IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

TREVOR SETH ADAMSON, *et al.*	§	
	§	
Plaintiffs-Appellants,	§	
	§	
v.	§	Case No.: M2020-01651-COA-R3-CV
	§	
SARAH E. GROVE, *et al.*	§	Case No.: 83CC1-2020-CV-906
	§	
Defendants-Appellees.	§	

PRINCIPAL BRIEF OF DEFENDANTS-APPELLEES AND CROSS-APPELLANTS SARAH E. GROVE, KARL S. BOLTON, AND DEBORAH SANGETTI

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Dated: June 18, 2021

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to Rule 27(b) of the Tennessee Rules of Appellate Procedure, the Defendants-Appellees submit their own competing Statement of the Issues Presented for Review:

A. DEFENDANTS' ISSUES AS APPELLEES

1. Whether this Court lacks subject matter jurisdiction to adjudicate the Appellant's claims arising out of Case No. 83CC1-2020-CV-616 or Case No. 83CC1-2020-CV-818, which resulted in final orders that the Appellant did not appeal.

2. Whether the Appellant's failure to appeal the trial court's final order in Case No. 83CC1-2020-CV-616 renders all claims presented in this appeal *res judicata* and moot for lack of a continuing controversy.

3. Whether the Appellant's constitutional challenges to the Tennessee Public Participation Act—and several other claims—are waived because he has presented them for the first time on appeal.

4. Whether the Appellant's failure to develop any argument in the body of his briefing regarding several issues the Appellant has raised on appeal results in waiver.

5. Whether the Appellant's failure to contest the trial court's dispositive ruling that the Appellees established valid defenses to the Plaintiff's speech-based causes of action pretermits the Plaintiff's merits issues.

6. Whether the Appellant failed to introduce admissible evidence establishing a prima facie case for each essential element of his speech-based tort claims.

7. Whether several of the issues identified in the Appellant's Statement of the Issues are waived due to the Appellant's failure to present an argument regarding them in the body of his Brief.

8. Whether the Appellant was treated improperly while acting pro se.

9. Whether the trial court's attorney's fee award—which represented actual fees incurred—should be affirmed.

10. Whether the trial court's sanctions award should be affirmed.

B. DEFENDANTS' ISSUES AS CROSS-APPELLANTS

11. Whether the Defendants are entitled to an award of attorney's fees regarding this appeal.

IV. STATEMENT REGARDING RECORD CITATIONS

This Brief uses the following designations:

1. Citations to the Technical Record are cited as "R. at [page number]."

2. Citations to the Supplemental Record are cited as "Supp. R. at [page number]."

3. The Plaintiff's Principal Brief is cited as "Appellant's Brief, [page number]."

The Plaintiff-Appellant is referred to interchangeably through this Brief as the "Plaintiff" or the "Appellant," and the Defendants-Appellees are referred to interchangeably as the "Defendants" or the "Appellees."

Record citations and citations to authority are footnoted throughout this Brief unless including a citation in the body of the Brief improves clarity.

V. APPLICABLE STANDARDS OF REVIEW

1. Whether this Court has appellate jurisdiction—and the scope of its appellate jurisdiction—are questions of law reviewed de novo. *See Peck v. Tanner*, 181 S.W.3d 262, 265 (Tenn. 2005) ("The issue before us concerning the scope of appellate jurisdiction is a question of law; as a result, our review is de novo without a presumption of correctness.") (citations omitted).

2. Whether a case has become moot is a question of law. *See State ex rel. Cunningham v. Farr*, No. M2006-00676-COA-R3-CV, 2007 WL 1515144, at *3 (Tenn. Ct. App. May 23, 2007), *no app. filed*; *id.* ("Determining whether a case or an issue has become moot is a question of law.") (citations omitted).

3. Where, as here, an appellant has not filed a transcript or statement of the evidence, the trial court's factual findings are conclusively presumed to be supported by the evidence and correct. *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) ("In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct." (citing *J.C. Bradford & Co. v. Martin Constr. Co.*, 576 S.W.2d 586, 587 (Tenn. 1979))).

4. The (assertedly) appealed portion of the trial court's Order granting the Defendants' Tennessee Public Participation Act Petition to Dismiss under Tennessee Code Annotated § 20-17-105(b) presents a mixed question of law and fact that is reviewed "de novo with a presumption of correctness extended only to the trial court's findings of fact." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Tr.*, 209

S.W.3d 595, 599 (Tenn. Ct. App. 2006) (citing *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 305 (Tenn. 2005)).

5. Because the portion of the trial court's Order granting the Defendants' Tennessee Public Participation Act Petition to Dismiss under Tennessee Code Annotated § 20-17-105(c) has not been contested by the Appellant, the correctness of that ruling is not subject to appellate review. *See* Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review."); *Bobo v. City of Jackson*, No. W2019-01578-COA-R3-CV, 2020 WL 5823341, at *2 (Tenn. Ct. App. Sept. 30, 2020) ("We are directed only to consider those issues that are properly raised, argued, and supported with relevant authority.") (citations omitted), *no app. filed*.

6. Had the Plaintiff's constitutional claims been presented to the trial court in the first instance, they would present questions of law reviewable de novo. *See Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019) ("The determination of whether a statute is constitutional is a question of law, which we review de novo on appeal." (citing *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018))), *no app. filed*.

7. Whether a prevailing petitioner is entitled to attorney's fees under the Tennessee Public Participation Act is a mandatory determination governed by Tennessee Code Annotated § 20-17-107(a)(1). *See id.* ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party: (1) Court costs, reasonable attorney's fees, discretionary costs, and other

expenses incurred in filing and prevailing upon the petition[.]").

8. A trial court's ruling on attorney's fees is reviewed for abuse of discretion. *Coleman v. Coleman*, No. W2011-00585-COA-R3CV, 2015 WL 479830, at *10 (Tenn. Ct. App. Feb. 4, 2015) ("[W]e review the trial court's ruling on attorney's fees under an abuse of discretion standard."), *no app. filed*.

9. "Appellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard." *Pegues v. Ill. Cent. R. Co.*, 288 S.W.3d 350, 353 (Tenn. Ct. App. 2008) (cleaned up).

VI. INTRODUCTION

This appeal arises out of speech-based tort claims that the Plaintiff—a candidate for U.S. Congress—filed against three political activists who criticized him. Despite the many issues that the Plaintiff presents, this appeal is easily resolved. Specifically, this appeal of Case No.: 83CC1-2020-CV-906 must be dismissed—and the trial court's order in Case No. 83CC1-2020-CV-616 must be affirmed—because the trial court's order in Case No. 83CC1-2020-CV-616 is a final order, and the Plaintiff did not appeal it. Thus, this Court lacks appellate jurisdiction over any claim the Plaintiff has presented.

Even if the Plaintiff—the Appellant in Case No.: 83CC1-2020-CV-906—had appealed Case No. 83CC1-2020-CV-616, though (and as the trial court has already determined, he did not[1]), the bulk of his claims still would not be cognizable, for several reasons:

First, the Appellant's constitutional (and many other) claims were not presented below, and they are waived because they cannot be raised for the first time on appeal.

Second, the Appellant has failed to develop an argument in his briefing with respect to several issues identified in his Statement of the

[1] Supp. R. at 58, ¶ 2 ("Although a consolidated case was appealed by the Plaintiff, the Plaintiff did not take an appeal of Case No. 83CC1-2020-CV-616."). *See also Northgate Ltd. Liab. Co. v. Amacher*, No. M2018-01407-COA-R3-CV, 2019 WL 3027906, at *1 n.2 (Tenn. Ct. App. July 11, 2019) ("[A]n appeal of an order in one consolidated case 'does not constitute an appeal' of the separate but consolidated case." (quoting *Rainbow Ridge Resort, LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d 252, 259 (Tenn. Ct. App. 2016))).

Issues, and thus, they are waived as well.

Third, the Appellant has failed to contest the trial court's ruling that the Defendants established "valid defenses . . . to the [Plaintiff's] speech-based tort claims" under Tennessee Code Annotated § 20-17-105(c),[2] which is dispositive of his merits claims.

Fourth, independent of jurisdictional defects, waiver, and the preclusive effects of unappealed rulings, Appellant's claims are meritless.

Accordingly, this appeal of Case No. 83CC1-2020-CV-906—the only case that the Plaintiff appealed—must be dismissed for lack of appellate jurisdiction, because none of the claims he raises on appeal arose out of Case No. 83CC1-2020-CV-906. In the event that the Appellant's claims arising out of Case No. 83CC1-2020-CV-616—a separate, consolidated case that the Plaintiff has not appealed—are adjudicated, though, the trial court's ruling in Case No. 83CC1-2020-CV-616 should be affirmed. The Appellees should also be awarded their appellate attorney's fees under Tennessee Code Annotated §§ 20-17-107(a)(1) and 27-1-122.

VII. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In February 2020, Plaintiff Trevor Adamson launched his campaign for Congress.[3] By April 2020, the media was covering his candidacy.[4] The Plaintiff's campaign website billed the Plaintiff—a self-described

[2] R. at 621, ¶ 4.

[3] R. at 163. *See also* Appellant's Brief, p. 28 ("Mr. Adamson held himself out to be a Congressional candidate . . . .").

[4] R. at 167.

"local and national" political operative[5]—as a true man of the people.[6] "Our campaign's main purpose is to represent all Tennesseans of District 6. A representatives [sic] job is to represent everyones [sic] rights, not just those at country clubs and cocktail parties. As your representative, I will take all of our interests to Congress[,]" he pledged.[7]

In May 2020, the Plaintiff saw an opportunity to demonstrate his asserted value by taking a role in organizing a political protest following the death of George Floyd. Thereafter, the Defendants—three political activists—criticized the Plaintiff on Facebook.

A. THE PLAINTIFF'S FIRST LAWSUIT: CASE NO. 83CC1-2020-CV-616.

After the Defendants criticized him, the Plaintiff filed a cornucopia of speech-based tort claims against the Defendants and demanded "not less than $300,000 for compensatory damages, and punitive damages . . . of $500,000.00."[8] The case was assigned Case No. 83CC1-2020-CV-616.[9]

B. THE DEFENDANTS' TENNESSEE PUBLIC PARTICIPATION ACT PETITION.

The Defendants timely exercised their vested statutory rights to petition to dismiss the Plaintiff's claims with prejudice and obtain

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[5] R. at 92, ¶ 8. *See also* Appellant's Brief, p. 28 ("Plaintiff is a political organizer[.] . . . . [H]e did serve the Presidential candidate, Bernie Sanders' [sic] political platform for a period of time.").

[6] R. at 168, 169.

[7] *Id.*

[8] R. at 108, ¶ 4.

[9] R. at 5.

sanctions under the Tennessee Public Participation Act (TPPA)[10]—a recently enacted statute that is designed to deter and punish such litigation. *See* Todd Hambidge, et al., *Speak Up. Tennessee's New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14, 16 (Sept. 2019). Of significance, the issue of whether the trial court retained jurisdiction to adjudicate the Defendants' TPPA claims was fully litigated and determined by the trial court,[11] and it has

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[10] R. at 120–276. *See also* Tenn. Code Ann. § 20-17-104(a) ("If a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action."); § 20-17-104(b) ("Such a petition may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper.").

[11] Once the Defendants retained counsel and incurred legal fees, the Plaintiff non-suited Case No. 83CC1-2020-CV-616. *See* R. at 118. The Defendants contended, though, that based on Rule 41.01's statutory exception, *see id.* (stating that Rule 41.01 is "[s]ubject to the provisions . . . of any statute"), and based on its exception protecting vested rights, *see, e.g.*, *Lacy v. Cox*, 152 S.W.3d 480, 484 (Tenn. 2004) ("A plaintiff's right to voluntary dismissal without prejudice is subject to the exceptions expressly stated in Rule 41.01(1) as well as to an implied exception which prohibits nonsuit when it would deprive the defendant of some vested right.")—coupled with the public policy reasons for the TPPA—the rights afforded to the Defendants by the TPPA could be exercised within the statute's 60-day period notwithstanding the Plaintiff's nonsuit. R. at 123–30. The Plaintiff never contested this assertion. Upon review, the trial court also agreed with it; it ruled that the Defendants' TPPA Petition was timely, R. at 620, ¶ 1; and it incorporated the Defendants' jurisdictional claim into its final order in Case No. 83CC1-2020-CV-616, R. at 621, ¶ 5.

On appeal, the Appellant does not contest the trial court's post-nonsuit jurisdiction in any respect. *See* Appellant's Brief, pp. 14–15.

not been appealed. Accordingly, that jurisdictional question is *res judicata*. *See Goeke v. Woods*, 777 S.W.2d 347, 350 (Tenn. 1989) ("*Res judicata* applies to questions of jurisdiction, if jurisdiction is litigated or determined by the court."); *see also id.* (holding that the doctrine "preclude[s] the relitigation of the issue of whether the first tribunal had

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Notably, the Defendants' theory of jurisdiction also was not novel. Indeed, multiple "[o]ther jurisdictions that have considered whether a sanction survives after a voluntary dismissal focus on the purpose of the sanction imposed." *Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 807 n.3 (Tex. 1993) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) (failure to impose Federal Rule 11 sanctions after a voluntary dismissal would thwart the Rule's purpose of deterrence because the litigant "would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'"); *Bryson v. Sullivan*, 412 S.E.2d 327 (N.C. 1992); *Berko v. Willow Creek I Neighborhood Ass'n, Inc.*, 812 P.2d 817 (Okla. Ct. App. 1991)). *See also eCash Techs., Inc. v. Guagliardo*, 127 F. Supp. 2d 1069, 1084 (C.D. Cal. 2000) ("It seems clear that Defendants took this action merely to try to avoid an award of attorneys' fees and costs under Section 425.16. However, the law in California is clear that even though these claims were voluntarily dismissed, this does not absolve the Defendants of liability for fees and costs incurred by Plaintiff in striking these counterclaims." (citing *Kyle v. Carmon*, 71 Cal. App. 4th 901, 918–19 (1999) (affirming award of attorneys' fees following voluntary dismissal); *Liu v. Moore*, 69 Cal. App. 4th 745, 755 (1999) (holding that voluntary dismissal does not preclude award of attorneys' fees); *Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 107–08 (1998) (same))), *aff'd*, 35 F. App'x 498 (9th Cir. 2002). *Cf. Rickets v. Sexton*, 533 S.W.2d 293, 294–95 (Tenn. 1976) ("The right of a plaintiff to take a nonsuit is subject to the further qualification that it must not operate to deprive the defendant of some right that vested during the pending of the case."); *Autin v. Goetz*, 524 S.W.3d 617, 633 (Tenn. Ct. App. 2017) ("We also cannot agree that *Rickets* stands for the proposition that the filing of a notice of nonsuit deprives the trial court of jurisdiction to enter any additional orders in the case other than an order confirming the voluntary dismissal.").

jurisdiction") (citation omitted). Further, because the Plaintiff did not appeal Case No. 83CC1-2020-CV-616, this Court need not address whether the trial court's jurisdictional ruling in that case was correct. *Id.* ("It is not necessary for us to address whether the trial court's jurisdictional ruling was correct. It is the preclusive effect of the unappealed final judgment, erroneous or otherwise, which is at issue.").

The effect of the Defendants' TPPA Petition was to require the Plaintiff to: "establish[] a prima facie case for each essential element of the claim[s] in the legal action," *see* Tenn. Code Ann. § 20-17-105(b), and demonstrate that his claims could overcome the Defendants' many valid defenses,[12] *see* § 20-17-105(c) ("Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action."). In both cases, such a showing must be made with "admissible evidence." Tenn. Code Ann. § 20-17-105 ("The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.").

The Defendants also sought an award of mandatory attorney's fees and discretionary sanctions under Tennessee Code Annotated § 20-17-107(a).[13] With respect to attorney's fees, the Defendants sought $15,000.00, which reflected their actual fees incurred.[14] The Defendants' claimed award was supported by a detailed fee petition addressing Rule

[12] R. at 134–58.

[13] R. at 158–59.

[14] R. at 159; R. at 225–42.

1.5's reasonableness factors and extensive supporting materials.[15] Additionally, regarding sanctions, each Defendant sought just 1% of the minimum $800,000.00 the Plaintiff had placed in controversy, reflecting an aggregate sanction of $24,000.00.[16] A hearing on the Defendants' TPPA Petition was set for October 5, 2020.[17]

C. THE PLAINTIFF'S SECOND LAWSUIT: CASE NO. 83CC1-2020-CV-906.

Instead of responding to the Defendants' TPPA Petition in Case No. 83CC1-2020-CV-616, the Plaintiff opted to file a new lawsuit—on his own behalf and on behalf of his fiancée—against the Defendants and their attorney, which the Plaintiff titled a "Verified Petition of Trevor Adamson and Samantha Myers to Dismiss Tenn. R. Civ. P. 27.01(1)[.]"[18] The Plaintiff's new lawsuit raised gripes about, for instance, the conduct of his former counsel, the Defendants' supposed "theft of services" for crowdfunding their legal defense, "the interest of public good[,]" and what "[t]he Greeks determined" about defamation.[19] The Plaintiff's (and his fiancée's) new lawsuit was assigned Case No. 83CC1-2020-CV-906.[20]

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[15] R. at 210–76.

[16] R. at 159.

[17] R. at 161.

[18] R. at 277.

[19] R. at 484–93.

[20] R. at 484.

D. OCTOBER 5, 2020 HEARING ON THE DEFENDANTS' TPPA PETITION IN CASE NO. 83CC1-2020-CV-616.

The Defendants initially treated the Plaintiff's new lawsuit as a response to their TPPA Petition in Case No. 83CC1-2020-CV-616.[21] The Defendants came to learn, however, that the Plaintiff had indicated "his intent to file his 'Verified Petition' as a new, original proceeding."[22] Thus, the Defendants contended that "no Response to their pending . . . TPPA Petition in Case No. 83CC1-2020-CV-616 ha[d] been filed pursuant to Tenn. Code Ann. § 20-17-104(c)[,]" and they proposed that the trial court enter an order granting their TPPA Petition because no timely response was filed.[23] The trial court declined to do so, though, and it did not enter the Defendants' proposed order.

Instead, on October 5, 2020, the trial court held a hearing on the Defendants' TPPA Petition as scheduled.[24] Although that hearing involved discussion of the evidence presented on several issues raised in this appeal, the proceedings are not in the record, because the Appellant did not file a transcript or statement regarding them. *Cf. In re M.L.D.*, 182 S.W.3d at 895 ("In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct.") (citation omitted). However, the record does reflect that after the Parties' October

[21] R. at 413–25.

[22] R. at 427.

[23] R. at 426–27.

[24] R. at 616.

5, 2020 hearing, the Court issued an order on three matters:

First, faced with what would otherwise have been a default ruling, the Plaintiff asked that his "Verified Petition" be treated as a response to the Defendants' TPPA Petition.[25] The trial court granted the Plaintiff's request and held that "the Court shall treat it as a Response and construe it liberally as such. Accordingly, it is **ORDERED** that Case No. 83CC1-2020-CV-906 shall be and is hereby **CONSOLIDATED** with Case No. 83CC1-2020-CV-616." [26]

Second, on its own motion, the trial court afforded the Plaintiff—who was *pro se* at this point—an additional 30 days to supplement his deficient response to the Defendants' TPPA petition and an opportunity to obtain new counsel, ordering:

> If the Plaintiff determines that any further response . . . is necessary, the Plaintiff or Plaintiff's new counsel, if any, shall have thirty (30) days from the date of the Parties' October 5, 2020 hearing—until November 4, 2020—to file and serve such further response, after which date the Court will issue a ruling on the Defendants' [TPPA Petition] based on the Parties' briefing.[27]

Third, because neither the Plaintiff's fiancée nor the Defendants' counsel—the new parties added by the Plaintiff in Case No. 83CC1-2020-CV-906—could properly be made parties to Case No. 83CC1-2020-CV-616 via a filing that the Plaintiff asked the Court to treat as a response to the Defendants' TPPA Petition in Case No. 83CC1-2020-CV-616, the

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[25] *Id.* at ¶ 1.

[26] *Id.*

[27] R. at 616–17, ¶ 2.

Court ordered that those parties and any claims regarding them be stricken.[28]

E. THE TRIAL COURT'S FINAL ORDER IN CASE NO. 83CC1-2020-CV-616.

The Plaintiff took advantage of the relief that the trial court had *sua sponte* afforded him. Thus, he filed a supplemental response to the Defendants' TPPA Petition in Case No. 83CC1-2020-CV-616, which he titled a "Response to Honorable Judge Joe H. Thomson."[29]

The Defendants replied to the Plaintiff's supplemental Response on November 5, 2020.[30] For the reasons detailed in that Reply, the Defendants asserted that the Plaintiff's supplemental response, too, failed to meet his evidentiary burden under either Tennessee Code Annotated § 20-17-105(b) or (c), and that the Defendants' TPPA Petition should be granted accordingly.[31]

Upon review, the trial court agreed with the Defendants. Thus, on November 17, 2020, the trial court entered a final order in Case No. 83CC1-2020-CV-616 that held, in pertinent part, as follows:

> 3. Neither of the Plaintiff's Responses introduced admissible evidence that establishes a prima facie case for each essential element of the speech-based tort claims in the Plaintiffs Amended Complaint.
>
> 4. Neither of the Plaintiff's Responses introduced admissible evidence sufficient to overcome the valid defenses

[28] R. at 616, ¶ 3.

[29] R. at 431–35.

[30] R. at 472–83.

[31] *Id.*

> that the Defendants established to the speech-based tort claims in the Plaintiffs Amended Complaint.
>
> 5. Accordingly, for the reasons set forth in the Defendants' Motion and TPPA Petition and the Defendants' October 1, 2020 and November 5, 2020 Replies, which are incorporated herein by reference, the Court **FINDS** and **ORDERS** that the Defendants' Motion and TPPA Petition are well taken and should be **GRANTED**; that the Plaintiff's Amended Complaint, and all causes of action asserted within it, should be and are hereby **DISMISSED WITH PREJUDICE** pursuant to Tenn. Code Ann. § 20-17-105(b), Tenn. Code Ann. § 20-17-105(c), and Tenn. Code Ann. § 20-17-105(e); and that a judgment shall **ISSUE** awarding the Defendants their actual, reasonable attorney's fees incurred in the amount of fifteen thousand ($15,000.00) pursuant to Tenn. Code Ann. § 20-17-107(a)(1) and assessing sanctions against the Plaintiff in the amount of twenty-four thousand dollars ($24,000.00) pursuant to Tenn. Code Ann. § 20-17-107(a)(2) to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.[32]

The above order rendered moot Case No. 83CC1-2020-CV-818—a separate, non-consolidated case in which the Defendants sought leave to take discovery under Tenn. R. Civ. P. 27. Thus, the trial court dismissed that case without prejudice as moot.[33] Case No. 83CC1-2020-CV-818 is not in the record, because it was neither consolidated nor appealed.

Given the foregoing, the trial court entered judgment as to Case No. 83CC1-2020-CV-616, Case No. 83CC1-2020-CV-818, and Case No. 83CC1-2020-CV-906, and it certified each case as final.[34]

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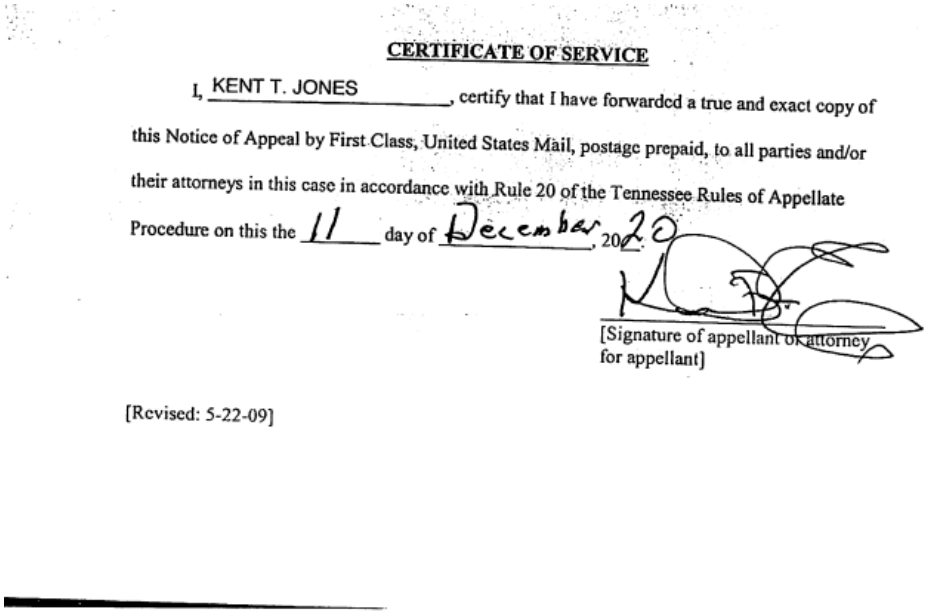
[32] R. at 621, ¶¶ 3–5.

[33] *Id.* at ¶ 6.

[34] *Id.* at 622, ¶ 8.

F. THE PLAINTIFF'S APPEAL OF CASE NO. 83CC1-2020-CV-906 ONLY.

The Plaintiff filed a Notice of Appeal on December 11, 2020.[35] The Plaintiff's Notice of Appeal states that it was taken as to "Trial Court Number 83CC1-2020-CV-906," which the Appellant's counsel typed into this Court's standard form.[36] Appellant's counsel thereafter signed and dated his Notice of Appeal by hand before e-filing it:



CERTIFICATE OF SERVICE

I, KENT T. JONES, certify that I have forwarded a true and exact copy of this Notice of Appeal by First Class, United States Mail, postage prepaid, to all parties and/or their attorneys in this case in accordance with Rule 20 of the Tennessee Rules of Appellate Procedure on this the 11 day of December, 2020.

[Signature of appellant or attorney for appellant]

[Revised: 5-22-09]

Of note, the Plaintiff's Notice of Appeal was styled: "Trevor Seth Adamson **(et al.)** v. Sarah E. Grove (et al.),"[37] which could only refer to Case No. 83CC1-2020-CV-906. The relevant page of the Plaintiff's Notice of Appeal—which reflects both that case-specific style and the fact that Appellant appealed the trial court's judgment in "Trial Court Number 83CC1-2020-CV-906" —only is reprinted hereafter for the Court's review:

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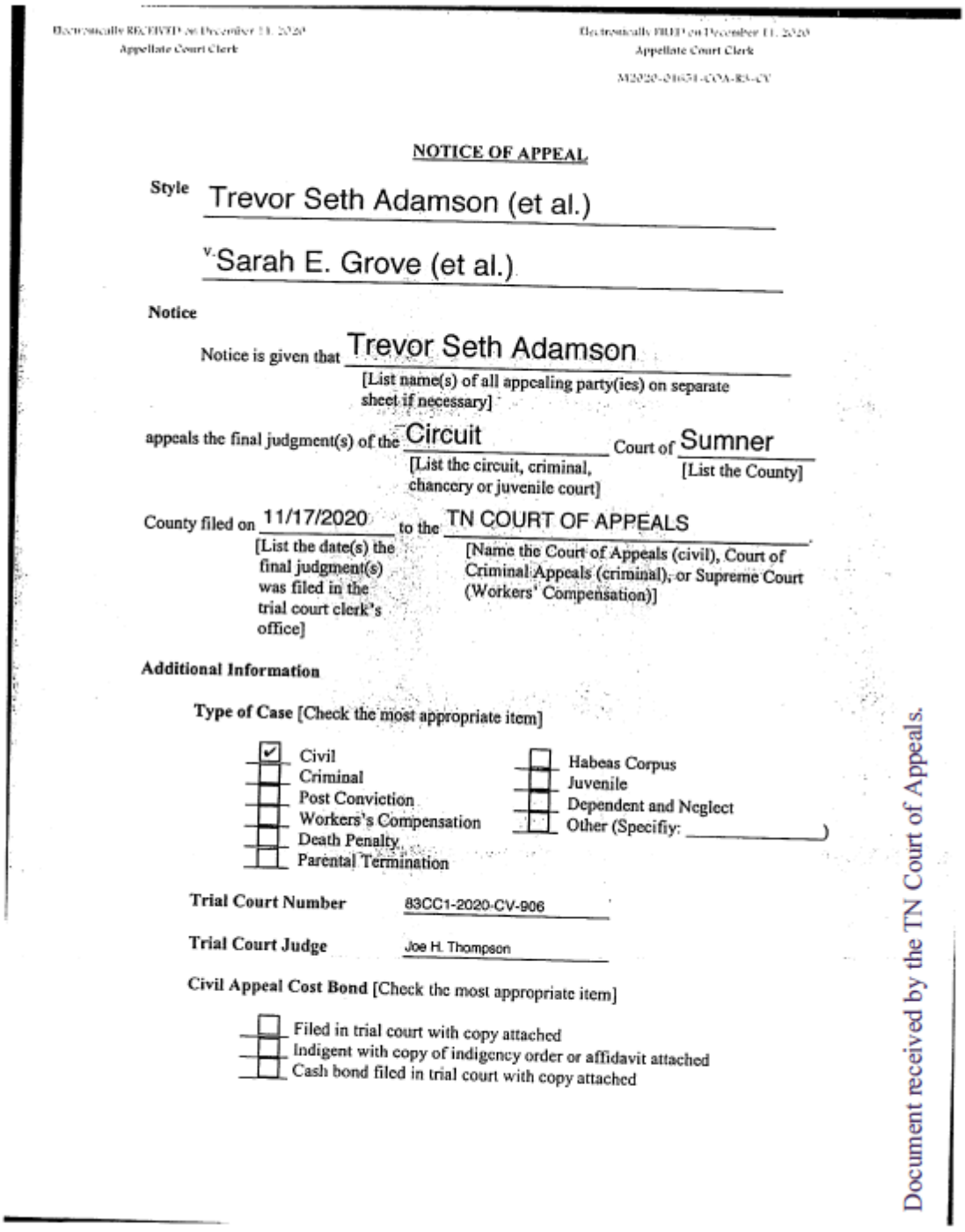
[35] Plaintiff's Notice of Appeal, Case 83CC1-2020-CV-906 (Dec. 11, 2020).

[36] *Id.*

[37] *Id.* (emphasis added).



Electronically RECEIVED on December 11, 2020
Appellate Court Clerk

Electronically FILED on December 11, 2020
Appellate Court Clerk

M2020-01651-COA-R3-CV

NOTICE OF APPEAL

Style Trevor Seth Adamson (et al.)

v. Sarah E. Grove (et al.)

Notice

Notice is given that Trevor Seth Adamson
[List name(s) of all appealing party(ies) on separate sheet if necessary]

appeals the final judgment(s) of the Circuit Court of Sumner
[List the circuit, criminal, chancery or juvenile court] [List the County]

County filed on 11/17/2020 to the TN COURT OF APPEALS
[List the date(s) the final judgment(s) was filed in the trial court clerk's office] [Name the Court of Appeals (civil), Court of Criminal Appeals (criminal), or Supreme Court (Workers' Compensation)]

Additional Information

Type of Case [Check the most appropriate item]

- [x] Civil
- [ ] Criminal
- [ ] Post Conviction
- [ ] Workers's Compensation
- [ ] Death Penalty
- [ ] Parental Termination
- [ ] Habeas Corpus
- [ ] Juvenile
- [ ] Dependent and Neglect
- [ ] Other (Specifiy: _____)

Trial Court Number 83CC1-2020-CV-906

Trial Court Judge Joe H. Thompson

Civil Appeal Cost Bond [Check the most appropriate item]

- [ ] Filed in trial court with copy attached
- [ ] Indigent with copy of indigency order or affidavit attached
- [ ] Cash bond filed in trial court with copy attached

In sum: The Appellant's typed, hand-signed, and hand-dated Notice of Appeal makes clear in multiple respects that he appealed "Trial Court Number 83CC1-2020-CV-906" only. Consequently, as the trial court determined in post-judgment, execution-related proceedings: "Although

a consolidated case was appealed by the Plaintiff, the Plaintiff did not take an appeal of Case No. 83CC1-2020-CV-616." *See* Supp. R. at 58, ¶ 2. *See also id.* at 60–61, ¶ 11 ("[A]lthough a consolidated case was appealed, Case No. 83CC1-2020-CV-616 was not appealed, and the Court of Appeals has made clear that the appeal of one consolidated case does not constitute the appeal of separate consolidated cases.") (citations omitted). Notably, in addition to being correct, that determination is the law of the case. *See, e.g.*, *State v. Reed*, No. E2019-00771-CCA-R3-CD, 2020 WL 5588677, at *13 (Tenn. Crim. App. Sept. 18, 2020) (favorably citing authority that "it is the practice to treat each successive decision as establishing the law of the case and depart from it only for convincing reasons") (cleaned up), *no app. filed*. *Cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . . .") (citation omitted).

VIII. ARGUMENT

A. THE PLAINTIFF'S FAILURE TO APPEAL THE TRIAL COURT'S FINAL ORDER IN CASE NO. 83CC1-2020-CV-616 PRECLUDES THIS APPEAL.

On December 23, 2020, the Defendants—now Appellees—moved to dismiss this appeal for lack of subject matter jurisdiction. In their Motion—which they now renew—they noted:

> Even after being consolidated, "consolidated lawsuits remain separate actions." *Rainbow Ridge Resort, LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d 252, 258 (Tenn. Ct. App. 2016) (citing *Givens v. Vanderbilt Univ.*, No. M2011-00186-COA-R3-CV, 2011 WL 5145741, at *3 (Tenn. Ct. App. Oct. 28,

> 2011), *perm. to app. denied* (Tenn. Feb. 21, 2012)). As a result, "an appeal of an order in one consolidated case 'does not constitute an appeal' of the separate but consolidated case." *Northgate Ltd. Liab. Co. v. Amacher*, No. M2018-01407-COA-R3-CV, 2019 WL 3027906, at *1 n.2 (Tenn. Ct. App. July 11, 2019) (quoting *Rainbow Ridge Resort, LLC*, 525 S.W.3d at 259), *no app. filed*. Consequently, circumstances occasionally arise like those presented here, in which a party files a notice of appeal regarding one—but not another—final order in consolidated cases involving the same claims and parties.[38]

In response, the Appellant blamed the e-filing system for his failure to file a Notice of Appeal as to any case other than Case No. 83CC1-2020-CV-906.[39] On December 29, 2020, this Court entered an order denying the Appellees' Motion "without prejudice to the parties addressing the same issues in their briefs."[40]

The Appellant has now addressed the issue in his briefing solely by—once again—blaming the e-filing system. *See* Appellant's Brief, p. 10 ("Pursuant to Tenn. R. Civ. Pro. 60.02, we are respectfully asking the Tennessee Court of Appeals to recognize that when I electronically file an appeal on a consolidated case, the True Filing and/or Efile system only allows you to enter in one case number."); *id.* at 5 ("The Notice of Appeal was filed through True Filing, which is an **electronic** system that, upon investigation and belief, only allows one case number to be entered in the electronically submitted form."). Beyond being false, though, the e-filing

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[38] Appellees' Motion to Dismiss Appellant's Appeal As *Res Judicata* and For Lack of a Continuing Controversy at 8–9.

[39] Appellant's Response to Appellees' Motion to Dismiss at 2; *id.* at 5.

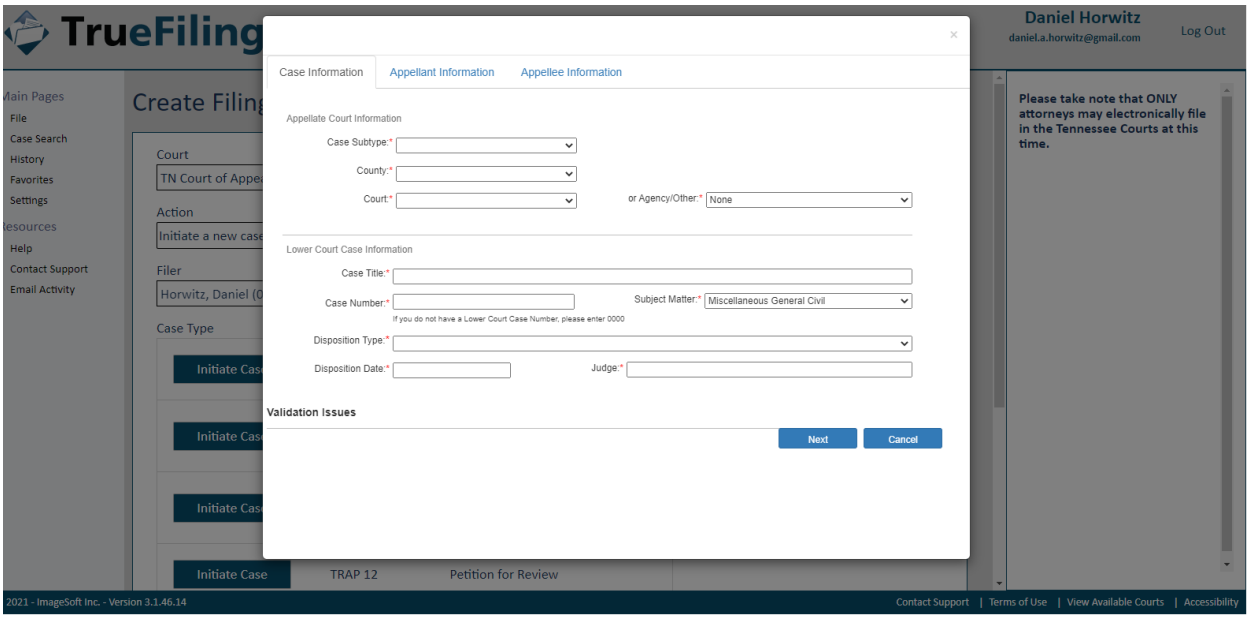
[40] Order, Case No. M2020-01651-COA-R3-CV (Dec. 29, 2020).

system does not explain why the Appellant's Notice of Appeal—which the Appellant himself typed only a single case into, hand-signed, hand-dated, uploaded, and then filed as a .pdf before mailing it to the Appellees in identical form—reflects that it was taken as to "Trial Court Number 83CC1-2020-CV-906" only. Nor does it explain why the Appellant styled his Notice of Appeal: "Trevor Seth Adamson (et al.) v. Sarah E. Grove (et al.)," when that style referred to—and could only refer to—Case No. 83CC1-2020-CV-906 alone.

As the Appellant's typed, hand-dated, and hand-signed Notice of Appeal itself makes plain, though—and as trial court had already determined[41]—the honest and accurate explanation is that the Appellant filed an appeal as to Case No. 83CC1-2020-CV-906 alone. The Appellees have also investigated the Appellant's claims regarding the Court's e-filing system, and as demonstrated below, they are false.

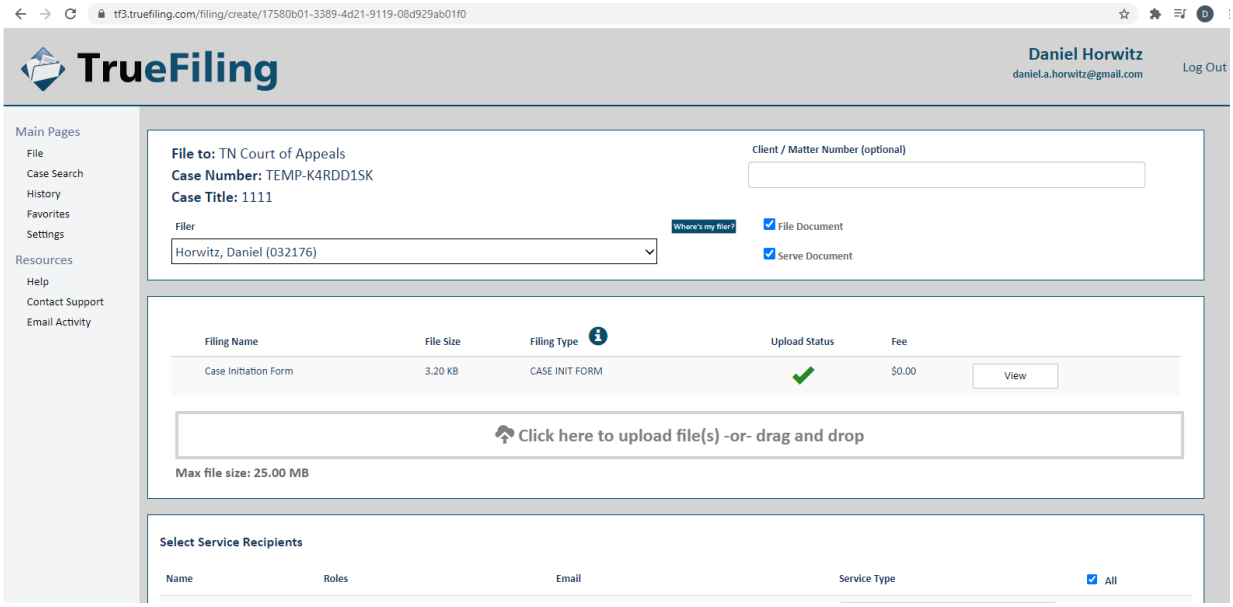
To initiate an appeal through the Court's e-filing system, litigants follow a two-step process. First, appellants select the "Initiate a new case" option, which allows appellants to type in whatever case number(s) they please, in addition to providing party information. That page looks like the following:

[41] Supp. R. at 58, ¶ 2 ("Although a consolidated case was appealed by the Plaintiff, the Plaintiff did not take an appeal of Case No. 83CC1-2020-CV-616."); Supp. R. at 60–61, ¶ 11 ("[A]lthough a consolidated case was appealed, Case No. 83CC1-2020-CV-616 was not appealed, and the Court of Appeals has made clear that the appeal of one consolidated case does not constitute the appeal of separate consolidated cases.").



The inputted case information is not an appellant's Notice of Appeal, though. Thus, it does not result in any document being filed.

Instead, a Notice of Appeal is a document that an appellant must create separately—unrelated to the Court's e-filing system—and then upload by selecting the "Click here to upload file(s)-or-drag and drop" option. That page looks like the following:



Given this context, the Appellant's claim that the e-filing system

"only allows you to enter in one case number" is not only false, *see* Appellant's Brief, p. 10—it is irrelevant. In truth, e-filing a Notice of Appeal does not require an appellant "to enter" a case number at all. Instead, it involves uploading a separate, appellant-created document—outside of the Court's e-filing system—and filing it. That is what the Appellant did here, and thus, he alone is responsible for the content of his of Notice of Appeal, which he—not the e-filing system—created.

As a result, the fact that the Appellant's Notice of Appeal states that it was taken only as to "Trial Court Number 83CC1-2020-CV-906" is not *and cannot be* attributable to the Court's e-filing system. The Appellant himself created his Notice of Appeal and typed "83CC1-2020-CV-906" as the only case being appealed. The Appellant then typed out the style of his Notice of Appeal as: "Trevor Seth Adamson (et al.) v. Sarah E. Grove (et al.)," which could only refer to Case No. 83CC1-2020-CV-906. Thereafter, Appellant's counsel hand-signed and hand-dated his Notice of Appeal before uploading and e-filing it.

Nowhere in the Appellant's Notice, however, did the Appellant indicate that he was seeking relief from any judgment other than the one issued in Case No. 83CC1-2020-CV-906. *But see* Tenn. R. App. P. 3(f). The Plaintiff's failure to take an appeal as to either Case No. 83CC1-2020-CV-616 or Case No. 83CC1-2020-CV-818—out of which all of the claims that the Appellant presents in this appeal arise—is also a defect of subject matter jurisdiction that this Court cannot waive. *See Craftique Constr., Inc. v. Justice*, No. E2018-02096-COA-R3-CV, 2020 WL 5415326, at *1 (Tenn. Ct. App. Sept. 9, 2020) ("If a notice of appeal is not timely filed, this Court is not at liberty to waive the procedural defect." (citing

Tenn. R. App. P. 2)), *no app. filed*. Instead, to the extent that the Appellant desires relief on the matter, his recourse is against his counsel. *Cf. Terminix Int'l Co. v. Tapley*, No. 02A01-9701-CH-00028, 1997 WL 437222, at *4 (Tenn. Ct. App. Aug. 4, 1997) ("Tennessee courts have held that an attorney's negligence is not excusable neglect and that such negligence will be imputed to the client, with the client's only recourse being a malpractice action against the attorney."), *no app. filed*. That the Appellant's counsel has misrepresented what occurred—baselessly blaming the e-filing system for the content of a Notice of Appeal that he alone created—also makes that relief particularly appropriate.

The Appellant is also fully aware of his failure to appeal Case No. 83CC1-2020-CV-616, even if he will not acknowledge that fact in this Court. "When [an] appeal is perfected, jurisdiction vests in the appellate court. Until the appellate court issues a mandate returning the case to the trial court, the appellate court retains jurisdiction." *Green v. Champs-Elysees, Inc.*, No. M2013-00951-COA-R3CV, 2014 WL 4058815, at *4 (Tenn. Ct. App. Aug. 15, 2014) (citation omitted), *no app. filed*. Because the Appellant did not perfect an appeal of Case No. 83CC1-2020-CV-616, though, while this appeal has been pending, the Appellant has filed a post-judgment Motion to Alter, Amend or Vacate the trial court's final order in 83CC1-2020-CV-616, in which he seeks the same relief that he is seeking in this appeal.[42] The fact that the Appellant's post-judgment motion is meritless[43] is beside the point. Instead, the point is

[42] Supp. R. at 69–77.

[43] *Id.* at 135–44.

that the Appellant is actually aware that this Court lacks jurisdiction to adjudicate his claims arising out of Case No. 83CC1-2020-CV-616, so he has simultaneously pursued those claims in the trial court while this appeal has been pending.

The ultimate effect of the Appellant's failure to appeal any case other than Case No. 83CC1-2020-CV-906 is that this Court lacks jurisdiction over this appeal and must dismiss it. *Fleming v. Saini*, No. W2013-01540-COA-R3CV, 2014 WL 2592548, at *4 (Tenn. Ct. App. June 10, 2014) ("If this Court does not have subject matter jurisdiction over the appeal, the appeal must be dismissed." (citing *Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Sys. of the Midsouth, Inc.*, 266 S.W.3d 421, 424 (Tenn. Ct. App. 2007))), *perm. to app. denied* (Tenn. Oct. 15, 2014). In particular, the Appellant's decision to appeal Case No. 83CC1-2020-CV-906 alone is fatal in two respects:

First, it precludes the Appellant from raising any of the issues that he has presented in his briefing, all of which arise out of final judgments in cases that he did not appeal. Eleven of the Appellant's twelve asserted issues arise out of the trial court's final order in Case No. 83CC1-2020-CV-616, which he did not appeal. And the Appellant's final issue—identified as Issue #9 in his Statement of the Issues, *see* Appellant's Brief, p. 14—arises out of Case No. 83CC1-2020-CV-818, which the Appellant also did not appeal. Because those cases resulted in unappealed final orders, neither one comes within the scope of this Court's appellate jurisdiction. As such, adjudicating the Appellant's claims would be "an unauthorized exercise" of appellate jurisdiction that this Court has not acquired, *see Peck*, 181 S.W.3d at 268, and this appeal must be dismissed

accordingly, *see Fleming*, 2014 WL 2592548, at *4.

Second, given that unappealed Case No. 83CC1-2020-CV-616 and appealed Case No. 83CC1-2020-CV-906 involve overlapping subject matter, the trial court's unappealed—and unappealable—final order in Case No. 83CC1-2020-CV-616 renders the Plaintiff's appeal of Case No. 83CC1-2020-CV-906 *res judicata*. *See State ex rel. Johnson v. Gwyn*, No. M2013-02640-COA-R3-CV, 2015 WL 7061327, at *9 (Tenn. Ct. App. Nov. 10, 2015) (holding, in case where overlapping claims were pursued in different venues, that "*res judicata* applies not only to those issues that were raised previously, but those that *could have been raised*"), *no app. filed*. The Appellees' *res judicata* defense became cognizable as soon as Case No. 83CC1-2020-CV-616 became final. As this Court explained in a similar context in *Rainbow Ridge Resort, LLC*, 525 S.W.3d at 260:

> [I]n this case, the bank could not have established the defense of res judicata before the order of dismissal in the chancery court case became final. As stated above, the trial court filed the orders of dismissal in the chancery court case and circuit court case on the same day, June 8, 2015. However, only one of those orders was appealed. With no appeal filed, the trial court's order dismissing the chancery court case became final thirty days after its entry. *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991). The bank could not assert a res judicata defense before the judgment was final.

That is the situation presented here. Case No. 83CC1-2020-CV-616 was consolidated with—and it involved the same claims (or potential claims) and Parties—Case No. 83CC1-2020-CV-906.[44] Thereafter, the Appellant filed a Notice of Appeal regarding Case No. 83CC1-2020-CV-906 alone.[45]

[44] R. at 616, ¶ 1.

Thus, the trial court's unappealed final order in Case No. 83CC1-2020-CV-616 is now an unappealable final judgment that renders the claims in this appeal *res judicata*.

As detailed at length in the Appellees' Motion to Dismiss this appeal, there is no dispute:

> (1) that the underlying judgment [in Case No. 83CC1-2020-CV-616] was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits. *Lien v. Couch*, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998); *see also Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990).

Rainbow Ridge Resort, LLC, 525 S.W.3d at 259 (quoting *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012)). The Appellant does not contend otherwise anywhere in his briefing. Consequently, this entire appeal must be dismissed on the basis that it is *res judicata*. *Id.*

Significantly—although irrelevant to this Court's lack of subject matter jurisdiction, which is non-waivable—the Appellees would also experience prejudice if they could not rely on the finality of the unappealed final judgment they obtained in Case No. 83CC1-2020-CV-616. Beyond having retained counsel to execute on that judgment after it became final and unappealable,[46] the finality of the unappealed judgment entered in Case No. 83CC1-2020-CV-616 affects the Defendants' credit, insurance eligibility and disclosure requirements,

[45] Plaintiff's Notice of Appeal, Case 83CC1-2020-CV-906.

[46] Supp. R. at 11.

among other things. Due to such concerns, the *res judicata* constitutes "a rule of rest" that "promotes finality in litigation," and it is a rule upon which the Appellees are entitled to rely. *See Jackson*, 387 S.W.3d at 491 (citing *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976).

B. THIS CASE MUST BE DISMISSED FOR LACK OF A CONTINUING CONTROVERSY.

A court's jurisdiction to adjudicate a matter is generally limited to "actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (citations omitted).[47] "Thus, cases must remain justiciable throughout the entire course of the litigation, including the appeal." *Farr*, 2007 WL 1515144, at *3 (citing *State v. Ely*, 48 S.W.3d 710, 716 n.3 (Tenn. 2001); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998)), *no app. filed*. *See also Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 330 (6th Cir. 1986) ("To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated.") (citation omitted).

Where—as here—a case "no longer serves as a means to provide some sort of judicial relief to the prevailing party," the "case will be considered moot" absent narrow exceptions not asserted here. *Farr*, 2007 WL 1515144, at *3 (collecting cases). "Determining whether a case or an

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[47] Tennessee's courts have "recognized justiciability doctrines similar to those developed by the United States Supreme Court to determine when courts should hear a case." *State ex rel. Cunningham State ex rel. Cunningham v. Farr*, No. M2006-00676-COA-R3-CV, 2007 WL 1515144, at *2 (Tenn. Ct. App. May 23, 2007) (citations omitted), *no app. filed*.

issue has become moot is a question of law." *Id.* (citing *Hurd v. Flores*, 221 S.W.3d 14, 30 (Tenn. Ct. App. 2006); *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338–39 (Tenn. Ct. App. 2005)).

Here, the Appellant's appeal of Case No. 83CC1-2020-CV-906 must be dismissed for lack of a continuing controversy for three reasons:

First, the Appellant has not presented any issues that arise out of Case No. 83CC1-2020-CV-906. Thus, the Appellant's appeal does not seek to obtain any judicial relief in the lone case that he has appealed. Accordingly, as this Court has done in similar cases, it should dismiss this appeal as moot. *See, e.g.*, *Jahn v. Jahn*, No. 03A01-9709-CH-00433, 1997 WL 789956, at *2 (Tenn. Ct. App. Dec. 23, 1997), *no app. filed*.

Second, the trial court's orders in Case No. 83CC1-2020-CV-906 were not adverse to him. After filing a largely unintelligible new lawsuit, the Appellant specifically "indicated to the Court that [his] September 29, 2020 filing in Sumner County Case No. 83CC1-2020-CV-906 was intended to serve as his Response" to the Appellees' TPPA Petition in Case No. 83CC1-2020-CV-616.[48] As a result, the trial court ruled that "the Court shall treat it as a Response and construe it liberally as such."[49]

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[48] R. at 616, ¶ 1.

[49] *Id.* The Appellant is bound by his statement to the Circuit Court regarding the scope of his filing. *See, e.g.*, *Metro. Life Ins. Co. v. Brown*, 160 S.W.2d 434, 437 (1941) ("The parties are bound by the oral statements made by them to the court of the pleadings and defenses in the case." (citing *Utley v. Louisville & N.R. Co.*, 61 S.W. 84 (Tenn. 1901))); *Merolla v. Wilson Cty.*, No. M2018-00919-COA-R3-CV, 2019 WL 1934829, at *9 n.13 (Tenn. Ct. App. May 1, 2019) (holding that "the

The trial court additionally afforded the Appellant an additional 30 days to file "any further response" that he determined was necessary in Case No. 83CC1-2020-CV-616 thereafter.[50]

Given this context, the Appellant was not plausibly harmed by any order issued in Case No. 83CC1-2020-CV-906, he can obtain no judicial relief through an appeal of that case, and he does not seek any. Indeed, the allowances that the trial court afforded the Appellant in Case No. 83CC1-2020-CV-906 *benefited* him and operated to the Appellees' detriment. If the trial court had not provided them, then the Defendants' TPPA Petition in Case No. 83CC1-2020-CV-616—which had been set for hearing on October 5, 2020—would have been granted automatically, because no response to it had otherwise been filed by the Appellant, and his response to it was due "no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems proper." Tenn. Code Ann. § 20-17-104(c). Thus, appealing Case No. 83CC1-2020-CV-906 cannot provide the Appellant any relief, and this case is moot.

Third, the Appellant's appeal of Case No. 83CC1-2020-CV-906 is moot because the Appellees no longer have any reason to care about it. As detailed above, the Appellees have obtained an unappealed final judgment in Case No. 83CC1-2020-CV-616 that affords them complete

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plaintiff is the master of his complaint, and this Court is limited to correcting the trial court's errors rather than steering the plaintiff's case toward the cognizable claims that had been abandoned by the litigant") (cleaned up), *perm. to app. denied* (Tenn. Sept. 18, 2019).

[50] R. at 616, ¶ 2.

relief as to all issues that concern them in Case No. 83CC1-2020-CV-906. Accordingly, the Appellees are no longer concerned with Case No. 83CC1-2020-CV-906—the only case the Appellant has appealed—or any order entered in it.

For all of these reasons, this case must be dismissed as moot.

C. THE APPELLANT MAY NOT PRESENT CONSTITUTIONAL (OR OTHER) CLAIMS ON APPEAL THAT HE DID NOT PRESENT TO THE TRIAL COURT IN THE FIRST INSTANCE.

Even if the Appellant had taken an appeal of Case No. 83CC1-2020-CV-616, the issues that the Appellant identifies in his Brief as Issues #1 and #2—constitutional challenges to the Tennessee Public Participation Act—still would not be cognizable, because they were not presented to the trial court in the first instance. As this Court held in *Metro. Gov't of Nashville & Davidson Cty. v. Jones*, No. M2020-00248-COA-R3-CV, 2021 WL 1590236, at *2 (Tenn. Ct. App. Apr. 23, 2021), *no app. filed*:

> "[M]atters not raised at the trial level are considered waived." *Eagles Landing Dev., LLC v. Eagles Landing Apartments, LP*, 386 S.W.3d 246, 254 (Tenn. Ct. App. 2012). This general rule "applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal." *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983); *see Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457 (Tenn. 1995) (reasoning that "issues of constitutionality should not first surface on appeal"); *City of Elizabethton v. Carter Cty.*, 321 S.W.2d 822, 827 (Tenn. 1958) ("We do not have any sympathy for the practice of raising constitutional questions for the first time on appeal. . . .")[.]

The lone exception to this rule is when a statute "is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Lawrence*, 655 S.W.2d at 929 (collecting cases). That exception does not

apply here, if for no other reason than that the Tennessee Public Participation Act's constitutionality has been affirmatively upheld. *See* Daniel A. Horwitz, *The Tennessee Public Participation Act is affirmed—and it's working.*, (Mar. 10, 2021), https://tnfreespeech.com/the-tennessee-public-participation-act-is-affirmed-and-its-working/ (citing Order, *Bedsole v. Sinclair Broadcast Group, Inc.*, No. 20C649 (Hamilton Cty. Cir. Ct. Feb. 4, 2021)). Further, even if the Tennessee Public Participation Act did have some constitutional infirmity (and it does not), then evidence—which this Court cannot receive in the first instance—would need to be admitted regarding the demonstrably compelling need that such an anti-SLAPP statute serves. *See generally* Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020), https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/.

As the Appellees noted during the proceedings below, the Appellant also failed to develop an argument in the trial court regarding the issues designated in Appellant's Brief as Issues #3 and #4. R. at 475 (observing that "the Plaintiff also has not contested a single one of these applicable [Tennessee Public Participation Act] criteria or developed any argument as to why they would not apply"). *But see Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived."). The Appellant did not do so with respect to the issues designated in his Brief as Issues #11 and #12, either.

As a consequence, as to all of the above issues—#1, #2, #3, #4, #11, and #12—the Appellant fails to identify "how such alleged error[s] w[ere] seasonably called to the attention of the trial judge with citation to that

part of the record where Appellant['s] challenge of the alleged error[s] [are] recorded" as required, because they were not. *See Davis v. Lewelling*, No. M2016-00730-COA-R3-CV, 2016 WL 6311799, at *4 (Tenn. Ct. App. Oct. 27, 2016) (citing Rule 6(a)(2) of the Rules of the Court of Appeals), *no app. filed*. Thus, each issue should be denied as waived.

D. THE APPELLANT HAS FAILED TO DEVELOP ANY ARGUMENT AS TO ISSUES #3, #4, #7, #8, OR #9 IN THE BODY OF HIS BRIEF.

The Appellant identifies his third and fourth issues as follows:

> 3. Whether Defendants / Appellees were simply exercising the right of free speech, the right to petition, or the right of association, or, instead exercising an intention and desire to destroy and undermine Plaintiff / Appellant's business? See generally Tenn. Code Ann. § 20-17-104.
>
> 4. Whether Defendants / Appellees have made a prima facie case that Plaintiff / Appellant's legal action against them is based on, relates to, or is in response to those parties' exercise of the right to free speech, right to petition, or right of association? See generally Tenn. Code Ann. § 20-17-105.

Appellant's Brief, p. 14.

These issues are not, however, argued anywhere in the body of the Appellant's Brief, resulting in waiver. *See, e.g.*, *Davis*, 2016 WL 6311799, at *5 ("This Court has repeatedly held that a party's failure to argue an issue in the body of his or her brief constitutes a waiver of the issue on appeal." (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006))). Further, to the extent that merely mentioning the relevant standard on page 30 of his Brief qualifies, such an undeveloped, "skeletal" contention would result in waiver regardless. *See Sneed v. Bd. of Prof'l Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of

the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived."). And even if such an argument had been properly raised and argued, either before the trial court or on appeal, for the reasons detailed in the Appellees' briefing below—set forth at pages 132 to 134 of the record—the claim would be meritless anyway.

Appellant's Issues #7 and #8—regarding whether the Defendants' claims (on which they prevailed) were "frivolous," *see* Appellant's Brief, p. 14—are waived for the same reasons. These issues appear to be an effort to raise a claim under Tennessee Code Annotated § 20-7-107(b), which provides that: "If the court finds that a petition filed under this chapter was frivolous or was filed solely for the purpose of unnecessary delay, and makes specific written findings and conclusions establishing such finding, the court may award to the responding party court costs and reasonable attorney's fees incurred in opposing the petition." The trial court did not make such a finding, though—indeed, it found the opposite—and the argument is never mentioned in the body of the Appellant's Brief. Accordingly, these issues are waived, too. *See Davis*, 2016 WL 6311799, at *5.

Issue #9 identified in the Appellant's Brief fails for this reason, too. *See* Appellant's Brief, p. 14. That issue arises out of Case No. 83CC1-2020-CV-818, which—contrary to the Appellant's assertions—was neither appealed *nor* consolidated and is not in the record as a consequence. Nor was Case No. 83CC1-2020-CV-818 decided adversely

to the Appellant, having been dismissed as moot.[51] In any event, though, the issue identified by the Appellant as Issue #9 is never mentioned in the body of his briefing, resulting in waiver. *Davis*, 2016 WL 6311799, at *5.

For the foregoing reasons, Appellant's Issues #3, #4, #7, #8, and #9 are waived.

E. THE APPELLANT HAS FAILED TO ASSERT ANY CLAIM OF ERROR REGARDING THE TRIAL COURT'S DISPOSITIVE RULING THAT THE APPELLEES ESTABLISHED VALID DEFENSES TO THE PLAINTIFF'S SPEECH-BASED CAUSES OF ACTION, WHICH PRETERMITS APPELLANT'S ISSUES #5 AND #6.

The Appellees prevailed on the merits in Case No. 83CC1-2020-CV-616 under two independent provisions of the Tennessee Public Participation Act. Specifically, the Appellees prevailed under Tennessee Code Annotated § 20-17-105(b)—which required the Plaintiff to introduce admissible evidence establishing a prima facie case for each essential element of his claims—and under § 20-17-105(c), which required the Plaintiff to overcome the Defendants' valid defenses. Presented together, the trial court's relevant findings as to both provisions were as follows:

> 3. Neither of the Plaintiff's Responses introduced admissible evidence that establishes a prima facie case for each essential element of the speech-based tort claims in the Plaintiffs Amended Complaint.
>
> 4. Neither of the Plaintiff's Responses introduced admissible evidence sufficient to overcome the valid defenses that the Defendants established to the speech-based tort claims in the Plaintiffs Amended Complaint.

[51] R. at 621, ¶ 6.

> 5. Accordingly, for the reasons set forth in the Defendants' Motion and TPPA Petition and the Defendants' October 1, 2020 and November 5, 2020 Replies, which are incorporated herein by reference, the Court **FINDS** and **ORDERS** that the Defendants' Motion and TPPA Petition are well taken and should be **GRANTED**; that the Plaintiff's Amended Complaint, and all causes of action asserted within it, should be and are hereby **DISMISSED WITH PREJUDICE** pursuant to Tenn. Code Ann. § 20-17-105(b), Tenn. Code Ann. § 20-17-105(c), and Tenn. Code Ann. § 20-17-105(e)[.][52]

The Appellant asserts error only with respect to the trial court's holding on Tennessee Code Annotated § 20-17-105(b). *See* Appellant's Brief, p. 14. For the reasons detailed by the Appellees both below and at pages 474–477 of the Record, the trial court did not err as to its ruling on § 20-17-105(b) in any respect. For present purposes, though, the salient issue is that the Appellant has failed to contest the trial court's ruling that the Defendants established "a valid defense to the claims in the legal action" under § 20-17-105(c) on appeal.

The trial court's ruling under § 20-17-105(c) is dispositive of the Plaintiff's merits claims, and the Appellant's failure to appeal it pretermits them. *Cf. Augustin v. Bradley Cty. Sheriff's Off.*, 598 S.W.3d 220, 226–27 (Tenn. Ct. App. 2019) ("Appellant's initial brief contains no properly supported argument responsive to the trial court's dispositive ruling in this case. This failure would generally result in a waiver on appeal.") (citation omitted). As this Court explained in *Lovelace v. Baptist Memorial Hosp.–Memphis*, No. W2019-00453-COA-R3-CV, 2020 WL 260295, at *3 (Tenn. Ct. App. Jan. 16, 2020), *no app. filed*:

[52] *Id.* at ¶¶ 3–5.

> Generally, where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling. *See* 5 Am. Jur. 2d Appellate Review § 718 ("[W]here a separate and independent ground from the one appealed supports the judgment made below, and is not challenged on appeal, the appellate court must affirm."). Based on this doctrine, this Court has at least twice ruled a party waived its claim of error on appeal by appealing less than all of the grounds upon which the trial court issued its ruling. *See Hatfield v. Allenbrooke Nursing and Rehabilitation Center, LLC*, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at *7–8 (Tenn. Ct. App. Aug. 6, 2018), *perm. app. denied* (Tenn. Jan. 17, 2019); *Duckworth Pathology Group, Inc. v. Regional Medical Center at Memphis*, No. W2012-02607-COA-R3-CV, 2014 WL 1514602, at *10–12 (Tenn. Ct. App. Apr. 17, 2014).

Here, too, the Appellant has waived his claim of error as to the merits "by appealing less than all of the grounds upon which the trial court issued its ruling." *Id.* (citations omitted). The trial court's ruling that the Appellant could not overcome the Appellees' valid defenses remains dispositive of the merits regardless of whether the Appellant established a prima facie case for each essential element of his claims. *See* Tenn. Code Ann. § 20-17-105(c) ("*Notwithstanding subsection (b)*, the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.") (emphasis added). Issues #5 and #6 identified by the Appellant are pretermitted accordingly.

Significantly, although the Appellant's failure to appeal the trial court's ruling as to Tennessee Code Annotated § 20-17-105(c) would conclude the matter even if that ruling were wrong, *see Moulton*, 533 S.W.2d at 296 ("The policy rationale in support of Res judicata is not based upon any presumption that the final judgment was right or just."),

the record also confirms that the trial court's § 20-17-105(c) ruling—that the Defendants established valid defenses—was correct. The Appellees' many valid defenses are detailed at pages 139 to 158 of the record. To provide one example: The Defendants noted that the Plaintiff was attempting to hold each Defendant liable for one another's Facebook posts—and posts by third parties—in contravention of the immunity afforded by 47 U.S.C. § 230, the Communications Decency Act.[53] To provide another: Although damages were an essential element of the Plaintiff's claims and he had sued the Appellees for a ridiculous $800,000.00 regarding his alleged damages arising from, for instance, lost business, the Defendants introduced a statement *from the Plaintiff himself* indicating that he had never actually been paid even "a single penny" for any of the work he claimed to do professionally—having "donated . . . [his] time over the years" instead.[54]

For the foregoing reasons, the Appellant's failure to appeal the trial court's ruling under Tennessee Code Annotated § 20-17-105(c) is dispositive of his merits claims and results in waiver. *Augustin*, 598 S.W.3d at 226–27.

F. THE APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE FOR EACH ESSENTIAL ELEMENT OF HIS SPEECH-BASED TORT CLAIMS.

Regardless of the Appellant's failure to appeal the trial court's independent, dispositive ruling under Tennessee Code Annotated § 20-17-105(c), the trial court's ruling that "[n]either of the Plaintiff's

[53] R. at 156–57.

[54] R. at 200; *see also* R. at 149.

Responses introduced admissible evidence that establishes a prima facie case for each essential element of the speech-based tort claims in the Plaintiff's Amended Complaint[,]" and, thus, that his claims would be dismissed with prejudice "pursuant to Tenn. Code Ann. § 20-17-105(b)"[55] was correct. *See* Tenn. Code Ann. § 20-17-105(b) ("[T]he court shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.").

The Appellant only appears to contest the trial court's ruling and develop an argument as to one of his causes of action—defamation. *See* Appellant's Brief, p. 28 (claiming that "Plaintiff established a prima facie case of defamation in Tennessee"). Notably, though, the Plaintiff filed several additional speech-based tort claims for "Invasion of Privacy[,]"[56] "Intentional Interference With Current And Prospective Business Relations[,]"[57] "Civil Conspiracy[,]"[58] and "Intentional Infliction of Emotional Distress"[59] as well—none of which the Appellant claims on appeal to have supported with admissible evidence. Significantly, none of the Appellant's responses below mentioned these torts, either. *See* R. at 476 (noting that: "The Plaintiff's Responses similarly fail to demonstrate a prima facie case for any element of any of his five (5) other asserted tort claims, which the Plaintiff's Responses fail even to

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[55] R. at 621, ¶¶ 3–5.

[56] R. at 99.

[57] R. at 103.

[58] R. at 105.

[59] R. at 106.

mention."). *But see Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000) ("As a general matter, appellate courts will decline to consider issues raised for the first time on appeal that were not raised and considered in the trial court.") (citations omitted).

Waiver aside, though, the Appellant presented no admissible evidence supporting any element of any of his claims—including defamation—with the sole exception of demonstrating the fact of publication through statements made by party opponents. The record confirms as much. The Plaintiff's supplemental reply—set forth at pages 431 to 471 of the Record—contains no affidavits or sworn statements of any kind. *But see* Tenn. Code Ann. § 20-17-105(d) ("The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties."). Neither does the Plaintiff's meandering and largely indecipherable petition-turned-response in Case No. 83CC1-CV-906—set forth at pages 484 to 615 of the Record—qualify, for several reasons. For one, despite being titled a "Verified Petition[,]"[60] the filing was not actually verified,[61] and there are no affidavits contained in it.[62] For another, to the extent that the Plaintiff's notarized Amended Complaint—appended to that filing as an exhibit—was intended to serve as his "admissible evidence" for purposes of Tennessee Code Annotated § 20-17-105(d) (which appears to be what

[60] R. at 484.

[61] R. at 493.

[62] R. at 484–615.

the Appellant is now arguing on appeal, but which he has never argued previously)—the Appellees note that the Appellant did not sign that pleading based on any claim of personal knowledge.[63] Instead, he attested that his allegations were "true to the best of my knowledge and belief[,]"[64] which is insufficient. *Bridgewater v. Adamczyk*, No. M2009-01582-COA-R3-CV, 2010 WL 1293801, at *4 (Tenn. Ct. App. Apr. 1, 2010) ("'Personal knowledge' is defined as 'knowledge gained through firsthand observation or experience, as distinguished from belief based on what someone else has said.' Black's Law Dictionary 703 (7th ed. 2000). Our courts have rejected affidavits filed in support of motions for summary judgment that were submitted 'upon information and belief.'") (collecting cases), *no app. filed*.

Further, the Plaintiff—who was a public figure as a matter of law, *see Kauffman v. Forsythe*, No. E2019-02196-COA-R3-CV, 2021 WL 2102910, at *2 (Tenn. Ct. App. May 25, 2021) ("Candidates for elected public office are public figures." (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971); *Taylor v. Nashville Banner Publ'g Co.*, 573 S.W.2d 476, 478, 482 (Tenn. Ct. App. 1978))), *no app. filed*—failed to introduce admissible evidence supporting several elements of defamation in particular. In addition to premising his defamation claims upon innocuous statements that are not even plausibly defamatory, *cf. Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at *5 (Tenn. Ct. App. Apr. 20, 2018) ("Whether a communication is capable of

[63] R. at 110.

[64] *Id.*

conveying a defamatory meaning is a question of law.") (cleaned up), *no app. filed*, as the Appellees emphasized below: "[T]he Plaintiff has introduced no evidence (much less admissible evidence) of falsity, no evidence (much less admissible evidence) of actual malice, and certainly no admissible evidence that he suffered any damages."[65]

On appeal, the Appellant's Brief similarly fails to cite admissible evidence in the record to the contrary. Instead, for its "facts," the Appellant cites only his own *allegations,*[66] which are not "admissible evidence" in any respect. *But see* Tenn. Code Ann. § 20-17-105(d) ("The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties."). Neither did the Appellant file a transcript or statement of the evidence from the hearing at which the evidence presented was considered, foreclosing any claim of factual error on appeal. *See In re M.L.D.*, 182 S.W.3d at 895 ("In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct.") (citation omitted).

Accordingly, the Appellant's claims regarding the trial court's ruling under Tennessee Code Annotated § 20-17-105(b) are meritless.

G. THE TRIAL COURT DID NOT TREAT THE PLAINTIFF IMPROPERLY WHILE HE ACTED PRO SE.

The Appellant identifies as his tenth issue: "Whether Plaintiff /

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[65] R. at 476.

[66] Appellant's Brief, pp. 18–19.

Appellant's position was evaluated under the legal standards mandated for pro se litigants[.]"[67] The only thing resembling an argument on the matter appears to be set forth in his conclusion, however, which states: "[I]t is not clear in any way that Plaintiff's two Verified Affidavits / Responses were ever given the deference that a *pro se* litigant is entitled to."[68] This is hardly an argument, though. *Cf. Sneed*, 301 S.W.3d at 615 ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived."). Nor would any additional "deference" transform the Appellant's responses—which were not affidavits, contained no affidavits, were not sworn, and did contain admissible evidence supporting each element of the Appellant's speech-based tort claims—into competent evidence that could overcome an adverse merits ruling under either Tennessee Code Annotated § 20-17-105(b) or 105(c).

Given this context, nothing the trial court did or held accounted for the Appellant's failure to introduce admissible evidence to support the claims he asserted in his $800,000.00 lawsuit. Simply put:

> while parties who choose to represent themselves are entitled to fair and equal treatment, they are not entitled to shift the burden of litigating their case to the courts, *see Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983), or to be excused from complying with the same substantive and procedural requirements that other represented parties must

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[67] *Id.* at 15.

[68] *Id.* at 36.

adhere to.

Goad v. Pasipanodya, No. 01A01-9509-CV-00426, 1997 WL 749462, at *2 (Tenn. Ct. App. Dec. 5, 1997), *no app. filed*.

What the trial court *did* do, however, was afford the Plaintiff enormous latitude while he acted pro se. For example, the Defendants asserted that they were entitled to prevail on their TPPA Petition by default because the Plaintiff had failed to file a timely response to it, and they submitted a proposed order to that effect.[69] The trial court did not enter it. Instead, the trial court held a hearing and discussed the defect with the Plaintiff, after which the Plaintiff "indicated to the Court that [his] September 29, 2020 filing in Sumner County Case No. 83CC1-2020-CV-906 was intended to serve as his Response" to the Appellees' TPPA Petition in Case No. 83CC1-2020-CV-616.[70] As a result, the trial court ruled that "the Court shall treat it as a Response and construe it liberally as such[,]"[71] notwithstanding that it had been filed as a new, separate case. The trial court additionally afforded the Plaintiff another 30 days to obtain new counsel if he wished, and it permitted him to file "any further response" that he determined was necessary in Case No. 83CC1-2020-CV-616 thereafter.[72]

Given this context, the Plaintiff was not only treated generously while he acted pro se—he was treated more generously than he deserved.

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[69] R. at 426–27.

[70] R. at 616, ¶ 1.

[71] *Id.*

[72] *See id.* at ¶ 2.

See Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) ("courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe."). Tennessee Code Annotated § 20-17-104(c) does not contemplate allowing a defendant to file a supplemental response to a TPPA petition up to 30 days *after* an evidentiary hearing has been held in an effort to cure a respondent's previous failure to satisfy the applicable burden. *See id.* ("A response to the petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems proper."). Because the Plaintiff was acting pro se, though, the trial court permitted the Plaintiff that opportunity anyway. Thereafter, the trial court correctly ruled against the Plaintiff, and not because it failed to afford him sufficient "deference," but because the law mandated it. *See* Tenn. Code Ann. § 20-17-105(b) ("[T]he court shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action."); § 20-17-105(c) ("Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.").

Accordingly, the Appellant's tenth identified issue is meritless, too.

H. THE TRIAL COURT'S ATTORNEY'S FEE AWARD WAS PROPER.

The attorney's fee award that the trial court issued in this matter

was mandated by statute. *See* Tenn. Code Ann. § 20-17-107(a)(1) ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party: (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition[.]"). Thus, for his eleventh issue, the Appellant does not contest the propriety of the award itself. Instead, he only contests its amount.[73] Again, though, this claim is raised for the first time on appeal. *But see Black*, 938 S.W.2d at 403 ("Under Tennessee law, issues raised for the first time on appeal are waived."). Indeed, far from being contested, *the Appellant himself* sought an award of $15,000.00 in attorney's fees on the asserted basis that such an award should be deemed reasonable.[74]

On appeal, the Appellant now claims that "without any real calculation as to" how it was determined, the attorney's fees assessed were "simply 'made up' by opposing counsel."[75] Like much of the Plaintiff's briefing, though, he does not bother to provide any record citation for his claims, which are easily disproved.

Contrary to the Appellant's misrepresentations on the matter, the amount assessed—$5,000.00 with respect to each Defendant, for a total of $15,000.00—represented the Defendants' actual legal fees incurred, which their retainer agreements (filed as part of the Defendants' fee petition) reflect.[76] The reasonableness of this amount—far less than

[73] Appellant's Brief, p. 15.

[74] R. at 278.

[75] Appellant's Brief, p. 30.

what the Defendants' counsel would have charged under normal circumstances or if he had billed at his standard hourly rate—was detailed at length by the Defendants' extensive fee petition set forth at pages 210 to 276 of the Record. And significantly, the Defendants' fee petition reflects not only that the fee sought by the Defendants was dramatically *lower* than several awards that Defendants' counsel had sought and obtained in recent, comparable cases;[77] it also reflects that the Defendants initially sought additional compensation for the time associated with litigating their fee claims based on applicable Sixth Circuit authority, *see* R. at 211 (citing *Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 724–25 (6th Cir. 2016) (allowing "compensatory fees for fees"), which the trial court did not ultimately award.

The Appellant, however, neither cites nor addresses any of this evidence. Instead, despite the Defendants' extensive and detailed fee petition, *see* R. at 210–76, the Appellant pretends it does not exist, and he falsely maintains that the Defendants' attorney's fees were "'made up[.]'"[78] They were not, though, and notwithstanding the Appellant's misrepresentations, the trial court appropriately considered the actual evidence presented and did not abuse its discretion. *See Coleman*, 2015 WL 479830, at *10 ("[W]e review the trial court's ruling on attorney's fees under an abuse of discretion standard."). The Appellant's claim to the contrary is unsupported and meritless.

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[76] R. at 226, ¶ 4; R. at 232, ¶ 4; R. at 238, ¶ 4.

[77] R. at 250–261.

[78] Appellant's Brief, p. 30.

I. THE TRIAL COURT'S SANCTIONS AWARD WAS PROPER.

Tennessee Code Annotated § 20-17-107(a)(2) provides that:

> If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party: . . . (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

Here, as grounds for sanctions, the Defendants asserted, among other things, that:

> The Plaintiff's prosecution of this facially frivolous action merits severe sanctions. The transparent purpose of this lawsuit was to silence, censor, intimidate, and retaliate against three Defendants who had the audacity to criticize the Plaintiff—*a public figure and candidate for U.S. Congress*—online regarding matters of clear public concern. No reasonable person could believe that the Defendants' criticism was actionable, something that the Plaintiff's immediate abandonment of his claims after the Defendants retained counsel evidences in spades. The fact that the Plaintiff additionally sought an order enjoining truthful speech about him conclusively settles the matter. *See* Plaintiff's Amended Complaint, [R. at 108], ¶ 3 (seeking "an injunction enjoining and restraining the Defendants, and all those acting in concert with them, from publishing, disseminating, or posting on social media. or Internet site, or through the use of any written or digital media of any type any reference to any events pertaining to Mr. Adamson's private life, **whether the same are believed by the Defendants to be truthful or otherwise**[.]") (emphasis added).
>
> Thus, to punish the Plaintiff's gross abuse of the judicial process and his attempt to silence and intimidate critics for their protected speech, *see* Tenn. Code Ann. § 20-17-107(a), sanctions amounting to $24,000.00—equivalent to a mere 3% of the minimum amount in controversy that the Plaintiff

> sought jointly and severally from each Defendant (not including his additional claims for costs and attorney's fees)—should be awarded "to deter repetition of the conduct by the party who brought the legal action or by others similarly situated." *See* Tenn. Code Ann. § 20-17-107(a)(2).[79]

Upon review, the trial court incorporated this reasoning into its order as a basis for issuing its sanctions award.[80] Notably, where, as here, a plaintiff has falsely claimed that he suffered damages,[81] trial courts acting on their own initiative have also awarded—and this Court has thereafter affirmed—comparable sanctions awards even outside the context of Tennessee Code Annotated § 20-17-107(a)(2), a deterrence-oriented statute. *See, e.g.*, *McMillin v. Realty Executives Assocs., Inc.*, No. E2018-00769-COA-R3-CV, 2019 WL 1578704, at *4 (Tenn. Ct. App. Apr. 12, 2019) (noting that trial court had "lev[ied] sanctions against Plaintiff in the amount of $19,983.94 on its own initiative" and holding that "Plaintiff had filed and maintained an action for slander when he either knew or should have known that he suffered no damages and that such a claim was, therefore, without merit. Plaintiff failed to address either of the Trial Court's findings of a violation of Tenn. R. Civ. P. 11. We find no error in the Trial Court's entry of its April 11, 2018 order sanctioning Plaintiff for his violation of Tenn. R. Civ. P. 11 and ordering Plaintiff to

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[79] R. at 222–23.

[80] R. at 621, ¶ 5.

[81] *See* R. at 200 (in which, contra the allegations in his lawsuit, the Plaintiff admits that he had not been paid "a single penny" for any of the work he claimed to do professionally—having actually "donated . . . [his] time over the years" instead).

pay $19,983.94 to Defendants' counsel."), *no app. filed*. Assessing punitive sanctions as a ratio of damages claimed or in reference to the amount in controversy also is not only appropriate—it is often required. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–83 (1996); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008). *See also Jee-Eun Tscha v. Thornton*, 362 P.3d 805 (Haw. Ct. App. 2015) ("[T]he amount of sanctions imposed in a given case must not be so disproportionate to the amount in controversy so as to operate as a practical denial of the right to a jury trial in civil cases."). Further, the total judgment issued was comparatively tiny in the context of anti-SLAPP litigation generally. *See, e.g., Herring Networks, Inc. v. Maddow*, No. 3:19-CV-1713-BAS-AHG, 2021 WL 409724, at *11 (S.D. Cal. Feb. 5, 2021) ("The Court awards Defendants fees in the amount of $247,667.50 . . . .").

The Appellant's failure to file a transcript or statement regarding the hearing below again obstructs appellate review of the issue. *Cf. In re M.L.D.*, 182 S.W.3d at 895 ("In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct.") (citation omitted). *See also Myers v. Hidden Valley Lakes Trustees, Inc.*, No. M2008-01677-COA-R3-CV, 2009 WL 1704419, at *5 (Tenn. Ct. App. June 16, 2009) ("'It is the duty of the appellant to prepare a fair, accurate, and complete record on appeal.' *State v. Climer*, No. M2007-01670-CCA-R3-CD, 2008 WL 1875155, at *2 (Tenn. Crim. App. 2008) (citing Tenn. R. App. P. 24(b)). 'When necessary parts of the record are not included, we must presume that the trial court's ruling is correct.'"), *no app. filed*. Regardless, though, "[a]ppellate courts review a trial court's decision to

impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard." *Pegues*, 288 S.W.3d at 353 (citing *Alexander v. Jackson Radiology Assoc., P.A.*, 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004) (in turn citing *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988))).

Here, the inquiry that determines the propriety of sanctions is determined by statute. Specifically, sanctions should issue when they are "necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated." Tenn. Code Ann. § 20-17-107(a)(2). Significantly, given the chilling effects that SLAPP suits have on free expression, this Court has long condemned SLAPP litigation like the Plaintiff's, which our legislature recognizes as "evil[]." *Residents Against Indus. Landfill Expansion, Inc. v. Diversified Sys., Inc.*, No. 03A01- 9703-CV-00102, 1998 WL 18201, at *3 n.6 (Tenn. Ct. App. Jan. 21, 1998) ("The legislature has recently recognized the evils of this type of lawsuit."), *no app. filed*; *see also id.* ("Their lawsuit fits all of the characteristics of a lawsuit filed to intimidate a citizen into silence regarding an issue of public concern.").

Of note, the Appellant's own briefing makes clear that the sanctions the trial court issued were actually too *low* to deter repetition of his misconduct. The Appellant offers no apology for abusing the judicial process by filing an $800,000.00 SLAPP-suit for the expressly-stated purpose of suppressing even truthful speech about him while he was running for U.S. Congress. To the contrary, he states unabashedly that he desires to "file[] a new Complaint for a Jury Trial and still ha[s] high

hopes of doing so."[82] Accordingly, if anything, the sanctions issued against him—which represented a mere 3% of the amount that Plaintiff placed in controversy as to each Defendant—were insufficient.

Neither does the Appellant—who, it should be emphasized, never contested the Defendants' sanctions claim during the proceedings before the trial court, *but see Black*, 938 S.W.2d at 403 ("Under Tennessee law, issues raised for the first time on appeal are waived.")—make any effort in his briefing to engage with the actual justifications underlying the sanctions award that the trial court issued. Instead, the Appellant buries his head in the sand once more and asserts—without either citation to the record or regard for accuracy—that the award was "'made up.'"[83] Notably, though, the Appellant's lone citation to the record on the issue cites to a notice—set forth at pages 426 to 428 of the Record—regarding a pre-hearing proposed order that the trial court declined to enter.[84]

Because the record reflects several uncontroverted justifications for the trial court's sanctions order; because the sanctions assessed were small in proportion to the extraordinary amount the Appellant placed in controversy; and because the Appellant's arguments regarding the trial court's sanctions awarded are unsupported by the record, the Appellant

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[82] Appellant's Brief, p. 21.

[83] *Id.* at 30.

[84] *Id.* at 7 (arguing that the Appellant "was **ordered** to pay sanctions to Defendants / Appellants [sic] in the amount of Twenty-Four Thousand Dollars ($24,000), an amount that was 'suggested,' without reason or justification, as appropriate by Defendants / Appellants' counsel without any known authority as to calculation of same.) (Vol. 4, pp. 426-428).")

has failed to demonstrate that the trial court abused its discretion on the matter. Thus, the trial court's sanctions order should be affirmed. *See Pegues*, 288 S.W.3d at 353.

J. THE APPELLEES SHOULD BE AWARDED THEIR ATTORNEY'S FEES REGARDING THIS APPEAL.

1. The Appellees should be awarded appellate attorney's fees under Tennessee Code Annotated § 20-17-107(a).

Under the TPPA, litigants who successfully petition to dismiss baseless SLAPP-suits like this one are entitled to a mandatory award of attorney's fees and costs. *See* Tenn. Code Ann. § 20-17-107(a) ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the court *shall* award to the petitioning party . . . [c]ourt costs, reasonable attorney's fees, and . . . [a]ny additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.") (emphasis added). Consequently, upon affirming the trial court's order in Case No. 83CC1-2020-CV-616—whether because it was final, unappealed, and *res judicata* or otherwise—this Court should also award the Defendants their appellate attorney's fees regarding this appeal, given:

(1) That they have expressly raised their entitlement to such fees in their Statement of the Issues,[85] *cf. Killingsworth v. Ted Russell Ford,*

[85] By contrast, the Appellant "do[es] not request appellate attorney's fees in [his] 'Statement of the Issues,'" *Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2017-00190-COA-R3-CV, 2018 WL 527104, at *14 (Tenn. Ct. App. Jan. 23, 2018), *perm to app. denied* (Tenn. June 12, 2018), though he asks for attorney's fees in his brief. *See* Appellant's Brief, p.

Inc., 205 S.W.3d 406, 410 (Tenn. 2006) (noting that "a plaintiff must initially request [attorney's fees] in his or her appellate pleadings in a timely manner");

(2) The mandatory nature of attorney's fee awards under Tennessee Code Annotated § 20-17-107(a) (specifying that a court "shall" award reasonable attorney's fees to a prevailing petitioner); and

(3) That prevailing in this appeal was necessary to secure the relief that the Defendants won below, *see, e.g., Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988) ("To paraphrase the acute observation of baseball great Yogi Berra, a case ain't over till it's over. This means that . . . counsel are entitled to compensation until all benefits obtained by the litigation are in hand.").

Consequently, this Court should remand this case with instructions that the Defendants be awarded their appellate attorney's fees and costs for prevailing in this appeal.

2. <u>The Appellees should be awarded appellate attorney's fees under Tennessee Code Annotated § 27-1-122.</u>

Tennessee Code Annotated § 27-1-122 provides that:

> 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.

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36. No basis for such fees (or argument supporting them) is presented, though, and in any event, no component of the Appellant's appeal has merit.

"Thus, if the appellate court determines that an appeal is frivolous, the appellate court may award attorney's fees pursuant to this statute. Any such award rests in the appellate court's sound discretion." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017) (*citing Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009) ("The decision to award damages for the filing of a frivolous appeal [under section 27–1–122] rests solely in the discretion of this Court.")).

Although exercised sparingly, Tennessee Code Annotated § 27-1-122 is based on important public policy interests. As our Supreme Court held in *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977):

> Successful litigants should not have to bear the expense and vexation of groundless appeals. Nor should this Court, which is becoming increasingly burdened by direct appeals, be saddled with such cases. . . . The Tennessee Legislature obviously intended the frivolous appeals statute [Tenn. Code Ann. § 27-1-122], to discourage such appeals and to redress the harm to harassed appellees.

Id. See also Jackson v. Aldridge, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999) ("Successful parties should not have to bear the cost and vexation of baseless appeals.") (citations omitted). This public policy is also especially salient where—as here—*a timely appeal was not even taken* as to the case out of which the Appellant's claims arise, and the only reason the Appellees had to incur the costs of appellate briefing is because the Appellant's counsel misrepresented the reason why he neglected to file a Notice of Appeal regarding the proper case.

Any number of other reasons support designating this appeal as frivolous, too. The Appellant has raised myriad issues that he failed to brief. *See supra*, pp. 46–48. He improperly raises several new issues for

the first time on appeal. *See supra*, pp. 44–46. He improperly cites to "exhibits" rather than the record, including appending inadmissible settlement communications that were not admitted. *But see Patterson v. Hunt*, 682 S.W.2d 508, 517–18 (Tenn. Ct. App. 1984) ("[E]vidence not admitted at trial, should not be included in the appendix to a brief, and, accordingly, for what it is worth, we grant the motion of plaintiffs."). And where record citations *are* necessary, they are routinely missing from the Appellant's briefing. As this Court has held many times, though: "It is well settled that 'parties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in a party's brief, or for that matter consider issues raised but not argued in the brief.'" *Manor v. Woodroof*, No. M2020-00585-COA-R3-CV, 2021 WL 527477, at *9 (Tenn. Ct. App. Feb. 12, 2021) (quoting *Bean v. Bean*, 40 S.W.3d 52, 56 (Tenn. Ct. App. 2000)), *no app. filed*. For the same reasons, appellees should not have to do such work for an appellant in order to ensure that a complete response has been presented to all claims that are raised in an appeal, either.

These are also nowhere near the Appellant's only problems. The formatting of his briefing is uniformly non-compliant. Certification of the applicable word count is missing. Almost no aspect of the Appellant's Brief complies with any portion of Court of Appeals Rule 6. The Appellant has raised evidence-based claims without filing either a transcript or statement of the evidence. And on top of all of this, the Appellant's counsel has subjected the Appellees' counsel to bizarre, unsolicited, and extraordinarily disturbing correspondence that can reasonably be perceived as death threats during the pendency of this

appeal in an effort to deter zealous advocacy.[86] As the trial court found:

> On January, 26, 2021, Plaintiff's counsel transmitted the following emails to Defendants' counsel regarding this matter:
>
> ___
>
> You are the biggest pussy attorney that I have ever met. My girlfriend's Bengal cat (which is half cat and half Leopard) could eat you alive. I am assuming, for the sake of argument, that you have not been swimmining [sic] outside of San Franscisco [sic] or Australia. I would be happy to tell you about my dives, and in particular, the Cayman Islands. KTJ
>
> ___
>
> It is so hard to place a nail on the head of a song that had meaning. The only one that I can think of is Kashmir by Led Zeppelin. You were probably a wee little boy when it came out. https://www.youtube.com/watch?v=PDMdiUm1
>
> ___
>
> Quite frankly, I am tired as fucking hell of you telling me who is going to win the Super Bowl. I'm sure you are with Brady, because he is easy. However, remember Andy Reid, who coached at Philadelphia with my friends for years before. Curious if you know how to box, because I do, and I would be happy to take you on TV in that regard. Come after my girl and me, and you will leave in a box.
>
> ___
>
> I got into the George Washington University Law School, because I did the right things in college. How much money did your California parents spend on you to get into Vanderbilt, and, furthermore, why the hell are you down here fucking with us in the South.
>
> ___
>
> My best suggestion would be for you to jump on a plane and head back to San Francisco and, just, for many reasons get

[86] Supp. R. at 59–60, ¶ 8. *See also* Supp. R. at 46–50.

> your stupid ass out of my State.
>
> ——
>
> If you want to box with me, after 9 years of winning, you are welcome to come to our ring in Red Bank, TN. I'll meet you there with gloves.
>
> ——
>
> Despite the fact that I am good friends with every Jewish attorney in a 50 mile radius, I shot a man, just to watch him die. Johnny Cash.[87]

"An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success." *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001) (collecting cases). Raising claims arising out of a final order in an unappealed case has no reasonable chance of success. Raising issues and then failing to brief them has no reasonable chance of success. Raising new claims—including new constitutional claims—for the first time on appeal has no chance of success, either.

Simply put, as this Court itself has previously: Appellant's counsel's conduct "evidences a fundamental misunderstanding of" applicable rules.[88] The Appellees should be awarded their appellate attorney's fees pursuant to Tennessee Code Annotated § 27-1-122 as a result.

IX. CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of subject matter jurisdiction; the trial court's unappealed final order in Case No. 83CC1-2020-CV-616 should be affirmed in all respects; and the Appellees should be awarded their attorney's fees regarding this appeal.

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[87] Supp. R. at 59–60, ¶ 8. *See also id.* at 46–50.

[88] Order, Case No. 83CC1-2020-CV-906 (Jan. 14, 2021).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2021, a copy of the foregoing was served via the Court's TrueFiling e-filing system to the following parties:

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III–IX) contains 14,882 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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