Reversed, Rendered, and Remanded; Opinion Filed March 23, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00672-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, Brown, and Whitehill
Opinion by Justice Lang

Appellee Le-Vel Brands LLC ("Le-Vel") filed this lawsuit against appellant Brian C. MacFarland, 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 Texas Citizens Participation Act ("TCPA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015). The trial court signed an order denying MacFarland's motion to dismiss and awarding "costs and reasonable attorney's fees" to Le-Vel pursuant to TCPA section 27.009(b). *See id.* § 27.009(b).

In this interlocutory appeal, MacFarland asserts ten issues complaining about the trial court's denial of his motion to dismiss and the award of costs and reasonable attorney's fees to

Le-Vel.[1] Several of the ten issues listed in the preceding footnote are related and overlap as to subject matter. Accordingly, please note that we will address some issues individually and some others in combination.

For the reasons stated below, we reverse the trial court's order, render judgment dismissing Le-Vel's claims, and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL CONTEXT

MacFarland is the owner and operator of a website titled *Lazy Man and Money*, which he describes as having more than four million visitors. Le-Vel is a multi-level marketing company ("MLM") that sells dietary supplements, including a product line called "Thrive." In approximately June 2015, MacFarland created a blog post on his website titled "Is Le-Vel Thrive a Scam?" (the "Article" or "Post"), which pertained to the business operations and products of Le-Vel.[2] On January 18, 2016, Le-Vel sent MacFarland a letter in which it (1) described the

[1] MacFarland's ten issues are as follows:

> 1. Whether the trial court properly denied Appellant's Motion to Dismiss pursuant to Chapter 27?
> 2. Whether the trial court properly awarded Appellees attorneys' fees, costs, and expenses?
> 3. Whether the trial court properly determined Appellant's Motion to Dismiss was frivolous or brought solely for the purpose of delay?
> 4. Whether the Post at issue commenting on Appellee, its products and business model was on a matter of public concern, and therefore constituted the exercise of Appellant's right to freedom of speech under the TCPA?
> 5. Whether Appellee presented clear and specific evidence that Appellant's Post is subject to the "commercial speech" exemption of the TCPA?
> 6. Whether Appellee presented clear and specific evidence of each element of his defamation claim as required by the TCPA?
> 7. Whether Appellee presented clear and specific evidence of each element of its business disparagement claim as required by the TCPA?
> 8. Whether Appellee presented clear and specific evidence that Appellant published false statements concerning Appellee?
> 9. Whether Appellee is a limited purpose public figure and thus required to prove "actual malice"—which is knowledge of falsity or reckless disregard of the truth that Appellant, in fact, entertained serious doubt about the truth when publishing the Post?
> 10. Whether Appellee presented clear and specific evidence that any of Appellant's allegedly false statements damaged Appellee?

[2] MacFarland's statements in his Article included, *inter alia*, the following:

> Thrive M is essentially a multivitamin with a proprietary blend of ingredients which you can see here. The vitamins and minerals are unexciting. With only 11 vitamins and minerals with an RDA daily value, you can do better with almost any product. They don't even put vitamin C or vitamin E in it. You can do much better with Kirkland Signature Daily Multi Vitamins & Minerals Tablets.
> That Kirkland vitamin & minerals costs around 3 cents a pill (at time of article publishing). For a full year it would cost $12.45.
> In sharp contrast Thrive M-Premium Lifestyle Capsules Mens is on Amazon for $62.50 for a 30 day supply. That's $2.08 a day or $760.42 a year.

Article as containing "disparaging, false, and defamatory statements about Le-Vel" and (2) demanded, among other things, that MacFarland permanently remove the Article from his website, along with any comments, and "cease and desist" from making "any further defamatory or derogatory statements regarding Le-Vel." Subsequent to that letter, MacFarland made several edits to the Article,[3] but did not remove the Article from his website.

Le-Vel filed this lawsuit on January 26, 2016. In its first amended petition, which is the live petition in this case, Le-Vel stated it manufactures, markets, and sells "nutritional supplements" to "health and fitness conscious individuals" through "a network of individual

---

> So you can spend $12.45 a year for a complete multivitamin or you can spend $760.42 a year for an incomplete one. Reflect on that for a moment. You can pay more than 50 times more money and get less value by going with Le-vel's product.
> . . . .
> A strong case could be made that you shouldn't buy either product. However, if you are going to buy one, the choice should be very obvious.
> I'm not being entirely fair in this comparison. Thrive M has a proprietary blend in addition to vitamins and minerals. Well the Kirkland does as well (Ginseng at least from the description).
> The problem with proprietary blends is that you don't know how much of what you are getting. This isn't like the Colonel's secret recipe or Coca-cola's recipe that are meant to taste good. This is your health. You should know what you are paying for. However, even if you knew how much you were getting of the ingredients, they may not benefit you. I didn't see much in the proprietary formula that had the science behind it to show the FDA it had real benefits.
> . . . .
> The rest of the Le-vel compensation plan looks like every other MLM/pyramid scheme that I've covered. There's the requirement to be Qualified and Active, which means that you have to buy product yourself or sell enough of it each month. As mentioned above, the pricing is banana pants crazy, which is one of a few reasons why no one would buy a MLM product from you. That means you are typically going to be left paying for itself [sic], which makes it clear that this is a Pay to Play scheme.
> . . . .
> The [Le-Vel] compensation plan clearly focuses the rewards on people with the most volume in their downline, not sales to outside people. According to these FTC guidelines, that would make Thrive an illegal pyramid scheme. Here's what the FTC says,
>
> > "Not all multilevel marketing plans are legitimate. If the money you make is based on your sales to the public, it may be a legitimate multilevel marketing plan. If the money you make is based on the number of people you recruit and your sales to them, it's not. It's a pyramid scheme. Pyramid schemes are illegal, and the vast majority of participants lose money."
>
> Between the extremely expensive products, dubious marketing, and what appears to be an obvious pyramid scheme (see FTC guidelines), I think it is clear that Le-vel Thrive is a scam.

Additionally, in the Article, MacFarland described an online article he had recently read in which a Le-Vel distributor was asked why she chose to promote the "Thrive patch" and she replied "It's a lot of mind over matter." MacFarland stated in his Article (1) that reply "seems to suggest that the Thrive Patch is essentially the same as the Dove Beauty Patch," and (2) "[i]t turns out that the Dove Beauty Patch has no ingredients," yet users of the Dove Beauty Patch "were going on and on about 'life altering' [sic] the patch was and how they'd buy it."

[3] MacFarland's edits included, *inter alia*, (1) the addition of the following statement: "I'd like to make a special pleading for the FTC (SEC or other government agency) to look into Le-Vel and ensure all its practices are legal"; (2) changing the existing statement "[s]o you can spend $12.45 a year for a complete multivitamin or you can spend $760.42 a year for an incomplete one" to "[s]o it appears you can spend $12.45 a year for a complete multivitamin or you can spend $760.42 for an incomplete one"; (3) changing the existing statement "which makes it clear that this is a Pay to Play scheme" to "which makes it look like a Pay to Play scheme"; (4) changing the existing statement "[a]ccording to these FTC guidelines, that would make Thrive an illegal pyramid scheme" to "[a]ccording to these FTC guidelines, that focus would appear to make Thrive a pyramid scheme"; (5) changing the existing statement "what appears to be an obvious pyramid scheme (see FTC guidelines)" to "what appears to be a pyramid scheme (see aforementioned FTC guidelines)"; and (6) changing the existing statement "seems to suggest that the Thrive Patch is essentially the same as the Dove Beauty Patch" to "seems to suggest that the Thrive Patch may be the same as the Dove Beauty Patch."

Promoters." Additionally, Le-Vel (1) described the Article and an additional article on MacFarland's website titled "Is Every MLM a Scam?" and (2) stated that based on MacFarland's published statements, it sought "monetary relief over $1,000,000," including "actual damages, general and special," and a permanent injunction requiring MacFarland to "remove his defamatory and disparaging publications." Specifically, as to its defamation claim, Le-Vel stated in part,

> 40. MacFarland published and republished numerous written statements to the public on the internet, asserting as fact that Le-Vel: incentivizes its Promoters to make misrepresentations; is violating FTC guidelines and regulations; is illegally violating FDA marketing restrictions; is an illegal pyramid scheme; is a scam; is not a legitimate business; supports Promoters who do not perform any function other than pyramid scheme recruiting; sets up its Promoters for failure as "a [m]athematical [c]ertainty"; is a "Pay to Play scheme"; is overcharging people by fifty times, for hundreds of dollars per year; sells snake oil; sells THRIVE patches that are placebos with no ingredients; sells THRIVE M supplements that are incomplete multivitamins; has never conducted any research to verify that THRIVE works; and has never studied its products in trials using a patch delivery system.
>
> . . . .
>
> 42. Defendant's statements were defamatory per se because they injured Plaintiff in Plaintiff's business reputation. Defamation per se entitles Plaintiff to a presumption of general damages.

Further, as to its business disparagement claim, Le-Vel specifically listed the same statements described in its defamation claim and asserted in part that MacFarland's "false and disparaging words" caused "pecuniary loss" to Le-Vel.

MacFarland filed a general denial answer. Additionally, MarFarland filed (1) a motion to dismiss the lawsuit under the TCPA, with more than fifty pages of exhibits attached, and (2) a supplemental motion to dismiss under the TCPA (collectively, the "motion to dismiss"). MacFarland's exhibits consisted of (1) a copy of Le-Vel's "Rewards Plan"; (2) a document describing Le-Vel's "Thrive M" product; (3) printouts from the *Lazy Man and Money* website, including copies of the five-page original Article and the edited version; and (4) printouts of pages from the website of the United States Federal Trade Commission.

In his motion to dismiss, MacFarland stated in part (1) "Le-Vel's lawsuit is based on, relates to, and is in response to MacFarland's exercise of his right of free speech"; (2) because MacFarland has met his burden to show this case "falls squarely in the purview of the [TCPA]," dismissal is proper unless Le-Vel "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question"; (3) "Le-Vel cannot meet its heavy burden"; and (4) "[a]s such, the Court must dismiss Le-Vel's Petition and award MacFarland costs, attorneys' fees, and other expenses incurred in defending this action." Also, MacFarland's motion to dismiss addressed each of the complained-of statements in turn. Further, as to Le-Vel's assertion that it was entitled to a "presumption of general damages" respecting its defamation claim, MacFarland stated in part (1) presumed damages are proper in defamation per se cases only when the speech is not public or the plaintiff proves actual malice and (2) neither of those circumstances is present in this case.

In its response to MacFarland's motion to dismiss, Le-Vel asserted in part that the "commercial nature" of MacFarland's speech in question defeats his motion on two grounds: (1) "[f]irst, the commercial nature of his speech removes it from the definition of 'free speech' under the TCPA, such that the statute does not apply," and (2) "[s]econd, his statements fall squarely under the TCPA's exception for commercial speech under Section 27.010(b)."[4] Further, Le-Vel stated in its response (1) "even if MacFarland could shift his burden to Le-Vel to show a prima facie case, by clear and specific evidence, for each essential element of its two claims, Le-Vel

[4] Specifically, Le-Vel stated in part,

> MacFarland makes it clear that selling services, and not advocating for consumers, is the primary purpose of the Website when he often places this boilerplate "Editor's Note" at the beginning of his MLM articles, including the Article:
>
> > [Editor's Note: This article is long and I hope you find the information you need to make an informed decision. Towards the end, I have a special gift for you. (If you want to cheat, click here to get it now.)].
>
> . . . Clicking on the link in MacFarland's "Editor's Note" takes a reader to a portion of the Article just before the conclusion, under the heading "My Gift to You." There, MacFarland tries to entice the Article's readers to register with one or more financial services companies.

easily meets that burden"; (2) the Texas Supreme Court has "stated without qualification that general damages are presumed in defamation per se cases"; and (3) even if general damages are not presumed, Le-Vel is entitled to "nominal" damages "without any need for evidence." Additionally, Le-Vel asserted (1) "a motion to dismiss is not a 'pleading' . . . so the factual assertions contained therein are not considered 'competent evidence under the TCPA'" and (2) because the exhibits attached to MacFarland's motion were unverified, those exhibits could not be considered in deciding the motion.

Attached to Le-Vel's response to the motion to dismiss were affidavits of Jeffrey Prudhomme,[5] Le-Vel's legal counsel, and Drew Hoffman,[6] chief operating officer of Le-Vel. Exhibits attached to Prudhomme's affidavit included printouts of (1) the original and edited versions of the Article; (2) several other blog posts created by MacFarland on his website, including one titled "Is Every MLM a Scam?"; (3) numerous comments purportedly posted on

[5] Prudhomme's statements in his affidavit included, in part,

> 17. In his article titled "Top Ten Ways Personal Finance Blogging has Helped Me" Defendant reveals that one of the main reasons he publishes his Website is to make money. . . .
>
> 18. Defendant uses sensational article headlines to drive internet traffic to the Website for the profit he generates by offering financial services to his readers and through advertisements and links to other companies. Defendant's website contains a "Terms and Conditions" webpage . . . in which he states that he has "a financial relationship with the companies mentioned on [the Website]" and that he uses "third party advertising companies to serve ads and collect information when users visit our site." . . . .
>
> 19. On his Website, Defendant directly offers visitors financial services through registrations with companies like Digit.co and Personal Capital Corporation, for which he receives a referral fee or commission. . . .
>
> 20. MacFarland has an agreement with Personal Capital Corporation, under which he earns between $70 and $150 for each person who uses his referral webpage, to which he links from within his blog posts, to register with Personal Capital and link at least $100,000 of investible assets to Personal Capital's Financial Dashboard. . . .

[6] Hoffman stated in part in his affidavit (1) he has knowledge of and is familiar with all of the business practices and products of Le-Vel and (2) based on his personal knowledge, duties at Le-Vel, and experience, each of the statements described above as forming the basis for Le-Vel's defamation and business disparagement claims is "objectively false." Further, as to damages, Hoffman stated,

> 16. Le-Vel has suffered damages as a result of Defendant's false and defamatory allegations. Specifically, Le-Vel's support and compliance departments have received a multitude of tickets and emails regarding Defendant's statements, requiring Le-Vel to respond and requiring the heads of both departments, as well as myself, to spend numerous hours explaining the allegations and why they are false to the compliance and support departments in a manner that allows them to respond to such communications. . . . Additionally, Le-Vel has spent money on outside legal representation to investigate and deal with Defendant's false allegations.
>
> 17. Additionally, comments to Defendant's Article specifically demonstrate that readers of the Article that otherwise would have attempted to become a Promoter or customer of Le-Vel decided not to promote or purchase specifically because of the false allegations contained in the Article. In my experience, it is common for false allegations, such as the statements made by Defendant, to have a negative effect on the reputation and business activities of companies, including Le-Vel. Therefore, Le-Vel's reputation has also been damaged by Defendant's false statements.

MacFarland's website by readers of the articles[7]; and (4) responses to those comments posted by MacFarland.[8] Exhibits attached to Hoffman's affidavit included (1) a copy of Le-Vel's "Policies and Procedures" and (2) five emails to "Le-Vel Compliance."[9]

Following a hearing on MacFarland's motion to dismiss,[10] MacFarland filed a reply to Le-Vel's response. As to his burden to show the TCPA applies in this case, MacFarland stated in his reply (1) "[t]he preponderance of the evidence shows that Le-Vel's claims are based on, related to, and in response to MacFarland's Post, which is unquestionably a communication about Le-Vel, a company who also unquestionably places goods, products, or services in the

[7] The comments posted on MacFarland's website included, in part, the following: (1) on October 19, 2015, a purported reader identified as "Amy" made the statement "Thank you for taking the time to post this article . . . . I am a TNBC [Triple Negative Breast Cancer] warrior and I have been looking into a healthier lifestyle. Someone suggested Thrive to me. But I love to do my research first! Thank you again!"; (2) on October 9, 2015, a purported reader identified as "Shaun in KS" made the statement "Awesome article, thank you a ton for this valuable info. Finally saw like the 10th friend on my feed mention it and I began to wonder if the hype could be real. Now that you have explained the pay structure it doesn't take a genius to see the obvious crooked nature. Yet another predatory model preying on the weakness of human nature."; (3) on September 25, 2015, a purported reader identified as "Gwen" made the statement "Just discovered you thanks to a search to learn more about Thrive, and I'm adding you to my bookmarks. Keep up the good work!!! And I have to say that your replies to comments are spot on, and are also worth reading. Thank you!! Futur3that [sic], I'm with you on not having the heart to share with the friend that inspired my search, but at the same time, I think withholding makes me less of a friend so I'll pass it on to her."; (4) on October 27, 2015, a purported reader identified as "Steve" made the statement "Thanks so much for this information. I was a few steps away from putting this into my daily life. Now…. I know what to do. Exercise, eat less and better, and laugh and love alot. The rest will just take shape."; (5) on November 13, 2015, a purported reader identified as "Kristin" made the statement "Thank You! I have been waiting on information about this whole Thrive thing. About the quality of vitamins you are really getting etc. I don't need to waste my money . . . ."; (6) on September 27, 2015, a purported reader identified as Lyubov" made the statement "Right on, thanks for this info. Getting so tired of seeing f.book peeps trying to sell this kind of rubbish! Now I can help pull out the imaginary bricks of another pyramid scam. :)"; and (7) on November 7, 2015, a purported reader identified as "Dave" made the statement "Thank you so much for taking the time to write this. I've been looking for something to forward my acquaintances who are brainwashed by this ridiculous pyramid scheme."

[8] Specifically, in response to a comment by a purported Le-Vel promoter, MacFarland stated in part, "Care to give us details of your retail sales to the public (people without a Le-Vel Thrive agreement), so we can compare it to the FTC guidelines to see if it is an illegal pyramid scheme based on recruitment?" Also, MacFarland stated in another comment,

> As I covered previously, [Le-Vel] appears to be over-charging some people 50x. Presumably the company isn't in the business of giving away free product… that would be terrible business. So some appear to [be] getting grossly overcharged by hundreds of dollars a year, but "most get it for free." Could you send this analysis into the FTC, please?

Further, in another response to a comment, MacFarland stated,

> I want to review the Le-Vel compensation plan to see what qualifies someone to remain active, but it appears that their website is currently down, so the documents are unavailable to me. Typically, in order to remain active, so level of personal volume has to be achieved. While this can be done through sales of the product, the problem is: Why Would Anyone Buy an MLM Product? People aren't going to fork over this kind of money for VITAMINS (as you say). So typically people in MLM end up satisfying the personal volume requirement by buying the overpriced vitamins themselves… i.e. "Pay to Play." This is where it starts to become more clear as a pyramid scheme.
> I don't think Le-Vel is different, but again, I can't confirm because the website isn't working for me.

[9] Those emails include statements by apparent Le-Vel promoters describing MacFarland as a "hater" and informing Le-Vel that MacFarland's website "makes ridiculous claims about Le-Vel"; is "talking bad about the company" and "bashing" Thrive; and has posted "a very negative article about Thrive" and "awful made up lies."

[10] The record shows that at the hearing on his motion to dismiss, MacFarland objected to the affidavits of Prudhomme and Hoffman described above on the grounds that those affidavits are "conclusory" and "unsupported." The record does not show a ruling as to those objections.

marketplace" and (2) "Le-Vel's Petition is all the 'competent evidence' MacFarland needs to establish that the TCPA applies." Further, as to whether the TCPA's "commercial speech" exemption is applicable, MacFarland stated (1) "[m]erely receiving compensation for services is not commercial speech"; (2) he is not "primarily engaged in the business of selling or leasing goods or services"; (3) even assuming, arguendo, that he is primarily engaged in the business of selling or leasing goods or services, "Le-Vel fails to meet its burden [to show] that the Post arises out of the sale or lease of goods or services that MacFarland allegedly peddles on his site" or "arise[s] out of a commercial transaction in which his intended audience is an actual or potential buyer or customer"; and (4) "Le-Vel has not produced any evidence, other than an objectionable affidavit from its counsel, to show that the commercial speech exemption applies to MacFarland's Post." Attached to MacFarland's reply was an affidavit by him.[11]

Le-Vel filed a sur-reply to MacFarland's reply. Therein, Le-Vel restated several of its arguments above and, additionally, asserted in part (1) "Le-Vel's argument is that MacFarland's speech is commercial speech that proposes a commercial transaction" and (2) "MacFarland's Website is indeed a commercial endeavor specifically designed to attract visitors off of whom MacFarland directly makes money, and MacFarland is primarily engaged in the business of offering services to these potential customers through his "affiliate links," for which he receives

[11] In his affidavit, MacFarland stated in part,

> 2. . . . My intended audience [respecting the Lazy Man and Money website] has always been and continues to be the general public. . . .
>
> 3. I began allow [sic] third parties to advertise on my website in or around 2007. I also sometimes receive bonuses from affiliate links posted on my website when a reader signs up for a respective service. Affiliate links from Digit.com and Personal Capital account for approximately 6.0% of the total income from the website. Although it varies from year to year, I receive approximately 20% of my total yearly household income from the website.
>
> 4. The primary purpose of my website is to discuss my opinions about personal finance and [it] is not commercial in nature. I do not offer any products for sale on my website. There is no way for a reader to purchase anything from my website. Most of my articles do not contain affiliate links.

money." Attached to Le-Vel's sur-reply was a second affidavit of Prudhomme,[12] with exhibits that included pages from MacFarland's website.

In a reply to Le-Vel's sur-reply, MacFarland asserted in part that he "is not primarily engaged in the business of selling or leasing goods or services." Under that statement, he listed the following points: (1) his website "is not commercial in nature and it is not used primarily for the business of selling or leasing goods or services"; (2) he "offers no goods or services for sale on his website"; (3) "[t]here is no way to purchase anything directly from his website"; and (4) he "has stated in his sworn affidavit that his 'business model,' if there even is one at all, is to blog about personal finance, not make money." Additionally, as to damages, MacFarland asserted in part (1) "Le-Vel has plead no evidence, much less clear and specific evidence, as to what and how [sic] MacFarland's allegedly defamatory statements have been obviously hurtful to its business reputation," and (2) "Le-Vel provides no support to show any harm to its business reputation that is directly attributable to MacFarland's Post or any of his allegedly defamatory statements."

In an order dated May 26, 2016, the trial court denied MacFarland's motion to dismiss, stated that it found the motion was "frivolous or solely intended for delay," and awarded Le-Vel its costs and reasonable attorney's fees. Pursuant to a request by MacFarland, the trial court issued findings of fact and conclusions of law. This interlocutory appeal timely followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West Supp. 2016).

II. MACFARLAND'S ISSUES

A. Standard of Review and Applicable Law

The Texas Legislature enacted the TCPA "to encourage and safeguard the constitutional

[12] Prudhomme's second affidavit included, in part, the following statements by him: "In his article [on the *Lazy Man and Money* website] titled 'Our Early Retirement Plan: My Personal Income (Part 2),' Defendant states that . . . 'I run a few websites, but the one you are reading is by far my most successful. While I've put numerous hours into it, it's starting to pay off well . . . .' Later in the article Defendant further reveals that 'my websites currently make around $40,000 a year.'"

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."[13] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.002; *see also In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding); *Watson v. Hardman*, 497 S.W.3d 601, 605 (Tex. App.—Dallas 2016, no pet.). The act states it "shall be construed liberally to effectuate its purpose and intent fully." TEX. CIV. PRAC. & REM. CODE ANN. § 27.011. The TCPA's main feature is "a motion procedure that enables a defendant to seek the dismissal of frivolous claims and to recover attorneys' fees and sanctions." *Watson*, 497 S.W.3d at 605; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003.

Under the TCPA, "a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). "Exercise of the right of free speech" means "a communication made in connection with a matter of public concern." *Id*. § 27.001(3). "Matter of public concern" includes an issue related to (1) "health or safety"; (2) "environmental, economic, or community well-being"; (3) "the government"; (4) "a public official or public figure"; or (5) "a good, product, or service in the marketplace." *Id*. § 27.001(7).

If the movant carries its initial burden, the nonmovant must then "establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id*. § 27.005(c); *see also Lipsky*, 460 S.W.3d at 584. If the nonmovant fails to carry this burden, the trial court shall dismiss the "legal action." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)–(c). Further, even if the nonmovant carries its § 27.005(c) burden, the trial court shall dismiss the

[13] 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").

legal action if the movant establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. *Id.* § 27.005(d). "In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a); *see also id.* § 27.006(b) ("On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.").

A "prima facie case" refers to "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *Lipsky*, 460 S.W.3d at 590. It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)).

"Clear and specific evidence" of each essential element of a claim is more than "mere notice pleading." *Id.* A plaintiff must "provide enough detail to show the factual basis for its claim." *Id.* at 590–91. The TCPA's requirement of proof by clear and specific evidence does not "impose an elevated evidentiary standard," does not "categorically reject circumstantial evidence," and does not "impose a higher burden of proof than that required of the plaintiff at trial." *Id.* at 591.

If the court orders dismissal of "a legal action" under the TCPA, the court shall award to the moving party (1) "court costs, reasonable attorneys' 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." TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a). Alternatively, if the court finds the motion to dismiss is frivolous or solely intended to delay, the court "may award court costs and reasonable attorney's fees to the responding party." *Id.* § 27.009(b).

Section 27.010 of the TCPA describes several exemptions from the act. Specifically, that section states in part the TCPA "does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer." *Id*. § 27.010(b). The nonmovant bears the burden of proving a statutory exemption. *See Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 309 (Tex. App.—Dallas 2013, pet. denied).

Pursuant to section 51.014(a)(12) of the Texas Civil Practice and Remedies Code, a person may appeal from an interlocutory order of a trial court that denies a motion to dismiss filed under section 27.003. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12). We review de novo the trial court's determinations that the parties met or failed to meet their section 27.005 burdens. *Watson*, 497 S.W.3d at 605; *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 282 (Tex. App.—Dallas 2015, pet. denied). Also, we also review de novo questions of statutory construction. *See Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 304–05; *Moldovan v. Polito*, No. 05-15-01052-CV, 2016 WL 4131890, at *3 (Tex. App.—Dallas Aug. 2, 2016, no pet.) (mem. op.).

B. Application of Law to Facts

1. Denial of MacFarland's Motion to Dismiss Pursuant to TCPA

In his first issue, MacFarland asserts the trial court erred by denying his motion to dismiss pursuant to the TCPA. In addressing that issue, we necessarily consider MacFarland's fourth through tenth issues, all of which are essentially sub-issues of his first issue.

a. Exercise of Free Speech

We begin with MacFarland's fourth issue, in which he asserts the trial court erred by concluding he did not meet his initial burden under the TCPA to show by a preponderance of the evidence that this lawsuit is an action based on, relating to, or in response to his exercise of the right of free speech. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). MacFarland contends Le-Vel's first amended petition (1) "clearly indicate[s] that Appellee's suit is based on MacFarland's Post in which he discusses Le-Vel, its products, and its business model" and (2) "admits" that Le-Vel's products are "sold in the marketplace." According to MacFarland, the requirements of section 27.005(b) were thus satisfied.

Le-Vel contends (1) "under Texas law, when a defendant's speech is really an attempt to attract potential customers, it serves a commercial purpose and is not a matter of public concern," and (2) "the commercial nature of MacFarland's speech removes it from the definition of 'free speech' under the TCPA, such that the statute does not apply." The sole authority cited by Le-Vel in support of that position is *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, No. 08-12-00278-CV, 2014 WL 6679122, at *6 (Tex. App.—El Paso Nov. 25, 2014, no pet.).

Miller Weisbrod involved a lawsuit filed by an ophthalmologist, Jorge Llamas-Soforo, against a law firm and two of the firm's individual attorneys, Lawrence Lassiter and Les Weisbrod. *See id.* at *1. Llamas contended television commercials created by the defendants encouraging former patients of Llamas to contact the law firm if they were left blind by treatment were slanderous, defamatory, and disparaging. *Id.* The defendants filed a motion to dismiss pursuant to the TCPA. The trial court held a hearing that it limited to two issues: (1) whether the motion was timely filed in accordance with the TCPA and (2) whether Lassiter and Weisbrod were "entitled to protection under TCPA or if they were exempt under 27.010(b)." *Id.* at *2. Following that hearing, the trial court denied the motion, ruling that Lassiter and

Weisbrod were not entitled to protection under the TCPA because the exemption set out in section 27.010(b) applied. *Id*. The court of appeals affirmed. *Id*. at *1.

The court of appeals observed that "[i]n their only issue, [Lassiter and Weisbrod] contend the trial court erred in finding they are 'primarily engaged in the business of selling or leasing goods or services' and are not afforded the protection of the TCPA, pursuant to the exclusion set out in Section 27.010(b)." *Id*. at *6. Specifically, Lassiter and Weisbrod argued in part that "'a lawyer is secondarily . . . engaged in selling services,' but it is not a 'lawyer's *primary* business.'" (emphasis original). *Id*. The court of appeals concluded (1) "each case must be evaluated on its individual merits"; (2) the television commercial in question was created, not as a "matter of public concern," but primarily to attract clients allegedly injured by Llamas; (3) the attorneys' speech "arose from the sale of their legal services to potential customers"; and (4) the trial court did not err in finding the advertisements were commercial speech and, thus, exempt from the protection of the TCPA pursuant to section 27.010(b). *Id*. at *9.

The court of appeals in *Miller Weisbrod* did not address whether the movants in that case had shown by a preponderance of the evidence that the legal action in question was based on, related to, or in response to the movants' exercise of free speech pursuant to section 27.005(b). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). Therefore, that case is inapposite respecting whether, in the case before us, MacFarland satisfied his section 27.005(b) burden. Le-Vel cites no other authority, and we have found none, to support its position that "under Texas law, when a defendant's speech is really an attempt to attract potential customers, it serves a commercial purpose and is not a matter of public concern." Further, at least one Texas court has specifically rejected an argument that application of the TCPA is precluded in "lawsuits relating to commercial speech." *BBB of Metro. Houston, Inc. v. John Moore Serv., Inc.*, 441 S.W.3d 345, 353–54 ((Tex. App.—Houston [1st Dist.] 2013, pet. denied) (concluding "broadly defined

references to speech rights" in TCPA section 27.001 did not support inference that only "limited subclass" of communications made in connection with issue related to product or service is protected); *see also BBB of Metro. Dallas*, 402 S.W.3d at 308 (term "matter of public concern" in TCPA is not ambiguous and must be enforced as written, without any limitation not stated therein); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *5 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (website post stating negative comments about BCG and other companies owned by BCG's owner constituted matter of public concern because post related to service in marketplace). Additionally, a plaintiff's own live pleading can satisfy a movant's 27.005(b) burden. *See Watson*, 497 S.W.3d at 607–08; *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App.—Austin 2015, no pet.) (TCPA does not require movant to present testimony or other evidence to satisfy section 27.005(b) burden); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006.

The record shows Le-Vel's first amended petition describes (1) its marketing and selling of "products" in the marketplace and (2) communications by MacFarland "in connection with" an "issue related to" Le-Vel's products in the marketplace. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(3), 27.001(7). On this record, we conclude MacFarland satisfied his section 27.005(b) burden. *Id.* § 27.005(b); *Watson*, 497 S.W.3d at 607–08; *see also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (construing TCPA requires looking to statute's plain language).

We decide in favor of MacFarland on his fourth issue.

b. Applicability of TCPA "Commercial Speech" Exemption

In his fifth issue, MacFarland contends the trial court erred by concluding Le-Vel met its burden to show the "commercial speech" exemption described in TCPA section 27.010(b) is applicable in this case. According to MacFarland, (1) Le-Vel "has provided no credible evidence" to support its position that MacFarland "is primarily engaged in the business of selling

services"; (2) "[t]he complained of statements have nothing to do with MacFarland's alleged commercial enterprise"; and (3) "[t]he intended audience is the general public, not potential customers."

Le-Vel argues, in part, (1) "MacFarland's speech is commercial speech that proposes a commercial transaction: MacFarland wrote the article to attract potential customers to whom he proposes a commercial transaction whereby they sign up for a financial tool, and he gets paid," and (2) "[w]ebsite visitors and Article readers are not strangers with whom MacFarland wants to share information about Le-Vel," but rather "they are targets—potential customers with whom he aims to establish a direct financial relationship, and with whom he intends to consummate a sale, or paid referral, just like in *Miller Weisbrod*." Additionally, Le-Vel asserts the requirements of TCPA section 27.010(b) have been satisfied because "Le-Vel brought its legal action against MacFarland, who is primarily engaged in the business of selling services through his financial referrals, and whose statements in the Article arise out of a commercial transaction in which the intended audience is an actual or potential customer." In support of those assertions, Le-Vel cites the affidavits of Prudhomme described above and exhibits attached thereto.

In his reply brief in this Court, MacFarland argues (1) the Post "does not arise out of a commercial transaction" and (2) "[s]imply because MacFarland profits off of portions of his website does not, in and of itself, render his speech in the Post 'commercial speech that proposes a transaction.'" Further, MacFarland contends this case is "analogous" to *Moldovan*, 2016 WL 4131890, a case decided after the filing of the parties' initial briefs in this case.

In *Moldovan*, Neely and Andrew Moldovan hired Andrea Polito Photography, Inc. ("APP') to photograph their wedding. Neely was the owner of a for-profit company, A Complete Waste of Makeup, LLC, which "represent[s] various social media accounts for

businesses." *Id.* at *1. Additionally, Neely authored a blog that generated revenue "[t]hrough sponsored posts and through a blog course" taught by Neely. *Id.* Specifically, as to the sponsored posts, (1) companies sent Neely products that she reviewed in posts she published on her blog; (2) she also promoted the brands on Twitter, Facebook, and Instagram; and (3) after the sponsoring company reviewed the posts, it compensated Neely for her services with payments made to Neely individually. *Id.* The number of daily hits to her blog was relevant to the amount of money she received from her sponsors—i.e., the more hits on her blog, the higher her compensation. Other factors affecting her compensation included the number of her followers on Facebook, Instagram, Twitter, and other social media accounts linked to her blog. *Id.*

After the Moldovans' wedding, a dispute arose over what items were included in the photography package purchased by the Moldovans from APP. The Moldovans contacted the local NBC news affiliate and invited a reporter to their home for an interview. *Id.* at *2. The resulting news story aired on television and was published on the news affiliate's website. The story stated that, according to the Moldovans, APP was requiring them to pay additional amounts for items they had already purchased under their contract and was "holding their pictures hostage" until such payments were made. *Id.* That news story "went viral" and received comments from viewers around the world. Then, the Moldovans published the story on social media and encouraged their social media contacts to view the story, share negative information about APP and its owner, Andrea Polito, and use photographers other than Polito and APP. *Id.*

Polito and APP filed a lawsuit against the Moldovans, alleging defamation, business disparagement, tortious interference with prospective clients, and conspiracy. *Id.* The Moldovans moved to dismiss the action pursuant to the TCPA. The trial court denied that motion and "found" in its order (1) Neely "is primarily engaged in the business of selling social media services through her personal blog, which exempts her statements from coverage" under

TCPA section 27.010(b), and (2) alternatively, Polito and APP "have proven by clear and specific evidence a prima facie case of each element of their claims."

On appeal to this Court, the Moldovans contended in part there was no evidence the commercial speech exemption to the TCPA was applicable. First, this Court addressed the plaintiffs' argument that by publicizing the dispute, Neely sought to increase the number of readers of her blog so that she could charge more for her sponsored posts, and thus "the Moldovans' statements were not a protected review of APP's services, but rather arose out of the marketing and sale of Neely's own blogging and social media services to her customers." *Id.* at *4. This Court rejected that argument. In doing so, this Court stated, in part, that although Neely's posts "may have had the effect of increasing sales for her business," the posts "were not about Neely's business," but rather "were about her dispute with Polito and APP." *Id.* Second, this Court addressed whether the statements in question arose out of "a commercial transaction in which the intended audience is an actual or potential customer." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b)). This Court reasoned (1) "Neely's 'actual potential buyer[s] or customer[s]' are companies that wish to purchase favorable social media reviews of their products, not the readers of the blog who pay nothing to Neely," and (2) "Neely's intended audience for her posts about Polito and APP was the general public, specifically persons seeking a wedding photographer, not entities seeking social media services." *Id.* Therefore, this Court concluded the commercial speech exemption was inapplicable. *Id.*

In the case before us, even assuming without deciding that MacFarland is primarily engaged in the business of selling or leasing goods or services, we cannot agree with Le-Vel's position that the nature of the speech in question is "just like in *Miller Weisbrod*." As described above, (1) *Miller Weisbrod* involved television commercials created by attorneys for the purpose of locating potential clients with negligence claims against a specific doctor and (2) the court of

appeals in that case concluded the attorneys' speech "arose from the sale of their legal services to potential customers." *See* 2014 WL 6679122, at *9. Unlike the case before us, *Miller Weisbrod* did not involve a website, blog, or advertising links. Rather, we find *Moldovan* instructive. *See Moldovan*, 2016 WL 4131890, at *4. Like the complained-of statements in *Moldovan*, MacFarland's Post in the case before us "may have had the effect" of increasing MacFarland's sales of services, but was "not about" MacFarland's business of selling services. *See Moldovan*, 2016 WL 4131890, at *4. Further, to the extent Le-Vel contends section 27.010(b) is applicable based on MacFarland's placement of two "notes" within the Article that functioned to promote certain financial services companies and could result in payment to MacFarland if readers purchased services through links on his website, we cannot agree with Le-Vel's position that the statements in question thus "arise[] out of" a commercial transaction in which the intended audience is an actual or potential customer. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b). On this record, we conclude the commercial speech exemption of section 27.010(b) does not apply in this case.

We decide MacFarland's fifth issue in his favor.

c. Le-Vel's Prima Facie Case

Because we concluded above that the TCPA applies to MacFarland's statements in question, we must next consider whether Le-Vel met its burden of establishing by "clear and specific evidence" a prima facie case on its causes of action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

In his sixth and seventh issues, MacFarland contends, respectively, that the trial court erred by concluding Le-Vel presented clear and specific evidence of each element of (1) its "defamation claim" and (2) its "business disparagement claim." In addressing those two issues,

we necessarily consider MacFarland's tenth issue, which pertains to a common element of those claims, damages.

i. Le-Vel's Business Disparagement Claim

"To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff." *Lipsky*, 460 S.W.3d at 592; *see Moldovan*, 2016 WL 4131890, at *13. Special damages are "economic damages such as for lost income." *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013). As to the element of special damages in a business disparagement claim, the plaintiff must establish "pecuniary loss that has been realized or liquidated as in the case of specific lost sales." *Moldovan*, 2016 WL 4131890, at *15 (quoting *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987)); *see also Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App.—Fort Worth 2007, pet. denied) ("To prove special damages, the plaintiff must prove that the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.").

We begin with the element of damages respecting the business disparagement claim.[14] Specifically, with respect to damages for business disparagement, MacFarland argues in part that Le-Vel presented (1) "no evidence of specific pecuniary loss as a result of MacFarland's alleged statements" and (2) "no evidence concerning the *amount* of damages suffered—what the expected revenues from the hypothetical purchases would be." (emphasis original).

[14] In addition to complaining generally in his seventh issue about lack of evidence respecting the elements of Le-Vel's business disparagement claim, MacFarland contends in his tenth issue that Le-Vel did not "present[] clear and specific evidence that any of [MacFarland's] allegedly false statements damaged [Le-Vel]." To the extent MacFarland's seventh and tenth issues overlap, we address them together. Further, we construe MacFarland's tenth issue to apply to each of Le-Vel's claims. Because we address Le-Vel's business disparagement and defamation claims separately in this opinion, we consider MacFarland's tenth issue in each analysis.

Additionally, MacFarland asserts "[t]he only evidence Appellee produced is the conclusory self-serving affidavit from Hoffman."

Le-Vel's brief on appeal contains a combined argument respecting evidence of damages for both its business disparagement and defamation claims. In that combined argument, Le-Vel asserts in part (1) "Le-Vel presents clear and specific evidence of special damages . . . , which includes 'the loss of trade or other dealings'"; (2) "MacFarland presents no basis for his suggestion that Le-Vel must prove, at the motion to dismiss stage, a specific amount of damages"; (3) "[t]his would be contrary to Le-Vel's prima facie burden, and is not required by the TCPA or any Texas court"; and (4) "Le-Vel proved by clear and specific evidence that it was damaged, which is what is necessary to meet its burden under the TCPA." In support of those assertions, Le-Vel cites the portions of Hoffman's affidavit described above, the five emails attached to that affidavit, and the seven comments described above in the exhibits attached to Prudhomme's affidavit.

Hoffman stated in his affidavit, in part, (1) he and others at Le-Vel have been required to "spend numerous hours explaining the allegations and why they are false" to others at Le-Vel, (2) "Le-Vel has spent money on outside legal representation to investigate and deal with Defendant's false allegations," and (3) "comments to Defendant's Article specifically demonstrate that readers of the Article that otherwise would have attempted to become a Promoter or customer of Le-Vel decided not to promote or purchase specifically because of the false allegations contained in the Article." However, the exhibits attached to Hoffman's affidavit merely describe Le-Vel's policies and procedures and show that apparent Le-Vel promoters sent emails informing Le-Vel of MacFarland's statements on his website. Further, Prudhomme's affidavits do not address damages, nor do his affidavits or the exhibits cited by Le-Vel show that readers of the Article "otherwise would have attempted to become a Promoter or customer of Le-

Vel." At most, those exhibits show comments by persons interested in information about Le-Vel. We conclude the pleadings and affidavits in the record before us show no evidence of "pecuniary loss that has been realized or liquidated as in the case of specific lost sales." *Moldovan*, 2016 WL 4131890, at *15; *see also Lipsky*, 460 S.W.3d at 593 (concluding "general averments of direct economic losses and lost profits, without more" did not satisfy minimum requirements of TCPA respecting damages element of business disparagement claim); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). Consequently, we conclude Le-Vel has not met its burden to establish by clear and specific evidence a prima facie case as to business disparagement. *See Moldovan*, 2016 WL 4131890, at *15. We decide MacFarland's seventh issue in his favor.

ii. Le-Vel's Defamation Claim

Next, we address MacFarland's sixth issue, in which he asserts lack of evidence respecting Le-Vel's defamation claim. "In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Lipsky*, 460 S.W.3d at 591. A statement is defamatory if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation. *Moldovan*, 2016 WL 4131890, at *6. Defamation's elements include (1) the publication of a false[15] statement of fact to a third party; (2) that was defamatory concerning the plaintiff; (3) with the requisite degree of fault, i.e., negligence or actual malice; and (4) damages, in some cases. *Lipsky*, 460 S.W.3d at 593. The status of the person allegedly defamed determines the requisite

[15] This Court has noted that "[p]lacing the burden of proving truth or falsity is a complex matter" in light of post-*Lipsky* cases in which our sister courts have concluded that a "private plaintiff" is not required to prove falsity of defamatory statements in certain cases. *Moldovan*, 2016 WL 4131890, at *5 n.4. However, we need not address that question in the case before us because we conclude below that Le-Vel did not satisfy its evidentiary burden as to damages.

degree of fault. *Id.* A private individual need only prove negligence, whereas a public figure or official must prove actual malice. *Id.* Further, "[i]t is a well-settled legal principle that one is liable for republishing the defamatory statement of another." *Moldovan*, 2016 WL 4131890, at *6 (quoting *Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013)).

Defamation is "delineated" into defamation per se and defamation per quod. *Hancock*, 400 S.W.3d at 63. Statements are considered defamatory per se if they "are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable." *Moldovan*, 2016 WL 4131890, at *6. "A false statement will typically be classified as defamatory per se if it injures a person in his office, profession, or occupation; charges a person with the commission of a crime; imputes sexual misconduct; or accuses one of having a loathsome disease." *Id.* The issue of whether statements are defamatory per se is generally a matter of law to be decided by the court. *Id.* (citing *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.—Austin 2007, pet. denied)). Defamation per quod is defamation that is not actionable per se. *Hancock*, 400 S.W.3d at 64. Statements that are defamatory per quod are actionable only upon allegation and proof of damages. *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580.

The Supreme Court of Texas has explained that there are three types of damages that may be at issue in defamation proceedings: "(1) nominal damages; (2) actual or compensatory damages; and (3) exemplary damages." *Hancock*, 400 S.W.3d at 65. Nominal damages "are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." *Id.* Actual or compensatory damages are intended to compensate a plaintiff for the injury he incurred and include general damages, which are non-economic damages such as for loss of reputation or mental anguish, and special damages. *Id.* Both an individual and a corporation may suffer reputation damages that are

noneconomic in nature. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 (Tex. 2014).

"Actual malice" in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth. *Lipsky*, 460 S.W.3d at 593; *Campbell v. Clark*, 471 S.W.3d 615, 629 (Tex. App.—Dallas 2015, no pet.). The standard for reckless disregard is subjective and focuses on the conduct and state of mind of the defendant. *Campbell*, 471 S.W.3d at 629 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002)). Reckless disregard requires more than mere negligence or "a departure from reasonably prudent conduct." *Id.* It requires "evidence that the defendant in fact entertained serious doubts as to the truth of his publication, evidence that the defendant actually had a high degree of awareness of . . . [the] probable falsity of his statements." *Bentley*, 94 S.W.3d at 591; *accord Campbell*, 471 S.W.3d at 629. "[A] failure to investigate the facts is not, by itself, any evidence of actual malice." *Campbell*, 471 S.W.3d at 631 (quoting *Bentley*, 94 S.W.3d at 601). Further, "the actual malice standard focuses on the defendant's state of mind at the time of publication[,] not after the defendant was sued." *Cruz v. Van Sickle*, 452 S.W.3d 503, 517 (Tex. App.—Dallas 2014, pet. denied). "Evidence of events after an article has been printed and distributed has been held to have little if any bearing on the defendant's state of mind at the time of publication." *Id.* (citing *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 174 (Tex. 2003)). A defendant's state of mind "can—indeed, must usually—be proved by circumstantial evidence." *Campbell*, 471 S.W.3d at 629; *see also Lipsky*, 460 S.W.3d at 584 (concluding "clear and specific evidence under the" TCPA "includes relevant circumstantial evidence"). The evidence must be viewed in its entirety. *Campbell*, 471 S.W.3d at 629. "In addition, the supreme court has stressed that proof of actual malice is not defeated by a defendant's self-serving protestation of sincerity." *Id.*

We begin our analysis by considering the evidence as to damages respecting the defamation claim. As described above, MacFarland contends in his tenth issue that Le-Vel did not "present[] clear and specific evidence that any of [MacFarland's] allegedly false statements damaged [Le-Vel]." In Le-Vel's combined argument in its appellate brief respecting evidence of damages for both its business disparagement and defamation claims, it asserts that in addition to the same "special damages" shown as to its business disparagement claim above, it "also has clear and specific evidence of general damages to its reputation." Le-Vel cites (1) the statements from Hoffman's affidavit described in connection with its business disparagement claim above and (2) Hoffman's additional statement in his affidavit, "In my experience, it is common for false allegations, such as the statements made by Defendant, to have a negative effect on the reputation and business activities of companies, including Le-Vel. Therefore, Le-Vel's reputation has also been damaged by Defendant's false statements." Further, Le-Vel argues "this reputational damage, as well as damages for lost profits and business opportunities, is confirmed by reader comments to MacFarland's Article."

We concluded above that the evidence cited by Le-Vel did not satisfy its burden respecting special damages regarding its business disparagement claim. Likewise, we conclude that evidence does not show special damages as to Le-Vel's defamation claim. *See Lipsky*, 460 S.W.3d at 595.

As to general damages, Hoffman's statement that it is "common for false allegations, such as the statements made by Defendant, to have a negative effect on the reputation and business activities of companies, including Le-Vel" does not demonstrate any "reputational" injury incurred by Le-Vel. *See Hancock*, 400 S.W.3d at 65. Further, while Hoffman refers generally in his affidavit to "comments to Defendant's Article," Hoffman does not describe or cite any such comments and none are contained in the exhibits attached to his affidavit. To the

extent Le-Vel relies on Prudhomme's affidavits, neither of those affidavits contain any testimony that mentions or addresses damages. Also, while Le-Vel's appellate argument describes each of the seven comments listed above from the exhibits attached to Prudhomme's first affidavit and asserts that each of those comments purportedly shows "actual potential" promoters or customers who were "considering buying" Le-Vel products, "but who did not, specifically on the basis of MacFarland's defamatory statements," we rejected that position above. Le-Vel does not otherwise address or explain how any of those comments show reputational damage. Nor does Le-Vel address or mention any of MacFarland's complained-of statements in its damages argument on appeal or describe reputational damage from any complained-of statement. On this record, we conclude Le-Vel has not met its burden to establish by clear and specific evidence a prima facie case for general damages respecting MacFarland's alleged defamatory statements. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); TEX. R. APP. P. 38.2, 38.1(i); *see also Whisenhunt v. Lippencott*, 474 S.W.3d 30, 45–46 (Tex. App.—Texarkana 2015, no pet.) (concluding nonmovant "filed no affidavit or pleading that provided the detail required by the TCPA" as to damages).

Additionally, Le-Vel contends it "does not have to plead or prove damages" because it can show MacFarland's statements in question constituted defamation per se. Specifically, according to Le-Vel, (1) the Supreme Court of Texas has "stated without qualification that general damages are presumed in defamation per se cases" and (2) regardless of whether general damages can be presumed, "nominal" damages are available in defamation per se cases "without any need for evidence." In support of those contentions, Le-Vel cites *Lipsky* and *Hancock*. *See* 460 S.W.3d at 596; 400 S.W.3d at 65. Further, Le-Vel asserts that to the extent it was required to show actual malice or private speech in order to be entitled to presumed damages, it has shown both.

MacFarland argues this case is not a defamation per se case. Additionally, he contends (1) the U.S. Constitution allows the presumption of general damages in defamation per se cases only when the speech is not public or the plaintiff proves actual malice and (2) "[Le-Vel] did not provide support for either case." In support of his position, MacFarland cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Gertz involved a libel action against the publisher of a magazine article that described the plaintiff, Elmer Gertz, as a "Communist-fronter." 418 U.S. at 326. After the jury found in favor of Gertz, the trial court rendered judgment in favor of the publisher notwithstanding the jury's verdict. *Id*. at 329. The United States Supreme Court reversed on the ground that the privilege claimed by the publisher was inapplicable. *Id*. Further, that Court concluded a new trial was necessary "[b]ecause the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury." *Id*. at 352. In its analysis, the Supreme Court stated in part (1) "we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"; (2) "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury"; and (3) "all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." *Id*. at 349–50. Additionally, in a subsequent case, the Supreme Court (1) clarified that *Gertz*'s requirement that compensatory awards must be supported by competent evidence pertains to "public" speech and (2) concluded that, in a defamation suit based on "private" speech, recovery of presumed damages does not violate the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *see Hancock*, 400 S.W.3d at 65 & n.7.

In *Hancock*, the Supreme Court of Texas "extrapolat[ed] the effect these holdings have on defamation per se," stating in part as follows:

> Historically in Texas, defamation per se claims allow the jury to presume the existence of general damages without proof of actual injury. But the First Amendment requires competent evidence to support an award of actual or compensatory damages when the speech is public or the level of fault is less than actual malice. Thus, the Constitution only allows juries to presume the existence of general damages in defamation per se cases where: (1) the speech is not public, or (2) the plaintiff proves actual malice.

Hancock, 400 S.W.3d at 65–66 (citations omitted).

Lipsky involved a TCPA motion to dismiss counterclaims filed by a natural gas drilling company, "Range," based on statements made by a property owner, Steven Lipsky, to the media, Lipsky's friends and family, the Environmental Protection Agency, the Parker County Appraisal Review Board, and the Texas Railroad Commission. 460 S.W.3d at 585. The trial court denied Lipsky's motion to dismiss. Lipsky sought mandamus relief in the court of appeals, which relief was granted in part.[16] Then, both sides filed petitions for mandamus relief in the supreme court. The supreme court concluded in part that certain remarks by Lipsky constituted defamation per se. *Id*. at 595–96. Then, that court addressed Lipsky's argument that "the trial court should have dismissed Range's defamation claim because no evidence established that his remarks caused the company specific damages." *Id*. at 595. In describing the applicable law, the supreme court stated in part "even though Texas law presumes general damages when the defamation is per se, it does not 'presume any particular amount of damages beyond nominal damages.'" *Id*. at 593 (quoting *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) (per curiam)). Further, in its analysis, the supreme court stated in part as follows:

> When an offending publication qualifies as defamation per se, a plaintiff may recover general damages without proof of any specific loss. *Hancock*, 400 S.W.3d

[16] At the time Lipsky sought mandamus relief, the law was not clear as to whether an interlocutory appeal was available for denial of a TCPA motion to dismiss. The availability of such relief has since been clarified. *See id*. at 585 n.2.

> at 63–64. Thus, if Lipsky's remarks concerning Range are actionable per se, then any failure in proof as to special damages is irrelevant. In other words, if such losses are not an essential element of Range's defamation claim, they can have no bearing on Lipsky's dismissal motion under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).
>
> . . . .
>
> As defamation per se, damages to its reputation are presumed, although the presumption alone will support only an award of nominal damages. *Salinas*, 365 S.W.3d at 320. Pleading and proof of particular damage is not required to prevail on a claim of defamation per se, and thus actual damage is not an essential element of the claim to which the TCPA's burden of clear and specific evidence might apply. Although Range's affidavit on damages may have been insufficient to substantiate its claim to special damages, it was not needed to defeat Lipsky's dismissal motion because Range's defamation claim was actionable per se.

Id. at 596; *see also Brady v. Klentzman*, No. 15-0056, 2017 WL 382427, at *5 & n.3 (Tex. Jan. 27, 2017) (stating in part that "*Lipsky* resolves the 'question as to whether . . . nominal damages may be presumed'" in defamation per se cases). This premise was confirmed in the Texas Supreme Court decision in *D Magazine Partners, L.P. v. Rosenthal*, No. 15-0790, 2017 WL 1041234, at *8 (Tex. Mar. 17, 2017). There, the supreme court stated the article in question in that case "is defamatory per se, and [the defamed party] need not show actual damages." *Id.*

In the case before us, Le-Vel cites the statements from *Lipsky* set out above, then asserts, "As *In re Lipsky* makes clear, because there is no damages element for Le-Vel's defamation per se cause of action, Le-Vel is not required, in order to survive MacFarland's TCPA motion to dismiss, to prove private speech or malice under *Hancock*." Further, Le-Vel contends (1) *Hancock* involved a jury award of actual damages and thus "implicate[s] Constitutional concerns that are simply not present in the context of a prima facie showing of damages in response to a [TCPA] motion to dismiss"; (2) "Le-Vel would nevertheless satisfy the *Hancock* test because the Article does not address a matter of public concern, and therefore is not public speech, and because MacFarland published the article with actual malice"; and (3) the court in *Hancock* "distinguished nominal damages from presumed general damages" and "[t]his makes the *Hancock* test irrelevant" as to nominal damages.

We disagree with Le-Vel's position that *Lipsky* is instructive in this case. The supreme court in *Lipsky* (1) did not address whether the speech in question was public or private and (2) specifically stated in its analysis that it was addressing whether Range had shown evidence of "special damages." *See Lipsky*, 460 S.W.3d at 594–96. Thus, *Lipsky* is distinguishable. Further, the supreme court's statement of the law in *Lipsky* relied primarily on language from *Salinas*, which case included a finding of actual malice. *See Salinas*, 365 S.W.3d at 319–20. Also, as to Le-Vel's position that the supreme court has "distinguished nominal damages from presumed general damages," the language quoted above from *Lipsky* and *Salinas* describes nominal damages for defamation per se as a subset of presumed general damages. *Lipsky*, 460 S.W.3d at 593 ("even though Texas law presumes general damages when the defamation is per se, it does not 'presume any particular amount of damages beyond nominal damages'"). Additionally, we cannot agree with Le-Vel's position that *Hancock* is inapposite because that case did not involve a TCPA motion to dismiss. Nothing in *Hancock* specifically limits the supreme court's statements therein to cases involving jury trials, and *Hancock* has been cited by the supreme court in at least one TCPA case. *See id.* Based on the authority described above, we conclude (1) general damages may be presumed in defamation per se cases only when the speech is not public or the plaintiff proves actual malice and (2) such presumed damages are limited to nominal damages. *See id.*; *Hancock*, 400 S.W.3d at 65–66 (citing *Dun & Bradstreet, Inc.*, 472 U.S. at 761; *Gertz*, 418 U.S. at 349–50);

In light of that conclusion, we now address whether the record shows either private speech or actual malice respecting Le-Vel's defamation claim. As to private speech, Le-Vel argues the statements in this case are not "public" speech "because the Article does not address a matter of public concern." However, we concluded above that the Article constitutes "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM.

CODE ANN. § 27.001(3). Le-Vel cites no authority, and we have found none, to support the position that "a communication made in connection with a matter of public concern" on a website blog such as MacFarland's constitutes private speech for purposes of the *Hancock* test. *See id.*; *cf. Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 383 (5th Cir. 1999) (concluding public employee's speech was private because it "was made in the setting of a private employee-employer dispute," rather than publicized dispute). On this record, we conclude the *Hancock* exception respecting private speech is inapplicable.

As to actual malice,[17] Le-Vel argues MacFarland made the following statements with "reckless disregard" as to their truth: Le-Vel (1) is an "illegal pyramid scheme," (2) is "a pay-to-play scheme," (3) is "a scam," (4) "violated FTC guidelines and regulations," (5) is "overcharging its customers fifty times," (6) sells "snake oil," (7) sells "THRIVE patches that are placebos with no ingredients," and (8) sells "THRIVE M supplements that are incomplete multivitamins."[18] As described above, reckless disregard requires "evidence that the defendant in fact entertained serious doubts as to the truth of his publication, evidence that the defendant actually had a high degree of awareness of . . . [the] probable falsity of his statements." *Bentley*, 94 S.W.3d at 591. Further, "the actual malice standard focuses on the defendant's state of mind at the time of publication." *Cruz*, 452 S.W.3d at 517.

Le-Vel asserts MacFarland "admitted" in his motion to dismiss that he (1) reviewed Le-Vel's "Rewards Plan" before publishing the Article and (2) "does not know the contents of [Le-Vel's proprietary blends] and thus cannot evaluate their value." Therefore, according to Le-Vel, evidence in the record shows MacFarland "ignore[d] the results of his own factual investigation"

[17] MacFarland's ninth issue states, "Whether Appellee is a limited purpose public figure and thus required to prove 'actual malice'—which is knowledge of falsity or reckless disregard of the truth that Appellant, in fact, entertained serious doubt about the truth when publishing the Post?" In light of our conclusions above, Le-Vel cannot establish damages as to any of the complained-of statements without showing actual malice. Therefore, we need not reach MacFarland's ninth issue. *See* TEX. R. APP. P. 47.1.

[18] In its appellate brief, Le-Vel does not specifically address or provide argument respecting actual malice as to any other statements of MacFarland, nor does the record show Le-Vel made specific arguments in the trial court respecting actual malice as to additional statements.

and acted with "reckless disregard for the falsity of his statements." Additionally, Le-Vel contends the Article and "MacFarland's own comments" show MacFarland "published his statements while entertaining serious doubts about their truth."

To the extent Le-Vel relies on portions of MacFarland's motion to dismiss as constituting evidence, MacFarland responds in his reply brief in this Court that the trial court was to consider as evidence only the parties' pleadings and affidavits. As described above, the TCPA provides that in determining whether a legal action should be dismissed, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."[19] TEX. CIV. PRAC. & REM. CODE ANN. § 27.006; *see Lippincott*, 462 S.W.3d at 509 (construing TCPA requires looking to statute's plain language).

The record does not show MacFarland's motion to dismiss was part of any pleading or affidavit. Therefore, we conclude MacFarland's motion to dismiss is not evidence for purposes of the TCPA. *See Bacharach v. Doe*, No. 14-14-00947-CV, 2016 WL 269958, at *1 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.) (mem. op.) (concluding defendant's TCPA motion to dismiss was not "pleading" under Texas Rule of Civil Procedure 45 and unverified factual assertions therein could not "be considered competent evidence under the TCPA"); *see also Portfolio Recovery Assocs., LLC v. Talplacido*, No. 05-13-00682-CV, 2014 WL 2583691, at *3 (Tex. App.—Dallas June 10, 2014, no pet.) (mem. op.) (concluding "a motion is not a pleading" and citing Texas Rules of Civil Procedure 45 and 78). Le-Vel relies solely on portions of that motion to dismiss to support its position as to actual malice respecting six of the eight statements described above, i.e., that Le-Vel (1) is "a scam," (2) "violated FTC guidelines and regulations," (3) is "overcharging its customers fifty times," (4) sells "snake oil," (5) sells "THRIVE patches that are placebos with no ingredients," and (6) sells "THRIVE M supplements

[19] Neither party asserts, and the record does not show, that the trial court allowed "specified" discovery pursuant to section 27.006(b). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b).

that are incomplete multivitamins." Consequently, in light of our conclusion above, we further conclude Le-Vel did not meet its burden to establish clear and specific evidence of actual malice as to those six statements. *See Bacharach*, 2016 WL 269958, at *1; *Portfolio Recovery Assocs.*, 2014 WL 2583691, at *3.

As to the statement that Le-Vel is an "illegal pyramid scheme," the record shows MacFarland (1) stated in the original version of the Article "[a]ccording to these FTC guidelines, that would make Thrive an illegal pyramid scheme"; (2) requested in the revised Article that the FTC or another government agency investigate Le-Vel, to "ensure all its practices are legal"; and (3) subsequently posted a comment in which he asked a reader, "Care to give us the details of your retail sales to the public (people without a Le-Vel Thrive agreement), so we can compare it to the FTC guidelines to see if it is an illegal pyramid scheme based on recruitment?" In support of its position that this evidence shows MacFarland "entertained serious doubts that Le-Vel was an illegal pyramid scheme," Le-Vel cites *Bentley*. *See* 94 S.W.3d at 602.

Bentley involved a call-in talk show televised on a public-access channel in a small community. *Id*. at 567. Over a period of several months, the host of the talk show, Joe Ed Bunton, repeatedly accused a local district judge, Bascom Bentley III, of being corrupt. *Id*. The show's co-host expressed agreement with the accusations, but never himself used the word "corrupt." *Id*. Bentley sued both of them for defamation. *Id*. Based on conclusive proof that the accusations were false and defamatory, and on jury findings that the defendants acted with actual malice, the trial court rendered judgment awarding Bentley actual and punitive damages. *Id*. The court of appeals affirmed the judgment against Bunton and reversed the judgment against his co-host. *Id*. Then, Bentley and Bunton sought review in the supreme court. *Id*.

In its analysis respecting actual malice of Bunton, the supreme court observed that the following facts had been "established conclusively": (1) Bunton first made his complained-of

statements during a show that aired on June 6, 1995; (2) after that show, Bentley telephoned Bunton to discuss the allegations; (3) Bunton did not return Bentley's call, but instead dared Bentley to appear on the show, which Bentley declined to do; (4) Bunton knew that others besides Bentley believed the allegations to be false; (5) the occurrences on which Bunton based his allegations of corruption did not prove those charges, as a matter of law; (6) during the show that aired on June 20, 1995, Bunton reported that Bentley had threatened to sue for defamation and, further, Bunton repeated his accusations and stated "I stand by everything that I said"; (7) on the show that aired on June 27, 1995, Bunton invited viewers to call in to "register their views on whether Bentley was corrupt," stated his "opinion" of Bentley's "corruptness," and asserted that court records showed that his allegations were "factual"; (8) during summer 1995 at "about the same time as these broadcasts," Bunton encountered a friend while running errands and told that friend he was trying to expose wrongdoing by a group of public officials, but "the one that he really couldn't get anything on" was Bentley; (9) during the January 30, 1996 program, Bunton repeatedly referred to Bentley as the "most corrupt" official in the county and made four additional allegations; (10) several weeks later, Bunton announced a "hot line" telephone number viewers could call to anonymously report anything Bentley had done that was "outrageous that might put a bad light on his profession as a judge or his character"; and (11) on February 6, 1996, Bentley filed his defamation lawsuit against Bunton and Bunton's co-host. *Id*. at 600–01. Additionally, the supreme court stated that although the record showed Bunton "attempted to make some investigation before airing his allegations," that evidence did not "have much weight" because "there is no evidence that Bunton's investigation ever led him to contact any one of a number of other people involved in the circumstances he criticized" and "[a]ll those who could have shown Bunton that his charges were wrong Bunton deliberately ignored." *Id*. at 601. Further, the supreme court observed there was evidence that Bunton "hounded Bentley

relentlessly and ruthlessly for months" and "carried on a personal vendetta against Bentley without regard for the truth of his allegations." Based on the record in its entirety, the supreme court concluded the evidence, "viewed as a whole," showed actual malice by Bunton. *Id.* at 602.

In the case before us, Le-Vel describes *Bentley* as a case in which the supreme court concluded the record showed evidence of malice "where defendant, *inter alia*, 'expressed doubt' as to whether there was a basis for his claims." However, we disagree with Le-Vel that *Bentley* directs a result in its favor. In *Bentley*, the defendant's alleged "doubt" was expressed during a time period of approximately eight months throughout which the defendant made a continuous series of related defamatory statements. By contrast, in the case before us, the alleged expression of doubt occurred only after the Article was printed and distributed. Le-Vel does not explain how that evidence shows MacFarland's state of mind at the time of publication. *See Forbes Inc.*, 124 S.W.3d at 174 (evidence concerning events after article has been printed and distributed has "little, if any, bearing" on defendant's state of mind during editorial process); *Cruz*, 452 S.W.3d at 517 ("Evidence of events after an article has been printed and distributed has been held to have little if any bearing on the defendant's state of mind at the time of publication."). Further, in *Bentley*, the "expressed doubt" was considered as part of the entirety of the evidence, viewed as a whole. *See Bentley*, 94 S.W.3d at 602. Le-Vel cites no authority, and we have found none, in which doubt expressed after distribution, without more, constituted clear and specific evidence of malice for purposes of a TCPA motion to dismiss. *See Forbes Inc.*, 124 S.W.3d at 174 (concluding conversation that took place after article was printed and in distribution cannot constitute evidence of actual malice at time of publication); *Cruz*, 452 S.W.3d at 517; *see also Campbell*, 471 S.W.3d at 631 ("[A] failure to investigate the facts is not, by itself, any evidence of actual malice."). On this record, we conclude Le-Vel did not establish clear and specific evidence of actual malice respecting the statement that Le-Vel is an "illegal pyramid scheme."

As to the remaining statement, i.e., that Le-Vel is "a pay-to-play scheme," the record shows MacFarland (1) stated in the original version of the Article, "[t]hat means you are typically going to be left paying for itself [sic], which makes it clear that this is a Pay to Play scheme"; (2) subsequently stated in response to a reader's comment, "So typically people in MLM end up satisfying the personal volume requirement by buying the overpriced vitamins themselves… i.e. 'Pay to Play.' . . . I don't think Le-Vel is different, but again, I can't confirm because the website isn't working for me"; and (3) edited the original version of the Article to state "[t]hat means you are typically going to be left paying for itself [sic], which makes it look like a Pay to Play scheme." Le-Vel does not explain how this evidence shows serious doubt as to truth at the time of publication. *See Cruz*, 452 S.W.3d at 517 ("Evidence of events after an article has been printed and distributed has been held to have little if any bearing on the defendant's state of mind at the time of publication."); *accord Forbes Inc.*, 124 S.W.3d at 174; *see also Campbell*, 471 S.W.3d at 631. On this record, we conclude the Article and MacFarland's comment, without more, do not demonstrate reckless disregard as to the complained-of statement that Le-Vel is "a pay-to-play scheme."

We conclude Le-Vel did not satisfy its burden respecting damages as to any of the fifteen statements upon which its defamation claim is based. We decide in favor of MacFarland on his first, sixth, and tenth issues. Consequently, we need not reach MacFarland's eighth issue.

2. Award of Costs and Attorney's Fees

In his second and third issues, MacFarland contends the trial court erred by (1) determining his motion to dismiss was "frivolous or brought solely for the purpose of delay" and (2) awarding Le-Vel "attorney's fees, costs, and expenses"[20] based on that determination. We

[20] Although MacFarland's second issue complains in part as to "expenses," the record does not show "expenses" were awarded to Le-Vel. Rather, as described above, the trial court's order awarded Le-Vel its costs and reasonable attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b).

address those two issues together. According to MacFarland, Le-Vel "has provided no support that MacFarland was acting outside the purpose of the TCPA by filing his Motion." Additionally, in his argument pertaining to those two issues, MacFarland asserts that in the event this Court concludes dismissal of Le-Vel's lawsuit was proper, this Court should remand this case to the trial court for determination of the amount of attorney's fees and costs to be awarded to MacFarland pursuant to section 27.009(a)(1).

Le-Vel argues this Court "lacks interlocutory jurisdiction to consider the trial court's award of costs and attorney's fees to Le-Vel" because "[s]ection 51.014 does not provide a right to interlocutory appeals for the granting of attorney's fees under [s]ection 27.009(b)." In support of that position, Le-Vel cites two cases in which the First Court of Appeals in Houston declined to consider "ancillary rulings" in interlocutory appeals pursuant to section 51.014(a)(12). *See Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (dismissing appeal from partial grant of motion to dismiss contained within same order as TCPA denial of motion to dismiss); *Paulsen v. Yarrell*, 455 S.W.3d 192 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (dismissing appeal of order denying attorney's fees ancillary to granting TCPA motion to dismiss).

In his reply brief in this Court, MacFarland responds that the two cases cited by Le-Vel are distinguishable because they involved appeal of the denial, rather than the granting, of attorney's fees. Additionally, MacFarland contends,

> As there is no case law directly on point, MacFarland's position is that if this Court reverses and remands to the trial court, there would be no basis for finding MacFarland's Motion was intended to delay and no basis for an award of fees to Le-Vel. Accordingly, there is no way to divorce the trial judge's findings award of fees from the order denying MacFarland's Motion to Dismiss. This Court could not overturn one without upending the other, and Le-Vel has presented no policy argument to hold otherwise. As such, the Order regarding fees is not "ancillary" as Le-Vel contends. It is material to the Order and this Court has jurisdiction to consider its reversal.

Unlike the case before us, *Schlumberger* and *Paulsen* involved TCPA motions to dismiss that were granted in whole or in part. Therefore, we do not find those cases instructive. In the more recent case of *Fawcett v. Grosu*, 498 S.W.3d 650, 665–66 (Tex. App.—Houston [14th Dist.] 2016, pet. filed), the trial court's denial of an appellant's TCPA motion to dismiss was reversed in part on interlocutory appeal. Further, in addressing that appellant's complaint respecting the attorney's fees and costs awarded to the appellee in the trial court pursuant to 27.009(b), the court of appeals stated in part,

> In light of our opinion, the results obtained by both parties have changed. We therefore conclude that the award of fees must be reversed and remanded for further proceedings, including but not limited to a finding on whether the motion to dismiss was frivolous or solely for purposes of delay, the reasonableness of the fees sought by [appellee], as well as any request by appellants for fees.

Id. at 666.

As in *Fawcett*, the results obtained by both parties in the case before us have changed. *See id*. Consequently, we conclude the trial court's award of attorney's fees and costs must be reversed and remanded for further proceedings, including consideration of MacFarland's request for attorney's fees and costs. *See id*.; *see also Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (section 27.009(a) of TCPA requires award of reasonable attorney's fees to successful movant).

We decide in favor of MacFarland on his second and third issues.

III. CONCLUSION

We decide in MacFarland's favor on his first, second, third, fourth, fifth, sixth, seventh, and tenth issues. We need not reach MacFarland's eighth and ninth issues.

We reverse the trial court's order, render judgment dismissing Le-Vel's claims, and remand this case to the trial court for further proceedings in accordance with this opinion.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

160672F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIAN C. MACFARLAND, Appellant

No. 05-16-00672-CV V.

LE-VEL BRANDS LLC, Appellee

On Appeal from the 401st Judicial District Court, Collin County, Texas
Trial Court Cause No. 401-00376-2016.
Opinion delivered by Justice Lang, Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's order, **RENDER** judgment dismissing appellee Le-Vel Brands LLC's claims, and **REMAND** this case to the trial court for further proceedings.

It is **ORDERED** that appellant Brian C. MacFarland recover his costs of this appeal from appellee Le-Vel Brands LLC.

Judgment entered this 23rd day of March, 2017.