Affirmed; Opinion Filed May 15, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00968-CV

BRIAN C. MACFARLAND, Appellant
V.
LE-VEL BRANDS LLC, Appellee

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-00376-2016

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Lang

Brian C. MacFarland appeals the trial court's award of $325.00 in attorney's fees to him pursuant to section 27.009(a) of the Texas Citizens Participation Act ("TCPA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015). Specifically, in four issues on appeal, MacFarland contends he is entitled to an award of $57,135.00 in attorney's fees under the TCPA, rather than $325.00.[1]

[1] MacFarland's four issues are stated in his appellate brief as follows:

> 1. Whether a successful movant under the Texas Citizens Participation Act is limited to recovering attorney's fees that were actually incurred in defense of the legal action?
>
> 2. Whether the trial court abused its discretion by excluding attorney's fees incurred under a contingency fee agreement from MacFarland's attorney's fee award under the Texas Citizens Participation Act?
>
> 3. Whether the trial court abused its discretion by entering an order awarding MacFarland less than reasonable attorney fees under the Texas Citizens Participation Act?
>
> 4. Whether MacFarland is entitled to an award of $57,135.00 in reasonable attorney's fees under the Texas Citizens Participation Act?

We decide against MacFarland on his first and second issues. We need not reach his remaining issues. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

Appellee Le-Vel Brands LLC ("Le-Vel") filed this lawsuit against MacFarland in January 2016, asserting claims for defamation and business disparagement based on statements published on a website owned and operated by MacFarland. MacFarland filed a motion to dismiss pursuant to the TCPA, which motion was denied by the trial court. On interlocutory appeal, this Court reversed the trial court's denial of MacFarland's motion to dismiss, rendered judgment dismissing Le-Vel's claims, and remanded this case to the trial court for determination of the amount of attorney's fees, costs, expenses, and sanctions to be awarded to MacFarland pursuant to section 27.009(a). *See MacFarland v. Le-Vel Brands LLC*, No. 05-16-00672-CV, 2017 WL 1089684, at *19 (Tex. App.—Dallas Mar. 23, 2017, no pet.) (mem. op.); *see also* CIV. PRAC. & REM. § 51.014(a)(12) (allowing for interlocutory appeal of denial of motion to dismiss under TCPA).

On remand, the trial court signed a June 15, 2017 order in which it "ordered . . . that pursuant to [section 27.009(a)], [MacFarland] recover attorneys' fees, costs, expenses, including from the appeal, and sanctions sufficient to deter [Le-Vel's] conduct in the future." Then, MacFarland filed an application for attorney's fees, costs, expenses, and sanctions. Therein, MacFarland stated in part,

> [D]efendants who successfully fend off libel suits do not accrue, by settlement or judgment, a pot of money that can be divided with counsel under a traditional contingency fee arrangement. Consequently, mandatory fee shifting statutes like the TCPA provide a vital incentive for lawyers in private practice to defend these cases even when their clients cannot pay by the hour or the normal hourly rates, making them effectively contingent-fee cases. This is the situation, here.

Additionally, MacFarland asserted in part (1) as the prevailing party on his motion to dismiss under the TCPA, he is entitled to recover "court costs, reasonable attorney fees, and other expenses

incurred in defending against the legal action as justice and equity may require" and (2) he "incurred 159.2 hours in attorney time totaling $57,135.00."

Exhibits attached to MacFarland's application included (1) a February 2016 "Engagement Agreement for Legal Services"[2] signed by MacFarland and his attorney, Mateo Z. Fowler of MZF Law Firm, PLLC; (2) a May 2016 invoice sent to MacFarland by MZF Law Firm showing "40.8 total contingency services" and an "outstanding balance owed" of "$0.00"; (3) redacted time records of MZF Law Firm; and (4) a July 3, 2017 affidavit of Fowler in which he testified in part "[u]nder the terms of [the Engagement Agreement], MZF Law Firm's representation has been divided between defending the underlying lawsuit brought by Le-Vel Brands, LLC in the above styled matter on a reduced hourly rate and pursuing an offensive motion to dismiss under the [TCPA] with MZF Law Firm recovering its attorney fees out of any Court-awarded attorney's fees or sanctions."

Le-Vel filed a response to MacFarland's application in which it stated in part (1) "incurred" in section 27.009 means "liable for payment"; (2) according to "MacFarland's counsel's own Engagement Agreement, time records, and lack of invoices," MacFarland "was never liable for any fees related to the 'offensive' services, and he therefore never 'incurred' such fees"; and (3) MacFarland was "liable" only for payment of $325 in hourly fees pertaining to "defensive" legal services provided by MZF Law Firm and therefore "$325 is all he 'incurred' and $325 is all he can recover under the statute."

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[2] The Engagement Agreement stated in part,

> **Fee Arrangement**
> . . . .
> **With respect to the Offensive Action**, Firm is to receive as attorneys' fees in this matter 40 percent (40%) of any amount recovered by Client by way of judgment, settlement, royalty, loan, option or share encumbered, sold, redeemed, or otherwise, including any attorneys' fees that may be awarded. In calculating attorneys' fees as described herein, attorneys' fees are first computed and deducted from the judgment, settlement, royalty, loan, option or share encumbered, sold, redeemed, or otherwise obtained by Client. If attorneys' fees are awarded by Court or arbitrator, in the form of sanctions or under statutes or agreements authorizing payment of said fees to a prevailing party, said fees become the property of Attorney. Any amount recovered by Attorney as a result of award by Court or arbitrator described above shall not be used in calculating the amount of attorneys' fees owed by Client to Attorneys in the event of a recovery and shall not be used as an offset. If no money is recovered by Client, Client shall remain responsible for all costs as described herein.

At the hearing on MacFarland's application, Fowler argued in part, "This is a contingency interest in that . . . the time spent is already encumbered. There is a lien on this time to the extent that there are any attorney's fees award [sic]." Further, Fowler contended in part,

> [T]his is not a pro bono case. . . . This was a client who agreed to pay hourly in defense of the litigation, and since he cannot pay my normal hourly rate, and we agreed I would work on the Motion to Dismiss, which carries mandatory fees and sanctions to the prevailing party, that I would work on that on a contingency fee.

The trial court stated in part, "The actual fees that have been incurred to date, best I can tell, is this number of 375 [sic]." Following the trial court's award of attorney's fees of $325.00 described above, this appeal was timely filed.

II. TRIAL COURT'S AWARD OF ATTORNEY'S FEES

A. Standard of Review

Generally, we review a trial court's award of attorney's fees for an abuse of discretion. *See Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 877 (Tex. App.—Dallas 2014, no pet.) (trial court did not abuse discretion by concluding challenged attorney's fees were "incurred" for purposes of section 27.009 of TCPA), *disapproved of on other grounds by Hersch v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). Questions of statutory construction are reviewed de novo. *See, e.g., Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 304 (Tex. App.—Dallas 2013, pet. denied). "[I]f a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Further, we review de novo the interpretation of an unambiguous contract. *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 787 (Tex. 2017). In doing so, we presume parties intend what the words of their contract say and interpret contract language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise. *Heritage Res., Inc. v. NationsBank*,

939 S.W.2d 118, 121 (Tex. 1996); *accord Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010).

B. Applicable Law

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[3] CIV. PRAC. & REM. § 27.002; *see also id.* § 27.011(b) (TCPA "shall be construed liberally to effectuate its purpose and intent fully"). Section 27.009(a)(1) provides that if a court orders dismissal of a legal action under the TCPA, "the court shall award to the moving party . . . court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." *Id.* § 27.009(a)(1). Court costs, attorney's fees, and expenses awarded pursuant to section 27.009(a)(1) must all be "incurred in defending the legal action." *Sullivan v. Abraham*, 488 S.W.3d 294, 298 (Tex. 2016). However, considerations of "justice and equity" in section 27.009(a)(1) apply only to the trial court's award of "other expenses." *Id.* Additionally, this Court has interpreted the word "incurred" in section 27.009(a)(1) to mean became "liable for payment." *Cruz v. Van Sickle*, 452 S.W.3d 503, 522–23 (Tex. App.—Dallas 2014, pet. denied) (citing *Am. Heritage Capital*, 436 S.W.3d at 877).

C. Application of Law to Facts

We begin by addressing together MacFarland's first and second issues, in which he contends the trial court (1) "applied the wrong legal standard" in erroneously concluding the TCPA limited his recovery of attorney's fees to those "actually incurred" and (2) "abused its discretion by excluding attorney's fees incurred under a contingency fee agreement from MacFarland's

[3] The TCPA is described as an "anti-SLAPP statute." *See Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 521 n.1 (Tex. App.—Fort Worth 2012, pet. denied) ("SLAPP" in term "anti-SLAPP" stands for "strategic lawsuit against public participation").

attorney's fee award under the [TCPA]." Specifically, MacFarland asserts the trial court erroneously found "that MacFarland did not 'actually incur' the attorney's fees that his counsel accrued on his behalf because his attorneys performed the lion's share of legal services under a contingency provision in the engagement agreement and because some other party besides MacFarland may end up paying the fee award." Further, according to MacFarland,

> The trial court's order awarding MacFarland $325.00 in attorney's fees cuts against controlling precedent from this Court construing the TCPA's mandatory attorney's fee award, it cuts against Texas Supreme Court jurisprudence interpreting analogous fees shifting statutes and it cuts against good sound policy. Moreover, courts in Texas have long recognized that attorney's fees are incurred under the terms of a contingency fee arrangement. Thus, looking to both Texas fee shifting jurisprudence as well as California jurisprudence interpreting their similar Anti-SLAPP's fee shifting provisions, it is clear that the trial court abused its discretion by failing to award MacFarland all of the attorney's fees that he incurred defending against Le-Vel's lawsuit. . . .
>
> MacFarland incurred $57,135.00 in attorney's fees defending against Le-vel's meritless claims because he was liable to his counsel for the attorney's fees they accrued on MacFarland's behalf at least as late as when the trial court entered its [June 15, 2017] order regarding mandate awarding MacFarland attorney's fees to be proved up by the evidence.

Le-Vel responds in part (1) the record does not support MacFarland's assertion that an incorrect legal standard was applied by the trial court; (2) "MacFarland's counsel constructed a fee arrangement under which his client would never be liable to pay attorney's fees associated with his TCPA motion to dismiss, which is what MacFarland is now seeking to obtain from Le-Vel"; (3) the trial court correctly concluded the attorney's fees in question were not "incurred" by MacFarland because he "was never liable in the first instance to pay more than $325 of the requested $57,135 of attorney's fees"; and (4) "MacFarland claims more than a dozen times that he became liable for his requested attorney's fees, but not once in his forty-page brief does he explain how he became liable."

In support of his contention in his first issue that the trial court improperly construed section 27.009 to require a "legal standard" of "actually incurred," MacFarland cites the trial court's

statement described above, i.e., "The actual fees that have been incurred to date, best I can tell, is this number of 375 [sic]." According to MacFarland, "[t]he trial court's 'actually incurred' standard re-writes the statute to limit the type of liability that must be incurred in order to recover reasonable attorney's fees." However, nothing in the trial court's statement or any other portion of the record shows the trial court used the term "actually incurred" in the proceedings below or made any finding that used or pertained to a "legal standard" of "actually incurred."[4] Thus, to the extent MacFarland contends the trial court reached its conclusion respecting the amount of attorney's fees to be awarded under section 27.009(a)(1) by applying a "wrong legal standard" of "actually incurred," the record does not support that contention.

As to his argument that the trial court improperly "exclud[ed] attorney's fees incurred under a contingency fee agreement," MacFarland contends (1) Texas courts "consistently hold that attorney's fees are incurred under a contingency representation" and (2) "California courts have interpreted a similar Anti-SLAPP statute to allow a successful movant to recover reasonable attorney's fees incurred under a contingency fee agreement." In support of his position, MacFarland cites authority from Texas and California. *See Cooper v. Cochran*, 288 S.W.3d 522, 538 (Tex. App.—Dallas 2009, no pet.); *Griffin v. Long*, 442 S.W.3d 380, 390 (Tex. App.—Tyler 2011), *rev'd on other grounds*, 442 S.W.3d 253 (Tex. 2014); *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401, 404 (Tex. App.—San Antonio 2005, no pet.); *Rosenaur v. Scherer*, 105 Cal. Rptr. 2d 674, 689–90 (Cal. Ct. App. 2001).

Sloan involved a lawsuit by a homeowners' association ("HOA") against a homeowner to collect assessed maintenance charges pursuant to a "Declaration of Protective Covenants," which declaration also provided for a lien to secure payment of attorney's fees "incurred" in collecting

[4] The appellate record does not show findings of fact and conclusions of law were requested or filed respecting the award of attorney's fees in question.

such charges. *See* 167 S.W.3d at 403. The trial court rendered judgment against the homeowner for actual damages and attorney's fees. *Id*. The homeowner contended that because the HOA had a contingent fee agreement with its counsel, the HOA had not "incurred" any legal expenses for which the homeowner could be held liable. *Id*. at 404. The court of appeals concluded, "Because the HOA is liable to its counsel for services provided, even if provided on a contingent fee basis, and because the HOA would be required to pay its counsel out of any proceeds received as a result of this litigation, we conclude the HOA has 'incurred' the legal fees that are secured by the lien in this case." *Id*. Unlike the case before us, *Sloan* involved litigation resulting in the recovery of proceeds from which the litigant would be required to pay its counsel. *See id*. Consequently, we do not find *Sloan* instructive.

Further, *Cooper* is inapposite because that case did not involve the issue of whether attorney's fees were "incurred" under a contingency fee contract, but rather whether the fees in question were per se unreasonable. *See Cooper*, 288 S.W.3d at 537 (rejecting argument in case involving breach of contract and declaratory judgment claims that "the contingency fee arrangement alone renders the award [of attorney's fees] unreasonable"). Also, unlike the case before us, *Griffin* did not involve a statute that required attorney's fees to be "incurred." *See Griffin*, 442 S.W.3d at 390 (observing in contingency fee case involving breach of contract and declaratory judgment claims that "it is not clear" plaintiff was required to "incur" attorney's fees to recover such under the statutes relied upon).

Additionally, the California anti-SLAPP provision addressed in *Rosenaur* states that in an anti-SLAPP action, "a prevailing defendant . . . shall be entitled to recover his or her attorney's fees and costs." *See* 105 Cal. Rptr. 2d at 689 (quoting CAL. CIV. PROC. CODE § 425.16(c) (West 2015)). The court in *Rosenaur* concluded "the plain language and purpose of section 425.16, as well as the decisional law, support the recovery of attorney fees that have accrued in representing

the defendants here, notwithstanding counsel's agreement not to look to defendants for payment." *Id*. at 693. However, unlike section 27.009(a)(1), the California anti-SLAPP provision addressed in *Rosenaur* does not contain the term "incurred." Therefore, we do not find the reasoning of *Rosenaur* persuasive. *See Cruz*, 452 S.W.3d at 524 n.36 (rejecting arguments based on statutes authorizing recovery of attorney's fees that do not contain language requiring fees to be "incurred").

As described above, this Court has stated that "incurred" means became "liable for payment." *Id*. at 522 (citing *Am. Heritage Capital*, 436 S.W.3d at 877). In *Cruz*, the plaintiff in a libel action that was dismissed pursuant to the TCPA argued that certain defendants who were being represented pro bono "have not incurred any attorney's fees as required under section 27.009(a)." *Id*. at 523. This Court agreed, stating in part, "The undisputed evidence demonstrates the [defendants] were being represented pro bono. Accordingly, they did not incur attorney's fees under section 27.009(a)(1) because they did not at any time become liable for the attorney's fees set forth in the invoices." *Id*. at 523–24.

In the case before us, the Engagement Agreement stated in part (1) "[w]ith respect to the Offensive Action, Firm is to receive as attorneys' fees in this matter 40 percent (40%) of any amount recovered by Client by way of judgment, settlement, royalty, loan, option or share encumbered, sold, redeemed, or otherwise, including any attorneys' fees that may be awarded," and (2) "[i]f attorneys' fees are awarded by Court or arbitrator, in the form of sanctions or under statutes or agreements authorizing payment of said fees to a prevailing party, said fees become the property of Attorney." MacFarland asserts repeatedly throughout his appellate brief and reply brief that he "was personally liable for and thus incurred" $57,135.00 in attorney's fees. In support of that position, he cites the Engagement Agreement, invoice, time records, and affidavit described above. However, MacFarland does not explain, and the record does not show, how any of that

evidence demonstrates that he "at any time became liable" for payment of those attorney's fees. *See id*. at 524.

MacFarland argues *Cruz* is distinguishable from the instant case because "MacFarland had entered into a contingency fee agreement with his counsel" and "a lien was placed on the services rendered by his counsel, unlike pro bono representation." To the extent MacFarland contends *Cruz* is limited to pro bono cases, we disagree. Nothing in *Cruz* limits its application to such cases. *See id*. Rather, *Cruz* specifically states the defendants in that case "did not incur attorney's fees under section 27.009(a)(1) because they did not at any time become liable for the attorney's fees set forth in the invoices." *Id*. MacFarland does not explain, and the record does not show, how the alleged "lien" and "contingency fee agreement" described by him made him liable for the attorney's fees in question. *See id*. Further, MacFarland contends "it blinks reality that MacFarland received 156.6 hours of legal services for free when the evidence shows that MacFarland retained his counsel to provide legal services in exchange for compensation at a reduced hourly rate for certain services and in exchange for compensation according to certain contingencies for other service." In support of that contention, MacFarland cites *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010), a case involving an attorney's fees provision in the Texas Medical Liability Act.

In *Garcia*, the supreme court stated that although there "was no evidence" about what the client agreed to pay for the attorney's services, "it blinks reality to assume that the attorney was a volunteer or that [the client] did not incur attorney's fees" for the legal services shown by the record. *Id*. However, unlike in *Garcia*, the record in the case before us contains an Engagement Agreement describing the specific terms of the fee agreement between MacFarland and his attorney. Therefore, we do not find *Garcia* instructive. *Id*.

Finally, MacFarland argues the trial court's order awarding him $325.00 in attorney's fees "cuts against good sound policy." According to MacFarland, affirming the trial court's award

"would encourage the filing of meritless claims in violation of a parties' [sic] First Amendment rights," "could encourage sham agreements between litigants and counsel in hopes of windfall attorney's fees awards," and "would discourage legal representation of defendants unable to afford an attorney's normal hourly rate." However, as this Court stated in *Cruz*, "We must give effect to the language used by the legislature and it is not our place to substitute our view of public policy for that of the legislature."[5] *Cruz*, 452 S.W.3d at 524.

On this record, we conclude the trial court did not apply an erroneous interpretation of section 27.009(a)(1) or abuse its discretion by awarding MacFarland $325.00 in attorney's fees pursuant to that provision. *See id*. We decide against MacFarland on his first and second issues. Consequently, we need not address MacFarland's remaining issues, which are dependent on his position that he "incurred" the attorney's fees in question. *See id*. at 525 n.37 (declining to address additional issues respecting attorney's fees not "incurred").

III. CONCLUSION

We decide MacFarland's first and second issues against him. Consequently, we need not reach his third and fourth issues. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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[5] Additionally, counsel for MacFarland argued during oral submission before this Court that "quantum meruit liability" would result if MacFarland were to terminate his counsel's services "part way through representation." The record shows the Engagement Agreement is silent respecting what fees, if any, might be recoverable if counsel were terminated before conclusion of litigation. Moreover, MacFarland's argument respecting termination of services "part way through representation" was not asserted in the trial court or in MacFarland's appellate brief. We conclude this argument presents nothing for this Court's review. *See, e.g., Isaac v. Villas del Zocalo 3*, No. 05-16-01338-CV, 2018 WL 360166, at *3 (Tex. App.—Dallas Jan. 11, 2018, no pet.) (mem. op.).

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIAN C. MACFARLAND, Appellant	On Appeal from the 401st Judicial District Court, Collin County, Texas
No. 05-17-00968-CV V.	Trial Court Cause No. 401-00376-2016.
LE-VEL BRANDS LLC, Appellee	Opinion delivered by Justice Lang, Justices Myers and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee LE-VEL BRANDS LLC recover its costs of this appeal from appellant BRIAN C. MACFARLAND.

Judgment entered this 15th day of May, 2018.