

**IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE**

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NANDIGAM NEUROLOGY, PLC,	§	
and KAVEER NANDIGAM, M.D.,	§	
	§	Case: M2020-00553-COA-R3-CV
<i>Plaintiffs-Appellants,</i>	§	
	§	Wilson County Circuit Court Case
<i>v.</i>	§	No.: 2020-cv-89
	§	
KELLY BEAVERS,	§	Wilson County General Sessions
	§	Court Case No.: 2020-cv-152
<i>Defendant-Appellee and</i>	§	
<i>Cross-Appellant.</i>	§	

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**BRIEF OF DEFENDANT-APPELLEE AND CROSS-APPELLANT  
KELLY BEAVERS**

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### **III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Pursuant to Rule 27(b) of the Tennessee Rules of Appellate Procedure, Ms. Beavers submits her own competing Statement of the Issues Presented for Review:

#### **A. DEFENDANT BEAVERS’S ISSUES AS APPELLEE**

(1) Whether the Court of Appeals has exclusive jurisdiction over **interlocutory** appeals of a “court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the Tennessee Public Participation Act]” under Tennessee Code Annotated § 20-17-106.

(2) Whether a Circuit Court has any jurisdiction over an **interlocutory** appeal of a non-final “order dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the Tennessee Public Participation Act]” given Tennessee Code Annotated § 20-17-106.

(3) Whether the Plaintiffs have waived the arguments that they have raised in this appeal.

#### **B. DEFENDANT BEAVERS’S ISSUES AS CROSS-APPELLANT**

(4) Whether this Court has jurisdiction over Ms. Beavers’s “immediate” appeal taken as of right under Tennessee Code Annotated § 20-17-106.

(5) Whether the General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’s Tennessee Code Annotated § 20-17-104(a) petition to dismiss the Plaintiffs’ legal action should be affirmed.

(6) Whether this Court should recognize that Tennessee’s common law “presumption of falsity” doctrine in defamation cases—first announced by *Hinson v. Pollock*, 15 S.W.2d 737, 738 (Tenn. 1929),

reiterated in *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978), rejected as a matter of First Amendment law by *Wilson v. Scripps-Howard Broad. Co.*, 642 F.2d 371, 375 (6th Cir. 1981), *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), and *Milligan v. United States*, 644 F. Supp. 2d 1020, 1033 (M.D. Tenn. 2009), *aff'd*, 670 F.3d 686 (6th Cir. 2012), and seemingly disregarded by *Sullivan v. Young*, 678 S.W.2d 906, 910 (Tenn. Ct. App. 1984)—has been abrogated.

(7) Whether Ms. Beavers is entitled to an award of reasonable attorney's fees regarding this appeal.

#### **IV. STATEMENT REGARDING RECORD CITATIONS**

Defendant-Appellee and Cross-Appellant Kelly Beavers’s Brief uses the following designations:

(1) Citations to the Technical Record (Vols. 1–2) are cited as “R. at [page number].”

(2) Citations to the February 6, 2020 Transcript of Proceedings in General Sessions Court Case No. 2020-cv-152 (Vol. 3) are cited as “Transcript of Feb. 6, 2020 Hearing, p. [page number], [line number].”

(3) Citations to the February 13, 2020 Transcript of Proceedings in General Sessions Court Case No. 2020-cv-152 (Vol. 4) are cited as “Transcript of Feb. 13, 2020 Hearing, p. [page number], [line number].”

(4) Citations to the February 21, 2020 Transcript of Proceedings in Wilson County Circuit Court Case No. 2019-cv-663 (Vol. 5) are cited as Transcript of Feb. 21, 2020 Hearing in Wilson County Circuit Court Case No. 2019-cv-663, p. [page number], [line number].”

(5) Plaintiffs’ Brief is cited as “Appellants’ Brief at [page number].”

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 over the Parties' respective interlocutory appeals under Tennessee Code Annotated § 20-17-106 is a question of law reviewed de novo without a presumption of correctness. *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) Here, the Plaintiffs did not appeal from the Wilson County Circuit Court's March 30, 2020 *Order Transferring Plaintiffs' Notice of Appeal*, which is the subject of the issues they present for review. If the Plaintiffs had appealed the Wilson County Circuit Court's March 30, 2020 *Order Transferring Plaintiffs' Notice of Appeal*,<sup>1</sup> though, the Wilson County Circuit Court's ruling that it lacked jurisdiction to consider the Plaintiffs' interlocutory appeal of the Wilson County General Sessions Court's February 13, 2020 Order on the Defendant's Tennessee Code Annotated § 20-17-104(a) Petition would be a legal conclusion reviewed de novo with no presumption of correctness. *See In re Easton W.*, No. E2018-01883-COA-R3-JV2, 2020 WL 3579762, at \*9 (Tenn. Ct. App. July 1, 2020) (“Legal conclusions of the trial court, which include

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<sup>1</sup> The Plaintiffs did not file any Notice of Appeal regarding the Wilson County Circuit Court's March 30, 2020 *Order Transferring Plaintiffs' Notice of Appeal*, see R. at 224–26, which became a final and unappealable order on April 29, 2020. *See* Tenn. R. App. P. 4(a). Thus, the only order that the Plaintiffs appealed was the Wilson County General Sessions Court's “Feb. 13, 2020” Order granting Ms. Beavers' TPPA Petition and dismissing the Plaintiffs' claims. *See* R. at 126.

determinations made concerning subject matter jurisdiction, are reviewed de novo with no presumption of correctness.”) (citations omitted), *no app. filed*.

(3) Normally, the Wilson County General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’s Tennessee Public Participation Act Petition to Dismiss under Tennessee Code Annotated § 20-17-105(b) would be a mixed question of law and fact that is “not accompanied by a presumption of correctness and [is] reviewed de novo,” with due deference given to appellate courts’ “great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal.” *In re Easton W.*, 2020 WL 3579762, at \*9 (quoting *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995), and citing *Murdock Acceptance Corp. v. Jones*, 362 S.W.2d 266, 268 (Tenn. Ct. App. 1961)). Here, however, because the correctness of the Wilson County General Sessions Court’s February 13, 2020 Order has not been contested or placed at issue by the Appellants, *see* Appellants’ Brief at 5, no standard of review applies to the issue, and the correctness of the Order accordingly is not subject to 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.”) *no app. filed*.

(4) Whether a trial court’s decision should be affirmed on other grounds is an issue subject to this Court’s discretion where there is no material controversy regarding matters of fact or law. *See Smith v.*

*Outen*, No. W2019-01226-COA-R3-CV, 2020 WL 6018757, at \*7 (Tenn. Ct. App. Oct. 9, 2020) (“[W]e are often permitted to affirm the trial court’s decision on other grounds.” (citing *Hill v. Lamberth*, 73 S.W.3d 131, 136 (Tenn. Ct. App. 2001), *no app. filed*; *White v. Dozier*, No. M1999-02386-COA-R3-CV, 2000 WL 244229, at \*2 (Tenn. Ct. App. Mar. 6, 2000) (quoting *Hooks v. Hooks*, 771 F.2d 935, 945 (6th Cir.1985) (“This appellate court ‘may examine the record and affirm the [trial] court on other grounds if we determine that there exists no material controversy regarding matters of fact or law.’”), *no app. filed*))).

(5) 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[.]”).

## VI. INTRODUCTION

On February 13, 2020, the Wilson County General Sessions Court entered an order granting Defendant Kelly Beavers’s Tennessee Code Annotated § 20-17-104(a) petition to dismiss the Plaintiffs’ speech-based tort claims under the Tennessee Public Participation Act (“TPPA”)—Tennessee’s new anti-SLAPP statute.<sup>2</sup> The Parties have now filed separate **interlocutory** appeals of that order. Critically, the General Sessions Court’s February 13, 2020 Order is not a final judgment—and the Plaintiffs’ appeal is interlocutory as a consequence—because the Plaintiffs’ appeal was filed before Ms. Beavers’s asserted and still-pending claims for both mandatory attorney’s fees under Tennessee Code Annotated § 20-17-107(a)(1) and discretionary sanctions under § 20-17-107(a)(2) were or could be adjudicated.<sup>3</sup> Ms. Beavers, independently, took her own interlocutory appeal to this Court as a matter of right under Tennessee Code Annotated § 20-17-106 as well.<sup>4</sup>

By statute, the Court of Appeals is the only court that has appellate jurisdiction to consider an interlocutory appeal of an order on a TPPA petition. *See* TENN. CODE ANN. § 20-17-106 (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under

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<sup>2</sup> *See* R. at 1 (“D/M [meaning dismissed] pursuant to petition to D/M on SLAP[P].”).

<sup>3</sup> *See* R. at 26 (seeking “Costs, Attorney’s Fees, and Sanctions” pursuant to Tennessee Code Annotated § 20-17-107(a)); *see also* Transcript of Feb. 13, 2020 Hearing, p. 12, line 23–p. 13, line 2 (“I’m going to file the transcript with the Court, and we’ll be back here on a motion for fees and sanctions at some later date.” The Court: “All right.”).

<sup>4</sup> *See* Kelly Beavers’ Notice of Cross-Appeal, Apr. 14, 2020.

this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.”). Thus, other than the interlocutory appellate jurisdiction conferred upon this Court by Tennessee Code Annotated § 20-17-106, the Wilson County General Sessions Court’s February 13, 2020 Order was not a final, appealable order at all. *See, e.g., City of Jackson v. Hersh*, No. W2008-02360-COA-R3-CV, 2009 WL 2601380, at \*4 (Tenn. Ct. App. Aug. 25, 2009) (“This Court has concluded on several occasions that an order that fails to address an outstanding request for attorney’s fees is not final.”) (citations omitted); *Grand Valley Lakes Prop. Owners’ Ass’n, Inc. v. Gunn*, No. W2008-01116-COA-R3-CV, 2009 WL 981697, at \*3 (Tenn. Ct. App. Apr. 13, 2009) (“[A]n order adjudicating fewer than all the claims of the parties is not a final, appealable order.” (citing Tenn. R. App. P. 3(a); Tenn. R. Civ. P. 54.02)), *no app. filed*; *Wells Fargo Bank, N.A. v. Dorris*, 556 S.W.3d 745, 753–54 (Tenn. Ct. App. 2017) (holding that “[t]he same principle [of finality] applies with regard to appeals in general sessions courts”).

Given this context, when the Plaintiffs’ interlocutory appeal of the Wilson County General Sessions Court’s February 13, 2020 Order was improperly taken to Wilson County Circuit Court,<sup>5</sup> the Wilson County Circuit Court appropriately transferred the Plaintiffs’ “immediate” appeal to this Court under Tennessee Code Annotated § 20-17-106,<sup>6</sup> given that this Court is the only court that has jurisdiction to consider it.

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<sup>5</sup> R. at 126.

<sup>6</sup> *See* R. at 224–26 (Order Transferring Plaintiffs’ Notice of Appeal).

Because Ms. Beavers also desired review of the Wilson County General Sessions Court's February 13, 2020 Order for her own reasons, as Cross-Appellant, Ms. Beavers also exercised her right to invoke this Court's interlocutory appellate jurisdiction under Tennessee Code Annotated § 20-17-106 herself.<sup>7</sup>

In summary: This Court is the only court with jurisdiction over the Plaintiffs' interlocutory appeal, which could not otherwise be taken. Ms. Beavers has also properly invoked this Court's appellate jurisdiction under Tennessee Code Annotated § 20-17-106 herself. Accordingly, this Court's appellate jurisdiction to adjudicate the merits of this appeal is secure.

This Court's jurisdiction to adjudicate the Parties' interlocutory appeal of the General Sessions Court's February 13, 2020 Order having been established, the merits of this appeal are also easily resolved. The Tennessee Public Participation Act was specifically designed to expedite review and dismissal of baseless speech-based tort claims like the Plaintiffs'. *See* TENN. CODE ANN. § 20-17-102. And based on its provisions, no outcome other than affirming the General Sessions Court's February 13, 2020 Order is possible, both because the Plaintiffs do not contend that any aspect of that order was erroneous and because the Plaintiffs failed even to attempt to meet their burden of proof under Tennessee Code Annotated § 20-17-105(b) during the proceedings below.<sup>8</sup> The General Sessions Court's February 13, 2020 Order may also be

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<sup>7</sup> *See* Kelly Beavers' Notice of Cross-Appeal, Apr. 14, 2020.

<sup>8</sup> *See* R. at 80–83.

affirmed based on multiple additional grounds that the General Sessions Court either did not reach or rejected. Accordingly, the General Sessions Court's February 13, 2020 Order should be affirmed. Ms. Beavers is additionally entitled to appellate attorney's fees regarding this appeal under Tennessee Code Annotated § 20-17-107(a)(1).

## **VII. STATEMENT OF FACTS**

In 2019, Kelly Beavers took her ailing father to a doctor's appointment at Nandigam Neurology.<sup>9</sup> During the appointment, she had a terrible experience with Dr. Kaveer Nandigam, who behaved horribly.<sup>10</sup> Accordingly, Ms. Beavers exercised her First Amendment right to post a critical review of Nandigam Neurology on Yelp!,<sup>11</sup> a popular consumer review website.

Unwilling to accept Ms. Beavers's criticism, Plaintiff Nandigam Neurology threatened Ms. Beavers with legal action if she did not remove her critical Yelp! review. When she declined to do so, Nandigam Neurology sued Ms. Beavers in Wilson County Circuit Court.<sup>12</sup> Upon being sued, Ms. Beavers promptly exercised her rights under the newly enacted Tennessee Public Participation Act, codified at Tennessee Code Annotated § 20-17-101, *et seq.*,<sup>13</sup> which was enacted with cases precisely like this one in mind.

The effect of Ms. Beavers's TPPA Petition was to require Nandigam

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<sup>9</sup> R. at 30.

<sup>10</sup> R. at 30–31.

<sup>11</sup> R. at 31–32. *See also* R. at 75.

<sup>12</sup> R. at 35–38.

<sup>13</sup> R. at 43–44.

Neurology to both come forward with admissible evidence establishing a prima facie case for each of its claims and demonstrate that it could overcome all of Ms. Beavers' valid defenses to them.<sup>14</sup> See TENN. CODE ANN. § 20-17-105(a). In lieu of meeting its evidentiary burden, however, Nandigam Neurology non-suited its Complaint before Ms. Beavers's TPPA Petition could be adjudicated.<sup>15</sup>

Nandigam Neurology's non-suit did not end the matter, however. Instead, Nandigam Neurology quickly refiled its claims against Ms. Beavers in Wilson County General Sessions Court.<sup>16</sup> The reason it did so, it would soon become clear, is that Nandigam Neurology's counsel believed—incorrectly—that the TPPA did not apply to speech-based tort claims filed in General Sessions Court.<sup>17</sup> Dr. Kaveer Nandigam was also added as a party to the Plaintiffs' new action himself.<sup>18</sup>

Once again, upon being sued, Ms. Beavers filed a TPPA Petition compelling the Plaintiffs to come forward with admissible evidence to substantiate their speech-based tort claims and overcome her many valid defenses to them.<sup>19</sup> Ms. Beavers's TPPA Petition was set for hearing on February 6, 2020.<sup>20</sup> Yet again, in response to Ms. Beavers's TPPA Petition, the Plaintiffs failed to come forward with any evidence to meet

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<sup>14</sup> See generally R. at 45–74.

<sup>15</sup> R. at 76–77.

<sup>16</sup> R. at 1.

<sup>17</sup> See R. at 80–83; Transcript of Feb. 6, 2020 Hearing, p. 8, line 14–p. 9, line 9; *id.* at p. 10, line 25–p. 11, line 6.

<sup>18</sup> R. at 1.

<sup>19</sup> R. at 2–74.

<sup>20</sup> R. at 28.

their evidentiary burden in advance of the scheduled hearing.<sup>21</sup>

Instead, the Plaintiffs' sole argument in response to Ms. Beavers's TPPA Petition was that it should be denied because the TPPA did not apply to tort claims filed in General Sessions Court.<sup>22</sup> The Plaintiffs' argument on the matter, however—which they have since abandoned on appeal<sup>23</sup>—was unmistakably wrong, as Ms. Beavers detailed in her February 5, 2020 Reply to it.<sup>24</sup> Further, Ms. Beavers observed, the Plaintiffs' failure to meet their evidentiary burden of proof under both Tennessee Code Annotated §§ 20-17-105(b) and (c) necessarily required that Ms. Beavers's TPPA Petition be granted and that the Plaintiffs' claims against her be dismissed with prejudice.<sup>25</sup>

The General Sessions Court held a hearing on Ms. Beavers's TPPA Petition on February 6, 2020 as scheduled.<sup>26</sup> At the conclusion of the hearing, the Court indicated that it would take the matter under advisement and issue a ruling on February 13, 2020.<sup>27</sup> Thus, the Parties were instructed to return the following week to receive a ruling.<sup>28</sup>

Six days after the hearing on Ms. Beavers's TPPA Petition concluded—and the night before the court indicated that it would rule on Ms. Beavers's TPPA Petition—the Plaintiffs filed a sur-reply that they

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<sup>21</sup> *See generally* R. at 80–83; Transcript of Feb. 6, 2020 Hearing.

<sup>22</sup> *See* R. at 80–83.

<sup>23</sup> *See generally* Appellants' Brief.

<sup>24</sup> R. at 84–90.

<sup>25</sup> *Id.* at 88.

<sup>26</sup> *See generally* Transcript of Feb. 6, 2020 Hearing.

<sup>27</sup> *Id.* at p. 23, line 22–p. 24, line 4.

<sup>28</sup> *Id.*

titled a “Supplemental Answer,” which purported to introduce the evidence necessary to overcome Ms. Beavers’s TPPA Petition.<sup>29</sup> Of course, new arguments could not be raised by the Plaintiffs in a reply. *See Gentry v. Casada*, No. M2019-02230-COA-R3-CV, 2020 WL 5587720, at \*6 (Tenn. Ct. App. Sept. 17, 2020) (“A reply brief cannot be used to raise new issues.”), *no app. filed*. The hearing on Ms. Beavers’s TPPA Petition had also concluded already nearly a week prior.<sup>30</sup> Further, to provide an opposing party fair notice and an opportunity to respond to evidence filed in opposition to a TPPA petition, the TPPA requires that all evidence be filed and served at least five days before the scheduled hearing on a TPPA petition, not six days after it has concluded. TENN. CODE ANN. § 20-17-104(c) (“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.”). Tellingly, the Plaintiffs also withheld service of their “Supplemental Answer” until 5:08 p.m. on February 12, 2020—after the clerk’s office had closed<sup>31</sup>—preventing Ms. Beavers from filing a response to it before the Parties’ scheduled February 13, 2020 appearance.

Appropriately, during its bench ruling on February 13, 2020, the Court indicated that the Plaintiffs’ “Supplemental Answer” had not been

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<sup>29</sup> R. at 102–25.

<sup>30</sup> *See generally* Transcript of Feb. 6, 2020 Hearing.

<sup>31</sup> R. at 175 (Exhibit #1 to Transcript of Feb. 13, 2020 Hearing). *See also* Transcript of Feb. 13, 2020 Hearing, p. 5, lines 22–23; *id.* at p. 10, lines 7–12.

timely filed.<sup>32</sup> It also ruled that the TPPA applied to speech-based tort claims filed in General Sessions Court.<sup>33</sup> Critically, the Plaintiffs do not argue that either of those rulings was erroneous in any respect.

As to its ruling on the merits of Ms. Beavers's TPPA Petition, the Court granted it.<sup>34</sup> The Plaintiffs' claims were thus dismissed with prejudice as Tennessee Code Annotated § 20-17-105(e) requires.<sup>35</sup> The Plaintiffs have not contested the Court's merits ruling or argued in this appeal that any aspect of that ruling was incorrect, either.

By granting Ms. Beavers's TPPA Petition, the General Sessions Court's ruling also triggered a mandatory attorney's fees award and discretionary sanctions under Tenn. Code Ann. § 20-17-107(a)—both of which Ms. Beavers had specifically requested.<sup>36</sup> As a result, during the Parties' February 13, 2020 hearing, Ms. Beavers's counsel stated that he would order the hearing transcript, file a motion for attorney's fees, and set the motion for hearing thereafter.<sup>37</sup> Merely five days later, however—well before Ms. Beavers's outstanding claim for attorney's fees and sanctions could be filed, much less adjudicated—the Plaintiffs filed an interlocutory appeal of the General Sessions Court's February 13, 2020 Order in Wilson County Circuit Court,<sup>38</sup> where the Plaintiffs' claims originally began. Thus, Ms. Beavers's claims for mandatory attorney's

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<sup>32</sup> See Transcript of Feb. 13, 2020 Hearing, p. 5, lines 9–15.

<sup>33</sup> *Id.* at p. 11, lines 4–11.

<sup>34</sup> Transcript of Feb. 13, 2020 Hearing, p. 9, lines 10–14.

<sup>35</sup> R. at 1.

<sup>36</sup> R. at 26.

<sup>37</sup> Transcript of Feb. 13, 2020 Hearing, p. 12, line 23–p. 13, line 2.

<sup>38</sup> R. at 126.

fees and discretionary sanctions still remain pending before the General Sessions Court, and they cannot be resolved until appellate proceedings conclude and jurisdiction returns to the General Sessions Court.

To be sure, the TPPA contemplates immediate interlocutory appeals of orders on a TPPA petition “as a matter of right.” *See* TENN. CODE ANN. § 20-17-106 (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals.”). However, Tennessee Code Annotated § 20-17-106 makes clear that such interlocutory appeals can only be taken “to the court of appeals.” *See id.* Consequently, given that their appeal was interlocutory, the Plaintiffs’ appeal—which they took to Wilson County Circuit Court<sup>39</sup>—was filed in a court without jurisdiction to consider it. *See id.*

Following a hearing on the matter, on March 30, 2020, the Wilson County Circuit Court entered an order transferring the Plaintiffs’ “immediate” appeal to this Court based on the provisions of Tennessee Code Annotated § 20-17-106 (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.”).<sup>40</sup> Significantly, although the Circuit Court’s March 30, 2020 Order is the only order that the Plaintiffs contest in this appeal,<sup>41</sup> **the Plaintiffs never appealed the Circuit Court’s**

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<sup>39</sup> R. at 126.

<sup>40</sup> R. at 224–26.

<sup>41</sup> *See* Appellants’ Brief.

**March 30, 2020 Order.** Neither have they filed the transcript of the Circuit Court’s hearing on the matter in order to enable appellate review.

Independently, having prevailed on some grounds but not others, Ms. Beavers invoked this Court’s interlocutory appellate jurisdiction over the General Sessions Court’s February 13, 2020 Order herself. Specifically, pursuant to Tennessee Code Annotated § 20-17-106, Ms. Beavers filed a Notice of Appeal seeking interlocutory review of the General Sessions Court’s February 13, 2020 Order granting her TPPA Petition.<sup>42</sup> Accordingly, pursuant to Ms. Beavers’s own “immediate” Tennessee Code Annotated § 20-17-106 appeal—and regardless of any issue asserted in the Plaintiffs’ appeal—this Court’s jurisdiction to adjudicate the merits of Ms. Beavers’s TPPA Petition is secure independently.

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<sup>42</sup> See Kelly Beavers’ Notice of Cross-Appeal, Apr. 14, 2020.

## **VIII. STATEMENT OF THE CASE**

### **A. FIRST ROUND OF PROCEEDINGS: WILSON COUNTY CIRCUIT COURT CASE NO. 2019-CV-663**

On November 27, 2019, Plaintiff Nandigam Neurology sued Ms. Beavers in Wilson County Circuit Court, asserting speech-based tort claims for defamation, false light invasion of privacy, and a supposed civil conspiracy to damage Nandigam Neurology's reputation.<sup>43</sup> Nandigam Neurology's lawsuit was assigned Wilson County Circuit Court Case No. 2019-cv-663.

On December 27, 2019, Ms. Beavers filed a TPPA Petition to dismiss Nandigam Neurology's uniformly speech-based tort claims in Wilson County Case No. 2019-cv-663 pursuant to Tennessee Code Annotated §§ 20-17-104(a) and 20-17-105.<sup>44</sup> Before Ms. Beavers's TPPA Petition could be set for hearing, however, on January 8, 2020, Plaintiff Nandigam Neurology non-suited its Complaint.<sup>45</sup> An order of dismissal was entered in Wilson County Case No. 2019-cv-663 thereafter on January 14, 2020.<sup>46</sup>

### **B. SECOND ROUND OF PROCEEDINGS: WILSON COUNTY GENERAL SESSIONS COURT CASE NO. 2020-CV-152**

On January 21, 2020, Plaintiff Nandigam Neurology—in addition to Plaintiff Kaveer Nandigam personally, whom the Plaintiffs added as a party—refiled their claims for defamation and false light invasion of

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<sup>43</sup> R. at 35–38.

<sup>44</sup> R. at 43–44. *See also* R. at 45–75.

<sup>45</sup> R. at 76.

<sup>46</sup> R. at 76–77.

privacy against Ms. Beavers in Wilson County General Sessions Court.<sup>47</sup> The Plaintiffs' lawsuit was assigned Wilson County General Sessions Court No. 2020-cv-152.

On January 23, 2020, Ms. Beavers again filed a TPPA Petition to dismiss the Plaintiffs' speech-based tort claims,<sup>48</sup> which was set for hearing on February 6, 2020.<sup>49</sup> In response, on January 31, 2020, the Plaintiffs filed a document opposing Ms. Beavers's TPPA Petition that they titled an "Answer."<sup>50</sup> The Plaintiffs' "Answer" exclusively contended that the TPPA did not apply to claims filed in General Sessions Court.<sup>51</sup> Thus, the Plaintiffs did not introduce any evidence to satisfy their burden of proof under Tennessee Code Annotated §§ 20-17-105(b) and (c) or otherwise make any attempt to respond to the merits of Ms. Beavers's TPPA Petition at all.<sup>52</sup>

On February 5, 2020, Ms. Beavers filed a Reply to the Plaintiffs' "Answer" to her TPPA Petition.<sup>53</sup> Ms. Beavers's Reply argued at length that the TPPA unmistakably did apply to speech-based tort claims filed in General Sessions Court.<sup>54</sup> It further argued that because the Plaintiffs had not met (or even attempted to meet) their evidentiary burden under either Tennessee Code Annotated §§ 20-17-105(b) or (c), Ms. Beavers's

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<sup>47</sup> R. at 1.

<sup>48</sup> R. at 2–79.

<sup>49</sup> R. at 28.

<sup>50</sup> R. at 80–83.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> R. at 84–90.

<sup>54</sup> R. at 86–88.

TPPA Petition must be granted due to the Plaintiffs' failure to satisfy their burden of proof, and thus, that dismissal with prejudice was required under Tennessee Code Annotated § 20-17-105(e).<sup>55</sup>

The General Sessions Court held a hearing on Ms. Beavers's TPPA Petition on February 6, 2020.<sup>56</sup> At its conclusion, the Court stated that it would issue a bench ruling the following week and instructed the Parties to return on February 13, 2020 to receive the Court's order.<sup>57</sup>

On February 12, 2020—six days *after* the hearing on Ms. Beavers's TPPA Petition had concluded—the Plaintiffs filed a sur-reply regarding Ms. Beavers's TPPA Petition that they titled “Plaintiff's [sic] Supplemental Answer.”<sup>58</sup> The Plaintiffs fax-filed the document at 2:49 p.m.<sup>59</sup> The Plaintiffs also withheld service of the document upon Ms. Beavers's counsel until 5:08 p.m.—after the clerk's office had closed for the day<sup>60</sup>—thereby preventing Ms. Beavers from filing a response to it before the Parties' scheduled February 13, 2020 appearance.

On February 13, 2020, the General Sessions Court issued its bench ruling on Ms. Beavers's TPPA Petition.<sup>61</sup> Several issues were resolved during the hearing, three of which are relevant to this appeal:

*First*, the General Sessions Court indicated its agreement that the

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<sup>55</sup> R. at 88.

<sup>56</sup> *See generally* Transcript of Feb. 6, 2020 Hearing.

<sup>57</sup> *See id.* at p. 23, line 22–p. 24, line 8.

<sup>58</sup> R. at 102–115.

<sup>59</sup> R. at 102.

<sup>60</sup> R. at 175 (Exhibit #1 to Transcript of Feb. 13, 2020 Hearing). *See also* Transcript of Feb. 13, 2020 Hearing, p. 5, lines 22–23; *id.* at p. 10, lines 7–12.

<sup>61</sup> *See generally id.*

Plaintiffs’ “Supplemental Answer”—which, again, had been filed six days after the hearing on Ms. Beavers’s TPPA Petition had concluded—had not been timely filed “five (5) days before the hearing or, in the court’s discretion, at any earlier time” before the Parties’ February 6, 2020 hearing as Tennessee Code Annotated § 20-17-104(c) required.<sup>62</sup> The matter has not been appealed by the Plaintiffs, and it is not addressed in either the Plaintiffs’ Statement of the Issues or in their briefing. It is nonetheless relevant to this appeal, however, because it means that no evidence was ever admitted in response to Ms. Beavers’s TPPA Petition—a fact that necessarily prevents the Plaintiffs from meeting their evidentiary burden under either Tennessee Code Annotated §§ 20-17-105(b) or (c). Given the untimeliness of the filing, the General Sessions Court did not consider the Plaintiffs’ “Supplemental Answer,” and the Plaintiffs do not argue that this Court should consider it on appeal.

*Second*, emphasizing—among other things—the Plaintiffs’ “failure to state a claim or a cause of action [that] would be actionable”<sup>63</sup> and the “lack of facts that we have here in evidence”<sup>64</sup>—the General Sessions Court granted Ms. Beavers’s TPPA Petition<sup>65</sup> and entered an order dismissing the Plaintiffs’ claims.<sup>66</sup> The Plaintiffs agree with this characterization. *See* Appellants’ Brief at 8 (“Judge Tatum ruled

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<sup>62</sup> *Id.* at p. 5, lines 9–15.

<sup>63</sup> *Id.* at p. 8, lines 16–19.

<sup>64</sup> *Id.* at p. 12, lines 6–7.

<sup>65</sup> *Id.* at p. 12, lines, 18–22. *See also id.* at p. 9, line 14 (“I’m granting it.”); *id.* at p. 9, line 24–p. 10, line 2 (“I’m going to dismiss it. . . . Grant the petition for dismissal.”).

<sup>66</sup> R. at 1.

Plaintiffs’ General Sessions warrant filed [sic] to state a valid claim . . . and granted Defendant’s Petition to Dismiss under the Tennessee Public Participation Act.”). Critically, **the Plaintiffs’ appeal does not argue that the General Sessions Court erred in any respect by granting Ms. Beavers’s TPPA Petition, and the Plaintiffs raise no challenge regarding the substance of the General Sessions Court’s February 13, 2020 Order whatsoever.**

*Third*, the General Sessions Court and the Parties addressed the outstanding matter of Ms. Beavers’s claim for attorney’s fees and sanctions regarding her TPPA Petition, as contemplated by Tennessee Code Annotated § 20-17-107.<sup>67</sup> That on-the-record discussion concluded with the following unambiguous colloquy reflecting that the matter still had yet to be adjudicated:

MR. HORWITZ: Thank you, Your Honor. I’m going to file the transcript with the Court, and we’ll be back here on a motion for fees and sanctions at some later date.

THE COURT: All right.<sup>68</sup>

Thereafter, a written order dismissing the Plaintiffs’ claims with prejudice “pursuant to pet. to d/m on SLAP[P]”—a reference to the fact that the TPPA is Tennessee’s anti-SLAPP statute (“SLAPP” is an acronym for a “Strategic Lawsuit Against Public Participation”)—was signed and entered on February 13, 2020.<sup>69</sup>

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<sup>67</sup> Transcript of Feb. 13, 2020 Hearing, p. 9, lines 5–17.

<sup>68</sup> *Id.* at p. 12, line 23–p. 13, line 2.

<sup>69</sup> R. at 1.

**C. THIRD ROUND OF PROCEEDINGS: PLAINTIFFS’ INTERLOCUTORY APPEAL TO WILSON COUNTY CIRCUIT COURT (CASE NO. 2020-CV-89); THE WILSON COUNTY CIRCUIT COURT’S MARCH 30, 2020 TRANSFER ORDER; AND MS. BEAVERS’S OWN TENNESSEE CODE ANNOTATED § 20-17-106 APPEAL**

On February 18, 2020—just five days after the Parties’ February 13, 2020 hearing concluded, and well before the transcript of that hearing had been prepared or Ms. Beavers’s motion for attorney’s fees and sanctions could be filed and heard—the Plaintiffs filed a Notice of Appeal of the General Sessions Court’s February 13, 2020 Order.<sup>70</sup> The Plaintiffs’ interlocutory appeal was taken to Wilson County Circuit Court,<sup>71</sup> notwithstanding that Plaintiffs’ counsel had stated on the record just five days earlier that such an interlocutory appeal is “statutory. It says it’s immediately appealable to the Court of Appeals.”<sup>72</sup> The Plaintiffs’ appeal of the General Sessions Court’s February 13, 2020 Order was assigned Wilson County Circuit Court Case No. 2020-cv-89.

On March 6, 2020, Ms. Beavers filed a motion to dismiss Wilson County Circuit Court Case No. 2020-cv-89.<sup>73</sup> As grounds, Ms. Beavers argued, among other things, that interlocutory “appeals regarding TPPA Petitions are appealable ‘to the court of appeals’”<sup>74</sup> under Tennessee Code Annotated § 20-17-106, and that “the General Sessions Court’s judgment is not yet final” due to Ms. Beavers’s still pending and unadjudicated claims for attorney’s fees and sanctions under Tennessee Code Annotated

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<sup>70</sup> R. at 126.

<sup>71</sup> *Id.*

<sup>72</sup> Transcript of Feb. 13, 2020 Hearing, p. 13, lines 16–17.

<sup>73</sup> R. at 128–29. *See also* R. at 130–166.

<sup>74</sup> R. at 144–45.

§ 20-17-107.<sup>75</sup>

A telephonic hearing was held by the Wilson County Circuit Court in Case No. 2020-cv-89 on March 24, 2020.<sup>76</sup> Given the outstanding issue of attorney’s fees and sanctions, the Circuit Court recognized that the Plaintiffs’ appeal was an “immediate” appeal of an order on a Tennessee Public Participation Act petition within the meaning of Tennessee Code Annotated § 20-17-106<sup>77</sup>—rather than an appeal of a final judgment. Accordingly, in a written order entered on March 30, 2020, the Circuit Court ruled that “the Wilson County Circuit Court lacks jurisdiction to consider the Plaintiffs’ **immediate** appeal of the Wilson County General Sessions Court’s February 13, 2020 Order dismissing this action pursuant to the Defendant’s petition filed under Tennessee Code Annotated § 20-17-104.”<sup>78</sup> In lieu of dismissing the Plaintiffs’ appeal, however, the Circuit Court transferred it to this Court for resolution as contemplated by Tennessee Code Annotated § 20-17-106, given that this Court is the only court with jurisdiction to consider it. In full, the Circuit Court’s March 30, 2020 Order in Case No. 2020-cv-89 provided as follows:

This matter came before the Court on March 24, 2020, upon a telephonic conference with counsel for the Parties. Upon consideration of the arguments of counsel and the record, the Court hereby **FINDS** and **ORDERS** that under Tenn. Code Ann. § 20-17-106 (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure

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<sup>75</sup> R. at 145–46.

<sup>76</sup> R. at 224.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (emphasis added).

applicable to appeals as a matter of right governs such appeals.”), the Wilson County Circuit Court lacks jurisdiction to consider the Plaintiffs’ **immediate** appeal of the Wilson County General Sessions Court’s February 13, 2020 Order dismissing this action pursuant to the Defendant’s petition filed under Tenn. Code Ann. § 20-17-104. Accordingly, pursuant to Tenn. Code Ann. § 20-17-106, the Plaintiffs’ appeal shall be and is hereby **TRANSFERRED** to the Tennessee Court of Appeals.

It is so **ORDERED**.<sup>79</sup>

Significantly, the Plaintiffs did not file a Notice of Appeal regarding the Circuit Court’s March 30, 2020 Order in Case No. 2020-cv-89, which became a final order on April 29, 2020. Neither have the Plaintiffs filed the transcript of or any statement regarding the Parties’ March 24, 2020 telephonic hearing in Case No. 2020-cv-89 to enable this Court’s review of it. *But see* Tenn. R. App. P. 24(b)–(c); Tenn. R. App. P. 26. Accordingly, neither of the issues that the Plaintiffs have presented in their Statement of the Issues is even subject to appeal, because the Wilson County Circuit Court’s March 30, 2020 Order in Case No. 2020-cv-89 was not appealed and is long since final.

Separately, Ms. Beavers exercised her own appellate rights under Tennessee Code Annotated § 20-17-106 and filed a separate Notice of Appeal directly in this Court.<sup>80</sup> Accordingly, as a matter of right, Ms. Beavers has independently invoked this Court’s jurisdiction and sought this Court’s review of “the February 13, 2020 judgment of the General

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<sup>79</sup> *Id.* (partial emphasis added).

<sup>80</sup> *See* Kelly Beavers’ Notice of Cross-Appeal, Apr. 14, 2020.

Sessions Court of Wilson County.”<sup>81</sup> Thus, this Court’s jurisdiction to adjudicate the merits of Ms. Beavers’s TPPA Petition is secure regardless of any issue presented in the Plaintiffs’ appeal, and Ms. Beavers’s TPPA Petition is ripe for a merits ruling from this Court as a consequence.

**D. FOURTH ROUND OF PROCEEDINGS: THE DISMISSAL OF WILSON COUNTY CIRCUIT COURT CASE NO. 2019-CV-663 WITH PREJUDICE**

While the Plaintiffs’ appeal of General Sessions Court Case No. 2020-cv-152 was unfolding, another development of significance to the present appeal occurred: The Wilson County Circuit Court entered an order altering and amending its January 14, 2020 order of dismissal in Wilson County Case No. 2019-cv-663—the case where the Plaintiffs’ SLAPP-suit originally began.<sup>82</sup> In particular, on March 5, 2020, the Wilson County Circuit Court amended its previous order to reflect that the dismissal of Plaintiff Nandigam Neurology’s claims in Case No. 2019-cv-663 would be with prejudice.<sup>83</sup> Of special note, the Plaintiffs additionally represented at length during Case No. 2019-cv-663 that they were in privity to such an extent that Dr. Nandigam should be deemed “a party” to Case No. 2019-cv-663, even though Nandigam Neurology, PLC was the only named plaintiff in that action.<sup>84</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> R. at 168–69.

<sup>83</sup> *See* R. at 169, ¶ 2 (“[T]he Court’s January 14, 2020 Order is accordingly amended to reflect that the Plaintiff’s claims against Ms. Beavers are dismissed with prejudice.”).

<sup>84</sup> *See* R. at 202 (arguing that “**DR. NANDIGAM IS A PARTY**” and that Nandigam Neurology cannot act “except through its officers, employees, and agents,” including Dr. Nandigam).

## IX. SUMMARY OF ARGUMENT

The Plaintiffs argue that the Wilson County Circuit Court “erred in determining the Court of Appeals has exclusive jurisdiction for any appeals for cases involving the Tennessee Public Participation Act.” *See* Appellants’ Brief at 9. But that is not an accurate characterization of the Wilson County Circuit Court’s March 30, 2020 Order, which the Plaintiffs also cannot challenge because they failed to appeal it. Additionally, there is no doubt that the Court of Appeals has exclusive jurisdiction over interlocutory appeals of an order granting a petition to dismiss filed under Tennessee Code Annotated § 20-17-104. *See* TENN. CODE ANN. § 20-17-106. By contrast, the Wilson County Circuit Court did not have any jurisdiction to hear the Plaintiffs’ interlocutory appeal of the General Sessions Court’s February 13, 2020 Order. As such, the Wilson County General Sessions Court’s February 13, 2020 Order—the propriety of which the Plaintiffs do not contest in any regard—should be affirmed.

The Plaintiffs additionally contend that “an appeal from the General Sessions Court is de novo to the Circuit Court.” Appellants’ Brief at 12. Even assuming—for the sake of argument—that this assertion were correct generally, it is definitely wrong with respect to interlocutory appeals of an “order dismissing or refusing to dismiss a legal action pursuant to a petition filed under” Tennessee Code Annotated § 20-17-104, which: (1) can only be taken to the Court of Appeals, *see* TENN. CODE ANN. § 20-17-106; and (2) are governed by “[t]he Tennessee Rules of Appellate Procedure[.]” *id.*, which circuit courts do not apply.

Because the Plaintiffs’ interlocutory appeal of the General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’s TPPA Petition

is properly before this Court and cannot be adjudicated elsewhere, the only issue that remains with respect to the Plaintiffs' appeal of that Order is whether it should be affirmed. For several reasons, it should. *First*, the Plaintiffs do not contend that the General Sessions Court's Order was erroneous in any regard, so they have waived any claim that it is wrong. *Second*, the Plaintiffs did not introduce any evidence to meet their burden of proof under Tennessee Code Annotated § 20-17-105(b), which necessarily compels dismissal of the Plaintiffs' claims with prejudice.

As Cross-Appellant, Ms. Beavers additionally submits that the General Sessions Court's February 13, 2020 Order should be affirmed on several additional grounds not reached or rejected by the General Sessions Court. In particular, the Order should be affirmed on the basis that Ms. Beavers established valid defenses to the Plaintiffs' claims under Tennessee Code Annotated § 20-17-104(a). The General Sessions Court's February 13, 2020 Order should also be affirmed on the basis that the Plaintiffs' identical claims have already been dismissed with prejudice in Wilson County Circuit Court Case No. 2019-cv-663, and that that dismissal constitutes the law of the case.

Finally, Ms. Beavers is entitled to an award of attorney's fees regarding this appeal. Accordingly, this matter should be remanded to the General Sessions Court with instructions to award Ms. Beavers additional attorney's fees, costs, and discretionary sanctions under Tennessee Code Annotated § 20-17-107(a) with respect to the proceedings on appeal.

## X. ARGUMENT

### **A. THE PLAINTIFFS HAVE WAIVED THE ONLY ARGUMENTS THAT THEY PRESENT IN THIS APPEAL.**

The Plaintiffs raise only two arguments in this appeal: (1) that “the Circuit Court erred in determining the Court of Appeals has exclusive jurisdiction for any appeals for cases involving the Tennessee Public Participation Act[.]” *see* Appellants’ Brief at. 9; and (2) that “an appeal from the General Sessions Court is de novo to the Circuit Court[.]” *id.* at 12. Even if these arguments had merit, however (and they do not), both arguments are waived, because the Plaintiffs did not take an appeal from the Circuit Court’s March 30, 2020 Order, and because the record does not reflect that the Plaintiffs’ arguments were ever raised below.

#### **1. The Plaintiffs did not take an appeal from the Circuit Court’s March 30, 2020 transfer order.**

The only Notice of Appeal that the Plaintiffs have filed concerns the February 13, 2020 Order of the Wilson County General Sessions Court in General Sessions Court Case No. 2020-cv-152.<sup>85</sup> The transfer order that the Plaintiffs now assert was erroneous, however, was entered by an entirely different court (the Wilson County Circuit Court) and in an entirely different case number (Case No. 2020-cv-89) on March 30, 2020.<sup>86</sup> The March 30, 2020 Order at issue became final on April 29, 2020, and the Plaintiffs did not appeal it. *But see* Tenn. R. App. P. 4(a) (“the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment

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<sup>85</sup> R. at 126.

<sup>86</sup> R. at 224.

appealed from”). Accordingly, the Plaintiffs have waived any challenge regarding the Wilson County Circuit Court’s March 30, 2020 Order, because that order is long since final and the Plaintiffs did not appeal it.

**2. The record does not reflect that the Plaintiffs’ arguments were raised below.**

Issues not presented to a lower court are routinely deemed waived on appeal. *See City-Cty. Fed. Credit Union v. Linboe*, No. E2005-00577-COA-R3CV, 2005 WL 2372760, at \*2 (Tenn. Ct. App. Sept. 27, 2005) (“We will consider these issues waived because they were raised for the first time on appeal.”) (citations omitted), *perm. to app denied* (Tenn. Mar. 27, 2006); *Reid v. State*, 9 S.W.3d 788, 796 (Tenn. Ct. App. 1999) (“If an issue ‘is not properly raised in the trial court, it will not be considered on appeal.’” (quoting *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn. App. 1990))); *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).

Here, the record contains no indication that the issues that the Plaintiffs raise in this appeal were ever raised by the Plaintiffs and considered by the Wilson County Circuit Court. Neither have the Plaintiffs filed a transcript of the Parties’ March 24, 2020 hearing in Wilson County Circuit Court, which resulted in the March 30, 2020 transfer order, or any statement regarding that hearing. *But see* Tenn. R. App. P. 26 (“If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is

to be filed, the appellate court may dismiss the appeal on its own initiative or any appellee may file a motion in the appellate court to dismiss the appeal.”). Accordingly, neither of the issues that the Plaintiffs present in this appeal is subject to review in this Court.

**B. THIS COURT IS THE ONLY COURT WITH JURISDICTION TO ADJUDICATE THE PLAINTIFFS’ APPEAL OF THE GENERAL SESSIONS COURT’S ORDER DISMISSING THE PLAINTIFFS’ CLAIMS UNDER THE TENNESSEE PUBLIC PARTICIPATION ACT.**

Even if this Court decided to address the Plaintiffs’ arguments in this appeal, no relief would be warranted. Specifically, because this Court is the only court with jurisdiction to adjudicate the Plaintiffs’ interlocutory appeal of the General Sessions Court’s February 13, 2020 Order dismissing the Plaintiffs’ claims under the Tennessee Public Participation Act, the Plaintiffs are wrong that Circuit Court was obligated to—or even could—adjudicate it.

**1. The General Sessions Court’s February 13, 2020 Order was not final, and as a result, the Plaintiffs’ appeal of it is interlocutory.**

As this Court has held repeatedly and without ambiguity, only final orders are appealable, and a party’s unadjudicated claim for attorney’s fees precludes finality. *See, e.g., Hersh*, 2009 WL 2601380, at \*4 (“This Court has concluded on several occasions that an order that fails to address an outstanding request for attorney’s fees is not final.”); *Scott v. Noland Co.*, No. 03A01-9407-CV-00248, 1995 WL 11177, at \*1 (Tenn. Ct. App. Jan. 12, 1995) (“Since there is no order in the record before us finally disposing of the Plaintiffs’ claim for attorney fees at the trial level, the ‘Final Judgment’ from which this appeal is being pursued is not a final

order and hence not appealable as of right under Tenn. R. App. P. 3(a). This is true because the ‘Final Judgment’ entered in this case ‘adjudicates fewer than all the claims.’”), *no app. filed*; *Robinson v. Haynes*, No. E2019-00477-COA-R3-CV, 2019 WL 7287161, at \*1 (Tenn. Ct. App. Dec. 27, 2019) (“[T]he Trial Court reserved the petitions for attorney’s fees. As such, the order from which the appellant seeks review is not ‘a final judgment adjudicating all the claims, rights, and liabilities of all parties.’”), *no app. filed*; *Grand Valley Lakes Prop. Owners’ Ass’n*, 2009 WL 981697, at \*3 (holding that an unresolved motion for attorney’s fees meant that the order being appealed was not final); *Homebuilders McGee & Story, LLC v. Buckner*, No. M2008-00291-COA-R3-CV, 2008 WL 3896749, at \*3 (Tenn. Ct. App. Aug. 21, 2008) (concluding that the order appealed from in the first appeal of the case was not a final order because there was a claim for attorney’s fees that had not been adjudicated), *rehearing denied* (Tenn. Ct. App. Sept. 23, 2008); *Headrick v. Headrick*, No. E2004-00730-COA-R3-CV, 2005 WL 524807, at \*3 (Tenn. Ct. App. Mar. 7, 2005) (concluding that there was no final order because the trial court reserved the issue of attorney’s fees) *no app. filed*; *Spencer v. The Golden Rule, Inc.*, No. 03A01-9406-CV-00207, 1994 WL 589564, at \*1 (Tenn. Ct. App. Oct. 21, 1994) (“Since there is no order in the record before us finally disposing of the Plaintiff’s claim for attorney fees at the trial level, the Order from which this appeal is being pursued is not a final order and hence not appealable as of right under Tenn. R. App. P. 3(a).”), *no app. filed*. *Cf. Fink v. Crean*, No. M2005-01364-COA-R3-CV, 2006 WL 3783541, at \*5 (Tenn. Ct. App. Dec. 21, 2006) (holding that where a trial court “did not ultimately adjudicate the issue of attorneys’

fees until its order of May 11, 2005, . . . [a]pplying Rule 3 of the Tennessee Rules of Appellate Procedure, all of the claims and rights of the parties were not decided until the order entered on May 11, 2005, and as such, this order was the appealable final judgment”), *perm. to app. denied* (Tenn. Apr. 23, 2007).

Critically, the same principle of finality also governs appeals taken from General Sessions Court. *See, e.g., Wells Fargo Bank*, 556 S.W.3d at 753–54 (holding that “[t]he same principle [of finality] applies with regard to appeals in general sessions courts”); *Graham v. Walldorf Prop. Mgmt.*, No. E200800837COAR3CV, 2009 WL 723837, at \*5 (Tenn. Ct. App. Mar. 19, 2009) (“before such an appeal can be taken, there must have been a final judgment entered in the general sessions court, and an appeal under this statute cannot be had for the review of interlocutory orders”) (cleaned up), *no app. filed*.

Here, Ms. Beavers’s claims for attorney’s fees and sanctions under Tennessee Code Annotated § 20-17-107(a) were pending and unadjudicated when the Plaintiffs filed their Notice of Appeal. *See, e.g., R.* at 26 (asserting claim for attorney’s fees, costs, and sanctions under Tennessee Code Annotated § 20-17-107(a)); Transcript of February 13, 2020 Hearing, p. 12, line 23–p. 13, line 2 (MR. HORWITZ: “I’m going to file the transcript with the Court, and we’ll be back here on a motion for fees and sanctions at some later date.” THE COURT: “All right.”). As a consequence, the General Sessions Court’s February 13, 2020 Order was not final; the Plaintiffs’ appeal of it was interlocutory; and the Circuit Court had no jurisdiction to consider it regardless of the type of case being appealed. *See, e.g., Wells Fargo Bank*, 556 S.W.3d at 753–54; *Graham*,

2009 WL 723837, at \*5. *See also State v. Osborne*, 712 S.W.2d 488, 491 (Tenn. Crim. App. 1986) (“Obviously, the wording of T.C.A. § 27-5-108 means that before such an appeal can be taken, there must have been a final judgment entered in the general sessions court, and an appeal under this statute cannot be had for the review of interlocutory orders, as were issued by the sessions court in the instant case.”).

This “obvious[]” reality is fatal to both of the issues that the Plaintiffs identify for review in this appeal. *See id.* The central question presented here is not whether the Court of Appeals has “exclusive” jurisdiction over cases involving the TPPA, as the Plaintiffs suggest. Neither is it whether an appeal from General Sessions Court can ever be taken de novo to Circuit Court in a TPPA case. Instead, more narrowly, the primary issues are: (1) whether this Court has exclusive jurisdiction over *interlocutory* appeals of an order granting a Tennessee Code Annotated § 20-17-104(a) petition; and (2) whether the Circuit Court had any jurisdiction to consider the Plaintiffs’ interlocutory appeal.

The answers to both of those questions are clear:

*First*, because interlocutory appeals cannot otherwise be taken, *see supra*, pp. 38–41, Tennessee Code Annotated § 20-17-106—the only statute conferring interlocutory appellate jurisdiction of the General Sessions Court’s February 13, 2020 Order—controls the court where the Plaintiffs’ interlocutory appeal must be heard, and that venue is restricted to the Court of Appeals. *See id.* (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to

appeals as a matter of right governs such appeals.”).

Second, because settled precedent establishes that Circuit Courts cannot adjudicate interlocutory appeals from General Sessions Court, *see supra*, pp. 38–41, the Plaintiffs’ interlocutory appeal could not be adjudicated there. *See, e.g., Wells Fargo Bank*, 556 S.W.3d at 753–54; *Graham*, 2009 WL 723837, at \*5; *Osborne*, 712 S.W.2d at 491.

Accordingly, though whether a final General Sessions Court order in a case governed by the TPPA can be appealed to Circuit Court de novo presents a (slightly) more difficult question, this appeal does not present such a case. Because the Circuit Court had no appellate jurisdiction to consider the Plaintiffs’ interlocutory appeal of the General Sessions Court’s non-final February 13, 2020 Order, the Circuit Court did not err in transferring the Plaintiffs’ appeal to the only court that did. Accordingly, in the event that this Court adjudicates the Plaintiffs’ claims, the Circuit Court’s March 30, 2020 transfer order should be affirmed.

**2. This Court has appellate jurisdiction over the Plaintiffs’ immediate appeal of the General Sessions Court’s order on Ms. Beavers’s TPPA Petition.**

While the Wilson County Circuit Court did not have appellate jurisdiction to consider the Plaintiffs’ interlocutory appeal of the General Sessions Court’s February 13, 2020 Order, *see Wells Fargo Bank*, 556 S.W.3d at 753–54; *Graham*, 2009 WL 723837, at \*5; *Osborne*, 712 S.W.2d at 491, this Court certainly does. *See* TENN. CODE ANN. § 20-17-106. Here, the Plaintiffs have appealed the General Sessions Court’s Order dismissing a legal action pursuant to a petition filed under the Tennessee

Public Participation Act. *See* R. at 1; R. at 126. In turn, Tennessee Code Annotated § 20-17-106 provides without ambiguity that: “[A] court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.” As such, jurisdiction over the Plaintiffs’ appeal is proper in this Court.

**3. The text of Tennessee Code Annotated § 20-17-106 confers upon this Court alone interlocutory appellate jurisdiction over the Plaintiffs’ appeal of the trial court’s order on Ms. Beavers’s TPPA Petition.**

Given the interlocutory nature of the Plaintiffs’ appeal and the absence of finality below, this Court need not reach the broader question of whether this Court has exclusive jurisdiction over all appeals of a “court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under” the Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-106. Even if the Plaintiffs were appealing a final order, however (and they are not), jurisdiction would still be proper in this Court alone. Several reasons compel this conclusion.

*First*, the clear intent of Tennessee Code Annotated § 20-17-106 is that appeals regarding orders on TPPA petitions be heard by “the court of appeals.” *See id.* (“The court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals.”) (emphasis added). And although the Plaintiffs insist that Tennessee

Code Annotated § 20-17-106 must bend to the general appeal provision set forth in Tennessee Code Annotated § 27-5-108, Tennessee Code Annotated § 20-17-106 is specific to appeals of orders on Tennessee Public Participation Act petitions, and when construing venue provisions, “the more specific statute governs over the more general.” *Hawkins v. Tenn. Dep’t of Corr.*, 127 S.W.3d 749, 763 (Tenn. Ct. App. 2002) (citing *Five Star Exp., Inc. v. Davis*, 866 S.W.2d 944, 946 (Tenn. 1993)). Significantly, this fundamental rule of construction also carries special force when it comes to a more specific statute concerning “the same subject”—in this case, appeals of orders on Tennessee Public Participation Act petitions. *See Five Star Exp.*, 866 S.W.2d at 946 (“This conclusion is buttressed by the basic rule of statutory construction which provides that a general statute concerning a subject must defer to a more specific statute concerning the same subject.” (citing *Watts v. Putnam Cty.*, 525 S.W.2d 488 (Tenn. 1975); *Koella v. State ex rel. Moffett*, 405 S.W.2d 184 (Tenn. 1966))). Accordingly, Tennessee Code Annotated § 20-17-106—the appeal statute that specifically concerns orders on TPPA petitions—rather than the general appeal statute set forth in § 27-5-108, governs appeals of a “court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under” the Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-106.

Second, Tennessee Code Annotated § 20-17-106 reflects the General Assembly’s intention that appeals of orders on Tennessee Public Participation Act petitions be governed by “[t]he Tennessee Rules of Appellate Procedure.” Circuit Courts, of course, do not and cannot utilize the Tennessee Rules of Appellate Procedure. *See* Tenn. R. Civ. P. 1 (“the

Rules of Civil Procedure shall govern procedure in the circuit . . . courts in all civil actions”). Accordingly, allowing appeals of orders on TPPA petitions to be adjudicated in Circuit Court would contravene Tennessee Code Annotated § 20-17-106’s plain text.

For both of these reasons, even if the Plaintiffs were appealing a final order, the text of Tennessee Code Annotated § 20-17-106 militates in favor of holding that only this Court has appellate jurisdiction over a “court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under” the Tennessee Public Participation Act. *Id.*

**4. Holding that Tennessee Code Annotated § 20-17-106 requires that appeals of orders granting or denying TPPA petitions be taken to this Court comports with the General Assembly’s intent in enacting the TPPA.**

Requiring appeals of orders on TPPA petitions to be taken to the Court of Appeals additionally comports with the General Assembly’s intent in enacting the TPPA and with the TPPA’s underlying public policy goals. By contrast, allowing SLAPP-suits to be restarted anew in Circuit Court following an adverse ruling would do precisely the opposite.

“Lawsuits aimed at censoring constitutionally protected speech are a metastasizing scourge” across the United States. See 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/>. “Known as Strategic Lawsuits Against Public Participation, or ‘SLAPP suits’ for short, these routine abuses of the legal process pose a constant threat to the First Amendment and undermine free expression in every U.S. jurisdiction.” *Id.* Based on the ease with

which the legal process can be abused to heap litigation expenses upon defendants in retaliation for their speech, “abusive litigants can frequently intimidate critics into silence by threatening or filing baseless SLAPP suits alleging claims like defamation, business disparagement, and any number of other speech-based torts.” *Id.* Understandably, “when faced with the prospect of having to spend tens—if not hundreds—of thousands of dollars in legal fees to defend one’s right to speak freely, for many people, agreeing to self-censor in exchange for avoiding or securing the dismissal of a SLAPP suit is an attractive proposition.” *Id.*

Given the chilling effects that SLAPP suits have on free expression, Tennessee’s judiciary has condemned SLAPP litigation, which our legislature recognizes as “evil[.]” *See 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) (“Their lawsuit fits all of the characteristics of a lawsuit filed to intimidate a citizen into silence regarding an issue of public concern.”), *no app. filed; id.* (“The legislature has recently recognized the evils of this type of lawsuit.”). In 2019, recognizing that Tennessee’s existing anti-SLAPP protections were insufficient to curb SLAPP suit abuse, the General Assembly enacted the TPPA—an additional and extremely robust anti-SLAPP statute—to discourage lawsuits precisely like this one. *See generally* 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) (“The cost and fees requirement, coupled with the threat of sanctions, discourages similar future litigation by the opposing party or by similarly situated parties who wish to pursue SLAPP litigation.”). *See*

*also id.* (“[T]he imposition of costs, fees, and possibly sanctions on a SLAPP filer discourage would-be plaintiffs from attempting to use the courts to trample First Amendment rights.”).

Faithful adherence to the policy considerations underlying the TPPA—which “shall be construed broadly to effectuate its purposes and intent[,]” *see* TENN. CODE ANN. § 20-17-102—requires that litigants like the Plaintiffs be deterred from heaping litigation costs upon defendants in General Sessions Court, rather than permitted to avoid all consequences for doing so and allowed to restart SLAPP litigation anew by taking a *de novo* appeal to Circuit Court following an adverse ruling. As noted above, the TPPA was enacted to prevent abusive plaintiffs from doing precisely what the Plaintiffs seek to do here: impose massive costs through extended litigation in retaliation for a defendant’s protected speech. Under the Plaintiffs’ “dealer’s choice” reading of Tennessee Code Annotated § 20-17-106, though—without experiencing any of the consequences that the TPPA is designed to ensure—a plaintiff can fearlessly abuse the judicial process and heap litigation costs upon SLAPP suit victims merely by initiating an action in General Sessions Court. Once that proceeding is complete, a plaintiff may then skirt all consequences and then begin the process anew by taking a *de novo* appeal to Circuit Court following an adverse ruling and start the process over.

Such a result is wholly incompatible with the underlying goals of the TPPA. *See generally supra*, Hambidge, et al. The instant case also provides the perfect illustration of that reality. Here, the Plaintiffs seek to perpetuate their abuse against Ms. Beavers not only once or twice, but *three* times, having begun this SLAPP-suit by filing it in Circuit Court,

non-suited it as soon as Ms. Beavers incurred litigation costs, refiled it in General Sessions Court thereafter, and then taken what the Plaintiffs intended to be a de novo appeal to Circuit Court to begin their abuse anew and avoid all prior consequences. Thus, after nearly a year of litigation over a Yelp! review and two dismissals, the Plaintiffs assert a right to rinse and repeat their abuse a third time with a clean slate through a de novo appeal to Circuit Court. The TPPA, however, was designed to prevent and deter such abuse, not to enable it.

**5. Ms. Beavers has properly invoked this Court’s interlocutory appellate jurisdiction herself. Thus, whether an appeal “must” be taken to this Court in all cases is irrelevant; in this case, this Court’s interlocutory appellate jurisdiction is proper.**

This Court may also safely adjudicate the merits of this action for yet another reason: Ms. Beavers has independently invoked this Court’s appellate jurisdiction under Tennessee Code Annotated § 20-17-106 herself.<sup>87</sup> On April 14, 2020, Ms. Beavers timely filed (under the extended deadline established by the Supreme Court’s COVID order) her own appeal of the Wilson County General Sessions Court’s February 13, 2020 Order.<sup>88</sup> Ms. Beavers’s cross-appeal also expressly invokes this Court’s interlocutory jurisdiction under Tennessee Code Annotated § 20-17-106. *See* Kelly Beavers’s Notice of Cross-Appeal, Apr. 14, 2020 (“Pursuant to Tenn. R. App. P. 3 and Tenn. Code. Ann. § 20-17-106, notice is hereby given that Kelly Beavers, the Defendant-Appellee in the above-

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<sup>87</sup> *See* Kelly Beavers’s Notice of Cross-Appeal, Apr. 14, 2020.

<sup>88</sup> *See id.*

captioned case, cross-appeals as of right the February 13, 2020 judgment of the General Sessions Court of Wilson County, Tennessee, to the Tennessee Court of Appeals.”).

Thus, regardless of whether the Plaintiffs wanted this case to reach this Court, Ms. Beavers has her own right to review under Tennessee Code Annotated § 20-17-106, and she has properly exercised it. *See id.* *See also* TENN. CODE ANN. § 20-17-106 (“The court’s order **dismissing or refusing to dismiss** a legal action pursuant to a petition filed under this chapter is immediately **appealable as a matter of right** to the court of appeals.”) (emphases added). Consequently, in the absence of some bar to justiciability that is not present here, Ms. Beavers’s appeal to this Court must be adjudicated. *See, e.g., Jackson v. Smith*, 387 S.W.3d 486, 494 (Tenn. 2012) (“courts must decide the cases brought before them”) (citations omitted); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”). As such, this Court’s jurisdiction to review the Wilson County General Sessions Court’s February 13, 2020 Order—which dismissed the Plaintiffs’ legal action on some grounds but refused to dismiss it on others—is secure independently based on Ms. Beavers’s own Notice of Appeal. *See* TENN. CODE ANN. § 20-17-106.

**C. THE GENERAL SESSIONS COURT’S ORDER GRANTING MS. BEAVERS’S TPPA PETITION SHOULD BE AFFIRMED.**

This Court’s appellate jurisdiction secured, the merits of this case are easily resolved, and the Wilson County General Sessions Court’s February 13, 2020 Order must be affirmed. Beyond the fact that the Plaintiffs do not argue that the February 13, 2020 Order was erroneous

in any way, affirmance is compelled for two straightforward reasons. *First*, the Plaintiffs unmistakably failed to meet their evidentiary burden under Tennessee Code Annotated § 20-17-105(b) by failing to introduce any evidence prior to the February 6, 2020 hearing on Ms. Beavers’s TPPA Petition. *Second*, under Tennessee Code Annotated § 20-17-105(c), Ms. Beavers established multiple valid defenses to the Plaintiffs’ claims that were unrebutted.

1. **This Court should affirm the General Sessions Court’s February 13, 2020 Order dismissing the Plaintiffs’ claims under Tennessee Code Annotated § 20-17-105(b).**

Tennessee Code Annotated §§ 20-17-104(a) and 20-17-105(a) afforded Ms. Beavers a statutory right to petition the General Sessions Court to dismiss the Plaintiffs’ uniformly speech-based tort claims. *See* 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.”); § 20-17-105(a) (“The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.”). Further, having met her initial burden under Tennessee Code Annotated § 20-17-105(a),<sup>89</sup> the General Sessions Court was compelled to “dismiss the legal action unless the [Plaintiffs] establishe[d] a prima facie case for each essential element of the claim in the legal action.” TENN. CODE ANN. § 20-17-

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<sup>89</sup> *See* R. at 2–79.

105(b).

Critically, to establish a prima facie case for each essential element of their claims, the TPPA required the Plaintiffs to file and serve their responses to Ms. Beavers’s TPPA Petition—“including any opposing affidavits”—“**no less than five (5) days before the hearing** or, in the court’s discretion, at any **earlier time** that the court deems proper.” *See* TENN. CODE ANN. § 20-17-104(c) (emphases added). During the proceedings below, however, the Plaintiffs did not file any evidence establishing a prima facie case for their claims “five (5) days before the hearing” on Ms. Beavers’s TPPA Petition as required, *see id.*, which was set for<sup>90</sup> and held on February 6, 2020.<sup>91</sup>

In fact, the Plaintiffs did not file a response (or any evidence) even *attempting* to establish a prima facie case for their claims before the Parties’ February 6, 2020 hearing on Ms. Beavers’s TPPA Petition.<sup>92</sup> Instead, prior to the February 6, 2020 hearing, the Plaintiffs argued only that the TPPA did not apply to legal actions filed in General Sessions Court<sup>93</sup>—an argument that the General Sessions Court rejected<sup>94</sup> and which the Plaintiffs have since abandoned.<sup>95</sup> Then, six days *after* the February 6, 2020 hearing on Ms. Beavers’s TPPA Petition concluded—at

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<sup>90</sup> *See* R. at 28 (“The above petition to dismiss is scheduled to be heard in the General Sessions Court of Wilson County, Tennessee on February 6, 2020 at 9:00 a.m. before Judge Barry Tatum.”).

<sup>91</sup> *See* Transcript of Feb. 6, 2020 Hearing.

<sup>92</sup> *See* R. at 80–83.

<sup>93</sup> *See id.*

<sup>94</sup> Transcript of Feb. 21, 2020 Hearing in Wilson County Circuit Court Case No. 2019-cv-663, p. 8, line 20–p. 9, line 4.

<sup>95</sup> *See* Appellants’ Brief.

5:08 p.m. on February 12, 2020<sup>96</sup>—the Plaintiffs served a sur-reply that they called a “Supplemental Answer,” which purported to be their response to Ms. Beavers’s TPPA Petition under Tennessee Code Annotated § 20-17-104(c). The General Sessions Court correctly held that the Plaintiffs’ “Supplemental Answer” had not been timely filed five days before the February 6, 2020 hearing,<sup>97</sup> however, and the court did not consider the untimely filing as a result.

Thus, the Plaintiffs were left with no evidence even attempting to establish a prima facie case for each essential element of their claims as required. As a consequence, under Tennessee Code Annotated § 20-17-105(b), dismissal of the Plaintiffs’ legal action was and remains mandatory. *See id.* (“[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.”) (emphasis added). The General Sessions Court’s February 13, 2020 Order should be affirmed accordingly.

**2. This Court should affirm the General Sessions Court’s February 13, 2020 Order dismissing the Plaintiffs’ claims under Tennessee Code Annotated § 20-17-105(c).**

Ms. Beavers’s TPPA Petition additionally established several valid and un rebutted defenses to the Plaintiffs’ speech-based claims, both legal and factual. *See R.* at 11–26. In particular, Ms. Beavers asserted all of the following outcome-determinative defenses to the Plaintiffs’ claims:

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<sup>96</sup> *See R.* at 175 (Exhibit #1 to Transcript of Feb. 13, 2020 Hearing).

<sup>97</sup> Transcript of Feb. 6, 2020 Hearing, p. 5, lines 9–19.

(1) The Plaintiffs failed to plead the substance of the statements that they claimed were actionable, *see* R. at 11–12;

(2) The statements contained in Ms. Beavers’s Yelp! review were inactionable as defamation as a matter of law because:

(a) they were not capable of conveying a defamatory meaning, *see* R. at 12–16;

(b) they were, at worst, merely “annoying, offensive, or embarrassing,” R. at 16–17;

(c) they were mere rhetorical hyperbole and could not reasonably read as objective assertions of false fact, R. at 17–19; and

(d) the Plaintiffs failed to plead actual malice, R. at 19–20;

(3) Plaintiff Nandigam Neurology was not permitted to sue over statements that did not concern it, *see* R. at 20–21;

(4) Plaintiff Nandigam Neurology’s claims could not be maintained because its previous dismissal could only be taken with prejudice, *see* R. at 21–22;

(5) Ms. Beavers’s Yelp! review was true or substantially true, *see* R. at 25 (citing Ms. Beavers’s affidavit at R. at 29–33);

(6) Ms. Beavers’s Yelp! review was not posted with actual malice or negligence in failing to ascertain the truth, *see* R. at 25 (citing Ms. Beavers’s affidavit at R. at 29–33); and

(7) The Plaintiffs—having previously attributed damages in excess of \$25,000.00 to a non-party to this lawsuit—cannot prove actual damages in this \$25,000.00 action. *See* R. at 25 (citing Plaintiff Nandigam Neurology’s previous claims against Devin Yount, set forth at R. 34–38).

This Court may affirm the General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’s TPPA Petition on all of these independent grounds, all of which were un rebutted. *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.”); *State v. Hester*, 324 S.W.3d 1, 21 n.9 (Tenn. 2010) (“This Court may affirm a judgment on different grounds than those relied upon by the lower courts when the lower courts have reached the correct result.”) (citations omitted); *Hopkins v. Hopkins*, 572 S.W.2d 639, 641 (Tenn. 1978) (“[T]his Court will affirm a decree of the trial court correct in result, though rendered upon different, incomplete or erroneous grounds.”) (citations omitted). This Court also *should* do so, for three reasons:

*First*, Ms. Beavers wants to continue to speak about her experience at Nandigam Neurology without fear of incurring liability, and in the absence of a specific determination that calling Dr. Nandigam “unethical” and discussing her atrocious experience with him is not illegal, she will be chilled from doing so.

*Second*, the General Sessions Court actually ruled against Ms. Beavers on one of the seven defenses she raised: That Plaintiff Nandigam Neurology’s original dismissal in Circuit Court could only be taken with prejudice because a TPPA Petition that functioned as a motion for summary judgment was pending, and thus, that the claim could not be refiled. *See* February 13, 2020 Hearing, p. 11, line 25–p. 12, line 3 (“The best I remember, if you take a voluntary nonsuit on a case in the Circuit Court, you certainly have the right to bring that cause of action back up

there.”). Significantly, however, just a few weeks later, the Circuit Court itself adopted Ms. Beavers’s argument on the matter and amended its judgment to reflect that Nandigam Neurology’s dismissal would be with prejudice, rather than without. *See* R. at 168–69, ¶ 2 (ruling that given Ms. Beavers’s pending TPPA Petition at the time, “the Plaintiff lacked a right to take a voluntary nonsuit to dismiss its claims against Ms. Beavers without prejudice, and the Court’s January 14, 2020 Order is accordingly amended to reflect that the Plaintiff’s claims against Ms. Beavers are dismissed with prejudice.”). That ruling—which has not been appealed—is now the law of this case. *Cf. Linn v. Howard*, No. E2006-00024-COA-R3-CV, 2007 WL 208442, at \*4 (Tenn. Ct. App. Jan. 26, 2007) (“The February 23, 2004, final order is the law of this case. The defendants chose not to appeal that final order.”), *no app. filed*; *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*. Accordingly, the General Sessions Court’s contrary ruling should be reversed.

*Third*, because Ms. Beavers has a right to immediate interlocutory review, *see* TENN. CODE ANN. § 20-17-106, failing to prosecute an appeal and obtain review of the defenses that she raised below but upon which she did not prevail would arguably result in waiver of her right to obtain such review at a later date. *See Mitchell v. Owens*, 185 S.W.3d 837, 841 (Tenn. Ct. App. 2005) (“Mitchell had the right to immediately appeal the issue of arbitration, but failed to file such an appeal in a timely manner,

and has waived the issue of whether arbitration was appropriate.”). Accordingly, Ms. Beavers’ defenses should be adjudicated.

**D. THIS COURT SHOULD RECOGNIZE THAT TENNESSEE’S PRESUMPTION OF FALSITY DOCTRINE IN DEFAMATION CASES IS ABROGATED BECAUSE THE SUPREME COURT HAS RULED IT UNCONSTITUTIONAL.**

Because Ms. Beavers has expressly preserved the issue,<sup>98</sup> and because it affects the basis for the proper outcome in this action (specifically, whether the Plaintiffs’ claims should be dismissed under Tennessee Code Annotated §§ 20-17-105(b) or (c)), this Court should also take this opportunity to revisit Tennessee’s “presumption of falsity” doctrine in defamation cases. Because Tennessee’s law of defamation is defined according to the common law, and because applying a presumption of falsity to allegedly defamatory statements is now recognized as unconstitutional, the common law should be clarified to reflect that the doctrine has been abrogated.

Tennessee’s “presumption of falsity” doctrine was first recognized in *Hinson*, 15 S.W.2d at 738. *See id.* (“Words which, upon their face and without the aid of extrinsic proof, are injurious, are defamatory per se; and words defamatory per se carry the presumption of falsity, of damages, and of malice, unless privileged.”) (citation omitted). Thereafter, it was reiterated in *Memphis Publishing Co.*, 569 S.W.2d at 420. *See id.* (“In libel actions the burden of proof rests upon the plaintiff to show defamation and prove damages. He need not show, however, that the statement is false. There is a legal presumption of falsity which the

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<sup>98</sup> R. at 160–61 n.4.

defendant may rebut by proving truth as a defense.”).

The Sixth Circuit called Tennessee’s presumption of falsity doctrine into doubt as a matter of First Amendment law for the first time nearly forty years ago in *Wilson*, 642 F.2d at 375–76. *See id.* (“Fairness and coherent consideration of the issue lead us to the conclusion that the party with the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault. In addition, a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. . . . **Falsity is an element of fault under the First Amendment that should be proved and not presumed.**”) (emphasis added, internal citations omitted). At least with respect to speech regarding matters of public concern, the United States Supreme Court did so, too, in *Philadelphia Newspapers, Inc.*, 475 U.S. at 777. *See id.* (“[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”). In *Milligan*, 644 F. Supp. 2d at 1033 n.9, the Middle District of Tennessee did so as well. *See id.* (noting that under Tennessee law, “[t]here is a legal presumption of falsity which the defendant may rebut by proving truth as a defense.” *Nichols*, 569 S.W.2d at 420. Since then, however, the United States Court of Appeals for the Sixth Circuit has addressed the proper allocation of the burden in defamation cases brought under Tennessee state law and found that the *Nichols* court’s allocation could have the effect of imposing defamation liability without fault . . .”).

As for Tennessee’s courts, in *Sullivan*, 678 S.W.2d at 910, this Court

seemingly dispensed with the presumption of falsity doctrine. *See id.* (“The plaintiff must . . . prove publication of a false statement to a third person . . .”). As noted above, the United States Supreme Court has also made clear that—at least with respect to speech regarding matters of concern—the doctrine is unconstitutional, *see Phila. Newspapers*, 475 U.S. at 777, and the Sixth Circuit has thoroughly explained why the doctrine can never be sustained under the First Amendment. *See Wilson*, 642 F.2d at 375–76.

Given this context, as several other courts have done in light of modern First Amendment jurisprudence,<sup>99</sup> this Court should take the

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<sup>99</sup> *See, e.g., Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 243–44 (2d Cir. 2017) (“‘At common law the majority position [was] that . . . the plaintiff must allege falsity in his complaint,’ but that, if the plaintiff so alleges, ‘the falsity of a defamatory communication is presumed’ and that ‘truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof.’ But ‘[m]any contemporary cases have announced . . . non-traditional requirements [that] are now necessary to sustain a libel claim,’ and one of the new requirements is that ‘the plaintiff must prove . . . [that] the publication was false.’ . . . Falsity is an element of defamation under contemporary New York law.”) (internal citations omitted); *Flanner v. Chase Inv. Servs. Corp.*, 600 F. App’x 914, 923 n.37 (5th Cir. 2015) (“[T]he Louisiana Supreme Court recognized that ‘the protections afforded by the First Amendment super[s]ede the common law presumptions of fault, falsity, and damages with respect to speech involving matters of public concern, at least insofar as media defendants are concerned.’ . . . Because the Louisiana Supreme Court in *Kennedy* found there is no reason to distinguish between media and non-media defendants when a matter of public concern is involved, the presumptions of falsity, malice, and injury available in the past when words were found to be defamatory *per se* no longer apply in defamation actions involving an issue of public concern . . . Flanner must prove all elements of his defamation claim without the

opportunity to make clear that—at least for speech regarding matters of public concern, which this case presents, *see* R. at 19–20—Tennessee’s presumption of falsity doctrine in defamation cases has been abrogated, because the United States Supreme Court long ago ruled it unconstitutional. *See Phila. Newspapers*, 475 U.S. at 777. *See also Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978) (“the Supreme Court of the United States has constitutionalized the law of libel”). Consequently, the Wilson County General Sessions Court’s February 13, 2020 Order dismissing the Plaintiffs’ defamation claims should be affirmed pursuant to Tennessee Code Annotated § 20-17-105(b) based on the Plaintiffs’ failure to prove falsity, rather than based on the fact that Ms. Beavers established the affirmative defense of truth under Tennessee Code Annotated § 20-17-105(c).

**E. MS. BEAVERS IS ENTITLED TO RECOVER HER APPELLATE ATTORNEY’S FEES.**

Under the TPPA, litigants who successfully petition to dismiss baseless SLAPP suits like this one are entitled to an award of attorney’s

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benefit of any presumptions.” (quoting *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 677–78 (La. 2006)); *Galatz v. Franscell, Strickland, Roberts & Lawrence*, No. 95–56289, 1996 WL 490200, at \*2 n.1 (9th Cir. Aug. 27, 1996) (“We observe that the California Court of Appeal has recently held that the common law presumption of falsity does not apply to allegedly defamatory remarks which relate to matters of public interest. . . . Thus, the burden of proof is on the plaintiff to prove falsity in cases involving matters of public interest.” (citing *Nizam–Aldine v. City of Oakland*, 54 Cal. Rptr. 2d 781, 786–88 (Cal. App. 1996) (applying *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) to non-media defendants))).

fees and costs, along with any additional relief (e.g., sanctions) necessary to deter future similar lawsuits. 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 General Sessions Court’s dismissal of the Plaintiffs’ claims, this Court should also award Ms. Beavers appellate attorney’s fees, given: (1) that she has expressly raised her entitlement to such fees in her Statement of the Issues, *cf. Killingsworth v. Ted Russell Ford, 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 Ms. Beavers won below, *see 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 affirm and remand this case to the Wilson County General Sessions Court with instructions that Ms. Beavers be awarded her appellate attorney’s fees and costs for prevailing in this appeal.

**F. THE PLAINTIFFS' CONTRARY ARGUMENTS ARE UNPERSUASIVE.**

The Plaintiffs make two contrary arguments. Each is unpersuasive.

*First*, the Plaintiffs argue that the Circuit Court had jurisdiction over the Plaintiffs' appeal, and thus, that it should not have transferred it to this Court for resolution. The Plaintiffs' argument chiefly relies on an analogy to the Tennessee Uniform Arbitration Act, TENN. CODE ANN. § 29-5-319.<sup>100</sup> Ms. Beavers is constrained to note, however, that while the TUAA similarly provides that an interlocutory appeal may be taken from certain orders as a matter of right, it is silent about which court has subject matter jurisdiction to consider such an interlocutory appeal. *See id.* By contrast, the TPPA expressly provides that a ruling on a TPPA petition “is immediately appealable as a matter of right *to the court of appeals.*” *See* TENN. CODE ANN. § 20-17-106 (emphasis added). It also specifies further that “[t]he Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals,” *see id.*, which Tennessee's circuit courts cannot apply, *see* Tenn. R. Civ. P. 1 (“the Rules of Civil Procedure shall govern procedure in the circuit . . . courts in all civil actions”).

The Plaintiffs also cite *Mitchell*, 185 S.W.3d 837, as ostensible support for their right to “elect[] to make an immediate appeal of a trial court decision to the Court of Appeals.”<sup>101</sup> Importantly, though, *Mitchell* concerned when an appeal could be taken and whether failure to take an

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<sup>100</sup> *See* Appellants' Brief at 10–12.

<sup>101</sup> *See* Appellants' Brief at 10.

interlocutory appeal resulted in waiver—not which court had jurisdiction to consider an interlocutory appeal that was timely filed. *See id.* at 839 (“The Court’s Order granting that Motion was immediately appealable by Mitchell as an appeal as of right under § 29–5–319. Mitchell failed to assert this right.”). Thus, *Mitchell* is inapposite in all material respects, and it certainly does not support the Plaintiffs’ asserted right to harass Ms. Beavers with extended litigation by restarting the same SLAPP suit anew three times across three cases. Indeed, if anything, *Mitchell* instructs that by formally adopting the position that “Appellants do not desire to appeal to the Court of Appeals under T.C.A. §20-17-106,”<sup>102</sup> the Plaintiffs have permanently waived their right to contest the propriety of the General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’ TPPA Petition at all. *Cf. Mitchell*, 185 S.W.3d at 841 (“In conclusion, Mitchell had the right to immediately appeal the issue of arbitration, but failed to file such an appeal in a timely manner, and has waived the issue of whether arbitration was appropriate.”).

Second, the Plaintiffs argue that they should be permitted to take an immediate de novo appeal of the General Sessions Court’s February 13, 2020 Order to Circuit Court under Tennessee Code Annotated § 27-5-108. As detailed above, however, interlocutory appellate review is not available in Circuit Court under Tennessee Code Annotated § 27-5-108, and the order from which the Plaintiffs have appealed is not final. *See supra*, at pp. 38–42. Accordingly, the Plaintiffs could not take an appeal under Tennessee Code Annotated § 27-5-108. As a result, Tennessee

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<sup>102</sup> *See id.* at 11.

Code Annotated § 20-17-106—which provides for interlocutory appellate jurisdiction in this Court alone—is the only statute that provides for any appellate jurisdiction over the Parties’ respective appeals.

## XI. CONCLUSION

For the foregoing reasons, the General Sessions Court’s February 13, 2020 Order granting Ms. Beavers’s Tennessee Code Annotated § 20-17-104 petition to dismiss the Plaintiffs’ claims should be **AFFIRMED**. This Court should additionally remand this matter to the Wilson County General Sessions Court with instructions to award Ms. Beavers attorney’s fees under Tennessee Code Annotated § 20-17-107(a)(1) with respect to the proceedings on appeal.

Respectfully submitted,

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**CERTIFICATE OF ELECTRONIC FILING COMPLIANCE**

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III–XI) contains 14,067 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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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of November, 2020, a copy of the foregoing was served via the Court's electronic filing system upon:

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