

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

TREVOR SETH ADAMSON,
et al.

Plaintiffs-Appellants,

v.

SARAH E. GROVE, *et al.*

*Defendants-Appellees/
Cross-Appellants.*

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Case No.: M2020-01651-COA-R3-CV

Case No.: 83CC1-2020-CV-906

**REPLY BRIEF OF DEFENDANTS/CROSS-APPELLANTS SARAH
E. GROVE, KARL S. BOLTON, AND DEBORAH SANGETTI**

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Dated: August 13, 2021

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III. INTRODUCTION

As Cross-Appellants, the Defendants raised a single issue for this Court’s review: “Whether the Defendants are entitled to an award of attorney’s fees regarding this appeal.” *See* Defendants’ Principal Brief, p. 14. The Defendants specifically asserted that they were entitled to an award of appellate attorney’s fees on two independent grounds. *First*, the Defendants asserted that they should be awarded appellate attorney’s fees under Tennessee Code Annotated § 20-17-107(a), which provides for a mandatory award of attorney’s fees in cases where a petitioner prevails under the Tennessee Public Participation Act. *See* Defendants’ Principal Brief, pp. 66–67. *Second*, the Defendants asserted that they should be awarded appellate attorney’s fees under Tennessee Code Annotated § 27-1-122, which governs frivolous appeals. *See* Defendants’ Principal Brief, pp. 67–71.

In a cursory, two-paragraph response—a substantial portion of which is devoted to characterizing several bizarre and disturbing emails by Plaintiff’s counsel that can reasonably be perceived as death threats¹ as an effort “to lighten things up[,]” *see* Appellant’s Amended Reply Brief, p. 16—the Plaintiff responds that the Defendants’ claims to appellate attorney’s fees are “denied, as alleged, and strict proof is demanded of same.” *See id.* at 15. The Plaintiff’s misunderstanding of this Court’s appellate role aside, though, for the reasons detailed below, the Defendants’ entitlement to appellate attorney’s fees is clear, and the Plaintiff’s response to the Defendants’ claims for appellate attorney’s fees

¹ Supp. R. at 59–60, ¶ 8. *See also* Supp. R. at 46–50.

is unpersuasive. As such, the Defendants should be awarded appellate attorney's fees for defending this appeal pursuant to Tennessee Code Annotated §§ 20-17-107(a), 27-1-122, or under both statutes.

IV. ARGUMENT

A. AS PREVAILING PETITIONERS UNDER THE TENNESSEE PUBLIC PARTICIPATION ACT, THE DEFENDANTS SHOULD BE AWARDED THEIR APPELLATE ATTORNEY'S FEES UNDER TENNESSEE CODE ANNOTATED § 20-17-107(a).

The Tennessee Public Participation Act provides that litigants who successfully petition to dismiss baseless speech-based tort claims like the Plaintiff's 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, where—as here—prevailing defendants raise their entitlement to appellate attorney's fees in their appellate briefing, this Court has held that they are also entitled to an award of attorney's fees on appeal. *See Nandigam Neurology, PLC v. Beavers*, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021) (slip op.) ("[A]s a matter of first impression, we conclude that the TPPA allows for an award of reasonable attorney's fees incurred on appeal, provided that the court dismisses a legal action pursuant to a petition filed under this chapter and that such fees are properly requested in an

appellate pleading.” (citing Tenn. Code Ann. § 20-17-107; *Killingsworth v. Ted Russell Ford*, 205 S.W.3d 406, 409 (Tenn. 2006))).

The Defendants have met these requirements. During the proceedings below, the Defendants were prevailing TPPA petitioners,² having secured the dismissal of the Plaintiff’s uniformly speech-based claims pursuant to both Tennessee Code Annotated §§ 20-17-105(b)³ and 20-17-105(c).⁴ The Defendants’ prevailing party status—reflected by the trial court’s unappealed final order in Case No. 83CC1-2020-CV-616—also cannot be disturbed on appeal, for several reasons. To begin, because the Plaintiff did not appeal Case No. 83CC1-2020-CV-616, this Court lacks subject matter jurisdiction to modify or reverse, in any respect, the unappealed final judgment that the Defendants secured in Case No. 83CC1-2020-CV-616. *See* Defendants’ Principal Brief, pp. 32–41. Further, every single one of the Plaintiff’s claims would lack merit even if the Plaintiff had taken an appeal regarding them. *See id.* at 44–66.

The Defendants also raised their claim to appellate attorney’s fees in their Statement of the Issues, *see id.* at 14, and they fully briefed it. *See* Defendants’ Principal Brief, pp. 66–67. Consequently, as prevailing TPPA petitioners, the Defendants are entitled to an award of appellate attorney’s fees. *See Nandigam Neurology, PLC*, 2021 WL 2494935, at *14. This Court should award the Defendants appellate attorney’s fees and “remand this matter to the [trial] court for a determination of the

² R. at 620–22.

³ R. at 621, ¶¶ 3, 5.

⁴ *Id.* at ¶¶ 4, 5.

proper amount of reasonable fees incurred by Defendant[s] during this appeal” as a consequence. *See id.*

B. BECAUSE THE PLAINTIFF’S APPEAL IS FRIVOLOUS, THE DEFENDANTS SHOULD BE AWARDED APPELLATE ATTORNEY’S FEES UNDER TENNESSEE CODE ANNOTATED § 27-1-122.

The Defendants should also be awarded appellate attorney’s fees for yet another reason: This appeal is frivolous in several respects. *See* Tenn. Code Ann. § 27-1-122. Concerns about frivolous appeals are especially heightened in cases—like this one—involving tort claims arising from constitutionally protected speech. *See, e.g., 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*; *Nandigam Neurology, PLC*, 2021 WL 2494935, at *11, n.7 (“the TPPA . . . was designed to prevent and deter such abuse, not to enable it”). Whether the frivolous nature of the Plaintiff’s appeal is attributable to the fact that “Plaintiff / Appellant’s counsel has not practiced Appellate [sic] law in the State of Tennessee in several years[.]” *see* Plaintiff’s First Rule 36 Mot. to Submit Amended Briefs, p. 2, is also immaterial. Instead, regardless of what this Court has characterized as Plaintiff’s counsel’s “fundamental misunderstanding” of applicable rules,⁵ the fact remains that “[s]uccessful parties should not have to bear the cost and vexation of baseless appeals,” *see Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999) (citing *Davis v. Gulf Ins. Group*,

⁵ Order, Case No. 83CC1-2020-CV-906 (Jan. 14, 2021).

546 S.W.2d 583, 586 (Tenn. 1977); *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989)), and here, the Plaintiff's appeal is "vexati[ous]" and "baseless" in myriad respects. *See id.*

To begin, as the Defendants have noted since the inception of this appeal,⁶ *the Plaintiff did not even file an appeal* regarding Case No. 83CC1-2020-CV-616, out of which all of the claims that he has briefed arise. *See* Defendants' Principal Brief, pp. 30–44. The Plaintiff's failure to appeal the trial court's final order in Case No. 83CC1-2020-CV-616 precludes this appeal and deprives this Court of subject matter jurisdiction to consider it. *See id.* As detailed below, the Plaintiff has also repeatedly misrepresented the reason for his failure to appeal Case No. 83CC1-2020-CV-616 throughout the proceedings before this Court, resulting in significant expense that the Defendants should never have had to bear.

Initially, Plaintiff's counsel attributed—repeatedly—his failure to appeal Case No. 83CC1-2020-CV-616 to a defect associated with the Court's e-filing system. *See generally id.* at 32–36. *See also* Appellant's Response to Appellees' Motion to Dismiss, p. 2 (claiming that: "the E-file system only allows you to appeal one (1) case number"); *id.* at 5 (claiming that: "Defendants / Appellees are, upon information and belief, making an extensive argument about the operation of the E-filing system."); Appellant's Amended Principal Brief, p. 16 (claiming that: "[W]hen I electronically file an appeal on a consolidated case, the True Filing and/or

⁶ *See* Appellees' Motion to Dismiss Appellant's Appeal As *Res Judicata* and For Lack of a Continuing Controversy (Dec. 23, 2020).

Efile system only allows you to enter in one case number.”). The Defendants have since demonstrated that no such defect existed, however, and they have further demonstrated that the Plaintiff’s Notice of Appeal—which reflects an appeal of “Trial Court Number 83CC1-2020-CV-906” only⁷—was actually prepared by Plaintiff’s counsel and was “typed, hand-dated, and hand-signed” before being e-filed. See Defendants’ Principal Brief, pp. 35–36.

Faced with these facts, in reply, the Plaintiff now proffers—for the first time—an entirely new explanation for his failure to appeal Case No. 83CC1-2020-CV-616. Specifically, he asserts that Case 83CC1-2020-CV-906 “was all we could fit into the fill-in *Notice of Appeal*.” See Appellant’s Amended Reply Brief, p. 24. This claim, too, is demonstrably false, though.

As previously, the relevant portion of the Plaintiff’s Notice of Appeal—which the Plaintiff now claims did not contain sufficient space to enable him to “fit” any mention of Case No. 83CC1-2020-CV-616—is reprinted below for the Court’s review:

⁷ Plaintiff’s Notice of Appeal, Case 83CC1-2020-CV-906.

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]

☒
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Civil
Criminal
Post Conviction
Workers's Compensation
Death Penalty
Parental Termination

☐
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Habeas Corpus
Juvenile
Dependent and Neglect
Other (Specify: _____)

Trial Court Number 83CC1-2020-CV-906

Trial Court Judge Joe H. Thompson

Civil Appeal Cost Bond [Check the most appropriate item]

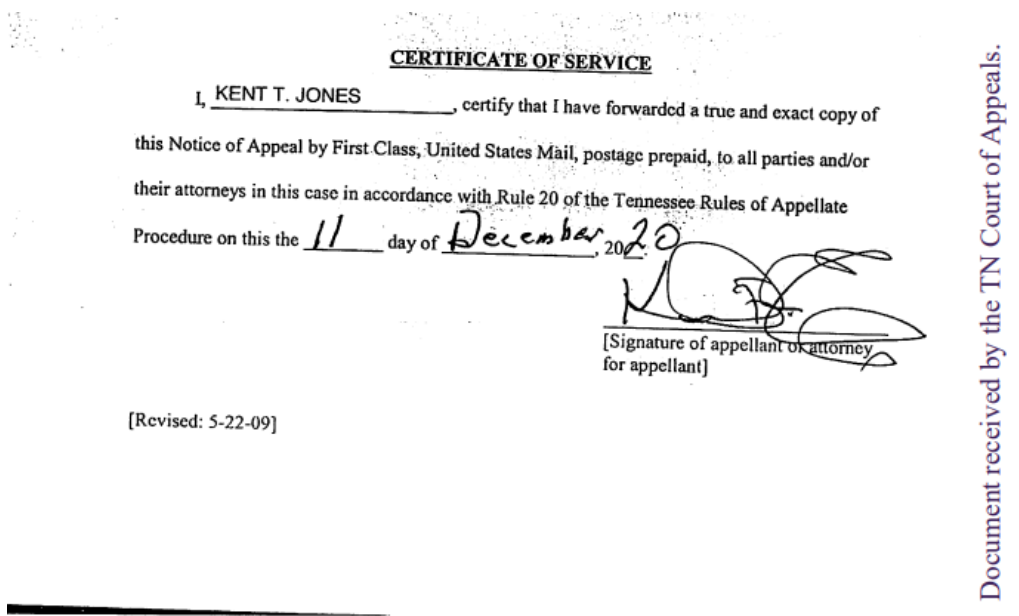
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Filed in trial court with copy attached
Indigent with copy of indigency order or affidavit attached
Cash bond filed in trial court with copy attached

Document received by the TN Court of Appeals.

Cursory review of the above Notice of Appeal confirms that the Plaintiff's newly and belatedly contrived claim that he could not "fit" mention of Case No. 83CC1-2020-CV-616 into his Notice of Appeal is not even plausibly accurate. To the contrary, there was plenty of space to designate Case No. 83CC1-2020-CV-616 as a case being appealed. To the extent that Plaintiff's counsel claims that something about his word

processor prevented him from utilizing that available space, Plaintiff's counsel could also have hand-written Case No. 83CC1-2020-CV-616 onto the Notice of Appeal without any difficulty—just as he hand-signed and hand-dated Plaintiff's Notice of Appeal before scanning and e-filing it:



Alternatively, the Plaintiff could have filed an additional sheet of paper along with his notice indicating that Case No. 83CC1-2020-CV-616 was being appealed. Alternatively again, the Plaintiff could have filed a separate notice of appeal reflecting the case number that he actually intended to appeal. Indeed, filing separate appeals is the proper approach, because “consolidated lawsuits remain separate actions[.]” See *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)). 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) (“an appeal of an order

in one consolidated case ‘does not constitute an appeal’ of the separate but consolidated case.”), *no app. filed*. (quoting *Rainbow Ridge Resort, LLC*, 525 S.W.3d at 259).

Whether through negligence or otherwise, though, the Plaintiff did none of these things. Thus, no notice of appeal that included any mention of Case No. 83CC1-2020-CV-616 was ever filed. What the Plaintiff did, instead, was fail to file an appeal regarding the trial court’s final order in Case No. 83CC1-2020-CV-616, then lie repeatedly about the reason for that failure after the Defendants moved to dismiss this action based on it. The result of that dishonesty was to force the Defendants to incur the cost and expense of briefing and arguing a case that they observed, back in December of 2020, that this Court lacked subject matter jurisdiction to consider.⁸ An award of appellate attorney’s fees under Tennessee Code Annotated § 27-1-122 is warranted for that reason alone.

This Court’s lacking subject matter jurisdiction over the Plaintiff’s appeal is not the only defect that renders this appeal frivolous, though. As the Defendants noted in their Principal Brief, the Plaintiff has raised multiple issues that he never briefed; he has failed to appeal multiple dispositive issues decided adversely to him; and he has raised multiple issues that he did not raise in the trial court. *See* Defendants’ Principal Brief, pp. 44–51. The Plaintiff has not adequately addressed any of these fatal defects,⁹ and he has not stopped raising new and waived issues in

⁸ *See* Appellees’ Motion to Dismiss Appellant’s Appeal As Res Judicata and For Lack of a Continuing Controversy.

⁹ As just one example: Although this Court has held repeatedly that absent rare exceptions, both constitutional and non-constitutional claims

reply, either. For example, review of the Plaintiff's briefing confirms that he has attempted to raise the following three new—and similarly groundless—appellate claims for the first time in his Reply:

1. That “the TPPA action is moot” based on application of Rule 41.01, *see* Appellant's Amended Reply Brief, p. 11—a claim that was expressly rejected below on two grounds and which the Plaintiff did not appeal or identify in his Statement of the Issues thereafter. *See* Defendants' Principal Brief, pp. 22–23, n.11; Appellant's Amended Principal Brief, pp. 20–21.

2. That the Defendants' proposed orders “were never circulated to anyone but the trial judge[,]” *see* Appellant's Amended Reply Brief, p. 14—a flagrantly false¹⁰ (and citationless) claim that similarly appears

are waived if they are not first raised at the trial court level, *see 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* (collecting cases), the Plaintiff maintains that he may raise his constitutional challenge to the Tennessee Public Participation Act for the first time on appeal. As grounds for that position, he cites the Tennessee Supreme Court's holding in *Harmon v. Hickman Community Healthcare Services, Inc.*, 594 S.W.3d 297, 301 (Tenn. 2020), *reh'g denied* (Feb. 21, 2020), quoting with emphasis the portion of the opinion that states: “Issues not raised in the trial court or in the intermediate appellate courts may be deemed waived when presented to this Court.” *See* Appellant's Amended Reply Brief, p. 5 (emphasis the Appellant's). No reasonably competent attorney could read the Tennessee Supreme Court's decision in *Harmon* as permitting a litigant to raise a constitutional challenge for the first time in the Court of Appeals, though. Instead, *Harmon*'s reference to “this Court” is to the Tennessee Supreme Court, and it stands for the proposition that the Tennessee Supreme Court will not consider issues that were not properly raised below, either.

nowhere in the Plaintiff's Statement of the Issues, *see* Appellant's Amended Principal Brief, pp. 20–21. And:

3. That the Plaintiff failed to file a notice of appeal regarding Case No. 83CC1-2020-CV-616 because Case 83CC1-2020-CV-906 “was all we could fit into the fill-in *Notice of Appeal*.” *See* Appellant's Amended Reply Brief, p. 24.

Notably, these are also just the Plaintiff's new *legal* positions, which come in addition to the new and conflicting *factual* positions that the Plaintiff has taken on critical issues in his Reply brief. *Compare, e.g.*, Appellant's Amended Principal Brief, p. 19 (stating that: “At one point in time, [Plaintiff] represented himself to be candidate for congressional office.”), *with* Appellant's Amended Reply Brief, p. 8 (“The allegation that Plaintiff / Appellant was a candidate for Congress is false.”).

This Court's rules clearly and unmistakably prohibit all of this. *See*

¹⁰ The record confirms not only that the proposed order about which the Plaintiff principally complains—a post-judgment order granting Defendants' motion to compel—was served on Plaintiff's counsel; it also confirms that Plaintiff's counsel responded repeatedly to the correspondence in which it was served upon him, which contains the subject line: “Defendants' Motion to Compel Plaintiff's Responses to Discovery in Aid of Execution **and Proposed Order**, Case No.: 83CC1-2020-CV-616.” *See* Supp. R. at 147–49 (emphasis added). *See also* Supp. R. at 85 (noting, in Motion to Compel that the Appellant agrees he received, that: “A proposed order granting this Motion is enclosed.”). In truth, what happened is that after Plaintiff's counsel claimed that he would set two motions for hearing on a specific date, *see* Supp. R. at 147, Plaintiff's counsel never did so, and thus, having failed to file either a timely response to the Defendants' motion or any timely objection to the Defendants' proposed order, the proposed order was entered in the normal course pursuant to local rule. *See* Supp. R. at 138.

In re Conservatorship of Winston, No. W2019-01134-COA-R3-CV, 2020 WL 4556830, at *5 (Tenn. Ct. App. Aug. 6, 2020) (“[P]arties may not raise novel issues by way of reply brief.” (citing *Hatfield v. Allenbrooke Nursing and Rehabilitation Ctr., LLC*, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at *8 (Tenn. Ct. App. Aug. 6, 2018) (“It is well-settled, however, that appellants may not raise new issues in their reply briefs or use reply briefs to correct deficiencies in initial briefs.”) (citations omitted), *app. denied* (Tenn. Jan. 17, 2019); *Caruthers v. State*, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991) (“An appellant cannot abandon an argument advanced in his brief and advance a new argument to support an issue in the reply brief.”))). As this Court held in *Denver Area Meat Cutters & Employers Pension Plan v. Clayton*, 209 S.W.3d 584, 594 (Tenn. Ct. App. 2006):

A reply brief allows the appellant to “reply to the brief of the appellee.” Tenn. R. App. P. 27. “A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee’s brief. An appellant cannot abandon an argument advanced in his brief and advance a new argument to support an issue in the reply brief. Such a practice would be fundamentally unfair as the appellee may not respond to a reply brief.” *Caruthers v. State*, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991). *See also Hobbs v. State*, No. 03CO1–9303–CR–0071, 1993 WL 539494 n.1 (Tenn. Crim. App. Dec. 22, 1993); *Gentry v. Gentry*, No. E2000–02714–COA–R3–CV, 2001 WL 839714 n.1 (Tenn. Ct. App. July 25, 2001) and *Castle v. State*, 2005 WL 2372762, E2005–00874–COA–R3–CV at *4 (Tenn. Ct. App. E.S. Sept. 27, 2005). Mr. Hayes’ argument that the trial court improperly failed to review claims advanced in Denver’s second amended complaint is advanced for the first time in his reply brief and, therefore, will not be considered.

Id. The fact that the Plaintiff has now belatedly attempted to raise new and different issues in Reply *that he also expressly declined to include in*

*his Tenn. R. App. P. 24 Statement of Issues on Appeal*¹¹—thereby affecting the content of, and the Defendants’ position on what should be included in, the appellate record—similarly precludes this Court’s review of these issues. *See, e.g., Chiozza v. Chiozza*, 315 S.W.3d 482, 492 (Tenn. Ct. App. 2009) (“The failure of the appellant to ensure that an adequate transcript or record on appeal is filed in the appellate court constitutes an effective waiver of the appellant’s right to appeal.”); *Gerakios v. Gerakios*, No. M2009-01309-COA-R3-CV, 2010 WL 2612684, at *2 (Tenn. Ct. App. June 30, 2010) (“it was Husband’s failure to provide a notice of the issues presented that prevented Wife from further detailing the facts relevant to the issues he subsequently raised on appeal. It is our opinion that Husband should bear the consequence of his failure, not Wife.”); *Rezba v. Rezba*, No. M2014-00553-COA-R3-CV, 2015 WL 112819, at *3 (Tenn. Ct. App. Jan. 7, 2015) (“When an appellant does not comply with Rule 24, this Court must presume that every fact admissible under the pleadings was found or should have been found in the appellee’s favor.”).

The Defendants, for their part, should not have to bear the cost of the Plaintiff’s pervasive and near-constant non-compliance with this Court’s rules throughout this appeal, which began with the Plaintiff’s defective Notice of Appeal, continued extensively throughout his briefing, and now finally concludes with the Plaintiff attempting to raise several new claims—both legal and factual—in his third attempt at filing a compliant Reply brief. Improperly raising new claims in a reply also cannot transform an appeal that was premised upon unbriefed, waived,

¹¹ *See* R. at 625–26.

or otherwise baseless issues—all of which this Court lacks subject jurisdiction even to *consider* in light of the Plaintiff’s failure to appeal the case out of which they arise—from an appeal that is frivolous into one that is not. The Defendants should be awarded their appellate attorney’s fees pursuant to Tennessee Code Annotated § 27-1-122 as a consequence.

V. CONCLUSION

For the foregoing reasons, the Plaintiff’s 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 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–V) contains 3,335 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).

By: /s/ Daniel A. Horwitz
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