TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00131-CV

Mary Louise Serafine, Appellant

v.

Alexander Blunt, Ashley Blunt, Scott Lockhart, Austin Drainage and Foundation, LLC d/b/a/ Austin Drainage and Landscape Development, Viking Fence Company, Ltd., and Viking GP, LLC, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-12-001270, HONORABLE KARIN CRUMP, JUDGE PRESIDING

O P I N I O N

Mary Louise Serafine appeals the trial court's final judgment (a) ordering that she take nothing on all of her claims against appellees; (b) denying her motion for attorney's fees and sanctions under the Texas Citizens Participation Act (TCPA), *see* Tex. Civ. Prac. & Rem. Code § 27.009(a); (c) awarding $10,000 in sanctions to appellee Viking Fence Company, Ltd.; and (d) establishing the legal boundary between Serafine's and the Blunts' real properties. For the following reasons, we will affirm the judgment except for the portion denying Serafine's motion for attorney's fees and sanctions under the TCPA, which portion we reverse and remand to the trial court with instructions to determine and award Serafine (1) an appropriate sanction against the Blunts, *see id.* § 27.009(b); and (2) reasonable attorney's fees incurred in successfully defending

against the portion of the Blunts' counterclaims that were previously dismissed by this Court in Serafine's interlocutory appeal, *see id.* § 27.009(a).

BACKGROUND[1]

Since 2012, Serafine has pursued litigation[2] against her former neighbors, Alexander and Ashley Blunt, over their replacement of a residential chain-link fence between their real properties. Serafine's claims against the Blunts can be distilled thus: (1) the new wooden fence "encroaches" on her land by a few inches of concrete, concealed under the grass, at three posts; and (2) the Blunts trespassed upon and damaged her land by digging a trench on or immediately adjacent to her land and by installing a drainage system that, in her view, will destroy the lateral support of her land. Serafine also sued the Blunts' fencing contractor (Viking Fence Company and Viking GP) (collectively, Viking) and drainage contractor (Scott Lockhart and Austin Drainage and Foundation, LLC, d/b/a Austin Drainage and Landscape Development) (collectively Lockhart) for their respective involvement in the fence replacement. Serafine's petition alleged theories of negligence, nuisance, trespass, and adverse possession, among others. The Blunts counterclaimed for tortious interference with their Austin Drainage contract and for fraudulent filing of a lis pendens. Serafine moved to dismiss both counterclaims under the TCPA; the trial court denied her motion; and this Court reversed in part, rendering dismissal of a portion of the first counterclaim and all of the second

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[1] Because the background of this case and the evidence adduced at trial are well known to the parties, we do not recite them except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.4.

[2] Serafine is a licensed attorney and has appeared both pro se and through other attorneys throughout these proceedings.

one and remanding to the trial court for consideration of whether attorney's fees and sanctions should be awarded. *See Serafine v. Blunt*, 466 S.W.3d 352, 364 (Tex. App.—Austin 2015, no pet.) (remanding case to trial court "to consider" award under section 27.009). On remand, the trial court denied Serafine's motion for attorney's fees and sanctions. Serafine's claims were tried to a jury in 2015, after which the jury unanimously decided against Serafine on every claim. Post trial, the court determined the boundary line between the properties, granted Viking's motion for sanctions, and rendered final judgment denying Serafine relief on all of her claims. Serafine raises several issues on appeal.

DISCUSSION

Adverse possession

In her first issue, Serafine contends that the evidence is legally and factually insufficient to support the jury's finding against her on her adverse-possession claim, on which she had the burden of proof. *See Valdez v. Moerbe*, No. 03-14-00731-CV, 2016 WL 1407800, at *6 (Tex. App.—Austin Apr. 6, 2016, pet. denied) (mem. op.) ("One seeking to establish title to land by virtue of the limitations statutes has the burden of proving each and every fact essential to that claim."); *City of Austin v. Chandler*, 428 S.W.3d 398, 407–08 (Tex. App.—Austin 2014, no pet.) (outlining standards for legal and factual sufficiency of evidence supporting finding that is adverse to party who has burden of proof on issue). She supports her argument with evidence in the record purportedly showing that a "boundary" indicated by a few railroad ties and the disputed chain-link fence (replaced by the Blunts) had been in place for over 30 years and had been "observed by others" yet "undisturbed" by anyone. She further contends that the evidence established adverse possession

of the disputed property because of her "peaceable, open, and notorious possession" of it for 30-plus years and that she has a "recorded deed" and has "paid taxes" on the disputed property. *See* Tex. Civ. Prac. & Rem. Code §§ 16.025 (noting elements of adverse possession under 5-year statute as requiring claimant to continuously (1) claim title under duly registered deed; (2) pay taxes on property; and (3) cultivate, use, or enjoy property), .026–.027 (noting elements of adverse possession under 10- and 25-year statutes as requiring claimant to cultivate, use, or enjoy property in continuous and hostile manner); *see also id.* § 16.021(1) ("'Adverse possession' means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.").

With respect to adverse possession under the five-year statute, however, it is not enough that Serafine paid taxes on *her* property or that she held the deed to *her* property; adverse possession under the five-year statute requires proof of taxes paid and recorded title to the *disputed* property. *See NJ Williams Family P'ship, Ltd. v. Winn*, No. 03-07-00724-CV, 2010 WL 142879, at *7 (Tex. App.—Austin Jan. 15, 2010, no pet.) (mem. op.) ("Unless the tax records distinguish the property in controversy from the property to which a taxpayer owns record title, the presumption is that the taxpayer has paid taxes on his own property."); *Welch v. Matthews*, 642 S.W.2d 829, 832 (Tex. App.—Tyler 1982, no writ). Serafine points to no evidence in the record that she paid taxes for or held title to the disputed property other than her conclusory testimony that she "held a deed" and "paid taxes on the property each year." It was the jury's province to weigh or reject this testimony, and Serafine has not demonstrated that the entirety of the evidence at trial established adverse possession as a matter of law or that the jury's finding was against the great weight and preponderance of the evidence. *See Chandler*, 428 S.W.3d at 407.

With respect to adverse possession under the 10- and 25-year statutes' requirement that possession be "hostile," courts have long held that casual fences and incidental uses of property are insufficient to meet the requirements of an adverse-possession claim, especially when the fence at issue existed at the time the claimant began using the land. *See NJ Williams Family P'ship*, 2010 WL 142879, at *6 ("Unless the claimant establishes that he built the fence for the purpose of enclosing the property at issue, the fence is a 'casual fence' rather than one that 'designedly encloses' the property," and use of property inside such fence is "not evidence of adverse possession."); *Anderson v. Shaw*, No. 03-08-00352-CV, 2010 WL 2428132, at *10 (Tex. App.—Austin June 18, 2010, no pet.) (mem. op.) ("The mere presence or maintenance of a fence that existed at the time the claimant began using the land is insufficient to show a designed enclosure."). Serafine also points to evidence showing her "installation" in the grass of two railroad ties in 1977 and landscaping and gardening activities of hers in the disputed area at various times over the years. The jury was free to consider this evidence as well as other testimony that the railroad ties and landscaping were more akin to temporary or decorative features rather than an expression of hostile use of the property sufficient to establish a boundary line. *See Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985) (holding that maintenance of hedge as alleged boundary marker is not sufficiently hostile to establish adverse possession). Based on this record, we conclude that the evidence did not conclusively establish Serafine's adverse possession and that the jury's finding on the issue was not against the great weight and preponderance of the evidence. Accordingly, we overrule Serafine's first issue.

Lis pendens

In her second issue, Serafine asserts that the trial court erred as a matter of law in expunging the notice of lis pendens at a post-trial hearing on November 10, 2015, after the jury had unanimously found against her on all of her property claims and in conjunction with the court's determination of the legal boundary line between the properties.[3] *See* Tex. Prop. Code § 12.0071(c)(2) ("The court shall order the notice of lis pendens expunged if the court determines that: . . . (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim."). Her complaint is two-fold: (1) the trial court "ignored statutory procedure" by "sua sponte" expunging the lis pendens because appellees did not file a written motion to expunge or provide the 20-day statutory notice for a hearing, *see id.* § 12.0071(d) ("Notice of a motion to expunge under Subsection (a) must be served on each affected party on or before the 20th day before the date of the hearing on the motion."); *In re Estate of Sanchez*, No. 04-11-00332-CV, 2012 WL 1364979, at *7 (Tex. App.—San Antonio, Apr. 18, 2012, pet. denied) (mem. op.) (holding that trial court erred in sua sponte expunging lis pendens four days after it was filed, in absence of any filed motion to expunge and proper notice to each affected party); and (2) the statute merely requires a real-property claim to have "probable validity," but the trial court "conflated" that language with whether the claim is "successful," *see* Tex. Prop. Code § 12.0071(c)(2) (stating that court shall expunge lis pendens if claimant fails to establish "probable validity of claim" by preponderance of evidence). She asserts that these errors warrant vacation of the expungement and a clarification that the expungement is void retroactively. The Blunts respond that Serafine has

[3] See our discussion of Serafine's third issue *infra*.

waived this issue by failing to make a timely, specific objection before the trial court. *See* Tex. R. App. P. 33.1. We agree. At the hearing, the Blunts' counsel orally requested the trial court to expunge the lis pendens. Although Serafine was present, she did not object to the request or to the court's ruling. Accordingly, Serafine has waived her complaints about the propriety of the trial court's expungement of the lis pendens, and we accordingly overrule her second issue.

Boundary-line determination

In her third issue, Serafine contends that (1) the evidence was factually insufficient to support the trial court's fixing of the boundary between Serafine's and the Blunts' properties at the "Carson line,"[4] *see Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (noting that trial court's fact findings may be overturned only if they are so against great weight and preponderance of evidence as to be clearly wrong and unjust), or, alternatively, (2) the court erred in not conducting a hearing on the matter. The boundary dispute was submitted to the bench post trial by agreement of the parties. The court made specific findings, including the following: (1) Serafine had not established an alternative boundary through adverse possession; (2) the survey method used by Serafine's expert, James Grant, was unreliable; and (3) Holt Carson's method was "specific, detailed and definite." To support her evidentiary-insufficiency issue, Serafine contends that the Carson survey is "untenable" and that the trial court erred in finding the Grant survey "unreliable."

A great amount of evidence from which the trial court could make the boundary determination was admitted at trial, including detailed testimony and surveys from both parties'

[4] Holt Carson was one of the three surveyors who testified at trial concerning the location of the properties' boundaries. The trial court concluded that Carson's survey "correctly and finally establishes the boundary line" between the two properties.

boundary experts (Grant and Carson), as well as testimony about and copies of two additional, independent surveys depicting the boundary line (the "1994 Stearns & Foster survey" and the "2016 Roder survey"). The trial court, acting as the fact-finder on this issue, was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Iliff v. Iliff*, 339 S.W.3d 74, 83 (Tex. 2011). While Serafine contends that the Carson survey was "untenable," she does not specifically contend that the trial court erred in admitting his expert testimony. However, even if the issue of the admissibility of his testimony were before us, we would conclude that the trial court did not abuse its discretion in admitting it. *See Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002) (noting that trial court serves as evidentiary gatekeeper by screening out irrelevant and unreliable evidence and has broad discretion to determine admissibility of evidence, and appellate courts review decision to admit expert testimony for abuse of discretion). Carson testified about his qualifications, experience, survey methodology, and the diligence he employed in conducting the survey at issue. He concluded that the Blunts' new fence lies entirely within their own boundary line, which conclusion was confirmed by two independent surveys admitted at trial. Our review of the entire record leads us to conclude that the trial court's findings on the boundary issue were not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Echols v. Olivarez*, 85 S.W.3d 475, 476–77 (Tex. App.—Austin 2002, no pet.).

With respect to Serafine's alternative issue, contending that the trial court did not conduct a hearing on the boundary issue, the reporter's record unambiguously indicates that she was aware that the November 10 hearing would address the court's determination of the boundary between the properties, and that the hearing did, indeed, address this issue. Nonetheless, Serafine complains that (1) she was allowed only about "five minutes" to argue, (2) the trial court determined

that all the evidence necessary to its decision had already been presented at trial and did not allow her to submit new evidence, and (3) the trial court announced at the hearing that it had already decided the boundary issue in accordance with the Carson survey. We will review the trial court's determinations on the procedural issue of the hearing on the boundary issue for abuse of discretion. *See In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000) ("[T]he abuse of discretion standard is typically applied to procedural or other trial management determinations."); *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (noting that test for abuse of discretion is whether court acted without reference to any guiding rules and principles, i.e., whether act was arbitrary or unreasonable).

With respect to the amount of time that Serafine was allowed to "argue" the boundary issue and the trial court's announcement that it had already determined the issue, we hold that the trial court did not act without reference to guiding rules and principles or act unreasonably. *See Aultman v. Dallas Ry. & Terminal Co.*, 260 S.W.2d 596, 600 (Tex. 1953) ("The trial judge is allowed wide discretion in fixing the time to be allowed for argument."); *United Bus. Mach., Inc. v. Southwestern Bell Media, Inc.*, 817 S.W.2d 120, 123 (Tex. App.—Houston [1st Dist.] 1991, no writ) (noting that unless otherwise required by rule or statute, trial courts may conduct hearings on written submission rather than oral argument). The reporter's record indicates that the trial court, despite having announced that it was ready to make a determination in favor of the Blunts' survey, nonetheless indicated that it would consider Serafine's motion on the issue filed that same day even though it had "enough testimony and argument" to make the determination. Considering the detailed evidence and argument presented on this issue at trial, the parties' agreement to submit the

issue to the bench post trial, and the additional oral and written arguments that Serafine was granted at the November 10 hearing, we hold that the trial court did not abuse its discretion in limiting Serafine's argument or indicating that it had already made a boundary determination.

As to Serafine's contention that the trial court did not admit additional evidence beyond that admitted at trial, the record indicates that Serafine did not attempt to offer any additional evidence regarding the boundary at the November bench hearing, and she therefore cannot point to any objection she made to any ruling by the trial court on this issue. Therefore, we will not address that aspect of her complaint on appeal as she has waived error on it.[5] *See* Tex. R. App. P. 33.1. Accordingly, we overrule Serafine's third issue.

Summary judgment on negligent-supervision and nuisance claims

In her fourth issue, Serafine contends that the trial court erred in granting Viking's summary-judgment motion on her negligent-supervision and nuisance claims. Viking moved for partial summary judgment on traditional and no-evidence grounds. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002) (in reviewing traditional summary judgment, appellate court determines whether there is any genuine issue of material fact and movant is entitled to judgment as matter of law, taking as true all evidence favorable to nonmovant, indulging reasonable inferences and resolving doubts in non-movant's favor); *Mack Trucks v. Tamez*, 206 S.W.3d 572, 581–82 (Tex. 2006) (in reviewing no-evidence motion, appellate court credits favorable evidence in favor of party against whom summary judgment was rendered unless reasonable jurors could not

[5] We also note that the trial court clarified at the start of trial that the parties should admit all relevant evidence then because it would not accept new evidence submitted to the bench post trial.

and determines whether non-movant has presented evidence raising genuine issue of material fact on each element contested in motion).

To prevail on a negligent-hiring or negligent-supervision claim, a plaintiff must prove that the employer was negligent *and* that the employee committed an actionable tort against the plaintiff. *See CoTemp, Inc. v. Houston W. Corp.*, 222 S.W.3d 487, 494 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Failure to prove the underlying, actionable tort means that the negligent-hiring, negligent-training, and negligent-supervision claims fail for lack of proximate causation. *Brown*, 178 S.W.3d at 383.

The jury found that Viking's employees were not negligent in their installation of the fence on the Blunts' property, and Serafine does not challenge that finding on appeal. Because Serafine failed to prove that the Viking employees committed an "actionable tort" for which Viking can be held directly liable through a negligent-supervision theory, the question of whether the trial court erred in granting summary judgment is irrelevant because, even assuming that the trial court erred in granting summary judgment for Viking, the error is harmless in light of the jury's subsequent findings negating this essential element of Serafine's claim. *See Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (holding that any error in granting summary judgment was rendered harmless when subsequent jury findings negated essential element of summary-judgment claim). Accordingly, we overrule this sub-part of Serafine's fourth issue.

To support her issue about her private- and public-nuisance claims, Serafine contends that Viking "invaded her legal rights" and "interfered with the use and enjoyment of her property"

by removing the chain-link fence and replacing it with a different one as requested by the Blunts. In particular, she contends that the old fence had "historic value" and that the new fence is an "eyesore" and "out of scale to the property." She contends that the evidence was sufficient to raise a fact issue on her nuisance claims. However, private-nuisance claims typically involve an invasion of the plaintiff's property by light, sound, odor, or a foreign substance, *see, e.g.*, *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied), and "aesthetic" nuisance claims are not recognized in Texas, *see Dallas Land & Loan Co. v. Garrett*, 276 S.W. 471, 474 (Tex. Civ. App.—Dallas 1925, no writ) ("Matters that annoy by being disagreeable, unsightly, and undesirable are not nuisances."); *Shamburger v. Scheurrer*, 198 S.W. 1069, 1071 (Tex. Civ. App.—Fort Worth 1917, no writ) (holding that "the law will not declare a thing a nuisance because it is unpleasant to the eye, because all the rules of propriety and good taste have been violated in its construction, nor because the property of another is rendered less valuable, nor because its existence is a constant source of irritation and annoyance to others"). Accordingly, we conclude that the trial court did not err in granting Viking summary judgment on Serafine's private-nuisance claims.

Public-nuisance claims involve actions of the defendant that have created a condition that amounts to "an unreasonable interference with a right common to the general public," and a private individual must demonstrate that she has suffered a substantial "special injury" different in kind from that suffered by the general public. *Jamail v. Stoneledge Condo. Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.) (noting that private citizen must demonstrate that she has either common-law standing or statutory standing to bring public-nuisance lawsuit); *compare McQueen v. Burkhart*, 290 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1956, no writ)

(finding no "special harm" in diminution of plaintiff's home's market value caused by defendant's obstructive fence across major portion of public street), *with Quanah Acme & Pac. Ry. v. Swearingen*, 4 S.W.2d 136, 138 (Tex. Civ. App.—Amarillo 1927, writ ref'd) (finding special harm where defendants installed platform that completely obstructed plaintiff's right of egress and ingress from rear of her property). Serafine has not cited any authority supporting her assertion that the trial court erred in granting Viking summary judgment on her public-nuisance claim, and we overrule this sub-part of her fourth issue.

Sanctions awarded to Viking

In her fifth issue, Serafine contends that the trial court engaged in improper "fee-shifting" by awarding $10,000 to Viking pursuant to its motion for sanctions after the trial was concluded. *See* Tex. R. Civ. P. 13 (providing for award of sanctions for party's filing of "groundless" pleadings, motions, and other papers); Tex. Civ. Prac. & Rem. Code §§ 10.001, .004 (providing for award of sanctions for person's signing pleadings or motions that are frivolous, unlikely to have evidentiary support, or filed for improper purpose). We will review the trial court's sanctions order for abuse of discretion. *See Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014). A trial court abuses its discretion if it acts without reference to guiding rules and principles to such an extent that its sanctions order is arbitrary or unreasonable. *Id.* We will not hold that the trial court abused its discretion in levying sanctions if some evidence supports its decision. *Id.*

A Chapter 10 sanction is warranted if there is little or no basis for the claims, no grounds for the legal arguments advanced, or misrepresentation of the law or facts, or where legal action is sought in bad faith. *See Herring v. Welborn*, 27 S.W.3d 132, 143 (Tex. App.—San Antonio

2000, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code 10.004. Similarly, Rule 13 authorizes a court to impose sanctions on a party or counsel for pleadings, motions, or other papers signed and filed that are groundless and brought in bad faith or for the purpose of harassment. *Loeffler v. Lytle Indep. Sch. Dist.*, 211 S.W.3d 331, 347 (Tex. App.—San Antonio 2006, pet. denied) (noting that circumstantial evidence will suffice to allow court to infer bad faith and improper motive); *see also* Tex. R. Civ. P. 13.

After reviewing the entire record, we conclude that there is some evidence to support the trial court's sanctions award. *See Shaw v. County of Dallas*, 251 S.W.3d 165, 171 (Tex. App.—Dallas 2008, pet. denied) (noting that appellate court considers entire record to determine whether trial court abused its discretion in awarding sanctions). At the hearing on Viking's motion for sanctions, the court heard testimony from Viking's counsel and viewed written documentation about the legal fees that Viking incurred in defending against Serafine's claims against the individual members of the LLC (Viking GP, LLC) that was the general partner of Viking Fence Company, Ltd., which specific claims were disposed of on summary judgment and which the trial court concluded were made in bad faith, with knowledge that they were groundless, and for the purpose of harassment. The record contains ample evidence to support the trial court's findings and conclusions about the groundless claims, and the amount of legal fees incurred in defending against groundless or frivolous claims or those unlikely to have evidentiary support is an appropriate minimum penalty for a sanctions award. *See Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007) ("[T]he determination of the amount of a penalty to be assessed under Chapter 10, which is not limited to attorney's fees and costs, should nevertheless begin with an acknowledgment of the costs and fees incurred because of the sanctionable conduct."). We overrule Serafine's fifth issue.

Attorney's fees and sanctions under TCPA

In her sixth issue, Serafine argues that the trial court erred in denying her any recovery of attorney's fees or sanctions under the TCPA or Rule of Civil Procedure 13. *See* Tex. Civ. Prac. & Rem. Code § 27.009; Tex. R. Civ. P. 13. In response to Serafine's claims, the Blunts counterclaimed for (1) tortious interference with their Austin Drainage contract, and (2) fraudulent filing of the lis pendens. Serafine moved to dismiss both counterclaims under the TCPA, urging that they were "based on, relate[d] to, or [] in response to [her] exercise of the right of free speech, right to petition, or right of association." The trial court denied her motion, and this Court reversed in part, in an interlocutory appeal, dismissing a portion of the Blunts' counterclaims. *See Serafine*, 466 S.W.3d at 364 (remanding case to trial court "to consider" award of attorney's fees and sanctions under section 27.009). Serafine then filed a motion for attorney's fees and sanctions under the TCPA or, alternatively, Rule 13.

The Blunts concede that, after a recent opinion from the supreme court, the TCPA portion of the judgment must be reversed because of the court's determination that an award of attorney's fees is mandatory. *See Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("[W]e conclude that the TCPA requires an award of 'reasonable attorney's fees' to the successful movant."); *see also* Tex. Civ. Prac. & Rem. Code § 27.009(a) ("If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the action from bringing similar actions described in this

chapter."). We, accordingly, hold that the trial court erred in denying Serafine's motion for attorney's fees under the TCPA and reverse the portion of its judgment denying her motion. Although Serafine urges us to render an award of attorney's fees, we conclude that the proper disposition is to remand the issue of the amount of reasonable attorney's fees attributable to her defense of the portion of the Blunts' counterclaims that were dismissed. *See Sullivan*, 488 S.W.3d at 299 (noting that "reasonable" attorney's fee is one that is fair and moderate rather than excessive or extreme and that determination thereof rests within trial court's discretion); *Kurtz v. Kurtz*, No. 14-08-00351-CV, 2010 WL 1293769, at * 2–3 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet.) (mem. op.) (noting that limited remand for determination of reasonable attorney's fees recoverable for specified portion of case is appropriate).[6] Accordingly, we remand this cause to the trial court for a determination of reasonable attorney's fees incurred by Serafine in defending against the portion of the Blunts' counterclaims we dismissed under the TCPA.

With respect to the trial court's failure to award Serafine sanctions under the TCPA or alternatively, Rule 13, we determine that the trial court abused its discretion in failing to award any amount of sanctions under the TCPA, as the statutory language is mandatory on this issue as well. Tex. Civ. Prac & Rem. Code § 27.009(a)(2) (providing that trial court "shall award to the moving party . . . sanctions against the party who brought the legal action as the court determines

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[6] The Blunts urge us to give specific instructions to the trial court on remand of the issue of attorney's fees, to include: limiting the attorney's fee evidence to the existing record and excluding certain "categories" of fees, such as Serafine's pro se fees and her fees incurred on the unsuccessful portion of her TCPA motion. We decline to provide such specific instructions, acknowledging that the trial court is given a reasonable amount of discretion to comply with a mandate with respect to an issue on limited remand. *See Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 690 (Tex. App.—Austin 1992, writ denied).

sufficient to deter the party who brought the legal action from bringing similar actions"); *cf.* Tex. R. Civ. P. 13 (authorizing imposition of sanctions against party who filed pleading that is "groundless" and brought in bad faith or to harass and requiring trial court to state "good cause" for sanctions within order). After this Court dismissed the Blunts' counterclaims and remanded for a consideration of an award under Section 27.009, the trial court conducted a hearing on Serafine's motion for attorney's fees and sanctions and took the issue under advisement, ultimately denying Serafine any recovery of fees or sanctions under either Section 27.009 or Rule 13.

Section 27.009's plain language presumes that *some* sanctions award—i.e., an amount greater than zero—is required but allows the trial court broad discretion to determine an amount "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter," i.e., a "legal action" subject to dismissal under the TCPA. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(2); *Kinney v. BCG Att'y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (noting that TCPA "gives the trial court broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future"). The supreme court has not specifically addressed the issue of whether sanctions under the TCPA are mandatory, but in *Sullivan* it noted without disapproval the appellate court's determination the TCPA "made an award of sanctions mandatory," "tempered by" the amount the trial court determines sufficient to deter similar actions. 488 S.W.3d at 299 (noting appellate court's reversal and remand to trial court to reconsider its decision to deny sanctions); *see also Serafine*, 466 S.W.3d at 364 (noting that under Section 27.009 court "shall award" movant attorney's fees and sanctions and remanding cause to trial court "to

consider an award under Section 27.009."). In light of the mandatory nature of a sanctions award under the TCPA, we hold that the trial court abused its discretion in failing to award Serafine some amount of sanctions deemed appropriate to achieve the deterrent effect the statute requires. Accordingly, we remand this cause to the trial court for a determination of the amount of sanctions to be awarded to Serafine under section 27.009 of the TCPA.[7]

Other issues

In her multifarious seventh issue, Serafine complains about a charge instruction and various evidentiary rulings of the trial court. However, she has not preserved error with respect to any of these complaints: (1) the trial court's failure to provide a jury instruction on "loss of lateral support," *see Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 829–31 (Tex. 2012) (explaining that charge error is waived when record reflects no objection and ruling on party's charge complaint); (2) the trial court's denial of her opportunity to provide rebuttal testimony in the form of her own testimony about repairs she made to her home in 2004 and 2005, *see Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035, at *6 (Tex. App.—Austin Mar. 8, 2016, no pet.) (mem. op.) (noting that to preserve error concerning exclusion of evidence, complaining party must demonstrate substance of excluded evidence through offer of proof so that appellate court may

[7] Our review of the record leads us to conclude that the trial court did not abuse its discretion in failing to award Serafine sanctions under Rule 13. *See American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (noting that standard of review for Rule 13 sanctions determination is abuse of discretion and that appellate court will reverse ruling only if trial court acted without reference to any guiding rules and principles such that its ruling was arbitrary or unreasonable). Serafine has not identified evidence in the record establishing that the Blunts' counterclaims and other complained-of conduct were both groundless and brought in bad faith or for the purpose of harassment, *see* Tex. R. Civ. P. 13, and the trial court's failure to award Rule 13 sanctions on this record was not arbitrary or unreasonable.

determine whether exclusion thereof was harmful);[8] (3) the trial court imposed upon her a "death penalty" sanction by informing her before trial that she would be limited to 100 trial exhibits, which the court later ordered to be listed in a particular format within a few hours of its order after the court determined that Serafine had repeatedly failed to properly identify her exhibits, *see B.O. v. Texas Dep't of Family & Protective Servs.*, No 03-12-00676-CV, 2013 WL 1567452, at *3 (Tex. App.—Austin Apr. 12, 2013, no pet.) (mem. op.) (noting that to preserve complaint about erroneous exclusion of evidence, party must have offered evidence during trial and obtained adverse ruling); and (4) the trial court erred in allowing Alexander Blunt to testify about a settlement offer and purported mediation between the parties, *see Colombia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 862 (Tex. App.—Fort Worth 2003, pet. denied) (holding that to preserve error about improper settlement-offer testimony, party must object, explain grounds for objection on record, and request limiting instruction to disregard testimony); *see also* Tex. R. Evid. 103(a)(1) (outlining how errors in evidentiary rulings must be preserved); Tex. R. App. P. 33.1(a) (detailing how error must be preserved for review).

Lastly and within this same issue, Serafine contends that the trial court "prevented appeal within the meaning of TRAP 44.1(a)(2)." However, she has waived this issue due to inadequate briefing, failing to provide any meaningful analysis of the record, articulate with

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[8] While Serafine filed a formal bill of exceptions several months after trial attempting to make an offer of proof, the trial court refused her bill of exceptions, and Serafine does not appeal such refusal. *See* Tex. R. App. P. 33.2. Therefore, her bill of exceptions and its offer of proof contained therein present nothing for our review. *See Goodpasture v. Coastal Indus. Water Auth.*, 490 S.W.2d 883, 885 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) ("A bill of exceptions that is not approved by either the trial judge or opposing counsel . . . presents nothing for appellate review.").

any context the specific rulings about which she complains (apart from those already addressed above), and discuss how the various trial-court rulings prevented her from "properly presenting her case on appeal." *See* Tex. R. App. P. 38.1(I); *Fredonia State Bank v. General Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (discussing long-standing rule that inadequately briefed appellate argument provides nothing for review).

CONCLUSION

For the foregoing reasons, we affirm the trial court's final judgment except for the portion denying Serafine's motion for attorney's fees and sanctions under the TCPA, which portion we reverse and remand to the trial court with instructions to determine and award Serafine (1) an appropriate sanction against the Blunts, as described herein, and (2) reasonable attorney's fees incurred in successfully defending against the portion of the Blunts' counterclaims previously dismissed by this Court in Serafine's interlocutory appeal.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed in Part; Reversed and Remanded in Part

Filed: May 19, 2017