

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

KEDALO CONSTRUCTION, §
LLC, and RANDY WHETSELL, §

Plaintiffs-Appellees, §

v. §

LINDA DUYGUL WARD and §
CALEDONIA FOREST, LLC, §

Defendants-Appellants. §

Case No.: M2024-00224-COA-R3-CV

Montgomery County Circuit Court

Case No. 22-CV-1380

PRINCIPAL BRIEF OF APPELLANTS

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Date: July 13, 2024

ORAL ARGUMENT REQUESTED

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by denying the Defendants' Tennessee Public Participation Act (TPPA) Petition on the ground that the Defendants "have not met their burden" under Tenn. Code Ann. § 20-17-105(a) when the Defendants were sued, at minimum, for speech about a "service in the marketplace" within the meaning of Tenn. Code Ann. § 20-17-103(6)(E) and when the Plaintiffs did not contest that the Defendants had met their burden under Tenn. Code Ann. § 20-17-105(a).

2. Whether the Plaintiffs waived any claim that the Defendants did not meet their burden under Tenn. Code Ann. § 20-17-105(a) when the Plaintiffs failed to raise any argument on the matter and did not respond to the Defendants' argument the Plaintiffs' legal action was "based on, relates, to or is in response to" the Defendants' exercise of the right of free speech within the meaning of the TPPA.

3. Whether the trial court violated the principle of party presentation by ruling against the Defendants based on an argument the Plaintiffs never made.

4. Whether the trial court's order denying the Defendants' TPPA Petition should be reversed because it contains insufficient findings.

5. Whether this case should be reassigned to a different judge on remand or remanded with instructions to adjudicate all remaining issues regarding the Defendants' TPPA Petition within thirty days.

6. Whether the trial court erred by considering Linda Ward's entire deposition transcript.

7. Whether the Defendants have a right to recover their appellate attorney's fees and costs if they prevail on remand.

IV. STANDARDS OF REVIEW

1. “The TPPA requires petitioners to make ‘a prima facie case’ that the statute applies.” *Goldberger v. Scott*, No. M2022-01772-COA-R3-CV, 2024 WL 3339314, at *3 (Tenn. Ct. App. July 9, 2024) (quoting Tenn. Code Ann. 20-17-105(a)). “Whether a party has made a prima facie case is a question of law.” *Id.*

2. “Review of a trial court’s application of the law to the facts of a particular case is de novo, with no presumption of correctness.” *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999) (citing *Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998)). Thus, “[c]ases that involve mixed questions of law and fact are subject to de novo review.” *Id.*

3. Whether to order reassignment on remand is a matter entrusted to this Court’s “inherent power to administer the system of appeals and remand.” *Culbertson v. Culbertson*, 455 S.W.3d 107, 158 (Tenn. Ct. App. 2014) (quoting 5 Am.Jur.2d Appellate Review § 754 (2007)).

4. This Court “review[s] a trial court’s evidentiary ruling under the abuse of discretion standard.” *Pippin v. Pippin*, 277 S.W.3d 398, 403 (Tenn. Ct. App. 2008). “An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011).

V. INTRODUCTION

When Linda Ward’s construction contractors failed to meet agreed-upon deadlines, did shoddy work, paid themselves prematurely, went overbudget, failed to complete work for which they had been paid, overcharged her, and responded to her inquiry about missing tiles by stating that “you guys aren’t my fucking problem anymore” and hanging up on her, Ms. Ward left the Plaintiffs negative online reviews. She also created a website to warn others about the Plaintiffs’ poor business practices. In response, the Plaintiffs sued Ms. Ward and her company for several speech-based tort claims in an unhidden attempt to shut her up.

Fortunately, based on the protections afforded to Ms. Ward by the Tennessee Public Participation Act, Ms. Ward and her company had an easy path to expedited dismissal of the Plaintiffs’ claims. At least, the Defendants *should have* had an easy path to expedited dismissal. Due to the trial court’s delays and its ultimate denial of the Defendants’ TPPA Petition based on an unargued point that the Plaintiffs did not even contest, though, this case has now languished for more than two years.

The trial court’s behavior is unacceptable. The basis for the trial court’s ruling—which was not accompanied by any findings that would enable this Court to review its reasoning—is so obviously wrong that it raises real doubts about whether the trial court is even paying attention. Worse: ruling against the Defendants based on a waived, unargued claim violated party-presentation rules and turned the litigation process into a “sham.” Combining those failures with the trial court’s long, unexplained delays in adjudicating this case, this Court should not only reverse; it should also remand with instructions that this case be reassigned.

VI. STATEMENT OF THE CASE

On July 14, 2022, Plaintiffs Kedalo Construction and Randy Whetsell sued Linda Ward and her company, Caledonia Forest, LLC, for a host of speech-based tort claims.¹ The Defendants responded with a Tennessee Public Participation Act (TPPA) Petition to dismiss the Plaintiffs' Complaint.² In response, the Plaintiffs amended their complaint, thereby restarting the litigation.³ The Plaintiffs also moved the trial court to enter a speech-based prior restraint ordering the Defendants not to make certain critical statements about the Plaintiffs and compelling Ms. Ward to take down her critical website.⁴

Once again, Ms. Ward and her company petitioned to dismiss the Plaintiffs' Amended Complaint under the Tennessee Public Participation Act.⁵ Also again, the Plaintiffs sought to delay adjudication of the Defendants' TPPA Petition, this time by moving for discovery.⁶

The Parties then came before the trial court for hearing to argue their respective motions on December 16, 2022.⁷ The trial court then took the matter under advisement while stating: "I understand there is some potential time sensitivity on this, and I've got time in the next few days to get something out for y'all on this."⁸

¹ R. (Vol. 1) at 1–8.

² *Id.* at 13–120.

³ *Id.* at 124–38.

⁴ R. (Vol. 2) at 139–207.

⁵ *Id.* at 284–362.

⁶ *Id.* at 263–69.

⁷ R. (Vol. 5) at 552–623.

⁸ *Id.* at 623:2–5.

Nearly eight months later—on August 1, 2023—the trial court ordered that the Plaintiffs could depose Ms. Ward and that “Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint and Tenn. Code Ann. § 20-17-104(a) Petition to Dismiss Plaintiffs’ Amended Complaint Pursuant to the Tennessee Public Participation Act should [be] reset on the court’s docket following completion of [Ms. Ward’s] deposition[.]”⁹ The Plaintiffs then deposed Ms. Ward on September 21, 2023.¹⁰ Afterward, the Parties returned to the trial court on November 3, 2023 for a final hearing on the Defendants’ long-outstanding TPPA Petition.¹¹

On February 7, 2024, the trial court denied the Defendants’ TPPA Petition.¹² In particular, the Court ruled that the Defendants had “not met their burden” of making a prima facie case that the Plaintiffs’ legal action was “based on, relates, to or is in response to” the Defendants’ exercise of the right of free speech within the meaning of the TPPA.¹³ That determination—which makes no sense under the circumstances of this case—was not something the Plaintiffs had even disputed.¹⁴ The trial court’s ruling on the matter also did not come with any findings that would enable anyone to understand its reasoning.¹⁵ Thus, the Defendants timely appealed as of right.¹⁶

⁹ *Id.* at 639–40.

¹⁰ R. (Vol. 7) at 755–905.

¹¹ R. (Vol. 8) at 1038-63.

¹² *Id.* at 1064–65.

¹³ *Id.* at 1064.

¹⁴ R. (Vol. 4) at 430–458.

¹⁵ R. (Vol. 8) at 1064.

¹⁶ Defendants-Appellants’ Notice of Appeal (Feb. 9, 2024).

VII. STATEMENT OF FACTS

In July 2021, Linda Ward—the owner and operator of Caledonia Forest—met with Plaintiff Randy Whetsell to discuss hiring Mr. Whetsell’s company, Kedalo Construction, to renovate her new storefront.¹⁷ The work that Ms. Ward was considering hiring the Plaintiffs to complete included “tearing down two small dry-wall partitions; removing linoleum flooring and replacing it with tile; updating electrical work; adding new light fixtures; painting the walls, ceiling, and window frames; adding a door to separate the front of the store from the back offices; and other light finishings.”¹⁸ Mr. Whetsell “assured [Ms. Ward] the requested work could easily be finished in time for [Caledonia Forest] to open by October 1, 2021.”¹⁹

After the Plaintiffs started work on Ms. Ward’s storefront renovation, “communication quickly broke down and work slowed significantly.”²⁰ Even so, Mr. Whetsell regularly promised that certain tasks would be completed by certain dates.²¹ Despite his assurances, though, “when [Ms. Ward] would visit the unit after the certain date to view the completed work, it was rarely even started, let alone completed.”²² Mr. Whetsell was not proactive in communicating with Ms. Ward about the delays, either, which she discovered herself.²³

¹⁷ R. (Vol. 2) at 217.

¹⁸ R. (Vol. 3) at 311–312, ¶ 6.

¹⁹ *Id.* at 311, ¶ 4.

²⁰ *Id.* at 312, ¶ 7.

²¹ *Id.* at 312, ¶ 8.

²² *Id.*

²³ *Id.* at 312, ¶ 9.

Concerned by the Plaintiffs' uncommunicated delays, Ms. Ward "re-inquired with Mr. Whetsell if an October 1, 2021, opening [of Caledonia Forest] was still going to be possible."²⁴ Mr. Whetsell assured her "that the project would be fully completed by October 1st."²⁵ Ms. Ward trusted Mr. Whetsell's assurance and advertised October 1, 2021 as the grand opening of her new store.²⁶ Ms. Ward spent two-thousand dollars to advertise her October 1, 2021 grand opening.²⁷

The only time Mr. Whetsell brought up delays to Ms. Ward was during "a conversation regarding the delivery of the ceiling tile," when Mr. Whetsell made "a comment about Covid-related delays for materials."²⁸ Mr. Whetsell assured Ms. Ward that those tiles would be delivered in time for the planned October 1st opening, however.²⁹ Afterward, in September 2021, Mr. Whetsell notified Ms. Ward that the renovation was complete.³⁰

When Ms. Ward then visited her store to view the Plaintiffs' work, it became clear to her that the renovation was not, in fact, complete.³¹ Instead, the space bristled with obvious unresolved issues. Among them: (1) "[b]lack paint was spilled all over the new floor tiling[;]"³² (2) "[t]he

²⁴ *Id.* at 312, ¶ 10.

²⁵ *Id.*

²⁶ *Id.* at 312, ¶ 11.

²⁷ *Id.*

²⁸ *Id.* at 312, ¶ 12.

²⁹ *Id.*

³⁰ *Id.* at 312, ¶ 13.

³¹ *Id.* at 313, ¶ 14.

³² *Id.* at 313, ¶ 15.

windows were covered in black paint splatter[;]”³³ (3) “[t]he ceiling needed at least one additional coat of black paint, as the original white paint still showed through in multiple spots[;]”³⁴ (4) “[t]he new molding was sloppily applied and already peeling in some areas[;]”³⁵ (5) grout was missing in certain areas of the floor and, “[i]n other areas of the floor, tile had not been laid in the first place[;]”³⁶ (6) the floors were uncleaned and covered “with a thick layer of dust collected from the construction work[;]”³⁷ (7) “[t]he back hallway and three back rooms were left fully unfinished with respect to the tiles, including light fixtures missing tiles as well as the ceiling[;]”³⁸ (8) “[b]lack paint was spilled in certain areas on the original linoleum flooring and not cleaned up[;]”³⁹ (9) “[t]he door separating the storefront from the back offices was measured incorrectly, leaving a significant gap that allowed customers to see into the back rooms despite the door being closed[;]”⁴⁰ and (10) tiling that had “never been approved or authorized for purchase” was “sloppily applied with large gaps between the tiles” to a pillar in the center of the store.⁴¹

Appalled at the sorry state of her store, Ms. Ward called Mr. Whetsell and expressed her shock and disappointment at the Plaintiffs’

³³ *Id.* at 313, ¶ 16.

³⁴ *Id.* at 313, ¶ 17.

³⁵ *Id.* at 313, ¶ 18.

³⁶ *Id.* at 313, ¶ 19.

³⁷ *Id.* at 313, ¶ 20.

³⁸ *Id.* at 313, ¶ 21.

³⁹ *Id.* at 313, ¶ 22.

⁴⁰ *Id.* at 313, ¶ 23.

⁴¹ *Id.* at 313, ¶ 24.

shoddy work.⁴² “In response, Mr. Whetsell sent his team back to touch up the ceiling, clean the windows of paint damage, re-apply the moldings, and add tile and grout to the missing areas.”⁴³

Based on the issues in her store—and notwithstanding Mr. Whetsell’s repeated assurances that the work would be completed on time—Mr. Ward was not able to open her store on October 1, 2023, costing her almost a month of business.⁴⁴ Mr. Whetsell acknowledged both the delays and Ms. Ward’s disappointment regarding the matter in a text message.⁴⁵ Even then, though, Mr. Whetsell was “deceitful” and made claims about attempted communications that never actually occurred.⁴⁶ Mr. Whetsell also promised that the still-unfinished work would be completed the next day, which did not occur.⁴⁷

In what was presented as attempt to rectify the situation, “Mr. Whetsell told [Ms. Ward] he would waive his builder’s fee as an attempt to apologize for the delays and poor quality, stating that he would only charge for the labor and cost of materials.”⁴⁸ When Ms. Ward received the invoice for the Plaintiffs’ work, though, it included the cost of pillar tile which had never been authorized and labor charges for time that the Plaintiffs spent fixing their own mistakes.⁴⁹

⁴² *Id.* at 313, ¶ 25.

⁴³ *Id.* at 313–14, ¶ 25.

⁴⁴ *Id.* at 356, ¶ 29.

⁴⁵ *Id.* at 354, ¶ 16.

⁴⁶ *Id.* at 355, ¶¶ 17–18.

⁴⁷ *Id.*

⁴⁸ *Id.* at 314, ¶ 27.

⁴⁹ *Id.* at 314, ¶ 28.

At first, Ms. Ward paid Mr. Whetsell through Quickbooks without issue.⁵⁰ After making one payment through Quickbooks, though, Mr. Whetsell demanded that the balance be paid by paper check.⁵¹ Ms. Ward then wrote multiple checks to Mr. Whetsell “and post-dated them such that, if cashed accordingly, the appropriate funds would be available to draw from” her bank account.⁵² Ms. Ward told Mr. Whetsell that she was post-dating the checks to be cashed one at a time.⁵³ The reason Ms. Ward post-dated her checks to Mr. Whetsell was that she was “uncomfortable writing out checks to him for the full amount despite the numerous issues [she] was having with him completing the work” and “wanted to make sure he got the work done.”⁵⁴

Rather than cashing each check on its specified date, Mr. Whetsell “waited a few weeks then cashed them all at once, causing a few to bounce.”⁵⁵ This resulted in Ms. Ward incurring bank charges due to the attempted overdraft.⁵⁶

Ms. Ward informed Mr. Whetsell about the issue with his premature check-cashing—that some had bounced because he did not cash them according to her explicit instructions—and insisted on paying with a credit card instead.⁵⁷ At that point, Mr. Whetsell “re-allowed [Ms.

⁵⁰ *Id.* at 314, ¶ 31.

⁵¹ *Id.*

⁵² *Id.* at 314, ¶ 32.

⁵³ *Id.*

⁵⁴ R. (Vol. 7) at 795:22–796:4.

⁵⁵ R. (Vol. 3) at 314, ¶ 32.

⁵⁶ *Id.*

⁵⁷ *Id.* at 315, ¶ 33.

Ward] to pay via Quickbooks[.]” and Ms. Ward “subsequently paid off the full invoice in periodic increments.”⁵⁸

Because the work was not being completed as promised and Ms. Ward still needed to open her store, Ms. Ward invested significant personal time and expense fixing the renovation work herself with the help of staff.⁵⁹ Mr. Whetsell nonetheless continued to demand full payment.⁶⁰ Mr. Whetsell and his Kedalo Construction team eventually stopped work entirely despite the renovation being incomplete.⁶¹

Months after Ms. Ward paid the Plaintiffs in full, Mr. Whetsell “sent a new invoice demanding an additional \$8,000 for the builder’s fee he had previously offered to waive as an apology[.]”⁶² That July 2022 demand came in the form of “a letter from an attorney threatening a lawsuit if [Ms. Ward] did not pay an additional \$8,222.64[.]”⁶³ Ms. Ward understandably felt scammed by this demand, given that Mr. Whetsell had specifically represented to her that he would waive his builder’s fee as an apology.⁶⁴

While paying off this additional invoice despite not owing it, Ms. Ward attempted to complete the still-unfinished renovation of her store herself. While doing so, Ms. Ward repeatedly asked Mr. Whetsell about

⁵⁸ *Id.* at 315, ¶ 33.

⁵⁹ *Id.* at 314, ¶ 29.

⁶⁰ *Id.* at 314, ¶ 30.

⁶¹ *Id.* at 314, ¶ 26.

⁶² *Id.* at 316, ¶ 42.

⁶³ *Id.* at 355, ¶¶ 20–21.

⁶⁴ *Id.* at 355, ¶ 21.

the whereabouts of missing floor tiles for which she had paid.⁶⁵ After ignoring many of Ms. Ward's inquiries, Mr. Whetsell eventually responded by sending Ms. Ward a photo of Heritage Tile—the company from which the tile was ordered—indicating that the rest of the tile was there.⁶⁶ Thus, “[b]elieving that [she] would be able to get the remaining tile, [Ms. Ward] paid the final outstanding balance on [her] account with Kedalo Construction of \$5,000.”⁶⁷

When Mr. Ward then tried to get the remaining tile from Heritage Tile, she was “informed that the tile was left in the care of Mr. Whetsell and his construction crew.”⁶⁸ Ms. Ward thus tried to contact Mr. Whetsell again by phone, but he ignored her calls.⁶⁹ When Ms. Ward then had an employee call Mr. Whetsell from the employee's own phone number, however, Mr. Whetsell answered.⁷⁰

At first, Mr. Whetsell insisted that the tile was at Heritage as previously suggested.⁷¹ After Ms. Ward informed Mr. Whetsell that Heritage Tile reported that the tile was left with the Plaintiffs, though, Mr. Whetsell responded: “‘You guys aren’t my fucking problem anymore,’ and hung up.”⁷² Thus, despite having paid the Plaintiffs in full to tile her entire store, large portions of the store were left untiled, and roughly five-

⁶⁵ *Id.* at 315, ¶ 34.

⁶⁶ *Id.*

⁶⁷ *Id.* at 352, ¶ 7.

⁶⁸ *Id.* at 315, ¶ 35.

⁶⁹ *Id.* at 315, ¶ 36.

⁷⁰ *Id.*

⁷¹ *Id.* at 315, ¶ 34.

⁷² *Id.* at 354, ¶ 10.

thousand dollars' worth of tile was neither installed nor given to Ms. Ward.⁷³

Adding insult to the injury the Plaintiffs caused Ms. Ward through their shoddy work, bad behavior, and dishonest business practices, Mr. Whetsell and three others then left *Ms. Ward's* brand-new business multiple one-star Google reviews, "tarnishing her previously-perfect five-star rating."⁷⁴ None had ever been a customer of Caledonia Forest.⁷⁵

By this point, Ms. Ward had had enough. Thus, to warn other prospective customers about Kedalo Construction and its no-good, very-bad principal, Ms. Ward wrote her own review of Kedalo Construction and Mr. Whetsell based on her terrible personal experiences with them.⁷⁶ Ms. Ward also created the website www.KedaloConstructionScam.com and "aggregate[d] the timeline of events from [her] first meeting with Mr. Whetsell throughout the entire renovation project and beyond."⁷⁷ Ms. Ward "made the website to warn others considering hiring Kedalo Construction about the poor communication and quality of work, as well as to address public concern about [her] own business based on the one-star ratings based on the hope that individuals who saw those ratings would also see the website in response and connect the timing of the rating to the timeline of events."⁷⁸

Ms. Ward "published the blog as a whole in order to stand up for

⁷³ *Id.* at 315, ¶ 37.

⁷⁴ *Id.* at 315, ¶ 38.

⁷⁵ *Id.* at 356, ¶ 30.

⁷⁶ *Id.* at 315, ¶¶ 39–40.

⁷⁷ *Id.* at 315, ¶ 40.

⁷⁸ *Id.* at 316, ¶ 41.

[her]self” and “shed light on Mr. Whetsell’s deceit to protect [her] own business.”⁷⁹ Ms. Ward also “wanted to protect any new or future businesses in the area that may fall into the same trap with Mr. Whetsell” by offering “as much information as [she] could to help others make an informed decision about whether or not to enter into business with Kedalo Construction.”⁸⁰ Everything Ms. Ward detailed on the website “was based on [her] own truthful recollection of [her] communications with Mr. Whetsell and his team, and [she] disclosed the underlying facts as [she] understood them.”⁸¹ Ms. Ward also provided photographs which “evidenc[ed] the poor quality of the Plaintiffs’ work and workmanship[.]”⁸² Having based her published statements on her own personal experience and observations—and because Ms. Ward had text messages acknowledging her concerns and photographs of the Plaintiffs’ poor work—Ms. Ward “did not have any reason to believe that any of the statements on the website were false.”⁸³

True to form, the Plaintiffs then ratcheted up their abuse by suing Ms. Ward and her company for “in excess of \$250,000.00” plus “[t]reble damages and attorney’s fees[.]”⁸⁴ The Plaintiffs’ uniformly speech-based tort claims all concern Ms. Ward’s statements about Mr. Whetsell’s and Kedalo Construction’s business practices.⁸⁵ Nor is there any dispute

⁷⁹ *Id.* at 357, ¶ 34.

⁸⁰ *Id.* at 357, ¶ 35.

⁸¹ *Id.* at 357, ¶ 36.

⁸² *Id.* at 316, ¶ 43 (citing Exhibit 1 to Declaration of Linda Ward).

⁸³ *Id.* at 358, ¶ 37.

⁸⁴ *See* R. (Vol. 1) at 1–8.

⁸⁵ *Id.* at 124–38.

among the Parties that the Plaintiffs are suing the Defendants for making statements about “[a] good, product, or service in the marketplace” within the meaning of Tenn. Code Ann. § 20-17-103(6)(E). Indeed, the Plaintiffs’ complaint itself asserts that they are suing the Defendants “for ‘disparaging the[ir] goods, services or business[.]’”⁸⁶

After the Plaintiffs amended their complaint, the Defendants petitioned anew to dismiss the Plaintiffs’ Amended Complaint under the TPPA.⁸⁷ In response, the Plaintiffs did not assert that the Defendants had not met their 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” under Tenn. Code Ann. § 20-17-105(a).⁸⁸ Instead, the Plaintiffs’ opposition focused only on whether the Plaintiffs had met their own burden at the second step of the TPPA’s review process and whether the Defendants had established valid defenses.⁸⁹

Following a discovery deposition, the Parties filed supplemental briefing. In contravention of Tenn. Code Ann. § 20-17-104(c)’s “no less than five (5) days before the hearing” rule, though, the Plaintiffs improperly attempted to introduce new evidence the night before the hearing on the Defendants’ TPPA Petition, to which the Defendants objected.⁹⁰ The Parties then appeared before the trial court for a final

⁸⁶ *Id.* at 133, ¶ 29.

⁸⁷ R. (Vol. 3) at 284–362.

⁸⁸ R. (Vol. 4) at 430–458.

⁸⁹ *Id.* at 433–458.

⁹⁰ R. (Vol. 8) at 1045:8–17.

hearing on the Defendants’ long-outstanding TPPA Petition and several contested issues related to it,⁹¹ including the Defendants’ unadjudicated objections to the admissibility of the Plaintiffs’ proposed evidence.⁹²

The hearing on the Defendants’ TPPA Petition “concluded at 9:46 a.m.” on November 3, 2023.⁹³ During the hearing, the Defendants objected to the trial court considering any evidence that was “not timely under the TPPA[,]” including any additional deposition testimony that had not been timely introduced.⁹⁴ The trial court then took the Defendants’ TPPA Petition “under advisement.”⁹⁵ Several hours *after* the hearing concluded, though—at 1:16 p.m. on November 3, 2023—the Plaintiffs filed what they called a “Notice of Filing” in support of their claims that newly included Ms. Ward’s entire deposition transcript and all exhibits to it.⁹⁶

Following another lengthy delay, the trial court finally ruled on the Defendants’ TPPA Petition, which the trial court “denied.”⁹⁷ As grounds for its ruling, the trial court stated:

Petitioner “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...” Tenn. Code Ann. § 20-17-105(a).

Based upon a review of the motion and accompanying filings, to include the transcript of the aforementioned

⁹¹ *Id.* at 1039–58.

⁹² R. (Vol. 4) at 544–48.

⁹³ R. (Vol. 8) at 1057 (“Proceedings concluded at 9:46 a.m.”).

⁹⁴ *Id.* at 1045:8–17.

⁹⁵ *Id.* at 1057:19.

⁹⁶ R. (Vol. 7–8) at 752–1035.

⁹⁷ R. (Vol. 8) at 1064.

deposition, the court is of the opinion that the motion to dismiss is not well-taken in that Defendants have not met their burden.

It is therefore ordered that Defendants' petition to dismiss should be, and is, respectfully denied.⁹⁸

The trial court's ruling "that Defendants have not met their burden" was not accompanied by any findings.⁹⁹ It also makes no sense within the context of this case, given that the Parties agreed that the Plaintiffs had sued the Defendants for their speech about, at minimum, Plaintiffs' "service in the marketplace." Thus, this timely appeal followed.

VIII. ARGUMENT

A. THE DEFENDANTS MET THEIR BURDEN OF MAKING A PRIMA FACIE CASE THAT THE PLAINTIFFS' LEGAL ACTION AGAINST THEM IS BASED ON, RELATES TO, OR IS IN RESPONSE TO THEIR EXERCISE OF THE RIGHT TO FREE SPEECH WITHIN THE MEANING OF THE TPPA.

"Courts engage in a two-step analysis to rule on a TPPA petition." *Charles v. McQueen*, No. M2021-00878-SC-R11-CV, 2024 WL 3286527, at *1 (Tenn. July 3, 2024). "First, the court determines whether the petitioner has made a prima facie case that the challenged lawsuit 'is based on, relates to, or is in response to [the petitioner's] exercise of the right to free speech, right to petition, or right of association.'" *Id.* (citing Tenn. Code Ann. § 20-17-105(a)). "If the petitioner has not made this showing, the court denies the petition." *Id.*

Here, the trial court ruled that the Defendants' TPPA Petition failed at the first step of the TPPA analysis.¹⁰⁰ That the Defendants had

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ R. (Vol. 8) at 1064.

met their initial burden under Tenn. Code Ann. § 20-17-105(a) was not even contested, though. Further, under the circumstances, the trial court's ruling makes no sense.

Beginning with the text of the TPPA, “[e]xercise of the right of free speech” is defined broadly. It means “a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution[.]” Tenn. Code Ann. § 20-17-103(3). “The TPPA does not define ‘matter of public concern’ so much as provide a list of examples, including ‘[a]ny matter deemed by a court to involve a matter of public concern.’” *Goldberger*, 2024 WL 3339314, at *4 (quoting Tenn. Code Ann. § 20-17-103(6)). Specific examples of a “matter of public concern” include:

[A]n issue related to:

- (A) Health or safety;
- (B) Environmental, economic, or community well-being;
- (C) The government;
- (D) A public official or public figure;
- (E) A good, product, or service in the marketplace;**
- (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or
- (G) Any other matter deemed by a court to involve a matter of public concern; and

Tenn. Code Ann. § 20-17-103(6) (emphasis added).

In their TPPA briefing, the Defendants observed that their speech

fell within several of these categories, even though only one was necessary.¹⁰¹ They also appended extensive admissible evidence to their TPPA Petition demonstrating both that the Defendants were sued in response to Ms. Ward’s statements about the Plaintiffs’ service in the marketplace and how those statements concerned community safety and well-being¹⁰² through Ms. Ward’s desire to “protect any new or future business in the area that may fall into the same trap” by “offer[ing] as much information as [she] could to help others make an informed decision about whether or not to enter into business with Kedalo Construction.”¹⁰³

That Ms. Ward’s statements concerned, at minimum, a “service in the marketplace” was hardly a controversial claim, either. The Plaintiffs’ entire Amended Complaint concerned the Defendants’ statements about the Plaintiffs’ service in the marketplace.¹⁰⁴ That fact also was not contested, given that the Plaintiffs’ own complaint asserted as much.¹⁰⁵ Thus, the trial court should not have struggled to adjudicate the issue, and it could have and should have determined that this action was filed in response to Ms. Ward’s speech about the Plaintiffs’ service in the marketplace—definitionally a matter of public concern under the TPPA—simply “from reading the complaint.” *Goldberger*, 2024 WL 3339314, at *6; *cf. id.* (“Mr. Scott’s communications . . . were also published over the internet and were made in connection with an issue

¹⁰¹ R. (Vol. 3) at 304.

¹⁰² *Id.* at 311–62.

¹⁰³ *Id.* at 357, ¶ 35.

¹⁰⁴ R. (Vol. 1) at 129–33.

¹⁰⁵ R. (Vol. 1) at 133, ¶ 29.

related to the regulation of franchisors, which is a matter of public concern.”); *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 668 (Tenn. Ct. App. 2021) (holding that a Yelp! review about a neurologist “was an exercise of Defendant’s right of free speech as that right is defined for purposes of the TPPA”); *Neumann v. Liles*, 369 P.3d 1117, 1126 (Or. 2016) (finding statements critical of wedding planning services were matters of public concern under Oregon’s Anti-SLAPP statute); *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1363 (1998) (holding that “the public has a well-recognized interest in knowing about the quality and contents of consumer goods” and finding that statements alleging that products were unhealthy were “matters of obvious widespread public interest”); *DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4th 562, 567 (2000), *as modified* (Jan. 25, 2000) (holding that statements comparing the quality and effectiveness of drug products were made “in connection with a public issue” for Anti-SLAPP purposes).

In their response to the Defendants’ TPPA Petition, the Plaintiffs did not dispute—or even respond to—the Defendants’ argument that they had met their initial burden under Tenn. Code Ann. § 20-17-105(a).¹⁰⁶ It is little wonder why, either, given that *the Plaintiffs themselves* pleaded that they were suing the Defendants for disparaging the “goods, services, or business of another”¹⁰⁷ At any rate, by itself,

¹⁰⁶ R. (Vol. 4) at 430–458.

¹⁰⁷ R. (Vol. 1) at 133, ¶ 29 (“Plaintiffs sue Defendants . . . for ‘[d]isparaging the goods, services or business of another by false or misleading representations of fact’”).

the Plaintiffs’ failure to dispute the Defendants’ claim that the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a) was dispositive of the issue. *See Charles*, 2024 WL 3286527, at *12 (“The parties do not dispute that McQueen satisfied this burden. The burden thus shifts to Charles to ‘establish[] a prima facie case for each essential element’ of his claims.”) (citing Tenn. Code Ann. § 20-17-105(b)).

The foregoing notwithstanding, the trial court determined without analysis that the Defendants had “not met their burden” under Tenn. Code Ann. § 20-17-105(a).¹⁰⁸ Under the circumstances presented here, though—where the issue was undisputed, where the Plaintiffs’ entire complaint concerned the Defendants’ statements about the Plaintiffs’ services in the marketplace, and where both Parties agreed about that fact—the trial court’s ruling is not only unsupportable; it is inexplicable. Thus, as in other cases, the trial court’s order that the Defendants did not meet their burden under Tenn. Code Ann. § 20-17-105(a)¹⁰⁹ should be reversed, and this action should be remanded “for further proceedings, including consideration of whether Plaintiffs met their prima facie burden and, if so, whether [the Defendants] nonetheless established a valid defense.” *Goldberger*, 2024 WL 3339314, at *7.

B. THE PLAINTIFFS WAIVED ANY CLAIM THAT THE DEFENDANTS DID NOT MEET THEIR BURDEN UNDER TENN. CODE ANN. § 20-17-105(A) BY FAILING TO RAISE ANY SUCH CLAIM IN THE TRIAL COURT.

“[I]ssues not raised in the trial court are waived.” *See Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL

¹⁰⁸ R. (Vol. 8) at 1064.

¹⁰⁹ *Id.* at 1064–65.

2972218, at *5 (Tenn. Ct. App. July 12, 2017); *see also In re A'ziya G.*, No. M2022-01282-COA-R3-PT, 2023 WL 2997968, at *8 (Tenn. Ct. App. Apr. 19, 2023) (“Issues not raised in the trial court are considered waived . . .”). Here, in response to the Defendants’ TPPA Petition, the Plaintiffs did not raise any claim that the Defendants had not met their initial burden under Tenn. Code Ann. § 20-17-105(a).¹¹⁰ Instead, the Plaintiffs’ opposition brief focused only on whether the Plaintiffs had met their own burden at the second step of the TPPA’s review process and whether the Defendants had established valid defenses.¹¹¹

Given these circumstances, the Plaintiffs waived opposition to whether the Defendants met their burden under Tenn. Code Ann. § 20-17-105(a) by failing to raise any such issue in the trial court. *See Jones*, 2017 WL 2972218, at *5. They also waived it by failing to respond to the Defendants’ argument on the matter. *See Innerimages, Inc. v. Newman*, 579 S.W.3d 29, 41, n.14 (Tenn. Ct. App. 2019) (“Because Mr. Newman failed to respond to this argument, we deem the issue waived.”); *Dominy v. Davidson Cnty. Election Comm’n*, No. M2022-00427-COA-R3-CV, 2023 WL 3729863, at *1 (Tenn. Ct. App. May 31, 2023) (“because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission’s mootness argument has been waived.”).

The Plaintiffs benefit from this waiver, of course. In particular, by agreeing that they have sued the Defendants for their speech about the Plaintiffs’ service in the marketplace, the Plaintiffs can press their own

¹¹⁰ R. (Vol. 4) at 430–458.

¹¹¹ *Id.* at 433–458.

pleaded claim that the Defendants disparaged their “goods, services, or business. . . .”¹¹² Because the Plaintiffs waived the sole issue that the trial court adjudicated, though, the trial court’s order on that unpreserved issue—which the trial court should have avoided entirely, *see State v. Bristol*, 654 S.W.3d 917, 926 (Tenn. 2022) (“Issue-preservation requirements promote efficiency and judicial economy by ‘enabl[ing] a trial court to avoid . . . error’”) (cleaned up)—must be reversed.

C. THE TRIAL COURT VIOLATED THE PRINCIPLE OF PARTY PRESENTATION BY RULING AGAINST THE DEFENDANTS BASED ON AN ARGUMENT THE PLAINTIFFS NEVER RAISED.

The principle of party presentation limits a court’s review “to the issues presented by the parties[.]” *Id.* at 924. The rule “helps preserve several fundamental values of our judicial system” and “promotes impartiality by ensuring that courts retain the passive ‘role of neutral arbiter of matters the parties present.’” *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). As the Tennessee Supreme Court has explained, the principle of party presentation

[R]ests on the premise that the parties “know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.” *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (Scalia, J., concurring in part and concurring in judgment)). In our adversarial system, the judicial role is not “to research or construct a litigant’s case or arguments for him or her,” *Sneed v. Bd. Pro. Resp. of Sup. Ct.*, 301 S.W.3d 603,

¹¹² *See, e.g., R.* (Vol. 1) at 133, ¶ 29 (“Plaintiffs sue Defendants for defamation, defamation by implication, and violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104(b) (8), for ‘[d]isparaging the goods, services or business of another by false or misleading representations of fact”).

615 (Tenn. 2010), but rather to serve as “arbiters of legal questions presented and argued by the parties before them,” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

Id. at 923–24.

“A court that transgresses the bounds of the party-framed controversy may be perceived as setting its own agenda and exercising political, rather than judicial, authority.” *Id.* at 924. Further, based on the Tennessee Supreme Court’s “clear instruction” that adherence to party-presentation rules is mandatory, a court that transgresses party-presentation rules is subject to summary reversal. *See, e.g., City of Memphis v. Edwards by & Through Edwards*, No. W2022-00087-SC-R11-CV, 2023 WL 4414598, at *3, n.3 (Tenn. July 5, 2023) (summarily reversing the Tennessee Court of Appeals when a panel majority “acted contrary to the clear instruction of our recent decision in *State v. Bristol*, 654 S.W.3d 917, 927 (Tenn. 2022).”).

Here, the trial court denied the Defendants’ TPPA Petition based on its “opinion that the motion to dismiss [was] not well-taken in that Defendants have not met their burden” under Tenn. Code Ann. § 20-17-105(a).¹¹³ As noted above, though, the Plaintiffs did not raise such a claim. Instead, the Plaintiffs argued that the “Defendants’ [TPPA] motion must be denied” at the *second* step of the TPPA analysis “because Plaintiffs have offered prima facie evidence on each element of their claims, as required by the TPPA.”¹¹⁴ The Plaintiffs’ attorneys never

¹¹³ R. (Vol. 8) at 1064.

¹¹⁴ R. (Vol. 4) at 432.

argued that the Defendants had not met their initial burden under Tenn. Code Ann. § 20-17-105(a) during either one of the hearings on the Defendants' TPPA Petition, either.¹¹⁵

Given these circumstances, the trial court “transgresse[d] the bounds of the party-framed controversy” by ruling against the Defendants based on an unargued issue that the Plaintiffs did not raise or even dispute. *Bristol*, 654 S.W.3d at 924. That approach rendered “the parties’ participation in the decision meaningless” and made the adjudicative process “a sham[.]” *Id.* (quoting Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978)). Thus, this Court should summarily reverse the trial court’s order—which was based entirely on a ground that was outside the bounds of the party-framed controversy—as “a clear abuse of the [trial] court’s discretion.” *City of Memphis*, 2023 WL 4414598, at *3.

D. THE TRIAL COURT’S ORDER SHOULD BE REVERSED FOR INSUFFICIENT FINDINGS.

Apart from its other deficiencies, the trial court’s order is inexplicable in the literal sense that it contains no factual findings and offers no explanation for its ultimate conclusion.¹¹⁶ Given the uncontested and simplistic nature of the issue involved, the Defendants also cannot hazard a guess at how the trial court arrived at its clearly wrong ruling below.

The deficient and unexplained nature of the trial court’s order alone merits reversing it. As this Court has explained, “[w]hen a trial court

¹¹⁵ R. (Vol. 5) at 556–71; R. (Vol. 8) at 1049–1054.

¹¹⁶ R. (Vol. 8) at 1064.

does not explain the basis of its ruling, we are hampered in performing our reviewing function, and we may remand the case with instructions to make requisite findings of fact and conclusions of law and enter judgment accordingly.” *Schanzenbach v. Skeen*, No. E2020-01199-COA-R3-CV, 2022 WL 3696867, at *5 (Tenn. Ct. App. Aug. 26, 2022). That is because a “trial court must include sufficient findings in its order for this Court to know how and why the court has made its decision.” *In re Samuel P.*, No. W2016-01665-COA-R3-JV, 2018 WL 1046784, at * 18 (Tenn. Ct. App. Feb. 23, 2018); *cf. Lucy v. Lucy*, No. W2020-01275-COA-R3-CV, 2021 WL 2579763, at *3 (Tenn. Ct. App. June 23, 2021) (“While there is no bright-line rule for the adequacy of a trial court’s order, ‘the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.’”); *In re S.S.-G.*, No. M2015-00055-COA-R3-PT, 2015 WL 7259499, at *12 (Tenn. Ct. App. Nov. 16, 2015) (“it is the trial court’s independent findings based on the evidence that are necessary for meaningful appellate review. While summation of the evidence may be necessary and helpful to the trial court in making its findings and conclusions, the court must go beyond mere summation by linking the evidence to its clearly stated findings of fact and conclusions of law.”).

Remanding for further findings is not always necessary when a trial court has failed to provide an adequate justification for its ruling, though. Instead, under Tenn. R. App. P. 36(a), an appellate court may “grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires[.]” *Id.*; *see also Lovlace v. Copley*, 418 S.W.3d 1, 37

(Tenn. 2013) (“The typical remedies of a remand and de novo review are not the only options available to this Court. Tennessee Rule of Appellate Procedure 36(a) authorizes appellate courts to grant ‘the relief on the law and facts to which the party is entitled or *the proceeding otherwise requires*.’ ‘This subdivision makes clear that the appellate courts are empowered to grant whatever relief an appellate proceeding requires.’”) (internal citations omitted).

Here, given the clarity of the legal issue involved, this Court should invoke its authority under Tenn. R. App. P. 36(a) and reverse the trial court’s order immediately, rather than remanding to the trial court for further findings. *See Pandey v. Shrivastava*, No. W2012-00059-COA-R3CV, 2013 WL 657799, at *5 (Tenn. Ct. App. Feb. 22, 2013) (“when a trial judge fails to make findings of fact and conclusions of law, the appellate court “may ‘soldier on’ when the case involves only a clear legal issue”). Timing considerations compel that approach, given that courts are supposed “to expediently resolve” TPPA claims to reduce the expenses associated with them. *See Nandigam Neurology*, 639 S.W.3d at 666. Based on the trial court’s lengthy delays and bizarre treatment of this case, though, this litigation is now entering its third year.

With this context in mind, this Court should not delay this case further by remanding with instructions that the trial court make adequate findings that explain its reasoning. As noted above, the trial court’s determination that the Defendants failed to meet their initial burden under Tenn. Code Ann. § 20-17-105(a) is clearly wrong under the circumstances of this case. Instead, the fact that the Defendants met their burden under Tenn. Code Ann. § 20-17-105(a) was undisputed;

opposition to the Defendants’ claim that they met their burden was waived; and the trial court’s determination to adjudicate the issue at all contravened party-presentation rules. Thus, rather than remanding for further findings, this Court should reverse the trial court’s order that the Defendants failed to meet their initial burden under Tenn. Code Ann. § 20-17-105(a) and remand with instructions to adjudicate the claims in the Defendants’ TPPA Petition that are actually in dispute.

E. THIS CASE SHOULD BE REASSIGNED ON REMAND. ALTERNATIVELY, THIS COURT SHOULD REMAND WITH EXPRESS INSTRUCTIONS TO ADJUDICATE ALL CLAIMS REGARDING THE DEFENDANTS’ TPPA PETITION WITHIN THIRTY DAYS.

This litigation has been plagued by extreme delay. The length of time it has been pending is also mostly attributable to a series of unexplained trial court delays that followed hearings where the trial court took matters under advisement. These lengthy delays—of eight months and three months, respectively—presumptively violated judicial ethics rules. *See* Tenn. Sup. Ct. R. 10, RJC 2.5(A) (requiring judges to “perform judicial . . . duties competently, promptly and diligently.”), *id.* at cmt. 5 (“A judge is required by law to promptly dispose of cases.”); Tenn. Sup. Ct. R. 11, § III(d) (“No case may be held under advisement in excess of sixty days and no motion, or other decision of the trial judge that delays the date of trial or final disposition in the trial court, shall be held under advisement for more than thirty days, absent the most compelling of reasons.”). Further, based on the trial court’s most recent ruling—which incorrectly adjudicated an issue that was not even in dispute, exceeded the bounds of the party-framed controversy, and could not “competently” have been rendered—the Defendants’ TPPA Petition,

which was first filed in 2022, likely will not be adjudicated until sometime in the year 2025.

This is not acceptable. Courts are supposed “to expediently resolve” TPPA claims, and the statute presumes that they will. *See Nandigam Neurology*, 639 S.W.3d at 666; *cf. Charles*, 2024 WL 3286527, at *1 (“The primary aim of a SLAPP is not to prevail on the merits, but rather to chill the speech of the defendant by subjecting him or her to costly and otherwise burdensome litigation. . . . Because SLAPPs threaten to interfere with the exercise of constitutionally protected rights, more than twenty states have adopted anti-SLAPP statutes to protect defendants ‘from the often punishing process of defending’ such suits.”). Thus, when a trial court refuses to adjudicate a TPPA petition promptly—not to mention when it adjudicates a TPPA petition adversely based on nonsensical, unexplained grounds that were not even presented—it does not merely frustrate litigants like the Defendants. Instead, a court that behaves that way interferes with the legislature’s exclusive policymaking role itself by participating in and exacerbating the “punishing process” that the TPPA is designed to prevent. *See id.*; *cf. Fisher v. Hargett*, 604 S.W.3d 381, 405, n.19 (Tenn. 2020) (noting “the prerogative of the Legislature . . . to make policy choices”); *Dorning v. Bailey*, No. M2004-02392-COA-R3-CV, 2006 WL 287377, at *13 (Tenn. Ct. App. Feb. 6, 2006) (“It is left to the legislative branch of government to set the policy for this state.”); *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting) (“It goes without saying that this Court does not make policy—that is for the legislature.”) (citing *Smith v. Gore*,

728 S.W.2d 738, 747 (Tenn. 1987) (quoting *Cavender v. Hewitt*, 239 S.W. 767, 768 (Tenn. 1921)); *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 350 (1968) (citations omitted)).

Under the circumstances presented here, then—which involve: (1) an eight-month delay in determining whether discovery should be allowed, followed by (2) a three-month delay in adjudicating the Defendants’ TPPA Petition erroneously on an unexplained ground that was not even raised, followed by (3) this extended appeal that was necessitated by the trial court’s inexplicable ruling at the first uncontested step of the TPPA’s analysis—the trial court has badly compromised the TPPA’s effectiveness. The trial court has also adjudicated this case in a way that rendered “the parties’ participation in the decision meaningless” and turned the adjudicative process into “a sham[.]” *Bristol*, 654 S.W.3d at 924 (cleaned up). For these reasons, reassignment on remand “is advisable to maintain the appearance of justice[.]” *Culbertson*, 455 S.W.3d at 158.

In addition to being long-delayed, procedurally improper, and bereft of explanation, the trial court’s ruling is also so obviously wrong that it raises serious questions about whether the trial court is even paying attention. That objectively reasonable concern merits reassignment, too. Thus, this Court should order reassignment under its “inherent power to administer the system of appeals and remand.” *See, e.g., Rudd v. Rudd*, No. W2011-01007-COA-R3-CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011) (“An appellate court may ... order reassignment of a case to a different judge in the exercise of the court’s inherent power to administer the system of appeals and remand.”) (quoting 5 Am.Jur.2d

Appellate Review § 754 (2007)); *Biggs v. Town of Nolensville*, No. M2021-00397-COA-R3-CV, 2022 WL 41117, at *5 (Tenn. Ct. App. Jan. 5, 2022) (“Case law reflects that this Court ‘may ... order reassignment of a case to a different judge in the exercise of the court’s inherent power to administer the system of appeals and remand.’”) (quoting *Culbertson*, 455 S.W.3d at 157).

Alternatively, this Court should remand with explicit instructions that that Judge Wallace adjudicate all outstanding claims concerning the Defendants’ TPPA Petition within no more than thirty days of this Court’s mandate issuing. Those instructions should specifically include ordering Judge Wallace to adjudicate:

1. The Parties’ evidentiary disputes—including the objections set forth in the Defendants’ December 19, 2022 *Objection to Plaintiffs’ Inadmissible Evidence* (R. 544–48) and the Defendants’ on-the-record objection to evidence that the Plaintiffs attempted to introduce the night before hearing in contravention of Tenn. Code Ann. § 20-17-104(c)’s “no less than five (5) days before the hearing” rule (R. (Vol. 8) at 1045:8–17);

2. The Parties’ dispute over whether the Plaintiffs established “a prima facie case for each essential element of the claim in the legal action” under Tenn. Code Ann. § 20-17-105(b); and

3. The Parties’ dispute over whether the Defendants established “establishe[d] a valid defense to the claims in the legal action” under Tenn. Code Ann. § 20-17-105(c), including all of the Defendants’ claims for dismissal under Rule 12.02(6).

This Court should also make clear that it will exercise its authority to enforce its mandate if the trial court does not comply.

F. THE TRIAL COURT’S ORDER THAT MS. WARD’S DEPOSITION MAY BE CONSIDERED SHOULD BE REVERSED IN PART.

Though it is not clear from the trial court’s order what specific portions of Ms. Ward’s deposition the trial court considered when adjudicating the Defendants’ TPPA Petition, the Defendants present an additional issue out of an abundance of caution and to avoid waiver: whether the trial court erred in considering the full transcript of Ms. Ward’s deposition.

The trial court’s order states that it reviewed “the transcript of [Ms. Ward’s] deposition” when adjudicating the Defendants’ TPPA Petition.¹¹⁷ That is not necessarily error, given that the Defendants introduced a portion of that transcript themselves.¹¹⁸

There is a material difference between the Defendants’ proper and timely use of a deposition excerpt and the Plaintiffs’ improper, untimely attempted use of Ms. Ward’s full deposition, though. As part of their post-discovery supplement in support of their TPPA claims, the Defendants filed an excerpt of Ms. Ward’s deposition on October 26, 2023—eight days before the Parties’ November 3, 2023 TPPA hearing.¹¹⁹ By contrast, at 1:16 p.m. CST on November 3, 2023—in other words, several hours *after the TPPA hearing ended*¹²⁰—the Plaintiffs filed a “Notice of Filing” that included Ms. Ward’s entire deposition transcript and all exhibits to it.¹²¹

¹¹⁷ R. (Vol. 8) at 1064.

¹¹⁸ R. (Vol. 5) at 641–74.

¹¹⁹ R. (Vol. 5) at 641–42; *id.* at 645–74. The filing was actually made on October 26, 2023, but the clerk stampfiled it received on October 27, 2023.

¹²⁰ R. (Vol. 8) at 1057 (“Proceedings concluded at 9:46 a.m.”).

¹²¹ R. (Vol. 7) at 752–1035.

The TPPA does not permit such post-hearing filings, given its strict requirement that materials be filed “no less than five (5) days before hearing” or earlier. *See* 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.”); *see also Nandigam Neurology, PLC*, 639 S.W.3d at 668 (affirming trial court’s exclusion of evidence because “[i]t was not until nearly a week later that Plaintiffs filed their ‘supplementary answer’ to the TPPA petition and offered an affidavit”). Thus, the full deposition transcript that the Plaintiffs illicitly attempted to introduce by filing it after the Parties’ TPPA hearing must be excluded from the trial court’s review.

This claim is not mere gamesmanship, either. Throughout Ms. Ward’s deposition, her counsel interposed dozens of objections to (among other things): poorly-formed deposition questions, improperly offered exhibits (some of which Ms. Ward had never seen), and questions that were outside the scope of the limited discovery permitted.¹²² The Parties also agreed that “[a]ll objections, except as to the form of the questions,

¹²² *See, e.g.,* R. (Vol. 7) at 775:11; *id.* at 779:20; *id.* at 782:21; *id.* at 783:5; *id.* at 784:12; *id.* at 786:16; *id.* at 788:16; *id.* 789:10; *id.* at 793:17; *id.* at 794:1; *id.* at 797:21; *id.* 793:6; *id.* at 799:5; *id.* at 802:19; *id.* at 804:1; *id.* at 805:20; *id.* at 806:8; *id.* at 807:1; *id.* at 809:11; *id.* at 812:3; *id.* at 813:19; *id.* at 814:4; *id.* at 814:23; *id.* at 816:18; *id.* at 816:25; *id.* at 819:1; *id.* at 822:6; *id.* at 822:21; *id.* at 824:7–8; *id.* at 831:6–14; *id.* at 835:16; *id.* at 842:19; *id.* at 844:15; *id.* at 844:19; *id.* at 845:17; *id.* at 845:25; *id.* at 846:17; *id.* at 849:23–24; *id.* at 873:17; *id.* at 874:4; *id.* at 874:21; *id.* at 874:2–3; *id.* at 876:12; *id.* at 878:11; *id.* at 879:18; *id.* at 881:11.

are reserved to the hearing.”¹²³ Thus, by waiting—strategically—until *after* the hearing on the Defendants’ TPPA Petition ended to file Ms. Ward’s full deposition transcript and the exhibits included in it, the Plaintiffs did not merely violate the TPPA’s timing rules; they also prevented the Defendants from litigating their deposition objections. The Defendants expressly stated their on-the-record objection to the trial court considering any evidence that was “not timely under the TPPA”—including any additional deposition testimony—during the Parties’ TPPA hearing, too.¹²⁴

For these reasons, to the extent the trial court’s order indicates that it considered Ms. Ward’s entire deposition transcript, the trial court’s order should be reversed with instructions that the trial court may consider only evidence that was introduced “no less than five (5) days before the hearing” as required by Tenn. Code Ann. § 20-17-104(c).

G. SHOULD THE DEFENDANTS PREVAIL ON REMAND, THEY HAVE A RIGHT TO RECOVER THEIR APPELLATE ATTORNEY’S FEES AND COSTS.

Prevailing TPPA petitioners have a right to recover their full expenses incurred in defending against a SLAPP suit. *See* Tenn. Code Ann. § 20-17-107(a). This includes attorney’s fees incurred on appeal. *See Nandigam Neurology, PLC*, 639 S.W.3d at 669. Thus, on remand, this Court should order that the Defendants are entitled to an award of appellate attorney’s fees if the trial court grants their TPPA Petition, given that:

¹²³ *Id.* at 760.

¹²⁴ R. (Vol. 8) at 1045:8–17.

1. The Defendants have expressly raised their entitlement to such fees in their Statement of the Issues here, *see, e.g., Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006); and

2. Prevailing in this appeal is necessary to secure the ultimate relief that the Defendants are seeking upon remand. *See, e.g., Norman v. Hous. Auth. Of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988) (“To paraphrase the acute observation of baseball great Yogi Berra, a case ain’t over till it’s over. This means that . . . counsel are entitled to compensation until all benefits obtained by the litigation are in hand.”).

Thus, if the Defendants’ TPPA Petitions are granted on remand, this Court should instruct the trial court to award the Defendants not only their attorney’s fees incurred in the trial court, but also their attorney’s fees incurred in prosecuting this appeal.

IX. CONCLUSION

For these reasons, the trial court’s ruling that the Defendants did not meet their burden under Tenn. Code Ann. § 20-17-105(a) should be reversed because it: (a) is erroneous, (b) adjudicated a waived issue, (c) violated party-presentation rules, and (d) is not supported by adequate findings. This case should also be reassigned on remand, or else, remanded with express instructions to adjudicate all outstanding claims regarding the Defendants’ TPPA Petition within no more than thirty days. And the trial court’s order that Ms. Ward’s entire deposition may be considered should be reversed.

Further, this Court should order that the Defendants have a right to recover their appellate attorney’s fees and costs should the Defendants prevail on remand.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 9,038 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 13th day of July, 2024, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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