IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 5, 2006 Session

GORDON H. THOMPSON, ET AL. v. JOHN W. LOGAN

Appeal from the Chancery Court for Davidson County
No. 02-983-III Ellen Hobbs Lyle, Chancellor

No. M2005-02379-COA-R3-CV - Filed on August 23, 2007

Defendants appeal the trial court's award to plaintiff of damages under an agreement wherein defendants and plaintiff were sharing brokerage commissions generated by plaintiff's clients. The trial court found the term "retirement," which governed whether plaintiff was entitled to a five (5) year pay out, was ambiguous and resorted to consideration of extrinsic evidence. We reverse and hold that the term is not ambiguous and that plaintiff is not entitled to payment under the retirement provision of the agreement. We also find that the defendants are not precluded by Tenn. R. App. P. 3(f) from raising the post-judgment imposition of discovery sanctions against them. However, we decline to reverse the sanctions decision since the trial court did not abuse its discretion in awarding them.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in Part and Affirmed in Part

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR, JJ., joined.

William R. Willis, Jr., Tyree B. Harris, IV, Katherine A. Brown, Nashville, Tennessee, for the appellants, Gordon H. Thompson and Brent G. Thompson.

Nader Baydoun, Stephen C. Knight, Nashville, Tennessee, for the appellee, John W. Logan.

OPINION

This appeal involves interpretation of an agreement among three employees of what was J.C. Bradford & Co.[1] regarding how they would share certain commissions. Their employer, J.C. Bradford & Co. ("J.C. Bradford"), was not a party to the agreement, and the agreement did not govern their employment with J.C. Bradford.

---

[1] J.C. Bradford & Co. has been the object of various corporate reconfigurations and is now part of Financial Services, Inc. ("UBS"). We will, however, for ease of reference refer to it as J.C. Bradford.

I. FACTS

John Logan, a certified public accountant, joined J.C. Bradford in 1997 with the intent of referring his clients to Gordon Thompson and Brent Thompson, employees at J.C. Bradford, for investment advice. Gordon Thompson was a partner of J.C. Bradford and his son, Brent Thompson, was an employee. Gordon Thompson and Brent Thompson shall be referred to collectively as "the Thompsons."

Many of the facts surrounding this matter are not in dispute. In 1997, the Thompsons and Mr. Logan decided upon an arrangement that would benefit all concerned.[2] At that time, Mr. Logan was a CPA who gave tax and estate planning advice to his clients. The parties agreed that Mr. Logan would develop clients for the Thompsons, particularly Brent Thompson. Mr. Logan would provide estate planning services to these clients. The Thompsons would provide investment advice. When clients used the Thompsons as their investment brokers, commissions were generated through J.C. Bradford as a result of the investment activity. J.C. Bradford received a portion of the commissions. The remaining commissions generated by Mr. Logan's clients would be split among the parties. This presumably applied also to Mr. Logan's existing clients. In order to effectuate this arrangement, Mr. Logan obtained a Series 7 license as an investment broker and in 1997 became an employee of J.C. Bradford. Mr. Logan never intended to provide investment advice and got his broker's license because the Thompsons asked him to do so.[3] At all times pertinent to this lawsuit, before he became employed by J.C. Bradford, while he was at J.C. Bradford, and thereafter, Mr. Logan acted solely in his capacity as a CPA giving tax and estate planning advice.

From 1997 until early 1999, the parties operated under an informal agreement wherein they split the commissions generated by Mr. Logan's clients. The parties decided to formalize their arrangement, so the Thompsons and Mr. Logan entered into an agreement dated February 1, 1999, that governed how the three would share in commissions generated by Mr. Logan's clients ("Agreement"). The Agreement specifically provided that the relationship between the Thompsons was governed by a separate agreement. The Agreement governed only the parties' rights and obligations with regard to business generated by Mr. Logan. The Agreement envisioned that the parties would work as a "team," but their arrangement would not constitute a partnership, joint venture or any type of employment relationship. The Agreement established an arrangement for the allocation and payment of commissions generated by Mr. Logan's clients.

While the Agreement was in effect, Mr. Logan was to receive 70% of the payout (or commissions) on business that he generated. The Thompsons received the remaining 30% "for investing Logan's client's funds and on-going servicing of Logan's accounts." The Agreement gave Mr. Logan no interest in any business generated by the Thompsons. The Agreement described how

---

[2] There was some dispute about Gordon Thompson's level of participation prior to the February 1999 contract.

[3] While it is not crystal clear in the record, it appears the Thompsons asked Mr. Logan to get a broker's license so they could legally share commissions with him.

it would be determined whether Mr. Logan generated the business. In the event of a dispute as to who generated a client, the Agreement specified who would make that decision.

The dispute that is the basis for this lawsuit concerns the provisions of the Agreement governing termination of the Agreement and Mr. Logan's departure from J.C. Bradford. The provisions of the Agreement relevant to this appeal are as follows:

> 2. Except as otherwise provided herein, the term of this Agreement shall commence on the date this Agreement is executed, and shall continue until the earliest of: (1) the express written agreement signed by each of the parties; (2) the death, disability, bankruptcy, insolvency, or resignation or termination from J.C. Bradford of any party; (3) a requirement by J.C. Bradford that the Agreement be terminated; or (4) the occurrence of any other circumstances which, by law, would require that the Agreement be terminated.
>
> 3. On the termination of this Agreement, each party will take his own clients and there will be no further obligation of either party to the other hereunder. . . . If this Agreement is in effect at Logan's death, disability or retirement from J.C. Bradford, Logan (or his representatives) shall continue to receive the following percentage of his share of the payout on any account Logan generated which remains with B. Thompson:
>
> | Year Following Logan's Death, Disability or Retirement | Percentage |
> |---|---|
> | First | 70% |
> | Second | 60% |
> | Third | 50% |
> | Fourth | 40% |
> | Fifth | 30% |
> | Sixth and subsequent Years | 0% |
>
> Upon Logan's retirement, he agrees to use his best efforts to assist B. Thompson with maintaining his clients. In this regard, for the first two years, Logan is expected to be at meetings with clients and to attend regular reviews with clients, as needed.
>
> . . .
>
> This Agreement may not be amended except by instrument in writing signed by the parties hereto.

Mr. Logan agrees that he was duly compensated under the Agreement while he remained at J.C. Bradford. After the Agreement had been in effect for approximately one (1) year, the parties agree that Mr. Logan's employment with J.C. Bradford ended on January 28, 2000. The parties' disagreement begins at the point of Mr. Logan's departure from J.C. Bradford. Mr. Logan maintains that he "retired" and is thus entitled to the five (5) years of payouts described in the Agreement. The Thompsons, on the other hand, contend Mr. Logan either resigned or was terminated from J.C. Bradford such that the Agreement terminated according to its terms and Mr. Logan is not entitled to additional amounts under the Agreement.

II. TRIAL COURT PROCEEDINGS

This matter was initiated when the Thompsons filed an Application to Vacate Arbitration Award asking the trial court to set aside an arbitration award to Mr. Logan of approximately $73,000 and to then hold a hearing to determine liability under the Agreement. On September 20, 2002 the trial court vacated the arbitration award under Tenn. Code Ann. § 29-5-313 since the parties had not agreed to arbitration.

The trial court held a bench trial in May of 2005 on whether Mr. Logan was entitled to a payout under Section 3 of the Agreement after he left J.C. Bradford. The trial court made the following findings of fact about Mr. Logan's departure from J.C. Bradford. The findings are not disputed, except as noted by footnote:

> In the same year the Contract was entered into, the defendant, in September of 1999, told the plaintiffs that because of marital difficulties he was moving from Nashville Tennessee, to Washington State. He stated that he intended to leave J.C. Bradford in December of 1999. December passed, and the defendant decided to extend his departure date because his business with the plaintiffs was doing well. On January 28, 2000, the defendant moved to Washington State to take care of his spouse who had injured her leg and to reside. The defendant considered himself an at will employee of J.C. Bradford who would periodically return to Tennessee to perform his obligations to assist with clients under the retirement payout provision of paragraph 3 of the contract.[4]
>
> In February of 2000, the defendant learned that J.C. Bradford had processed documents reflecting his voluntary resignation from J.C. Bradford effective January 28, the date the defendant had moved to Washington. The defendant was not fired. His departure was processed by J.C. Bradford as a "voluntary termination."

[4] Mr. Logan testified that he intended to operate under the Agreement until May of 2000 or possibly longer since the parties were picking up new business. Therefore, the trial court's finding that while an employee of J.C. Bradford Mr. Logan performed "under the retirement payout provision of paragraph 3 of the contract" appears inconsistent. The Agreement does not contemplate a situation where Mr. Logan could be simultaneously retired and employed. Furthermore, Mr. Logan testified that he had no intent to retire in January or February of 2000.

According to the testimony of Luanne Waltemath, the J.C. Bradford human resources director from 1997-2000, who testified by deposition . . . J.C. Bradford has only four categories for a departing employee: voluntary termination, involuntary termination, death or disability. . . . "Voluntary termination" equates to resignation; "involuntary termination" equates to firing. *Id*. Significantly with respect to the term "retirement" in the Contract, J.C. Bradford has no retirement program for any employee . . . and no "retirement" category for processing and documenting the departure of an employee . . . . Moreover, J.C. Bradford made no distinction between retirement and voluntary withdrawal. . . .

Ms. Waltemath had no recollection about the departure of the defendant. Trial Exhibit 7 is the U-5 form J.C. Bradford is required to file with the SEC upon the departure of an employee. Although not prepared or kept in custody by Ms. Waltemath, the U-5 form, she testified, is a document she is familiar with. She testified that on trial Exhibit 7 J.C. Bradford had designated the defendant's departure as a voluntary resignation. . . .

After the defendant left Nashville, the plaintiffs made a payment to the defendant as of January 31, 2000 using the 70%/30% split provided for in the retirement payout schedule. The defendant continued to consult with and assist with clients.[5]

In February 2000, the parties learned that SEC rules prohibited the defendant from splitting fees with the plaintiffs unless he was affiliated with a brokerage firm. Trial Exhibit 8, prepared at the time of the events in issue, evidences this development. As further evidenced by Trial Exhibit 8, the court finds that the parties agreed that the defendant would become affiliated with a broker in Washington. The Court also finds that the parties agreed that during the interim of establishing that affiliation the defendant would be paid by the plaintiffs $12,500.00 per month. The Court credits the defendant's testimony that the parties agreed on $12,500.00 as a reasonable monthly measure of 70% of the commissions as required by the retirement payout schedule.[6] The defendant was paid $12,500.00 for February, March and April of 2000 . . . and $14,027.37 for May and June of 2000.

The defendant became affiliated with a Washington State brokerage firm, Fortis. The Court further credits the defendant's testimony that the sole reason he became associated with the Fortis brokerage firm was not to operate as a stock broker or resume the business he had performed at J.C. Bradford, but solely to comply with

[5] We note that this payment was for a period wherein Mr. Logan was still employed by J.C. Bradford and Mr. Logan's share was 70% while he was at J.C. Bradford.

[6] The parties entered into a handwritten agreement dated March 9, 2000 wherein they agreed Mr. Logan would be paid $12,500 per month for February, March and April as a "consultant fee."

the SEC requirement of affiliation to enable him to continue to split fees with the plaintiffs on the clients the defendant had generated.

The trial court found the term "retirement" as used in the Agreement to be ambiguous and resorted to extrinsic evidence to determine the parties' intent. The trial court concluded "that the greater weight and preponderance of the extrinsic evidence is that 'retirement' in this case does not mean to withdraw from active working life but, instead, to withdraw from a particular position in an occupation, and that the latter is what the defendant did such that he does qualify under the terms of the contract to receive the five-year payout provided for in the Contract."

Both parties appealed the trial court's decision. The Thompsons argue the trial court erred in its interpretation of the Agreement, the amount of damages awarded, and the sanctions awarded Mr. Logan resulting from the Thompsons' failure to cooperate in discovery. Mr. Logan argues on appeal that the trial court should have included in its award part of a retention bonus given the Thompsons since it was based in part on Mr. Logan's business.

III. Law Governing Contract Interpretation

The issue before the court is clearly one of contract interpretation. The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Allstate Insurance Company v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Staubach Retail Services - Southeast LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 526 (Tenn. 2005); *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc*., 521 S.W.2d 578, 580 (Tenn. 1975).

All provisions of the contract should be construed in harmony with each other to promote consistency and avoid repugnancy among the various contract provisions. *Allstate Ins. Co.*, 126 S.W.3d at 904; *Teter v. Republic Parking Systems, Inc.*, 181 S.W.3d 330, 342 (Tenn. 2005); *Guiliano*, 995 S.W.3d at 95. The interpretation of an agreement is not dependent on any single provision, but upon the entire body of the contract and the legal effect of it as a whole. *Aetna Cas. & Surety Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978). The entire contract must be considered in determining the meaning of any or all of its parts. *Id*.

In construing the contract, the trial court is to determine whether the language is ambiguous. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Planters Gin Co.*, 78 S.W.3d at 890. If the language in the contract is clear and unambiguous, then the "literal meaning controls the outcome of the dispute." *Allstate Ins. Co.*, 195 S.W.3d at 611; *Teter v. Republic Parking System, Inc.*, 181 S.W.3d at 342; *City of Cookeville, Tn. v. Cookeville Regional Med. Ctr.*, 126 S.W.3d 897, 903 (Tenn. 2004); *Planters Gin Co.*, 78 S.W.3d at 890. "A contract term is not ambiguous merely because the parties to the contract may interpret the term in different ways." *Staubach*, 160 S.W.3d at 526.

If, however, the language in a contract is susceptible to more than one reasonable interpretation then the parties' intent cannot be determined by a literal interpretation of the contract. *Allstate Ins. Co.*, 195 S.W.3d at 611, *citing Planters Gin Co.*, 78 S.W.3d at 889-90. Contract language "is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Allstate Ins. Co.*, 195 S.W.3d at 611, *quoting Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975).

If a contractual language is found to be ambiguous, then a court must apply established rules of construction to ascertain the parties' intent. *Allstate Ins. Co.*, 195 S.W.3d at 611-12 *citing Planters Gin Co.*, 78 S.W.3d at 890. "Only if ambiguity remains after the court applies the pertinent rules of construction does [the legal meaning of the contract] become a question of fact" appropriate for a jury. *Planters Gin Co.*, 78 S.W.3d at 890. In that case, a factfinder may use extrinsic or parol evidence, such as the parties' course of conduct and statements, to guide the court in construing the contract. *Allstate Ins. Co.*, 195 S.W.3d at 612; *Stephenson v. The Third Co.*, M2002-02082-COA-R3-CV, 2004 WL 383317, at *4 (Tenn. Ct. App. Feb. 27, 2004) (no Tenn. R. App. P. 11 application filed). "If the contract is unambiguous, then the court may not look beyond its four corners to ascertain the parties' intention." *Stephenson*, 2004 WL 383317, at *4, *citing Rogers v. First Tennessee Bank National Ass'n*, 738 S.W.2d 635, 637 (Tenn. Ct. App. 1987); *Bokor v. Holder*, 722 S.W.2d 676, 679 (Tenn. Ct. App. 1986).

We will first focus our attention on the Agreement and its appropriate interpretation. Thereafter, we will decide whether Mr. Logan is entitled to a payout under the Agreement in light of the applicable terms of the Agreement and the undisputed facts.

IV. INTERPRETATION OF THE AGREEMENT

The Thompsons maintain that Mr. Logan either resigned or was terminated from J.C. Bradford as those terms are used in the Agreement, thereby triggering termination of the Agreement under Paragraph 2. Mr. Logan claims his departure was a retirement that entitled him to a five (5) year payout under Paragraph 3 of the Agreement.

In order to resolve the dispute, the trial court found it necessary to define "retirement" as that term is used in the Agreement. The trial court concluded that the term in the Agreement "retirement from J.C. Bradford" is ambiguous within the four corners of the Agreement for several reasons. First, "retirement" is not defined in the Agreement and has varied dictionary meanings. Second, the

use of retirement in Section 3 but not Section 2 leads to competing interpretations. Having determined that the phrase was ambiguous, the trial court accepted extrinsic evidence to assist it in determining what the parties intended the phrase "retirement from J.C. Bradford" to mean. The court concluded that the parties' conduct "reflects that the parties intended the term 'retirement' in paragraph 3 . . . to mean withdraw from a particular position in an occupation."

The Thompsons argue that under this interpretation by the trial court, "retirement" means both total retirement from working as well as mere resignation from J.C. Bradford, making the termination or resignation provision of paragraph 2 meaningless. According to the Thompsons, "retirement" in the Agreement means total retirement that is career ending. Since the evidence showed Mr. Logan continued to work and earn money after he left J.C. Bradford, the Thompsons argue he did not retire from J.C. Bradford, but instead resigned, thus terminating the Agreement.

We agree with the Thompsons that the trial court's definition of retirement as to "withdraw from a particular position in an occupation" includes a resignation. Consequently, the trial court's interpretation makes "retirement" as used in Section 3 synonymous with "resignation" in Section 2. Since the parties used different terms in the Agreement, with different consequences attached to each, it follows that the parties meant the terms to have different meanings.

Under the clear language of Paragraph 2, the Agreement was to terminate upon Mr. Logan's "resignation or termination from J.C. Bradford." The evidence clearly shows that Mr. Logan resigned from J.C. Bradford or voluntarily terminated his employment there. Consequently, the Agreement ceased to be in effect when Mr. Logan quit his job at J.C. Bradford. Paragraph 3 sets out what is to happen in that situation. "Upon termination of the Agreement, each party will take his own clients and there will be no further obligation of either party to the other hereunder."

However, Mr. Logan argues, and the trial court apparently found, that this provision did not govern. This conclusion can only be based upon an interpretation of Mr. Logan's actions in leaving J.C. Bradford as retirement. If Mr. Logan simply resigned, the Agreement terminated. Under Paragraph 3, only if the Agreement was still in effect at the time of Mr. Logan's "death, disability or retirement from J.C. Bradford" did he become entitled to the described payout.

We conclude that the Agreement is not ambiguous. It establishes alternative consequences of specified actions by Mr. Logan. The only question is whether Mr. Logan resigned from J.C. Bradford, with the effect that the Agreement terminated according to Paragraph 2. We conclude he did and, consequently, the Agreement terminated, with the consequences described in the first sentence of Paragraph 3.

That conclusion is required by the evidence. Additionally, it is clear that "resignation from J.C. Bradford" and "retirement from J.C. Bradford," as those terms are used in the Agreement, are mutually exclusive. Reading the entire Agreement as a whole, we find the term "retirement" is not ambiguous and the evidence shows Mr. Logan did not retire.

The evidence shows there was no retirement system at J.C. Bradford, which the parties knew, so the phrase cannot mean the act of drawing retirement pay or a pension. Nonetheless, it must mean something other than or different from simply terminating employment with J.C. Bradford. The other occurrences that trigger the payout are death and disability. "Retirement" should be construed in a way that is consistent with those terms. Clearly, those situations involved Mr. Logan's inability to continue working, eliminating his ability to refer clients to the Thompsons for investment advice.

The payout provision of Section 3 in the Agreement is triggered only under circumstances where Mr. Logan is no longer working. Otherwise the Agreement clearly contemplates that Mr. Logan's clients will follow Mr. Logan. Any circumstance that does not end Mr. Logan's continued work life, *i.e.*, he becomes insolvent, goes bankrupt, or resigns (voluntarily) or is terminated (involuntarily) from J.C. Bradford, contemplates that he will take his clients elsewhere. It only makes sense that if Mr. Logan left under a situation wherein his clients were of no benefit to him because he was disabled or retired, leaving clients with Brent Thompson was logical. The payout provision in Section 3 thus compensated him for the clients left with the Thompsons. Reviewing the Agreement in its entirety, it is clear that the parties intended the term "retirement" to mean a situation where Mr. Logan elected to no longer work.

The trial court allowed extrinsic evidence to be introduced in order to interpret the parties intent when they used the phrase "retirement from J.C. Bradford." From this evidence, the trial court concluded from the parties' course of conduct that they intended "retirement" to mean "withdraw from a particular position in an occupation" which obviously includes resignation. While we reject the notion that the phrase was ambiguous necessitating resort to extrinsic evidence, we do not believe the extrinsic evidence about the parties' course of conduct is inconsistent with our interpretation of the contract.

When Mr. Logan was no longer affiliated with J.C. Bradford, the parties entered into a written consulting agreement covering a three month period. This is not inconsistent with the Thompsons' position that the Agreement terminated. One critical point is that when Mr. Logan left Nashville and J.C. Bradford, the Thompsons could not know what Mr. Logan would do, *i.e.*, whether he would continue in his career as a CPA. Mr. Logan himself testified that he did not intend to retire in January or February of 2000 and that he "thinks" he intended to retire in March. Not even Mr. Logan knew what he was going to do. The evidence clearly shows, however, that Mr. Logan opted to continue in his career.

The Thompsons point out that there is uncontradicted evidence in the record offered by Mr. Logan showing that he continued to work and earn money after he left J.C. Bradford. While this evidence does not contradict the trial court's findings of facts, it is relevant to the inquiry. Also, since Mr. Logan himself testified to his employment after he left J.C. Bradford, it is undisputed.

Mr. Logan testified in his deposition that after leaving J.C. Bradford, he continued his work as a CPA giving tax and estate advice.[7] From December of 2000 through May of 2001, Mr. Logan was affiliated with the CPA firm Douglas Coleman & Associates to run its tax department. When his deposition was taken in 2004, Mr. Logan was employed by Logan Tax & Consulting as a salaried employee working usually 35 hours a week. Apparently, he started working for Logan Tax and Consulting in 2001. When business was slow at Logan Tax and Consulting, Mr. Logan would be laid off. On those occasions, he applied for unemployment insurance.

It is important to note that Mr. Logan's work had always been tax and estate planning. This is the only profession he ever practiced. It is through this profession that Mr. Logan generated clients. His brokerage license and affiliation with J.C. Bradford and Fortis were purely for the purpose of receiving his percentage of commissions from the Thompsons generated by his clients.

The uncontradicted evidence leads to the conclusion that Mr. Logan did not "retire from J.C. Bradford." He voluntarily terminated his employment, thus triggering paragraph 2 of the Agreement. When Mr. Logan left J.C. Bradford, he continued to work in his regular, chosen career. Mr. Logan was still in his early fifties. Since Mr. Logan continued to work in his chosen career, he did not "retire" from J.C. Bradford and is thus not entitled to a payout under Section 3 of the Agreement.

V. DISCOVERY SANCTIONS

After holding a hearing on November 4, 2005, in an order entered on December 12, 2005, the trial court imposed sanctions totaling approximately $6,000 on the Thompsons and their counsel for failure to cooperate during discovery. The Thompsons' brief raises this order on appeal.

The discovery dispute that is at the core of the post-judgment sanctions order apparently began in July of 2004. On August 2, 2004, counsel for Mr. Logan filed a motion to revise, alter, or amend an order denying his previous motion to compel.[8] The parties made various filings with regard to the discovery issue, and Mr. Logan asked that the court order the Thompsons to provide complete answers to interrogatories and produce documents requested earlier. Mr. Logan also asked for attorneys' fees and costs he incurred "pursuing the motion to compel and this motion." The record does not include an order resolving this motion.

The case was tried in May of 2005, and the trial court entered its judgment on June 20, 2005. Thereafter, Mr. Logan filed a motion for discretionary costs pursuant to Tenn. R. Civ. P. 54.04(2) and a motion for prejudgment interest. The Thompsons filed a motion to alter or amend the judgment. By order entered August 29, the trial court denied the motion to alter or amend and granted Mr. Logan's motions, awarding him $1,979.55 in discretionary costs and prejudgment

[7] These portions of Mr. Logan's deposition were introduced at the hearing.

[8] Neither the motion to compel nor the order ruling on that motion appears in the record before us, but the parties agree to the substance of the motion and order.

interest from the date of the filing of the lawsuit. The Thompsons filed a Notice of Appeal on September 23.

On September 30, the trial court entered an order setting Mr. Logan's pretrial motion for attorneys fees related to the motion to compel.[9]

The court's order setting the hearing triggered a flurry of filings. The Thompsons objected to the trial court's *sua sponte* order on the basis the trial court no longer had jurisdiction since a notice of appeal had already been filed. Mr. Logan responded by asserting that the trial court still had jurisdiction over the motions for sanctions because either (1) the sanctions issue was collateral to the case on appeal or (2) if it was not collateral, then the trial court's order was not a final order and, consequently, the Thompsons' notice of appeal was premature. The Thompsons disputed the claim that sanctions were considered collateral or ancillary so that the trial court retained jurisdiction. The trial court decided that:

> The Court has jurisdiction to consider the pending sanctions motions. Because the Thompsons failed to object to the Court's decision to consider the sanctions issue post-judgment, the Thompsons waived their right to object to a post-judgment hearing and they are estopped from objecting to such a hearing. Further, the sanctions issue is collateral to the judgment from which the Thompsons have appealed.

The basis for the waiver conclusion was explained in the trial court's ruling from the bench, wherein the court found that:

> in two orders, one dated August 31, 2004, and the other dated January 7, 2005, the Court stated that the collateral matter of sanctions would be considered by the Court post judgment. Significantly, no objection was raised by counsel for the applicants to the Court deciding the issue of sanctions post judgment or putting that issue aside and not making it a part of the central part of the case.

The record before us does not include either of the orders referenced by the trial court. Additionally, while Mr. Logan challenges the Thompsons' ability to raise the sanctions on appeal, he does not rest his argument on the waiver finding by the court.[10]

---

[9] The order also referenced a request by Mr. Logan for sanctions in the form of attorneys fees, also made pretrial, related to the continuance of the trial. That issue was considered at the hearing, and the trial court denied sanctions. That ruling is not raised in this appeal.

[10] It is well settled that lack of subject matter jurisdiction may not be waived by the parties. *McCarver v. Insurance Co. of State of Penn.*, 208 S.W.3d 380, 383 (Tenn. 2006).

In any event, the hearing was held on November 4, 2005, and in an order dated December 12, 2005, the trial court imposed sanctions totaling $6,888 on the Thompsons and their counsel for failure to cooperate during discovery.

On appeal, the Thompsons argue that the trial court lacked jurisdiction to award sanctions after the notice of appeal was filed. On the other side, Mr. Logan asserts that the trial court had jurisdiction to consider the sanctions motions because those motions raised "collateral" matters. Alternatively, he argues that the trial court's judgment was not a final order and, consequently, the trial court retained jurisdiction and the notice of appeal was merely premature. However, he asserts that because the Thompsons did not notice an appeal from the sanctions order, this court does not have jurisdiction to review that order.

The Thompsons argue first that the trial court lacked jurisdiction to rule on the sanctions request because a notice of appeal had been filed before the court even raised the issue. Relying on cases such as *Spence v. Allstate, Ins. Co.*, 883 S.W.3d 586 (Tenn. 1994); *First American Trust Co. v. Franklin-Murray Development Co., L.P.*, 59 S.W.3d 135 (Tenn. Ct. App. 2001); and *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677 (Tenn. Ct. App. 1999), they assert the well-established principle that a case cannot be pending in more than one court at a time, and once a notice of appeal is filed, jurisdiction lies in the appellate court. Mr. Logan counters that there exist exceptions to this general rule, primarily where the post-judgment rulings involve "collateral" matters. He cites authority regarding federal court interpretation of federal rules for the proposition that attorney's fees and sanctions are collateral matters that do not affect the finality or appealability of a judgment on the merits and, accordingly, remain within the jurisdiction of the trial court after appeal of the decision on the merits.

Mr. Logan asserts that Tennessee law is the same as that applied in the manner he described in federal courts. While there are Tennessee decisions that hold that a trial court retains jurisdiction over some ancillary matters, such as enforcement and collection of a judgment, *First American Trust Co.*, 59 S.W.3d at 141 n.8, we have found no opinion holding that pre-judgment motions for sanctions (or even for attorney's fees) are "ancillary" or "collateral" as those terms are used by Mr. Logan. Trial court enforcement of a judgment, including contempt orders for failure to comply with a judgment, based as they are on post-judgment conduct and motions, differ from the case before us, which involves motions made before judgment based on prejudgment conduct, which were unresolved by the purported final judgment and remained unresolved at the time the appeal was perfected.

Our courts have long adhered to the principles regarding jurisdiction resting in only one court at a time because they "keep cases together during the appellate process and prevent undesirable consequences of permitting a case to be pending in more than one court at the same time." *First American Trust Co.*, 59 S.W.3d at 141 (citing *Spence*, 883 S.W.2d at 596). We see no reason for, or benefit from, approval of a practice that would require or allow two separate successive appeals in the same case regarding matters that were raised prior to judgment. The imposition of sanctions is reviewable by an appellate court, and requiring parties to file a second notice of appeal in order

to obtain review of a sanctions order just because it was entered after the judgment would result in additional costs to the parties, additional work for the trial court clerk, and a loss of judicial efficiency. In short, we find no authority for the proposition that issues pending at the time of an order purporting to be a final judgment can be later resolved as "collateral" matters without affecting the finality of the judgment or the jurisdiction of the trial court. Further, we find nothing to recommend adoption of such a practice.

In the case before us, apparently, the parties and the trial court knew the sanctions motions had not been resolved in the purported final judgment. The better procedure would have been for Mr. Logan to request a ruling on those motions immediately after the ruling on the merits at the same time he filed his motions for prejudgment interest and discretionary costs.[11] That procedure would have put the Thompsons, as well as a less observant trial court, on notice that the issue was still pending. Had such a motion appeared in the appellate record, or had the trial court mentioned the unresolved sanctions motions in its final order, this court would have been alerted to the problem. Based on prior actions by this court, we can predict what we would have done had the issue been raised earlier. In such circumstances, this court will generally deem the notice of appeal premature and order the parties to obtain a final judgment resolving all outstanding claims, rights, or liabilities. Alternatively, we may dismiss the appeal.

Neither the trial court's order dated June 20, 2005, on the merits of the lawsuit nor the August 29, 2005, order denying the motion to alter or amend constituted a final appealable order as defined in the rules. Rule 3(a) of the Tennessee Rules of Appellate Procedure provides as follows:

> (a) Availability of Appeal as of Right in Civil Actions. In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure **if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.** (emphasis added).

When the trial court entered its orders on June 20 and August 29, all the "claims or the rights and liabilities" among the parties had not yet been adjudicated. Namely, Mr. Logan's pre-trial claim

---

[11] The Thompsons argue that by failing to make a timely request, Mr. Logan waived the right to have the sanctions issue considered. While this argument has some appeal, the trial court proceeded to hear the issue, stated that it had in earlier orders indicated that it would reserve ruling on the sanctions motions until after the merits were adjudicated, and noted that the Thompsons failed to object to that procedure. Those orders are not in the record, and we will presume they were specific enough to warrant a waiver determination. In view of the procedural facts of this case, we decline to hold that Mr. Logan's failure to renew his motions precluded the trial court's *sua sponte* decision to consider the motions more than thirty days after entry of the order ruling on the post-trial motions.

for sanctions and the Thompsons' potential liability therefor remained unadjudicated.[12] Therefore, under Rule 3(a), the August 29, 2005 order, which certainly appeared to be and was characterized as the final judgment, was in fact not the final judgment and not yet appealable.[13]

Since the "final order" was not actually an appealable final judgment until resolution of all claims and liabilities among the parties, the trial court had jurisdiction to resolve the unadjudicated claim for sanctions. We now turn to the efficacy of the Thompsons' premature Notice of Appeal in regard to the sanctions issue.

There is no question that the Thompsons' Notice of Appeal, while premature, is nevertheless effective as to the trial court's orders of June 20 (on the merits) and August 29 (denying the motion to alter or amend), since their Notice of Appeal specified those orders by date and content. Rule 3(f) of the Tennessee Rules of Appellate Procedure requires that a notice of appeal, among other things, designate the judgment from which relief was sought. The Notice of Appeal filed by the Thompsons, however, could not have specified the order awarding sanctions since the trial court had not yet made that decision when the Notice was filed. The question is whether the Thompsons were required to amend their Notice of Appeal to specifically include the order on sanctions, or should the premature Notice be interpreted to include that order. We believe the answer lies in the interpretation of relevant Rules of Appellate Procedure in conjunction with one another.

We begin with Rule 3(f) of the Tennessee Rules of Appellate Procedure, which states:

> The notice of appeal shall specify the party or parties taking the appeal, . . . shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

The Advisory Committee Comments to Rule 3(f) suggest that compliance with that section should be determined under a broad interpretation that focuses on its intent, stating:

> This subdivision specifies the content of the notice of appeal. **The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal.** As long as this purpose is met, it is irrelevant that the paper filed is deficient in some

---

[12] This situation is different from that in *Barth v. Hutcheson*, 178 S.W.3d 731 (Tenn. Ct. App. 2005). In that case, the final judgment granting summary judgment resolved all outstanding claims. After that judgment was entered, apparently in response to a motion for contempt, the parties entered an agreed order awarding the counterplaintiff pre-judgment interest. No claim for prejudgment interest had been made in the original pleadings, and no motion for such was pending at the time of the grant of summary judgment. The original plaintiff attempted to appeal the award of summary judgment to the counterplaintiff, but did not file a notice of appeal within thirty days of that order. Instead, the notice of appeal was filed within thirty days of the entry of the agreed order. Consequently, this court determined that the plaintiff was precluded from appealing the award of summary judgment. 178 S.W.3d at 733.

[13] The trial court did not certify the order as final for purposes of immediate appeal under Tenn. R. Civ. P. 54.02.

> other respect. Similarly, the **notice of appeal plays no part in defining the scope of appellate review**. Scope of review is treated in rule 13. This subdivision read in conjunction with rule 13(a) permits any question of law to be brought up for review as long as any party formally declares an intention to appeal in timely fashion. (emphasis added).

As this commentary indicates, Rule 13 often comes into play in the courts' consideration of the efficacy of notices of appeal. Subsection (a) of that rule governs the scope of review on appeal and provides that "any question of law may be brought up for review and relief by any party." Tenn. R. App. P. 13(a). The Advisory Committee Comment to Rule 13(a) states, in part:

> This subdivision rejects use of the notice of appeal as a review-limiting device. In federal practice the notice of appeal has limited review in two principal ways. Some courts have limited the questions an appellant may urge on review to those affecting the portion of the judgment specified in the notice of appeal. However, since the principal utility of the notice of appeal is simply to indicate a party's intention to take an appeal, this limitation seems undesirable. The federal courts have also limited the issues an appellee may raise on appeal in the absence of the appellee's own notice of appeal. Here again, since neither the issues presented for review nor the arguments in support of those issues are set forth in the notice of appeal, there seems to be no good reason for so limiting the questions an appellee may urge on review. The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole.

This court has considered questions regarding the sufficiency of a notice of appeal with regard to specific issues a number of times. Our application of Rule 3(f)'s requirement of designation of the order appealed from has generally depended on the circumstances involved. *See Consolidated Waste Systems, LLC v. Metropolitan Government*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *42-45 (Tenn. Ct. App. June 30, 2005) (no Tenn. R. App. P. 11 application filed) (discussing appellate opinions on the breadth of notices of appeal). Most of the cases use language indicating either a strict application of Rule 3(f) or else an approach declining to use that rule as an issue-limiting device and concentrating instead on the purpose of the notice of appeal.

In a number of cases, this court has stated that a failure to follow the designation requirement of Rule 3(f) is not necessarily fatal and the court is not precluded from considering issues in orders or judgments not specifically designated. *See Dunlap v. Dunlap*, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1999); *Oakley v. Oakley*, No. W2002-00095-COA-R3-CV, 2003 WL 103215, at * 6 (Tenn. Ct. App. Jan. 8, 2003) (no Tenn. R. App. P. 11 application filed); *Glidden v. Glidden*, 1987 WL 9452, at *1-2 (Tenn. Ct. App. Apr. 16, 1987) (no Tenn. R. App. P. 11 application filed). Many of those cases also relied on Tenn. R. App. P. 13(a), and the relationship between that rule and Rule 3, finding that the rules allow the appellate court to consider the case as a whole, including any question involved in the case, once a party has taken an appeal. *Oakley*, 2003 WL 103215, at *6; *Glidden*,

1987 WL 9452, at *2. In *Dunlap*, the court also stressed that the appellant's oversight in designating a judgment in the notice of appeal neither prejudiced the appellee nor hampered the appellate court in its review. *Dunlap*, 996 S.W.2d at 811; *see also Anderson v. Standard Register Co.*, No. 01A01-9102-CV-00035, 1992 WL 63421, at *2-3 (Tenn. Ct. App. Apr. 1, 1992), *affirmed* 857 S.W.2d 555 (Tenn. 1993) (holding that since the notice of appeal met the purpose of providing notice, the appellee was not prejudiced, and the appeal was not hampered, Tenn. R. App. P. 3(f) did not preclude consideration of issues not raised by the order designated).

This view of Rule 3 has been applied in several situations, especially where no particular order was designated and where the appeal involved all the same parties from trial. For example, in *Dunlap*, a divorce case, the notice of appeal did not specify any particular judgment,[14] but this court determined that the failure to designate an order or judgment did not preclude the court from reviewing the issues raised in the appellant's brief. *Dunlap*, 996 S.W.2d at 810. Essentially, the issues considered by the court were resolved in the final judgment, rulings prior to the final judgment, and an order altering or amending the judgment. All those orders or judgments had been entered prior to the notice of appeal.

The same result was reached in *Strong v. Elkins*, 1987 WL 18069, at *2 (Tenn. Ct. App. Sept. 30, 1987) (no Tenn. R. App. P. 11 application filed), wherein the Court of Criminal Appeals held that although the notice of appeal did not designate the judgment appealed, there could be no misunderstanding by appellee that the appellant intended to appeal from the *sua sponte* dismissal of his complaint. The court relied on Tenn. R. App. P 1 and federal authority to hold that an error in designating the judgment appealed from will not prevent review of the entire appeal if the notice manifests an intent to appeal from the judgment sought to be vacated.

In *Oakley*, the appellants' notice of appeal merely stated they were appealing the "dismissal of this case." However, the time to file an appeal from the dismissal order had long passed, and the only order from which a timely appeal was available was a ruling on a Tenn. R. Civ. P. 59 motion. This court determined it could consider the issue raised by appellants that related only to that order and that it did not have jurisdiction to review the prior orders. 2003 WL 103215, at * 5. The *Oakley* case involved a series of motions brought under Tenn. R. Civ. P. 59 and 60, all designed to have the lower tribunal reconsider or change its ruling dismissing the case. Consequently, much of the discussion involves the validity of those motions. While the court held that the failure to designate the specific order appealed from did not prevent the court from considering the issues raised in the brief, the court determined that it was nevertheless limited to consideration of the only order from which a timely notice of appeal was filed. Thus, although the notice of appeal did not designate the last order, this court nevertheless considered that order.

---

[14] Actually, the appellant filed two notices of appeal. The first, which did not designate a particular order or judgment, was dismissed by the trial court. The second, filed after that dismissal, specifically designated the order dismissing the first appeal. This court ruled that the trial court was without authority to dismiss an appeal and, consequently, considered the first notice of appeal as the effective one. Of course, this court actually also considered the issues raised by the second notice of appeal because we ruled on the authority of the trial court to dismiss an appeal.

In *Glidden*, the appellant designated the order denying a motion to alter or amend, but failed to designate the final decree of divorce. This court held that the notice of appeal sufficed to allow the appellant to raise and this court to consider any question of law or fact in the case as a whole, and our review was not limited to the order denying the motion to alter or amend. 1987 WL 9452, at *1-2.

In *J.W.G. v. T.L.H.G.*, No. M2002-02656-COA-R3-JV, 2003 WL 22794537 (Tenn. Ct. App. Nov. 25, 2003) (perm. app. denied May 10, 2004), the juvenile court entered an order awarding custody of the child to the father. Two days later, the court entered an order directing the sheriff to accompany the father to pick the child up from the mother. The mother filed a timely notice of appeal that designated the last order entered, *i.e.*, the one ordering the sheriff to accompany the father. In her brief, she attempted to raise issues relating to the subject of the first order, the award of custody. The father contended that by referring specifically to the later order, the mother had deprived herself of the right to raise issues pertaining to the earlier order. Relying on *Dunlap* and the advisory committee comments to Tenn. R. App. P. 3(f), this court held:

> The notice of appeal formally declared Mother's intention to appeal. That notice was sufficient to vest this court with jurisdiction to consider, at a minimum, any and all issues raised by Mother pertaining to all decrees formalized by court orders entered within 30 days of the filing of the notice of appeal. To hold otherwise is to triumph form over substance.

2003 WL 22794537, at *3.

The same rationale was applied in *State v. Godsey*, 165 S.W.3d 667 (Tenn. Ct. App. 2004), wherein the Court of Criminal Appeals agreed with the *Dunlap* opinion that Rule 3(f), read in conjunction with Rule 13(a), permits any question to be brought up for review "as long as any party formally declares an intention to appeal in a timely fashion." 165 S.W.3d at 670 (quoting *Dunlap*, 996 S.W.2d at 811). Accordingly, the court held that appellant's designation (by date) of a specific order did not preclude consideration of another judgment entered in another case that was referenced in the caption of the notice of appeal.

However, in some cases, we have strictly applied the designation requirement of Rule 3(f), based on the principle that the rule limits the scope of appellate review to the judgment or order designated by the order. In several of those cases, the notice of appeal designated a specific judgment, but the designation was erroneous or the order designated did not include issues raised by the appellant in his or her brief. *See*, *e.g.*, *Cox v. Shell*, 196 S.W.3d 747, 760-61 (Tenn. Ct. App. 2005) (holding that a notice of appeal that specified the July 7, 2004 order "in which the Court denied Shell's and Celanese's Joint Motion for Reconsideration of the Court's prior order dismissing

the contempt remedies sought by Shell and Celanese" excluded another order entered the same day and dealing with other matters).[15]

Another factual situation was presented in *Hall v. Hall*, 772 S.W.2d 432 (Tenn. Ct. App. 1989). In that case the relevant notice of appeal (as well as an earlier one that was dismissed as premature) designated a judgment of May 13, 1987, along with the order denying a motion to alter or amend or for new trial and stated the appellant was appealing "from the alimony, support and property divisions" in the May 13 judgment.

However, the appellant attempted to challenge a contempt finding resulting from a hearing held October 7, 1987, well after the judgment and ruling on post trial motions. This court determined that the October contempt order was not contemplated in either notice of appeal. Because of the designation required by Tenn. R. App. P. 3(f), "[i]nasmuch as the October, 1987, order related to a supplemental issue raised after entry of final judgment (albeit before finalized by the belated ruling on the 'Motion to Amend or New Trial'), the clear and specific wording of the notices of appeal limits the issues on this appeal to the judgment designated in the notices." 772 S.W.2d at 436. For purposes of the case before us, it is important to note that the contempt order in *Hall* was not in response to motions filed before the judgment was entered. Further, the contempt order was found not to be a final appealable order. 772 S.W.2d at 437.

Two other cases require some discussion. They are distinguishable from the case before us because they involved separate orders, each immediately appealable, dismissing different defendants. In *Grigsby v. Univ. of Tenn. Medical Ctr.*, No. E2005-010199-COA-R3-CV, 2006 WL 408053 (Tenn. Ct. App. Feb. 22, 2006), the appellant designated a final judgment by date. The designated order dismissed one of several defendants, and it was certified as a final appealable judgment pursuant to Tenn. R. Civ. P. 54.02. Two months later, the trial court entered a judgment granting summary judgment to the remaining defendants. The appellant did not file a second or amended notice of appeal. This court held that the appellant could not raise issues related to the second judgment. 2006 WL 408053, at *2-3. We specifically noted that the appellant could not have included the later judgment in his notice since it had not been entered at the time the notice of appeal was filed. *Id.*

One important distinction between the *Grigsby* case and the one before us is that the judgment designated on the notice of appeal was a final appealable order, per Rule 54.02 certification, dismissing one party entirely. The appellant was required to file a notice of appeal within thirty days of that judgment. The second judgment, summary judgment for the remaining defendants, was a separate judgment, and the time for appealing that judgment started to run at its entry. The defendants who were dismissed in the second judgment received no notice that that dismissal was being appealed.

[15] The court adopted, without citing, the reasoning of *Consolidated Waste Systems, LLC*, 2005 WL 1541860, at *44, but reached an opposite conclusion.

Similarly, in *Goad v. Pasipanodya*, No. 01A01-9509-CV-00426, 1997 WL 749462, at *2 (Tenn. Ct. App. Dec. 5, 1997) (no Tenn. R. App. P. 11 application filed), the appellants' claims against two different defendants were dismissed by the trial court in two separate orders, one dated March 17, certifying the dismissal final under Tenn. R. Civ. P. 54.02, and the second dated June 19, 1995, also certifying the dismissal as final. The plaintiff filed a notice of appeal on July 24 stating he was appealing the trial court's June 19 order. This court held that the appellant had not perfected an appeal of the earlier order because his notice of appeal designated only the second order. "Thus, Tenn. R. App. P. 3(f) limits his appeal to the June 19, 1995 order." *Id*., at *2. Significantly, however, this court also dismissed the appeal as untimely as to both orders.

The results in both *Grigsby* and *Goad* are more about the timeliness of the notice of appeal than its content.

Finally, in *Howse v. Campbell*, No. M1999-01580-COA-R3-CV, 2001 WL 459106 (Tenn. Ct. App. May 2, 2001) (no Tenn. R. App. P. 11 application filed), this court dealt with a premature notice of appeal designating a March 11, 1999, order that dismissed one of multiple defendants. That order did not become a final, appealable order until all remaining claims among all parties were adjudicated, at which time the premature notice of appeal, which had not been dismissed, became timely. By order dated March 22, 2000, the trial court dismissed the claims against all the remaining defendants. The appellant did not file another notice of appeal. The question before this court was whether the appellant could pursue appeal of the dismissal of the defendants in the March 22, 2000 order. We determined he could not, holding that because his only notice of appeal did not state he desired to appeal from the March 22 order (and could not have, because the notice was filed months before that judgment), the notice of appeal applied only to the order it designated, and this court would only consider those issues related to the dismissal of the first defendant. *Id*. at *3. In *Howse*, this court discussed the notice purposes underlying Tenn. R. App. P. 3(f) and determined that the appellant's failure to file a second notice of appeal undermined the notice function that notices of appeal are intended to serve, leaving the other parties to guess whether he intended to appeal either, both, or neither order of dismissal. *Id*.

From these varying applications of the rules, a few general conclusions may be drawn. First, of course, an appeal from a final judgment brings up all pre-judgment orders or decisions, and any question of law or fact may be considered. Tenn. R. App. P. 13(a); *Anderson v. Standard Register Co.*, 1992 WL 63421, at *2-3 (holding that the designation in the notice of appeal of the final judgment dismissing the complaint included the prejudgment denial of a motion to amend the complaint). Second, where there is both a final judgment as well as an order on a motion to alter or amend (or other post-judgment motion recognized in Tenn. R. Civ. P. 59), issues raised in either or both orders may be considered regardless of which may be designated in a timely notice of appeal.

On the other hand, the thirty day time limit for filing a notice of appeal is jurisdictional. Thus, where a judgment that does not resolve all the claims and liabilities of all the parties but is certified as final and immediately appealable, it must be timely appealed. A later notice of appeal

filed after resolution of remaining claims cannot provide the appellate court with jurisdiction even if that notice designates the prior judgment.

In other situations, we think the guiding principle must be whether the notice of appeal provided the notice which is its purpose. In *Consolidated Waste*, 2005 WL 1541860, at *44-45, we agreed with Howse's emphasis on whether the particular notice of appeal fulfilled the notice purpose of Rule 3, but reached a different result. That is because the distinguishing feature of *Howse* was that different parties were dismissed at different times and, consequently, some never received any notice the their dismissal was being appealed. In *Consolidated Waste*, however, the appellant designated the judgment on the merits, but did not designate an order on attorneys' fees filed two months later. The notice of appeal was filed the day after the attorney's fee order was entered.

While we recognized that we could have taken the appellant at its word since the appellant had designated only one order when it knew about the other order. However, we decided that it was unreasonable to assume that the appellant would not appeal the award of attorneys' fees against it, since the fee award was based on the finding that the appellee was the prevailing party and the appellant was challenging the merits of that decision. *Consolidated Waste*, 2005 WL 1541860, at *45. Thus, we concluded the appellee could reasonably have anticipated appeal of the fee decision along with all the other issues in the case. We held:

> We are aware of the varying interpretations of the requirements of Tenn. R. App. P. 3(f). Further, the clear preference is for liberality in interpreting a notice of appeal and the scope of appeal. While it is true that the Metropolitan Government's notice of appeal did not inform Consolidated that it intended to appeal the attorney's fee award, Consolidated cannot point to any prejudice it suffered from the failure of the Metropolitan Government to designate the attorney's fee judgment. In these circumstances, we think the better view is that the Metropolitan Government can raise any issue resulting from the trial court's final judgment.

Id.

Like *Consolidated Waste*, the case before us differs from the situation in *Howse*, which also emphasized the notice function, in that Mr. Logan was well aware that the Thompsons intended to appeal the trial court's decision. He received a copy of the notice of appeal; the lawsuit involved only the Thompsons and Mr. Logan. Mr. Logan was also fully aware that the Thompsons disagreed with the trial court's decision on the sanctions issue as well as with the trial court's jurisdiction to hear the sanctions motions after appeal. Mr. Logan was not taken by surprise when the Thompsons raised the sanctions order in their brief. Neither was he prejudiced, nor was the appeal hampered by the designation in the notice of appeal and the subsequent challenge to the sanctions order.

In this case, the issue of the breadth of the notice of appeal *vis-à-vis* the designation of the judgment appealed from arises in a unique procedural context. There was no indication in the "final" judgment that the sanctions motions remained unresolved. There was no motion by a party to have the motions adjudicated. Instead, the trial court *sua sponte* set the motions for hearing after the

Thompsons had filed their notice of appeal designating what appeared to be the "final" judgment. Hopefully, this type of situation, leading as it has to procedural complexity and unnecessary expense, does not arise on a regular basis. The Thompsons could have amended their Notice of Appeal to clarify their intent, but did not. Nonetheless, as we have determined earlier, the Thompsons' Notice of Appeal was premature since no final judgment, as defined in the Rules of Appellate Procedure, had been entered.

With regard to such notices, Rule 4(d) of the Rules of Appellate Procedure provides as follows:

> A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.

While the direct application of this rule to the situation before us is not immediately obvious, we must nonetheless attempt to apply it. Because the judgment in this case did not become a final judgment until the sanctions claims were adjudicated, according to the rule, the Notice of Appeal became effective as of the date of entry of the sanctions order. Consequently, under the language of Rule 4(d), the sanctions order, combined with the judgment on the merits, became "the judgment from which the appeal is taken."

We conclude that the Thompsons' Notice of Appeal was sufficient to bring the whole case up for review and this court has jurisdiction to consider their challenge to the imposition of sanctions against the Thompsons.

Having determined that we may consider the Thompsons' challenge to the trial court's award of sanctions, we can now address the merits of that appeal, *i.e.*, whether the trial court abused its discretion in awarding sanctions/attorney's fees to Mr. Logan. The December 12, 2005 order is brief and simply grants Mr. Logan's request for sanctions against the Thompsons and their counsel in the amount of $6,888.

As this court explained in *Alexander v. Jackson Radiology Associates*, 156 S.W.3d 11 (Tenn. Ct. App. 2004):

> Appellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard. *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988). An abuse of discretion occurs where the trial court has applied an incorrect legal standard or where its decision is illogical or unreasoned and causes an injustice to the complaining party. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004). We review a trial court's determinations on issues of law *de novo*, with no presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).
>
> . . .

> Thus, although the Rules do not explicitly provide for sanctions for discovery abuse absent a court order, trial courts possess the inherent authority to take actions to prevent abuse of the discovery process. *Mercer*, 134 S.W.3d 121, 133. Further, wide discretion is afforded to the trial courts to determine the appropriate sanction. *Id*. Although "reasonable judicial minds can differ concerning [its] soundness," the trial court's determination of the appropriate sanction will be set aside only where the court "has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *Id*. (quoting *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)).

Alexander, 156 S.W.3d at 14-15.

We have carefully reviewed the record regarding Mr. Logan's request. This issue is primarily centered on documents Mr. Logan requested from the Thompsons that were in the possession of UBS (previously J.C. Bradford). The Thompsons did not initially produce the documents requested and took the position the documents were in the possession of UBS and they were not authorized to release them. However, the trial court was presented with an affidavit from the counsel of UBS stating that in early July of 2005, he had left voice mails for Mr. Thompson and his attorney advising them that they were authorized to allow Mr. Logan's counsel to review the UBS documents subject to the protective order. Attached to his affidavit was a letter to the Thompsons' counsel with a copy to Mr. Logan's lawyer to the same effect.

Based on the standard we are bound to apply, we do not find that the trial court abused its discretion in the award of sanctions against the Thompsons and their attorney. The sanction award is, therefore, affirmed.

VI. CONCLUSION

The judgment of the trial court awarding Mr. Logan damages is reversed. The imposition of discovery sanctions against the Thompsons by award of attorney's fees to Mr. Logan is affirmed. Costs of this appeal are taxed against the appellee, John W. Logan, for which execution may issue if necessary.

_____

PATRICIA J. COTTRELL, JUDGE