IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 23, 2015 Session

MICHAEL DAVID MARTIN v. FRANKLIN COOL SPRINGS CORPORATION, ET AL.

Appeal from the Circuit Court for Williamson County
No. 2013594 Robbie T. Beal, Judge

No. M2014-01804-COA-R3-CV – Filed November 10, 2015

Plaintiff filed suit against the company providing billing services for the water and sewage utilities at his apartment; the complaint alleged that the company's fee for late payments violated, among others, the Tennessee Consumer Protection Act. Defendant moved for dismissal pursuant to Tenn. R. Civ. P. 12.02(6), which was granted by the trial court. Defendant then sought recovery of the attorney's fees it incurred in defending the TCPA claim and Plaintiff's motions for sanctions. The court granted Defendant's motion, awarding one-half of the amount sought. Plaintiff appeals the award of attorney's fees; Defendant appeals the amount awarded. Finding no error, we affirm the judgment of the trial court in all respects; concluding that an award of fees incurred by Defendant on appeal is appropriate, we remand the matter to the trial court for determination of the amount to be awarded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J. joined.

Michael David Martin, Franklin, Tennessee, *Pro Se*.

Charles Patrick Flynn, Brentwood, Tennessee, for the appellee, Water Systems Incorporated.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

In September 2013, Michael David Martin rented an apartment in the Alara complex located in Franklin, Tennessee, which is owned and managed by Franklin Cool Springs Corporation ("FCSC"). His lease required him to establish an account with Water Systems Incorporated ("WSI"), which provided billing services for the water, sewage, and trash utilities at his apartment. After living in the apartment for two months and incurring two $10 late fees for failing to pay his utility bill on time in the months of October and November, Mr. Martin, acting *pro se*, filed suit on December 3, 2013, against FCSC and WSI. The Complaint asserted that WSI's "late fee of ten (10) dollars violates Tennessee's Public Policy because it is an excessive and unreasonable estimate of damages … [and] therefore serves as a Penalty"; and that "WSI and FCSC have conspired with each other in furtherance of exploiting the Tenants for the Defendant's mutual unjust enrichment as evident in their arrangement whereby Defendant WSI kicks back half of the late fee penalties to Defendant FCSC." Plaintiff alleged that WSI's "illegal late fees" constituted a breach of the Tennessee Civil RICO Act,[1] breach of fiduciary duty, and violation of the Tennessee Consumer Protection Act ("TCPA").

WSI filed its answer in which it admitted that it "bills a late fee of ten dollars" but denied the remaining allegations and asserted 14 affirmative defenses. WSI filed a motion on February 6, 2014, seeking dismissal pursuant to Tenn. R. Civ. P. 12.02(6) and summary judgment pursuant to Tenn. R. Civ. P. 56.

[1] Plaintiff did not cite a statute where what he calls the "Tennessee Civil RICO Act" can be found. Tenn. Code Ann. § 39-12-201 *et seq*. contains the Racketeer Influenced and Corrupt Organization (RICO) Act of 1989. Tenn. Code Ann. § 39-12-202(a) states the legislative intent of that Act to be as follows:

> The general assembly hereby finds and declares that an effective means of punishing and deterring criminal activities of organized crime is through the forfeiture of profits acquired and accumulated as a result of such criminal activities. It is the intent of the general assembly that this part be used by prosecutors to punish and deter only such criminal activities.

As the question is not presented in this appeal, we do not make any determination that the Act authorizes a private right of action.

A hearing was held on March 31, 2014; the trial court entered an order on April 11, dismissing the case against WSI pursuant to Rule 12.02(6).[2] Thereafter, several motions were filed by the parties, including Plaintiff's motion to reconsider the order of dismissal and two motions for sanctions against WSI's counsel for alleged violations of the Rules of Professional Conduct. WSI filed three motions for sanctions against Plaintiff pursuant to Rule 11 and for attorney's fees pursuant to the TCPA. The court heard argument at a hearing on June 23 and subsequently entered an order on July 8 denying both parties' motions for Rule 11 sanctions; the court granted WSI's motion for attorney's fees and awarded judgment for $8,032.50.

Plaintiff appeals, raising one issue: "Did the trial court err when it awarded Appellee/Defendant attorney fees in reliance upon *Glanton v. Bob Parks Realty*, [M2003-01144-COA-R3-CV,] 2005 WL 1021559 (Tenn. Ct. App. [Apr. 27,] 2005), without considering this Court of Appeal's adverse findings in the same case not presented at oral argument by Defendant/Appellee's counsel C. Patrick Flynn." WSI articulates three issues on appeal:

> The trial court erred in declining to award fees and expenses to WSI based upon Plaintiff's violation of Rule 11 of the Tenn. R. Civ. P.

---

[2] A transcript of the ruling at the March 31 hearing was included as an exhibit to WSI's motion for sanctions for Plaintiff's alleged violation of Rule 11, filed June 16. In its ruling, the court stated:

> The Court does not believe the civil RICO Act applies in any way as claimed against WSI. There is no evidence that would suggest the pleadings themselves were deficient [sic] to warrant any type of RICO action, and failed to state a claim upon which relief can be granted.
>
> The same relates to the -- any type of breach of fiduciary duty. While it is technically possible for an agent, in some scenarios, for an agent to have a fiduciary responsibility not only to the principal, but also to a third party, in this particular case, there certainly isn't a suggestion of any of that type of relationship. The only relationship that was suggested is already stated, WSI was acting as a billing agent for the apartments, themselves. That's certainly, again, without any further information, does not rise to the level of a fiduciary relationship, and therefore, there can be no breach. Again, there's no claim on which there's a causable action.
>
> Again, [the] same relates to the Tennessee Consumer Protection Act. . . .While it can be contemplated that Mr. Martin is a consumer under the protection of that act, there is no basis within the complaint itself to believe that there is a violation of the act by WSI. . . . So, procedurally, I think the complaint against WSI is just simply too flawed. The motion to dismiss is going to be granted as to WSI in its entirety under [Tenn. R. Civ. P.] 12.06 [sic].

> Is [WSI] entitled to additional attorney's fees and expenses incurred in opposing the Appellant's appeal based upon the Tennessee Consumer Protection Act, [Tenn. Code Ann. §] 47-18-109(e).
>
> Is [WSI] entitled to recover fees and expenses because the Appellant's appeal is frivolous.

II. DISCUSSION

A. ATTORNEY'S FEES UNDER THE TCPA

The TCPA, found at Tenn. Code Ann. § 47-18-101 *et seq.*, creates a private right of action for "[a]ny person who suffers an ascertainable loss of money or property, real, personal or mixed . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part." Tenn. Code Ann. § 47-18-109. TCPA claims "must be stated with the particularity of common-law fraud claims under Tenn. R. Civ. P. 9.02." *Glanton v. Bob Parks Realty*, M2003-01144-COA-R3-CV, 2005 WL 1021559, at *6 (Tenn. Ct. App. Apr. 27, 2005) (citing *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 275-76 (Tenn. Ct. App. 1999); *Humphrey v. West End Terrace*, Inc., 795 S.W.2d 128, 132 (Tenn. Ct. App. 1990)).

"In Tennessee, courts follow the American Rule, which provides that litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005) (*citing State v. Brown & Williamson Tobacco Corp*., 18 S.W.3d 186, 194 (Tenn. 2000)). One statute which provides otherwise is section 109(e) of the TCPA; pertinent to this appeal, subsection (2) provides:

> In any private action commenced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.

Tenn. Code. Ann. § 47-18-109(e)(2). The TCPA also allows for an award of attorney fees incurred on an appeal. *Killingsworth v. Ted Russell Ford, Inc*., E2004-02597-COA-

R3CV, 2006 WL 26355, at *5 (Tenn. Ct. App. Jan. 5, 2006) *aff'd*, 205 S.W.3d 406 (Tenn. 2006).

The trial court held that the complaint did not state a claim for which relief could be granted and dismissed the complaint.[3] Subsequently, WSI moved for its attorney's fees pursuant to section 109(e)(2) of the TCPA because "[i]t is apparent from the totality of the circumstances which have been revealed during this litigation that the Plaintiff's motivation is to harass and cause expense to [WSI] and to assault and impugn the integrity and professionalism of the attorney for WSI . . . ." WSI also requested the court "enter a judgment in favor of [WSI] and against the Plaintiff for such sums as the court may deem appropriate pursuant to the provisions of [Tenn. R. Civ. P.] 11" because "[d]espite the Plaintiff's legal education and the fact that the Plaintiff was the recipient of a Rule 11.03(1)(a) letter dated and mailed on December 26, 2013, which enclosed a motion for sanctions detailing the inapplicability of the [TCPA], the Plaintiff has insisted on causing [WSI] great expense in defending Plaintiff's frivolous claims." In support of its motion, WSI filed the affidavit of counsel, which stated that WSI "has been forced to pay me $16,065 in responding to the Plaintiff's claim under the [TCPA] and regarding defense of motions for sanctions filed by the Plaintiff and motions for sanctions against the Plaintiff filed by me on behalf of [WSI]." The court granted the motion, awarding WSI half of the fees it incurred.

Plaintiff does not appeal the dismissal of his complaint. Rather, Plaintiff takes issue with the court's award of attorney's fees pursuant to Section 109(e)(2) of the TCPA. That statute was discussed in *Glanton v. Bob Parks Realty*, in which we held that "the provision for attorney fees found in Tenn. Code Ann. § 47-18-109(e)(2) is designed to discourage consumers from using the Act to file frivolous or baseless claims . . . . [i.e., those that are] so utterly lacking in an adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed." 2005 WL 1021559, at *9. "Where the Act does not apply to the facts alleged, a claim based on the Act is without legal merit." *Id.* at *10 (citing *Wagner v. Fleming*, 139 S.W.3d 295, 304 (Tenn. Ct. App.

[3] The complaint's allegation of a violation of the Act stated:

> COUNT VI— VIOLATION OF TENNESSEE CONSUMER PROTECTION ACT
> 73. Plaintiff hereby re-avers and re-asserts the preceding paragraphs of his Complaint.
> 74. The intentional actions and omissions of Defendant FCSC and Defendant WSI constitute Unfair and Deceptive trade practices in violation of T.C.A. § 47-18-101 et seq., by reason of which Plaintiff has been damaged in an amount to be proven at trial, plus pre-judgment interest, as well as treble damages and attorney's fees as provided by said statute.

2004)). Further, this Court noted that "[a]s the language of the statute makes clear, even where this prerequisite is met, whether or not to award fees is discretionary with the court." *Glanton*, 2005 WL 1021559, at *9 (citing *Wagner*, 139 S.W.3d at 304). When awarding attorney's fees, "[t]rial courts are to consider the factors set forth in *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980), and, when appropriate, the guidelines listed in Supreme Court Rule 8, RPC 1.5 . . ." *Brooks v. Tennessee Farmers Mut. Ins. Co*., M2013-02326-COA-R3CV, 2014 WL 6735129, at *9 (Tenn. Ct. App. Nov. 26, 2014), *no perm. app. filed*.[4]

"The 'determination of reasonable attorneys' fees is necessarily a discretionary inquiry' by the trial court; absent an abuse of that discretion, appellate courts will uphold the trial court's decision." *Id.* (quoting *Keith v. Howerton*, 165 S.W.3d 248, 250-51 (Tenn. Ct. App. 2005)). An abuse of discretion occurs when the decision of the lower court has no basis in law or fact and is therefore arbitrary, illogical, or unconscionable. *Brown v. Shappley*, 290 S.W.3d 197, 200 (Tenn. Ct. App. 2008)(citing *Hooker v. Sundquist*, 107 S.W.3d 532, 535 (Tenn. Ct.App. 2002)).

The trial court dismissed the complaint pursuant to Tenn. R. Civ. P. 12.02(6); thus, the complaint "on its face failed to establish a legal predicate for the Tennessee Consumer Protection Act, making the success of that claim highly unlikely." *Glanton*, 2005 WL 1021559, at *10.[5] Plaintiff disagrees, arguing in his brief that:

---

[4] In *Connors*, the Supreme Court held:

> The appropriate factors to be used as guides in fixing a reasonable attorney's fee have been phrased in various terms over the years, but may be summarized as follows:
>
> 1. The time devoted to performing the legal service.
> 2. The time limitations imposed by the circumstances.
> 3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
> 4. The fee customarily charged in the locality for similar legal services.
> 5. The amount involved and the results obtained.
> 6. The experience, reputation, and ability of the lawyer performing the legal service.

Connors v. Connors, 594 S.W.2d 672, 676-77 (Tenn. 1980). These are substantially similar to the guidelines found in TN R S CT Rule 8, RPC 1.5.

[5] The record does not contain a certified transcript of the June 23 hearing nor does it contain a statement of the evidence as required by Tenn. R. App. P. 24(b) or (c). The record does contain a transcription, prepared by Plaintiff and attached as an exhibit to his August 18 "motion to compel," of that hearing at which the court stated that "The claims made against Water Systems were definitely frivolous."

> [H]is claim was not "so utterly lacking in adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed" . . . [but that] once Appellant/Plaintiff attached [WSI's] Transaction History Ledger to his Complaint showing the $10.00 flat late fee charges, [which were] not a reasonable estimation of damages . . . [or] on its face not reasonably calculated to recover for actual damages, and cited in his Complaint "The intentional actions and omissions of . . . Defendant WSI constitute Unfair and Deceptive trade practices in violation of T.C.A. § 47-18-101 et seq." . . . , [the foregoing] created a prima facie claim for relief which should have easily survived Appellee/Defendant WSI/UBS's Motion to Dismiss.

This argument does not address the manner in which Plaintiff contends the court abused its discretion in awarding attorney's fees for the successful defense of the TCPA claim. The award of fees was predicated on the grant of WSI's Rule 12 motion which, in turn, invoked Section 109(e)(2) of the TCPA. Plaintiff has not identified any act or ruling from which we could determine that the court's decision to impose attorney's fees is arbitrary, illogical, or unconscionable, and we discern none on our review of the record.

Acknowledging that "the trial court applied the correct standard and acted within its discretion in awarding fees to the Appellee under the Tennessee Consumer Protection Act," WSI presents as an issue whether it should be awarded fees for the appeal of this case under the TCPA. We address the propriety of an award of fees on appeal at Section C, *infra*.

B. TENN. R. CIV. P. 11 SANCTIONS

"When an attorney [or a party] signs a motion, document, or other paper submitted to the court, he certifies to the court that he has read it, that he has reasonably inquired into the facts and law it asserts, that he believes it is well-grounded in both fact and law, and that he is acting without improper motive." *Boyd v. Prime Focus, Inc*., 83 S.W.3d 761, 765 (Tenn. Ct. App. 2001) (citing *Andrews v. Bible*, 812 S.W.2d 284, 287 (Tenn. 1991)); *see also* Tenn. R. Civ. P. 11.01–11.02. Rule 11 permits sanctions to be imposed against attorneys or unrepresented parties who violate its provisions; such sanctions "may include payment of the opposing party's legal expenses." *Boyd*, 83 S.W.3d at 765 (Tenn.

Ct. App. 2001) (citing *Andrews*, 812 S.W.2d at 288); Tenn. R. Civ. P. 11.03. Rule 11.03(1)(a) contains a 21-day "safe harbor" provision that "provides an attorney or party acting pro se with 'notice and fair warning that an adversary is proposing seeking sanctions.' . . . [and] deters frivolous, unsupported, or otherwise improper pleadings from being filed with the court." *Brown*, 290 S.W.3d at 202 (quoting *Mitrano v. Houser*, 240 S.W.3d 854, 862 (Tenn. Ct. App. 2007)).[6]

Our review of Rule 11 decisions is governed under the deferential abuse of discretion standard "since the question of whether a Rule 11 violation has occurred requires the trial court to make highly fact-intensive determinations regarding the reasonableness of the attorney's conduct." *Id.* at 200 (citing *Hooker*, 107 S.W.3d at 535). "[T]rial courts, while urged not to hesitate to impose sanctions once a violation of Rule 11 is found to exist, should use utmost care in doing so." *Andrews*, 812 S.W.2d at 292 (citing *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 570 (1991)). In our consideration of whether the court erred in declining to impose sanctions pursuant to Rule 11, we are also guided by the following language from *Brown v. Shappley*:

> The courts are to apply a standard of objective reasonableness under the circumstances when determining whether conduct is sanctionable under Rule 11. Sanctions are appropriate when an attorney submits a motion or other paper on grounds which he knows or should know are without merit,

[6] Tenn. R. Civ. P. 11.03 provides in pertinent part:

> If, after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02 has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision 11.02 or are responsible for the violation.
>
> **(1) How Initiated.**
>
> (a) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

> and a showing of subjective bad faith is not required. However, when deciding whether to impose sanctions under Rule 11, the trial court should consider all the circumstances. [T]he trial judge should consider not only the circumstances of the particular violation, but also the factors bearing on the reasonableness of the conduct, such as experience and past performance of the attorney, as well as the general standards of conduct of the bar of the court.

290 S.W.3d at 202-03 (internal citations and quotations omitted).

WSI filed three motions for sanctions against the Plaintiff and contends that the court erred in not awarding sanctions pursuant to Rule 11. The first motion, initiated in accordance with Rule 11.03(1)(a), had been sent to Plaintiff when WSI filed its answer to the complaint. In the motion, WSI asserted that the Complaint was deficient in several respects[7]; WSI contended that these deficiencies violated Rule 11 and "clearly show[ed] that Plaintiff acted with improper purpose asserting claims that are not warranted by existing law."

WSI's second motion for sanctions was filed in response to Plaintiff's motion to reconsider the dismissal of the action; WSI asserted that Rule 11 sanctions were warranted because "Plaintiff intentionally misquoted the court" in his motion; "ma[de] unjustified attacks on counsel for WSI"; accused "WSI's attorney of 'misrepresentation of law'"; failed to provide WSI's attorney with a copy of the motion to reconsider; and because Plaintiff's motion to reconsider "was not warranted by existing law or any nonfrivolous argument for the extension of existing law."

WSI's third motion for sanctions addressed one of Plaintiff's motions for sanctions against WSI's counsel. WSI asserted that Plaintiff had not complied with the safe harbor provision of Rule 11.03 in filing the motion for sanctions and that Plaintiff

[7] As to Plaintiff's RICO claims, WSI asserted that the "allegations in the five paragraphs under Count IV are nonsensical in that none of the facts stated in the complaint relate to the provisions of TCA 39-42-201 et seq., and Rico statute is available for use of prosecutors only as provided by TCA 39-42-202(a)." As to Plaintiff's claim for breach of fiduciary duty, WSI asserted that there was "no basis in law or fact to support the allegation of fiduciary duty." As to Plaintiff's TCPA claim, WSI asserted that the complaint "violate[d] Rule 8.02 [sic] and the obligation of a Plaintiff to plead with specificity TCPA violations and to identify monetary loss" when the Plaintiff did "not identify any provision of the TCPA which was violated," "describe any conduct on the part of WSI which violated the [TCPA]," or "identify any amount of damages suffered by the Plaintiff."

falsified the certificate of service; WSI also asserted that the allegations of its counsel's conduct were "false," "defamatory[,] and are clearly made for the purpose of harassment and to cause the Defendant unnecessary delay and increase the cost of litigation."

The trial court entered an order denying all motions for sanctions.[8] WSI contends on appeal that this holding was error, arguing that "[i]t is incongruous that the trial court, at once found that Appellant's conduct of this litigation was frivolous and without merit[,] should have then declined to award the Appellee the balance of its fees and expenses for the Appellant's clear violations of Rule 11."

WSI erroneously equates the court's grant of the Rule 12 motion as requiring sanctions under Rule 11. A court's inquiry into the sufficiency of a complaint under Rule 12 is inherently different from the court's inquiry into counsel's or a party's conduct after a violation of Rule 11 has been alleged. While Rule 12 tests the sufficiency of the allegations in a complaint to state a claim for relief, Rule 11 prescribes standards to be followed in preparing and filing pleadings; when those standards are not followed, Rule 11 permits, but does not require, the imposition of sanctions. The analyses should not be equated just because the instrument to be considered under both motions is the same.

The court characterized the claims against WSI as "definitely frivolous" in its oral ruling; however, in the order disposing of the motions for sanctions, the court did not specifically find a Rule 11 violation with respect to any of the five motions under consideration. Without such a finding, a court may not impose sanctions. Tenn. R. Civ. P. 11.03(3).

Notwithstanding the fact that there was not a finding of a Rule 11 violation, we have reviewed the record in response to WSI's contention that there should have been such a finding such as to warrant the imposition of sanctions. The record shows that WSI complied with Rule 11.03 with respect to its first motion, which was submitted to Plaintiff when WSI filed its answer to the complaint. It does not appear from the record

[8] This order disposed of Plaintiff's two motions for sanctions as well. On May 8, Plaintiff filed a motion for sanctions against WSI's counsel based on WSI's counsel's alleged violations of the Rules of Professional Conduct. The motion was not served on WSI's counsel prior to filing, in accordance with Rule 11.03, or at the time of filing. The record also contains WSI's response to a motion for sanctions filed by Plaintiff on June 6, 2014. For reasons that are not clear, Plaintiff's June 6 motion for sanctions is not included in the record; however Plaintiff does reference his motion for sanctions in his brief, though not in any manner that is helpful to our resolution of this issue on appeal. No issue is raised regarding the denial of Plaintiff's motions for sanctions.

that WSI served its second and third motions on Plaintiff at least 21 days before filing them in the trial court, as required by Rule 11.03(1)(a); consequently, sanctions would not have been appropriate on the basis of those motions, and only the first motion filed by WSI is pertinent to our review of this issue.

The first motion for sanctions was based on asserted deficiencies in Plaintiff's complaint, specifically that the factual allegations contained did not establish violations of the "Tennessee Civil RICO Act" and the TCPA, as well as a breach of fiduciary duty allegedly owed Plaintiff by WSI. As we consider this issue, we are mindful that the "main purpose [of Rule 11] is to deter 'abuse in the litigation process.'" *Brown*, 290 S.W.3d at 202 (quoting *Andrews*, 812 S.W.2d at 292). We are also aware that Plaintiff, though a law student at the time, was not to be held to the high standards expected of attorneys, both in the preparation of pleadings or in his interactions with WSI's counsel. Measured by these considerations, Plaintiff was entitled to have his complaint — however inadequate or inartfully worded — tested by Rule 12; the fact that the complaint did not survive the Rule 12 motion does not rise to the level of "abuse in the litigation process" that Rule 11 seeks to deter. *Id.* Applying the objective reasonableness standard as articulated in *Brown v. Shappley*, *supra*, the court did not err in failing to find a violation of Rule 11 on the basis of the matters complained of in WSI's first motion for sanctions. Accordingly, we affirm the denial of relief for a violation of Rule 11.

C. FEES AND EXPENSES ON APPEAL

WSI seeks to recover its fees and expenses incurred in defending this appeal pursuant to the TCPA and because WSI contends the appeal is frivolous.

As we have previously noted, the TCPA authorizes the award of attorney's fees on appeal. *Killingsworth*, 2006 WL 26355, at *5. For the same reason that WSI is entitled to its attorney's fees incurred in the trial court pursuant to the TCPA, we conclude that WSI is entitled to the attorney's fees and costs it incurred in defending this appeal. The case will be remanded to the trial court for a determination of the amount of attorney's fees incurred by WSI on appeal.

Our holding that WSI is entitled to fees on appeal pursuant to the TCPA pretermits our consideration of whether it is entitled to fees pursuant to Tenn. Code Ann. § 27-1-122.[9]

[9] Tenn. Code Ann. § 27-1-122 states:

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's award of attorney's fees in the amount of $8,032.50 pursuant to Tenn. Code Ann. §47-18-109(e)(2) and denial of additional fees as a sanction for violation of Tenn. R. Civ. P. 11. We remand this case to the trial court for determination of the amount to be awarded WSI for attorney's fees incurred on appeal. The costs of appeal are assessed against the Plaintiff, Michael David Martin.

_____

RICHARD H. DINKINS, JUDGE

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.