

**No. 04-16-00184-CV**

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IN THE  
FOURTH COURT OF APPEALS  
AT SAN ANTONIO, TEXAS

FILED IN  
4th COURT OF APPEALS  
SAN ANTONIO, TEXAS  
7/1/2016 9:27:42 AM  
KEITH E. HOTTLE  
Clerk

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RONALD F. AVERY,

*Appellant/Cross-Appellee*

V.

DYLAN BADDOUR and HEARST COMMUNICATIONS, INC.,

*Appellees/Cross-Appellants.*

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On Appeal from the 2nd 25th Judicial District Court  
Guadalupe County, Texas, Honorable W.C. Kirkendall, Presiding  
Cause No. 15-2186-CV

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**CROSS-APPELLANTS' REPLY BRIEF**

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**TO THE HONORABLE FOURTH COURT OF APPEALS:**

Appellees/Cross-Appellants Hearst Communications, Inc., publisher of the Houston Chronicle, and Dylan Baddour, a reporter for the Chronicle (collectively, “the Chronicle”) hereby submit their reply brief in support of their Cross-Appeal, and respectfully show the Court as follows:

**I. The Trial Court Abused Its Discretion In Denying the Chronicle Recovery Of Costs And Fees Under Section 27.009(a).**

Cross-Appellee Ronald F. Avery provides no legal justification for the trial court’s denial of attorneys’ fees and costs to the Chronicle, and there is none. As Mr. Avery concedes, an award of the prevailing party’s reasonable fees and costs is *mandatory* in the event of a dismissal under the Texas Citizens Participation Act (“TCPA”), Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.* See Tex. Civ. Prac. & Rem. Code § 27.009(a)(1); *Sullivan v. Abraham*, No. 14-0987, 2016 WL 1513674, at \*4 (Tex. Apr. 15, 2016); Combined Appellant Reply Brief & Cross Appellee Brief (“Avery Reply”) at 27.

Instead, Mr. Avery asserts that the trial court’s denial of a fee award indicates that the trial court failed to read the TCPA or properly consider the issues raised in this case. Avery Reply at 27-28. His speculation is baseless and is belied by the transcript of the hearing (*see* 1 RR 1-18) and the trial court’s holding, which make clear that it was familiar with the claims and applicable law.

Mr. Avery also posits that the trial court believed the suit “did not deserve” a

fee award, Avery Reply at 28, but this too is groundless speculation. It is irrelevant in any event. The trial court cannot substitute its own judgment for that of the legislature, which provided that attorney fees are mandatory. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1).<sup>1</sup>

Because “the TCPA *requires* an award of ‘reasonable attorney’s fees’ [and court costs] to the successful movant,” *Sullivan*, 2016 WL 1513674, at \*4 (emphasis added), the trial court abused its discretion in denying the Chronicle an opportunity to recover its fees and costs. This case should accordingly be remanded for the limited purpose of determining an appropriate award of such fees and costs.

### **CONCLUSION AND PRAYER**

For these reasons and those in the Chronicle’s Combined Appellees’ and Cross-Appellants’ Brief, the Court should affirm the trial court’s dismissal of Avery’s libel claim under the TCPA, but reverse to the extent it denied the Chronicle an opportunity to recover its fees and costs under Section 27.009(a)(1)

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<sup>1</sup> To the extent Mr. Avery is also arguing that the fee denial indicates that this “is not a SLAPP suit,” Avery Reply at 28, he is incorrect. The TCPA unambiguously applies to *all* suits based on, relating to, or in response to “communication[s] made in connection with a matter of public concern.” *See* Tex. Civ. Prac. & Rem. Code §§ 27.001(3), 27.003. It is irrelevant that the communications at issue in this case are news reports of facts, and that Mr. Avery claims they are false and defamatory (*see* Avery Reply at 28). *See, e.g., AOL, Inc. v. Malouf*, No. 05-13-0167-CV, 2015 WL 1535669, at \*1-3 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (holding that online article reporting facts was an exercise of free speech covered by the TCPA, where plaintiff alleged the article was false and defamatory).

of the TCPA, and remand for the limited purpose of determining an appropriate award of the Chronicle's fees and costs under that Section.

Dated: July 1, 2016

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 571 words.

/s/ Jonathan R. Donnellan  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following parties via Federal Express on July 1, 2016:

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