. Um-hmm.

Q. Do you recall that allegation?

A. I remember the -- I recall the -- I -- I remember, yeah, a little bit about that.

Q. Okay. What oral misrepresentations do you believe Ms. Freed and her -- and/or her law firm made to Ms. Brunsting?

A. I don't know.

Q. Are you aware of any mis- -- specific misrepresentations that you believe Ms. Freed and her law firm made to Nelva E. Brunsting?

A. Not that I can say specifically, no.¹⁷

3.7 At no time during the deposition did Bayless (1) assert an objection based on Carl's incapacity, (2) instruct Carl not to answer due to his incapacity, (3) request that the

¹⁵ Ex. A at 56:9-21.

¹⁶ Ex. A at 58:25-59:6.

¹⁷ Ex. A at 110:5-20.

deposition end so that Carl could receive medical attention, or (4) mention on or off the record to defense counsel that Carl was possibly incapacitated or in any manner acting unusually. Moreover, Carl's wife Drina Brunsting was present during the deposition but never mentioned that Carl was acting unusually or needed medical attention or, if she did, Bayless never relayed such concerns to defense counsel. Instead, defense counsel spent three hours questioning Carl, developing testimony which (as explained in Defendants' motion for summary judgment, on file with the Court) decimates this lawsuit. Moreover, Carl shockingly testified that he had paid Bayless \$250,000 for her legal services in this lawsuit and the lawsuits in Probate Court.¹⁸

3.8 The next day, Bayless contacted defense counsel and said she thought Carl was acting strange during his deposition and she believes he might be incapacitated. Over one month later on March 5, 2015, Bayless sent defense counsel a letter explaining that Carl's deposition testimony was without value because Carl lacked capacity during the deposition. Bayless asserted that Carl's lack of capacity had "not been apparent through the other phases of the litigation" but that the stress of the deposition caused a relapse of memory problems stemming from his 2009 encephalitis infection. In support of her letter, Bayless attached the letter of a layperson who, without any qualification, opined that encephalitis survivors tend to have memory issues during stressful situations.¹⁹ Bayless also attached to the statement a letter from Dr. Kevorkian dated February 12, 2015 in which he succinctly stated Carl was not fit to be executor.²⁰ **However, to date, Bayless has provided the opinion of a qualified medical that Carl was incapacitated during his deposition such that his answers are untrustworthy.**

¹⁸ Ex. A at 77:13-15; 116:24-117:8.

¹⁹ Ex. D: Bobbi Bayless Post-Deposition Statement Regarding Carl Brunsting.

²⁰ Ex. D.

Thus, Carl's deposition testimony is admissible and competent and may be used by V&F to defeat the allegations made in this Lawsuit.

3.9 Bayless expressed in her statement that, based upon Dr. Kevorkian's evaluation of Carl, Carl had filed an application to resign as executor of his parents' estate.²¹ Amazingly, in an attempt to downplay the fact that the person who had been prosecuting this suit for several years had suddenly become incapacitated and of no value to the suit, Bayless added to her statement, "[Carl] was excluded from the actions on which this case is based so he had no personal knowledge of what occurred anyway."²² Bayless made this nonchalant averment after having presented Carl for a full three-hour deposition, and despite the fact that Carl had thrice made sworn verifications to his interrogatory answers regarding the allegations in this lawsuit and after she listed Carl in her disclosure responses as someone with relevant knowledge about "All aspects of case."²³

3.10 On February 19, 2015, in Probate Cause 412,248, Carl filed an application to resign as executor, noting that he has personally borne all expenses of the estate up to that date.

The Probate Court granted the application in March 2015. Since that time, this malpractice lawsuit has been in limbo.

IV. MOTION FOR SANCTIONS

A. Law

4.1 Texas Civil Practices and Remedies Code Chapter 10 provides a party the ability to move for sanctions against another party or attorney for signing frivolous pleadings. Relevant

²¹ Ex. D.

²² Ex. D.

²³ See Ex. E: Response to Requests for Disclosure.

here, an attorney's signature on 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 to cause unnecessary delay or needless increase in the cost of litigation;

...

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

Tex. Civ. Prac. & Rem. Code Ann. § 10.001.

4.2 Additionally, an attorney who signs discovery responses makes an affirmative statement about the merit of those responses:

The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;(2) has a good faith factual basis;(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Tex. R. Civ. P. 191.3(c). "If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code." Tex. R. Civ. P. 191.3(e).

4.3 When a party or attorney violates Section 10.001, the opposing party may make a motion for sanctions *or* "[t]he court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show

cause why the conduct has not violated that section.” Tex. Civ. Prac. & Rem. Code Ann. § 10.002(a), (b).

4.4 “The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney’s fees incurred in presenting or opposing 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.” Tex. Civ. Prac. & Rem. Code Ann. § 10.002(c). “A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.” Tex. Civ. Prac. & Rem. Code Ann. § 10.004(a).

A sanction may include any of the following:

- (1) a directive to the violator to perform, or refrain from performing, an act;
- (2) an order to pay a penalty into court; and
- (3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney’s fees.

Tex. Civ. Prac. & Rem. Code Ann. § 10.004(c).

Additionally, discovery abuse is sanctionable under Tex. R. Civ. P. 215.3:

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b).

Tex. R. Civ. P. 215.3.

B. Argument

4.5 The evidence attached to this Motion establishes that Bayless and Carl should be sanctioned pursuant to the foregoing legal authorities for bringing frivolous claims for improper purposes and for signing discovery responses with knowledge that the responses were inaccurate.

Accordingly, V&F brings this motion for sanctions and also urges the Court to order Bayless and Carl to appear and show cause why their conduct has not violated Section 10.001. *See* Tex. Civ. Prac. & Rem. Code Ann. § 10.002(a), (b).

4.6 Throughout the three years that this lawsuit has been ongoing, Carl and Bayless have not produced any evidence that supports the vitriolic and damaging allegations made in their Third Amended Petition. Specifically, V&F is accused of conspiring with and aiding and abetting Carl's siblings in a calculated plot to undermine the actual intentions of Nelva, who V&F purportedly knew had become incompetent but did nothing about this fact, and alter trust and estate instruments so as to deprive Carl and his sister Candace Curtis of assets Nelva intended them to have.²⁴ However, Bayless and Carl did not have any evidentiary support for these claims at the time the Third Amended Petition was filed. Moreover, it is now clear the Bayless and Carl knew at the time the Third Amended Petition was filed that it was unlikely evidentiary support would be discovered to support these claims.

4.7 In 2013, Carl signed verifications to his interrogatory responses, swearing that the facts he responded with were true. *See* Tex. R. Civ. P. 197.2(d). Moreover, Bayless signed these responses, certifying that they have a "good faith factual basis." *See* Tex. R. Civ. P. 191.3(c). However, years later, after Carl provided deposition testimony that disproved his allegations against V&F, Bayless sent defense counsel a letter stating the Carl's deposition testimony was worthless because he was incapacitated but that it did not really matter because, "[Carl] was excluded from the actions on which this case is based so he had no personal knowledge of what occurred anyway."²⁵ In other words, Bayless was admitting that Carl—regardless of whether he

²⁴ Put differently, instead of being a truly independent claim by the Estate seeking to rectify wrongs perpetrated on Nelva, the legal-malpractice lawsuit is really about Carl and Ms. Curtis individually trying to collect damages against V&F.

²⁵ Ex. D.

was competent or not—had no knowledge that would support his allegations in this suit. This necessarily means that Carl was untruthful and perjured himself when he verified his interrogatory responses earlier swearing to facts supporting his allegations.²⁶ It also means Bayless did not have a good faith belief that Carl’s interrogatory answers had a factual basis.²⁷ Moreover, Bayless did not have a good faith belief that Carl was actually a party with relevant knowledge about “All aspects of case” when she signed Carl’s Responses to Requests for Disclosure.²⁸

4.8 Because Carl and Bayless signed or verified discovery responses in violation of Tex. R. Civ. P. 191.3 and Section 10.001 of the Civil Practice and Remedies Code, V&F requests that they be sanctioned under Tex. Civ. Prac. & Rem. Code Ann. § 10.004(a) and Tex. R. Civ. P. 215.3.

4.9 Additionally, it is clear that Carl and Bayless filed this lawsuit based on Carl’s mere musings about events he has no basis for actually believing ever occurred. However, a lawyer is supposed to counsel a client and help him understand that baseless hunches do not equate to legal claims. *See Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 367 (Tex. 2014) (“Though zealous advocacy is expected of an attorney—indeed, it is a professional obligation—the attorney must not permit client desires to supersede the attorney’s obligation to maintain confidence in our judicial system.”). Carl’s and Bayless’s allegations have no factual support and were never likely to have evidentiary support even after the discovery process. Further, the only reasonable purpose Carl and Bayless could have for filing this suit and serving their discovery responses was to harass V&F, causing an unnecessary delay by acting as though there

²⁶ See Ex. B.

²⁷ See Ex. B.

²⁸ See Ex. E.

is some evidence to support the allegations when they knew this was not true, and to increase the cost of litigation, all in hopes of forcing V&F to settle the lawsuit. Because these actions violate sections 10.001(1) and 10.001(3) of the Civil Practice and Remedies Code, V&F requests that they be sanctioned under Tex. Civ. Prac. & Rem. Code Ann. § 10.004(a).

4.10 Carl and Bayless also brought this suit in bad faith and for purposes of harassment because, even assuming *arguendo* that V&F did breach some duty, damages have not occurred yet. Two months prior to Carl's deposition, Bayless admitted in an email to defense counsel that her damage model was speculative because the Estate assets have not be distributed yet:

Another thing it has taken me a while to realized is that somehow, this case [the malpractice case] is set earlier than the case involving the claims against Amy, Anita, and Carole [in the Probate Court]. As I think we have discussed before, it is going to be hard to have final answers on the damage questions in this case until the other case is disposed of. That one is set for 3/30/15. I wonder if we need to push our trial setting a bit later so that we can get the other one done.²⁹

4.11 During his deposition, Carl admitted that his alleged damages (**importantly—not the Estate's damages, which the Party he was supposed to be acting for**) are that he has not received 1/5th of the Estate, split equally among the five Brunsting siblings:

Q. What is your understanding of your damages that you've suffered as a result of this lawsuit?

A. What we're going through right now instead of it being divided five ways.

Q. Okay. Anything else?

A. Not specifically, no.³⁰

* * *

Q. Okay. So again, you're saying because you and your sisters are having a dispute about the trust --

A. Yeah.

Q. -- and the assets --

²⁹ Ex. F: Bobbi Bayless Email of December 4, 2014.

³⁰ Ex. A at 77:7–12.

A. Yeah.

Q. -- that that's why you believe that Ms. Nelva Brunsting's rights aren't -- weren't protected?

A. That's right. It should have been split five ways, and then it would be -- would be over by now, yeah.

Q. Okay. And what you basing that on?

A. Pardon?

Q. What are you basing that on, that it should have been split five ways?

A. Well, there are five kids.³¹

4.12 As Carl and Bayless are well aware, issues regarding the Estate and distribution of assets to heirs are being hotly contested in the Probate Court and it is entirely speculative to say Carl has been injured at this point. In fact, the temporary administrator recently issued a report in which he opined that, if some siblings received more money from the Estate than they should have, it will be easy to rectify that when making distributions of Estate assets.³² Accordingly, Carl and Bayless have brought claims for damages for which no evidence supports or is likely to support and for an improper purpose, hoping to collect a settlement while knowing damages are unripe and may never occur. For this additional reason, V&F requests that Carl and Bayless be sanctioned under Tex. Civ. Prac. & Rem. Code Ann. § 10.004(a).

4.13 Finally, V&F notes that an experienced attorney like Bayless knows better than to bring such serious malpractice allegations without evidentiary support, and it is especially egregious to know she has done so while receiving \$250,000 for her legal services in this lawsuit and the lawsuits in Probate Court.³³ V&F asks that the Court consider this fact in determining this Motion.

³¹ Ex. A at 65:16–66:5.

³² Ex. G: Report of Temporary Administrator at pp. 8–9.

³³ Ex. A at 77:13–15; 116:24–117:8.

V.
CONCLUSION AND PRAYER

5.1 Because of Carl's and Bayless's bad-faith filing of this lawsuit and serving discovery responses, V&F has unjustly had to defend a lawsuit since 2013. For the foregoing violations, V&F requests that the Court sanction Carl and Bayless by

- (1) directing them to refrain from making factual allegations in pleadings or discovery requests for which they do not have a good faith basis to believe are true and are based upon personal knowledge when so required;
- (2) ordering them to pay a penalty into court; and
- (3) ordering them to pay V&F the amount of the reasonable expenses it incurred because of the filing of the Third Amended Petition and the serving of their responses to interrogatories and requests for disclosure, including reasonable attorney's fees.

Tex. Civ. Prac. & Rem. Code Ann. § 10.004(c). V&F also requests that the Court sanction Carl and Bayless under Tex. R. Civ. P. 215.3 pursuant to Tex. R. Civ. P. 215.2(b).

5.2 Moreover, based on the totality of the circumstances and the egregiousness of Carl's and Bayless's violations, death-penalty sanctions are proper, V&F requests that the Court award sanctions by striking the Third Amended Petition and disallowing them from refileing a petition and/or an order preventing them from continuing to bring and argue their allegations in this lawsuit.

5.3 V&F also requests that the Court award them reasonable expenses and attorney's fees incurred in presenting this Motion and all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation due to Carl's and Bayless's lack of due diligence. Tex. Civ. Prac. & Rem. Code Ann. § 10.002(c)

5.4 V&F also requests an evidentiary hearing on its Motion for Sanctions. "A trial court must hold an evidentiary hearing on a party's request for sanctions to make the necessary factual determinations." *W. Houston Airport, Inc. v. Millennium Ins. Agency, Inc.*, 349 S.W.3d

