

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

DAVID L. RICHMAN and
CHRISTINE N. BROOKS,

Plaintiffs-Appellees,

v.

JOSHUA DEBITY and
LEAH DEBITY,

Defendants-Appellants.

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Court of Appeals Case No.:
E2022-00908-COA-R3-CV

Blount County General Sessions
Court Case No.: CV-35903

**PRINCIPAL BRIEF OF DEFENDANTS-APPELLANTS
JOSHUA DEBITY AND LEAH DEBITY**

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III. STATEMENT REGARDING RECORD CITATIONS

The Appellants' brief uses the following designations:

1. Citations to the Technical Record are abbreviated as R. at [page number].
2. Citations to the March 14, 2022 Transcript of Proceedings are cited as "Tr. of Mar. 4, 2022 Hearing, [page number]:[line number]."
3. Citations to the May 13, 2022 Transcript of Proceedings are cited as "Tr. of May 13, 2022 Hearing, [page number]:[line number]."
4. Citations to the Supplemental Record are abbreviated as Supp. R. 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.

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred by adjudicating the Defendants' Tennessee Public Participation Act (TPPA) Petition based on live witness testimony taken during a post-briefing evidentiary hearing, rather than based on written materials submitted by the Parties "no less than five (5) days before the hearing" as contemplated by Tenn. Code Ann. § 20-17-104(c).

2. Whether, in response to the Defendants' TPPA Petition, the Plaintiffs "establishe[d] a prima facie case for each essential element of the claim in the legal action" under Tenn. Code Ann. § 20-17-105(b).

3. Whether the General Sessions Court erred by denying the Defendants' petition to dismiss this action pursuant to the Tennessee Public Participation Act.

4. Whether a restraining order is an injunctive remedy, rather than a cause of action.

5. Whether the Defendants are entitled to an award of attorney's fees, costs, and expenses regarding this appeal.

V. APPLICABLE STANDARDS OF REVIEW

1. Whether the Tennessee Public Participation Act contemplates adjudication based on live witness testimony, rather than based on written materials submitted by the Parties “no less than five (5) days before the hearing[,]” *see* Tenn. Code Ann. § 20-17-104(c), is a question of statutory construction that this Court reviews de novo. *See Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 657 (Tenn. Ct. App. 2021) (“this case requires us to construe the TPPA. ‘[W]hen an issue on appeal requires statutory interpretation, we review the trial court's decision de novo with no presumption of correctness.’”) (quoting *Nationwide Mut. Fire Ins. Co. v. Memphis Light, Gas and Water*, 578 S.W.3d 26, 30 (Tenn. Ct. App. 2018) (citing *Wade v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 469 S.W.3d 54, 58 (Tenn. Ct. App. 2015))).

2. Whether, in response to the Defendants’ TPPA Petition, the Plaintiffs came forward with sufficient evidence to allow their claims to reach a fact-finder is a question of law reviewable de novo. *Cf. Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992) (“Whether evidence is sufficient to warrant submission of the case to a jury is a question of law for the Court.”); *Underwood v. HCA Health Servs. of Tennessee, Inc.*, 892 S.W.2d 423, 425 (Tenn. Ct. App. 1994) (“th[is] appeal involves a question of law concerning whether the evidence is sufficient to create an issue for the jury to decide.”).

3. Whether a restraining order is an injunctive remedy, rather than a substantive claim or cause of action, is a question of law that this Court reviews de novo. *See City of Lebanon ex rel. Craighead v. Dodson*,

No. M2016-01745-COA-R3CV, 2018 WL 2027239, at *5 (Tenn. Ct. App. Apr. 30, 2018) (“Injunctive relief ... is a remedy, not an independent cause of action. . . . So a permanent injunction is available as a remedy only if an applicant prevails on the merits of a claim.”).

4. Whether a prevailing TPPA petitioner is entitled to an award of appellate attorney’s fees, costs, and expenses is a mandatory determination controlled by statute. *See Nandigam Neurology, PLC*, 639 S.W.3d at 670 (“the TPPA allows for an award of reasonable attorney’s fees incurred on appeal, provided that the court dismisses a legal action pursuant to a petition filed under this chapter and that such fees are properly requested in an appellate pleading.”).

VI. INTRODUCTION

To protect and safeguard Tennesseans’ First Amendment rights, the Tennessee Public Participation Act, codified at Tenn. Code Ann. § 20-17-101, *et seq.*, contemplates specialized procedures for adjudicating speech-based lawsuits. Here, the Trial Court correctly ruled that the Defendants met their initial burden under the TPPA.¹ That determination accordingly shifted the evidentiary burden to the Plaintiffs to establish a prima facie case “for each essential element” of their claims. *See* Tenn. Code Ann. § 20-17-105(b) (“the 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.”).

In response to the Defendants’ TPPA Petition, the Plaintiffs failed to submit any admissible evidence before the hearing on the Defendants’ Petition. As a consequence, granting the Defendants’ TPPA Petition and dismissing this action was mandatory. *See id.* Instead of granting the Defendants’ TPPA Petition, though, the Trial Court conducted an evidentiary hearing featuring live witness testimony—a procedure that the TPPA not only does not contemplate, but forbids.

Regardless of that procedural error, though, the Plaintiffs failed to establish a prima facie case for each essential element of any claim in this action. To the contrary, the Plaintiffs made clear that there is no claim being asserted in this action at all. Instead, the Plaintiffs indicated

¹ *See* Tr. of Mar. 4, 2022 Hearing at 11:3–9 (“Counsel, the Court finds that the petitioners/defendants have, in fact, in comportment with the statute, made a prima facie case showing that would require the burden to now shift to [the Plaintiffs] as far as rebutting that petition.”).

that they are seeking only a *remedy*—a restraining order—that is untethered to any substantive cause of action. For this reason, too, the Defendants’ TPPA Petition should be granted, and the Trial Court erred by denying it. Accordingly, the Trial Court’s July 6, 2022 order denying the Defendants’ TPPA Petition² should be **REVERSED**.

VII. STATEMENT OF THE CASE

On October 14, 2021, the Plaintiffs initiated this action for a “Restraining Order” against Defendants Joshua and Leah Debity.³ As grounds, the Plaintiffs alleged that the Defendants had “harassed plaintiffs [and] invaded privacy by taking pictures of [Plaintiffs]’ minor daughter (in bathing suit) [and] pictures inside open garage (from street)[.]”⁴ The Plaintiffs served process on October 16, 2021.⁵

On December 14, 2021, the Defendants timely petitioned to dismiss the Plaintiffs’ lawsuit pursuant to the Tennessee Public Participation Act.⁶ Based on the factual allegations set forth in the Plaintiffs’ warrant, which asserted that the Defendants were being sued for the facially First Amendment protected activity of “taking pictures” from the “street”⁷—and based on additional admissible evidence appended to the Defendants’ TPPA Petition—the Defendants asserted that the Plaintiffs’ civil warrant was a “legal action filed in response to a party’s exercise of the

² R. at 73.

³ *See id.* at 1.

⁴ *Id.*

⁵ *Id.* at 1 (“Date of Service: 10-16-01”).

⁶ *Id.* at 3–27.

⁷ *Id.* at 1.

right to free speech[.]”⁸ In particular, the Defendants asserted that this action was filed in response to:

(1) the Defendants seeking a legally required accommodation for their disabled son;⁹ and

(2) the Defendants taking photographs from the street,¹⁰ the purpose of which was to document selective enforcement of the HOA’s bylaws for purposes of a forthcoming legal action.¹¹

On February 25, 2022, the Plaintiffs filed a response in opposition to the Defendants’ TPPA Petition.¹² The Plaintiffs’ response—which was unsworn and did not include any exhibits—did not contain any “admissible evidence” as contemplated by Tenn. Code Ann. § 20-17-105(d).¹³ Accordingly, the Plaintiffs neither met—nor even attempted to meet—their evidentiary burden under Tenn. Code Ann. § 20-17-105(b) in advance of the hearing on the Defendants’ TPPA Petition. *See id.* (“the court shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.”).

The Plaintiffs’ response additionally clarified that their action was a “non-emergent request for a restraining order against Defendants, Joshua and Leah Debity[.]”¹⁴ rather than asserting any tort claim. Thus,

⁸ *Id.* at 8.

⁹ *See id.* at 7–9 (citing Defendants’ TPPA Exhibits, R. at 17–27).

¹⁰ R. at 1.

¹¹ *See id.* at 7.

¹² *Id.* at 28–30.

¹³ *Id.*

¹⁴ R. at 28 at ¶ 1.

because no claim or cause of action was even being *alleged*,¹⁵ it was impossible for the Plaintiffs to establish a “prima facie case for each essential element of the claim in the legal action,” *see* Tenn. Code Ann. § 20-17-105(b), because no “claim” is being asserted in this action at all.

The Trial Court held a hearing on the Defendants’ TPPA Petition on March 4, 2022.¹⁶ During that hearing, the Trial Court ruled that the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a) of making a prima facie case that the Plaintiffs’ legal action was based on, related to, or was in response to the Defendants’ exercise of the right to free speech, right to petition, or right of association.¹⁷ *Id.* In particular, the Trial Court held “that the petitioners/defendants ha[d], in fact, in comportment with the statute, made a prima facie case showing that would require the burden to now shift to [the plaintiffs’] presentation . . . as far as rebutting that petition.”¹⁸

Because the Defendants met their initial burden under the TPPA, the Plaintiffs’ failure to introduce any admissible evidence in response to the Defendants’ TPPA Petition before the scheduled hearing on it should have been the end of the matter. Instead of granting the Defendants’

¹⁵ A restraining order is not a claim or cause of action. Instead, as this Court has made clear, a restraining order is a *remedy*. *See, e.g., City of Lebanon ex rel. Craighead v. Dodson*, No. M2016-01745-COA-R3CV, 2018 WL 2027239, at *5 (Tenn. Ct. App. Apr. 30, 2018) (“Injunctive relief . . . is a remedy, not an independent cause of action. . . . So a permanent injunction is available as a remedy only if an applicant prevails on the merits of a claim.”).

¹⁶ *See generally* Tr. of Mar. 4, 2022 Hearing.

¹⁷ Tr. of Mar. 4, 2022 Hearing at 11:3–9.

¹⁸ *Id.*

TPPA Petition, though, the trial court conducted an evidentiary hearing featuring live testimony from five witnesses.¹⁹

Following the conclusion of proof at the evidentiary hearing, the Plaintiffs' counsel clarified again that no tort claim or cause of action was being asserted. Specifically, he explained: "the causes of action are not invasion of privacy and harassment. **The cause of action is a restraining order.**"²⁰ Plaintiffs' counsel also conceded that "[c]reating a photo in and of itself might be protected" by the First Amendment,²¹ which is something of an understatement. The Trial Court thereafter took the Defendants' TPPA Petition under advisement.²²

On May 13, 2022, the Parties reconvened and the Trial Court delivered its ruling. During that hearing, the Trial Court determined "that the SLAPP challenge does, in fact, fail based on the review of the proof, the reception of the proof, and the applicable case law."²³ The Trial Court's oral ruling was reduced to a written order thereafter, and a written order denying the Defendants' TPPA Petition was entered on July 6, 2022.²⁴ The Defendants timely exercised their right to appeal the Trial Court's order refusing to dismiss the Plaintiffs' legal action thereafter. *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

¹⁹ *See generally* Tr. of Mar. 4, 2022 Hearing.

²⁰ Tr. of Mar. 4, 2022 Hearing at 155:17–19 (emphasis added).

²¹ *Id.* at 160:2–4.

²² *See id.* at 166:19–167:9.

²³ Tr. of May 13, 2022 Hearing at 3:2–4.

²⁴ *See* R. at 73–81.

the court of appeals. The Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.”).

VIII. STATEMENT OF FACTS²⁵

In July 2021, Defendants Joshua and Leah Debity closed on and moved into their new home in Maryville, Tennessee.²⁶ Because their neighborhood was governed by the Vintage Villages Homeowners Association, prior to moving in, the Defendants emailed HOA board members about obtaining special accommodations for their disabled child—specifically, a wooden privacy fence for their backyard.²⁷ However, after multiple email exchanges—including descriptions of and explanations for why the Defendants needed the new wooden fence—the Defendants were only approved for a metal fence,²⁸ even though they had seen another wooden fence in the neighborhood.²⁹

Following this initial conflict, the Defendants took photos of objects in front of the Plaintiffs’ house. The Defendants asserted that they did so to document “selective enforcement of HOA rules for purposes of a

²⁵ The TPPA does not contemplate an evidentiary hearing at which live testimony is taken. Accordingly, when adjudicating the Defendants’ TPPA Petition, the only admissible evidence that can properly be considered are: (1) the exhibits to the Defendants’ TPPA Petition; (2) the statements made of the parties as party opponents; and (3) Mr. Debity’s “stipulated affidavit” affirming the authenticity of the parties’ correspondence. *See* Tr. of Mar. 4, 2022 Hearing at 8:5–6. *See also* Supp. R. at 1.

²⁶ R. at 20.

²⁷ *Id.*

²⁸ *Id.* at 23.

²⁹ *Id.* at 20.

forthcoming federal lawsuit arising from the HOA's refusal to provide reasonable accommodations for the Defendants' disabled son."³⁰ Thereafter, the Plaintiffs filed this action for a restraining order,³¹ asserting that the Defendants taking photos "from [the] street" caused the Plaintiffs to feel "harassed" and "invaded [their] privacy[.]"³² Of note, the Plaintiffs did *not* assert that the Defendants had in any way trespassed or physically infringed upon any their property when taking these photos, either in their initial filing or in their response to the Defendants' TPPA Petition.³³

After the initiation of this action, counsel for both parties conferred by telephone regarding the Plaintiffs' lawsuit, which was followed by email correspondence.³⁴ In that email, Plaintiffs' counsel stated as follows:

[T]he Debitys' doctor's office (Pediatric Choice) has informed the HOA that the PA that wrote the letter to the HOA is out on maternity leave until 1/5/2022. Said PA asked for an extension until after her return to respond to our last letter. **Can you ascertain from your clients whether they want us to wait until then to take any further action, or to proceed with the information we have?**³⁵

The email confirmed that the Defendants' request for an accommodation for their disabled son and this lawsuit were inextricably connected; otherwise, there was no plausible explanation for why a letter

³⁰ *Id.* at 7.

³¹ *Id.* at 1.

³² *Id.* at 1.

³³ *See generally id.* at 1-2; *id.* at 28-30.

³⁴ *See id.* at 26.

³⁵ *See id.* (emphasis).

from the Defendants’ pediatrician would have any bearing on the Plaintiffs’ claims in this action. Thus, fueled by Plaintiffs’ counsel’s confirmation that this action was a “response to a party’s exercise of the right of free speech,” *see* Tenn. Code Ann. § 20-17-104(a)—specifically, a response to the Defendants’ demanding a disability accommodation for their disabled son—and because this action was also facially a response to the Defendants’ exercising their right of free speech by taking photographs “from [the] street”³⁶—the Defendants filed a petition to dismiss this action pursuant to Tenn. Code Ann. § 20-17-104(a).

IX. ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANTS’ TPPA PETITION BASED ON THE PLAINTIFFS’ FAILURE TO INTRODUCE ANY ADMISSIBLE EVIDENCE IN RESPONSE TO IT.

The TPPA requires that admissible evidence in opposition to a TPPA petition be submitted five days (or earlier) before hearing. *See* Tenn. Code Ann. § 20-17-104(c); *see* Tenn. Code Ann. § 20-17-105(d). In furtherance of the statute’s goal of expediting litigation and reducing expense, the TPPA also presumptively forbids discovery from being taken before a TPPA Petition is adjudicated. *See* Tenn. Code Ann. § 20-17-104(d).

Here, the Trial Court correctly determined that the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a) of demonstrating that the Plaintiffs’ lawsuit was based on, related to, or was filed in response to the Defendants’ exercise of their right of free speech. *See id.* (“The petitioning party has the burden of making a prima

³⁶ *Id.* at 1.

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.”). *See also* Tr. of Mar. 4, 2022 Hearing at 11:3–9 (“the Court finds that the petitioners/defendants have, in fact, in comportment with the statute, made a prima facie case showing that would require the burden to now shift to [the Plaintiffs] as far as rebutting that petition.”). After the Defendants met their initial burden, though, the Plaintiffs failed to meet—or even attempt to meet—their evidentiary burden in their response. *See* Tenn. Code Ann. § 20-17-105(b) (“If the petitioning party meets this burden, the 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.”). *See also* R. at 28–30 (Plaintiffs’ response to the Defendants’ TPPA Petition, which contains no admissible evidence).

Given the foregoing, the Trial Court erred by failing to grant the Defendants’ Petition when the Plaintiffs failed to meet their evidentiary burden in response to it before the hearing on the Defendants’ TPPA Petition. By the same token, an evidentiary hearing featuring live witness testimony instead is not a procedure contemplated by the TPPA, and the Trial Court’s erred by conducting one. For both reasons, the Trial Court’s order denying the Defendants’ TPPA Petition should be reversed.

1. Statutory Procedure for Adjudicating TPPA Petitions

When a defendant is sued for activity protected by the First Amendment, the TPPA establishes a specialized procedure to expedite review of and (when appropriate) secure dismissal of the claim. *First*, Tenn. Code Ann. § 20-17-105(a) provides that “[t]he 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.” *Id.* Such a petition must be filed promptly and presumptively within sixty days of service. *See* Tenn. Code Ann. § 20-17-104(b). Second, if the petitioning party meets their initial burden under Tenn. Code Ann. § 20-17-105(a), “the 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.” *See* Tenn. Code Ann. § 20-17-105(b).

The manner in which evidence is presented in support of and in response to a TPPA Petition is similarly governed by statute. Specifically, when adjudicating a TPPA petition, “[t]he court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.” *See* Tenn. Code Ann. § 20-17-105(d). Further, pursuant to 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 id.* (emphasis added).

Given the foregoing, a live evidentiary hearing on a TPPA Petition is not contemplated. Instead, the TPPA contemplates that written materials containing admissible evidence will be submitted at least five days before hearing. *See* Tenn. Code Ann. § 20-17-105(d); Tenn. Code

Ann. § 20-17-104(c). *See also Reiss v. Rock Creek Construction, Inc.*, No. E2021-01513-COA-R3-CV, 2022 WL 16559447, at *9 (Tenn. Ct. App. Nov. 1, 2022) (“Pursuant to the time limitations prescribed in Tennessee Code Annotated § 20-17-104, Rock Creek was required to file a response to the motion ‘no less than five (5) days before the hearing.’ Rock Creek never filed such a response.”). Further, all discovery in the action—including, but not limited to, live deposition testimony—is presumptively stayed until a petitioner’s TPPA Petition has been adjudicated. *See* Tenn. Code Ann. § 20-17-104(d) (“All discovery in the legal action is stayed upon the filing of a petition under this section. The stay of discovery remains in effect until the entry of an order ruling on the petition. The court may allow specified and limited discovery relevant to the petition upon a showing of good cause.”).

2. The Plaintiffs failed to meet their evidentiary burden in response to the Defendants’ TPPA Petition.

Upon review of the Defendants’ TPPA Petition, the trial court correctly determined that the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a) of demonstrating that the Plaintiffs’ legal action “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.” *See id.* *See also* Tr. of Mar. 4, 2022 Hearing at 11:3–9 (“Counsel, the Court finds that the petitioners/defendants have, in fact, in comportment with the statute, made a prima facie case showing that would require the burden to now shift to [the Plaintiffs] as far as rebutting that petition.”). Given that the Plaintiffs’ lawsuit was facially premised upon photography taken from the “street,” *see* R. at 1—activity that the Defendants

observed was widely recognized as being within the First Amendment’s protection, *see* R. at 10–12—and given additional admissible evidence indicating that the Plaintiffs’ lawsuit was a direct response to the Defendants demanding a disability accommodation for their disabled son, *see generally* R. at 6–7 (citing Defendants’ TPPA Exhibits, R. at 17–27)—this initial ruling was correct.

Given the Trial Court’s ruling that the Defendants met their initial burden under Tenn. Code Ann. § 20-17-105(a), the burden shifted to the Plaintiffs to establish a *prima facie* case for each essential element of their claims. *See* Tenn. Code Ann. § 20-17-105(b) (“the 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.”). As noted above, that burden must also be met by filing admissible evidence in response to a TPPA Petition at least five days before hearing. *See* Tenn. Code Ann. § 20-17-105(d); Tenn. Code Ann. § 20-17-104(c).

In their three-page response to the Defendants’ TPPA Petition, though, the Plaintiffs did not submit any admissible evidence.³⁷ Instead, the Plaintiffs responded by making various unsworn factual claims through counsel, and they filed no exhibits.³⁸ Thus, the Plaintiffs offered no admissible evidence in response to the Defendants’ TPPA Petition.³⁹

³⁷ *See* R at 28–30.

³⁸ *See id.*

³⁹ Definitionally, “the statements of counsel . . . are not evidence.” *See In re Estate of Dunlap*, No. W2009-00794-COA-R3-CV, 2010 WL 681352, at *3 (Tenn. Ct. App. Feb. 26, 2010) (collecting cases), *no app. filed*. Further, unsworn out-of-court statements are admissible as evidence on multiple

Pursuant to Tenn. Code Ann. § 20-17-105(b), that should have ended the matter, and this action should have been dismissed. *Id.* (“the 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.”).

B. THE TRIAL COURT ERRED TAKING LIVE TESTIMONY AFTER THE CONCLUSION OF BRIEFING.

In lieu of adjudicating the Defendants’ TPPA Petition based on the admissible evidence submitted five days before hearing, *see* Tenn. Code Ann. § 20-17-104(c), Tenn. Code Ann. § 20-17-105(d), the Trial Court conducted an evidentiary hearing featuring live witness testimony from multiple witnesses.⁴⁰ Such a procedure was directly contrary to the TPPA in multiple respects, and accordingly, none of the evidence taken during that hearing should be considered.

First, allowing evidence to be taken during a TPPA hearing is contrary to the TPPA’s notice provision. *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.”) (emphasis added). *See also Nandigam Neurology, PLC*, 639 S.W.3d at 668 (holding that by filing an untimely response to a TPPA petition—even one that contained admissible evidence—a plaintiff had “essentially failed to respond to Defendant’s TPPA petition at all.”). Such an approach renders the notice guaranteed

grounds. *See, e.g.,* Tenn. R. Evid. 603 (requiring oath or affirmation); Tenn. R. Evid. 802 (generally prohibiting hearsay).

⁴⁰ *See* Tr. of Mar. 4, 2022 Hearing.

by Tenn. Code Ann. § 20-17-104(c)'s five-day notice requirement meaningless. If approved, it would also encourage plaintiffs to present surprise evidence on the day of hearing that a TPPA Petitioner cannot prepare to address in advance.

Second, allowing live testimony to be offered in support of a response to a TPPA Petition is contrary to the TPPA's evidentiary provisions. See Tenn. Code Ann. § 20-17-105(d) ("The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties."). Simply stated: the TPPA contemplates that written materials will be filed and served far enough in advance of hearing that the Parties can be prepared to address them, *see id.*, and live testimony on the day of hearing does not qualify.

Third, as a practical matter, allowing a plaintiff to respond to a TPPA Petition by subpoenaing witnesses to give testimony at a TPPA hearing is tantamount to permitting deposition discovery without a showing of good cause. The TPPA forbids that as well. See Tenn. Code Ann. § 20-17-104(d) ("All discovery in the legal action is stayed upon the filing of a petition under this section. The stay of discovery remains in effect until the entry of an order ruling on the petition. The court may allow specified and limited discovery relevant to the petition upon a showing of good cause.").

For all of these reasons, the Trial Court erred by adjudicating the Defendants' TPPA Petition based on live testimony taken during an evidentiary hearing after the conclusion of briefing. Accordingly, when this Court adjudicates the Defendants' TPPA Petition, no evidence taken

during the Parties' evidentiary hearing should be considered.

Because the Plaintiffs' response to the Defendants' TPPA Petition contained no admissible evidence for the Trial Court to consider, the Plaintiffs "essentially failed to respond to Defendant's TPPA petition at all." *See Nandigam Neurology, PLC*, 639 S.W.3d at 668. Accordingly, with no timely and admissible evidence from the Plaintiffs available to consider, the Defendants' TPPA Petition should be granted, and the Trial Court's order refusing to dismiss this action should be reversed. *See* Tenn. Code Ann. § 20-17-105(b) ("the 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.").

C. EVEN IF THE LIVE TESTIMONY PRESENTED ON THE DAY OF HEARING WERE CONSIDERED, THE PLAINTIFFS STILL FAILED TO MEET THEIR EVIDENTIARY BURDEN UNDER THE TPPA.

Even if live testimony were permitted by the TPPA and could properly be considered when adjudicating the Defendants' TPPA Petition, dismissal of this action would still be appropriate, because the Plaintiffs failed to meet their evidentiary burden under Tenn. Code Ann. § 20-17-105(b) regardless. Indeed, under the circumstances of this case, no amount of evidence—no matter when it was submitted, no matter in what form it was submitted, and no matter how robust—would permit the Plaintiffs to meet their evidentiary burden and overcome the Defendants' TPPA Petition, because the Plaintiffs have made clear repeatedly that they are not asserting any cognizable claim at all.

To satisfy Tenn. Code Ann. § 20-17-105(b)'s evidentiary burden, a responding party must "establish[] a prima facie case for each essential

element of the claim in the legal action.” *Id.* Here, however, the Plaintiffs not only failed to establish a prima facie case for each element of the “the claim in the legal action” that they filed, *see id.*; instead, they indicated repeatedly that they were asserting no claim in this action at all.

From the inception of this proceeding through the evidentiary hearing on the Defendants’ TPPA Petition, the Plaintiffs have asserted that the underlying “claim” in this case is a request for a restraining order. Their civil warrant states as much. *See* R. at 1 (Civil Warrant seeking a “Restraining Order”). Their response to the Defendants’ TPPA Petition similarly states as much. *See* R. at 28 (referencing “Plaintiff’s basis for requesting a restraining order...”); R. at 29 (“[Plaintiff Richman] immediately sought legal representation and filed, through counsel, a request for non-emergent restraining order”); R. at 31 (“Plaintiffs filed a request for civil warrant restraining order”). Most significantly, though, during the evidentiary hearing conducted below, the Plaintiffs expressly stated that they were *not* asserting any tort claims, and they maintained that they were exclusively seeking “a restraining order” instead. *See* Tr. of Mar. 4, 2022 Hearing at 155:16–19 (“this is not an action based on – **the causes of action are not invasion of privacy and harassment. The cause of action here is a restraining order.**”) (emphasis added). *See also id.* at 157:21–24 (“I want to go back a little bit to this underlying claim and then what we’re here for because the petition concerns what we filed. What we filed is a restraining order.”).

For a simple reason, the Plaintiffs’ repeatedly-stated concession on the matter is dispositive of this action. In particular, as this Court has

held, a restraining order—which is a form of injunctive relief—is not a cause of action, but a remedy. See, e.g., *City of Lebanon ex rel. Craighead*, 2018 WL 2027239, at *5 (“Injunctive relief ... is a remedy, not an independent cause of action.’ So a permanent injunction is available as a remedy only if an applicant prevails on the merits of a claim.”) (internal citation omitted) (citing *Curb Records, Inc. v. McGraw*, No. M2011–02762–COA–R3–CV, 2012 WL 4377817, at *4 (Tenn. Ct. App. Sept. 25, 2012); 42 Am. Jur. 2d *Injunctions* § 11 (2018) (“For a permanent injunction to issue, the plaintiff must prevail on the merits of his or her claim and establish that equitable relief is appropriate in all other respects.”). See also *Smith Mech. Contractors, Inc. v. Premier Hotel Dev. Grp.*, 210 S.W.3d 557, 565 (Tenn. Ct. App. 2006) (“Tenn. R. Civ. P. 65 presupposes that a party will bring the request for injunctive relief and the underlying claim together. . . . Thus, when a party is seeking injunctive relief, that party should bring one action containing both the request for injunctive relief as well as the underlying cause of action.”). A phalanx of courts across the country agree.⁴¹

⁴¹ See, e.g., *Thompson v. JPMorgan Chase Bank, N.A.*, 563 F. App’x 440, 442 n.1 (6th Cir. 2014) (“**Injunctive relief is not a cause of action, it is a remedy.**”); *Kaplan v. Univ. of Louisville*, 10 F.4th 569, 587 (6th Cir. 2021) (“**Injunctive relief is not a cause of action, it is a remedy.**” (quoting *Thompson*, 563 F. App’x at 442 n. 1); *Madej v. Maiden*, 951 F.3d 364, 369 (6th. Cir. 2020), *cert. denied*, 141 S. Ct. 612, 208 L. Ed. 2d 202 (2020) (“And while they separately challenge the court’s rejection of what they call their ‘injunction’ count, **an injunction is a remedy, not a claim.** If they cannot show ‘actual success’ on their claims, they cannot obtain a permanent injunction.” (quoting *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012))); *Goryoka v. Quicken Loan, Inc.*, 519 F. App’x

926, 929 (6th Cir. 2013) (“Goryoka also argues that the district court erred in dismissing her requests to quiet title and for injunctive relief. The district court properly found that **these requests are remedies and are not separate causes of action.**”); *K.C. by & through T.C. v. Marshall Cnty. Bd. of Educ.*, 762 F. App’x 226, 233 (6th Cir. 2019) (“[A]bsent a viable claim, plaintiff cannot be entitled to **injunctive relief.**”); *KM Organic Fund, Inc. v. Smithson*, No. 3:20-CV-01016, 2020 WL 7178929 (M.D. Tenn. Dec. 7, 2020) (“In the Complaint, **Plaintiffs seek a writ of attachment and injunctive relief, which are both remedies, but set forth no underlying cause of action in this Court.**”); *Wert. v. Vanderbilt University*, No. 3:20-CV-00140, 2020 WL 5039466, at *2 (M.D. Tenn. Aug. 26, 2020) (“**A request for a preliminary injunction is not an independent cause of action;** it is a procedural device that seeks out a remedy for a cause of action. *See e.g., Goryoka*, 519 F. App’x at 929 (affirming dismissal of request for injunctive relief because it is a remedy, not a separate cause of action); *NAECIS Outreach v. Vislak*, No. 2:14-cv-00161, 2014 WL 6810781, at *3 (S.D. Ohio Dec. 3, 2014) (dismissing ‘claim’ for an injunction because it is ‘not an independent cause of action’); *Hanover Ins. Grp. V. Singles Roofing Co.*, No. 10 C 611, 2011 WL 2368328, at *8 (N.D. Ill., Jun. 21, 2012) (“ ‘[T]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held’ – it is a procedural device, not a cause of action.” (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).”) *Z.J. v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 705 n. 47 (M.D. Tenn. 2018) (“**Injunctive relief, of course, is a remedy, not a cause of action.**” (citing *Reyes v. Wilson Mem. Hosp.*, 102 F.Supp.2d 798, 801 n.1 (S.D. Ohio 1998)); *Bell v. Fed. Nat’l Mortg. Ass’n*, No. 2:16-CV-327, 2017 WL 4293225, at *5 (E.D. Tenn. Sept. 27, 2017) (“**[I]njunctive relief is a remedy rather than a cause of action and is therefore unavailable if Plaintiff cannot state a claim for relief under an appropriate legal theory.**”); *Harris v. U.S. Bank Nat’l Ass’n as Tr. for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2004-2*, No. 19-12935, 2020 WL 5819563 (E.D. Mich. Sept. 30, 2020), *aff’d*

sub nom. Harris v. US Bank Nat'l Ass'n as Tr. for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2004-2, No. 20-2005, 2021 WL 7542603 (6th Cir. Sept. 10, 2021), *cert. denied sub nom. Watkins v. U.S. Bank Nat'l Ass'n*, 142 S. Ct. 1369, 212 L. Ed. 2d 327 (2022) (“Further, as **Defendants correctly argue, Plaintiffs’ claim for injunctive relief fails because ‘an injunction is a form of remedy, not a separate cause of action.’**” (cleaned up)); *Fuller v. JPMorgan Chase Bank, N.A.*, No. 1:19-CV-482, 2019 WL 5586906, at *9 (W.D. Mich. Oct. 30, 2019) (“**[I]njunctive relief is a remedy, not a cause of action.**” (citing *Cruz v. Capital One, N.A.*, 192 F. Supp. 3d 832, 838 (E.D. Mich. 2016))); *Hamm v. Williams*, No. 1:15CV273, 2016 WL 5462959, at *8 (N.D. Ohio Sept. 29, 2016) (“The Court holds that **permanent injunction is not a cause of action, but rather an equitable remedy.**”); *MEMC Elec. Materials v. Balakrishnan*, No. 2:12-CV-344, 2012 WL 3962905, at *5 (S.D. Ohio Sept. 11, 2012) (“**An injunction, however, is a remedy, not a cause of action.**”) (citing *Hammond v. Citibank, N.A.*, No. 2:10–CV–1071, 2011 WL 4484416, at *11 (S.D. Ohio Sept. 27, 2011); *Reyes*, 102 F.Supp.2d at 801 n. 1 (noting that claim for injunction “does not constitute a separate legal claim for relief”)); *Hopper v. New Buffalo Corp.*, No. 4:12-CV-00100-CRS, 2016 WL 3040682, at *3 (W.D. Ky. May 25, 2016), *aff’d*, 664 F. App’x 530 (6th Cir. 2016) (“**Injunctive relief is not a cause of action, it is a remedy.**” *Thompson, N.A.*, 563 Fed.Appx. at 442 n.1. A claim for injunctive relief is a misnomer and appropriately pleaded as relief for a particular claim.” (internal quotations omitted)); *Pasha v. Payton*, No. CV 5:18-595-DCR, 2019 WL 6341638 (E.D. Ky. Nov. 27, 2019) (“**An injunction is a form of relief, a remedy, which must be based upon a valid claim.**”) (quoting *Smith v. Thompson*, 638 F. Supp. 2d 754, 756 (E.D. Ky. 2009)); *Milligan v. GEICO Gen. Ins. Co.*, No. 20-3726-CV, 2022 WL 433289, at *6 (2d Cir. 2022) (“[A] request for injunctive relief is not a separate cause of action.... [R]ather, the injunction is merely the remedy sought for the legal wrongs alleged in the ... substantive counts.”) (quoting *KM Enterprises, Inc. v. McDonald*, No. 11-CV-5098, 2012 WL 4472010, at *20 (E.D.N.Y. Sept. 25, 2012), *aff’d*, 518 F. App’x 12 (2d Cir. 2013)); *Birdman*

v. Off. Of the Governor, 677 F.3d 167, 172, 109 A.F.T.R.2d 2012-1741 (3d Cir. 2012) (“**[A]n injunction is a remedy, not a cause of action, and [] plaintiffs must have a cause of action to seek a remedy[.]**”); *Blankenship v. Consolidation Coal Co.*, 850 F.3d 630, 640 (4th Cir. 2017) (“**Injunctive relief is a remedy, not a cause of action.**”); *Crook v. Galaviz*, 616 F. App’x 747, 753 (5th Cir. 2015) (“[A]n injunction is a remedy that must be supported by an underlying cause of action[.]”); *Knutson v. City of Lakemoor*, 932 F.3d 572, 576 n. 4 (7th Cir. 2019) (“**With respect to injunctive relief, that is a remedy, not a cause of action, and thus should not be pleaded as a separate count.**” (citation omitted)); *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (“**[A]n injunction is technically a remedy rather than a cause of action[.]**”); *Romstad v. City of Colorado Springs*, 650 F. App’x 576, 585 n. 7 (10th Cir. 2016) (“**An injunction is not an independent cause of action; it is a ‘remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed’—if the plaintiff’s rights have not been violated, he is not entitled to any relief, injunctive or otherwise.**”) (quoting *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir. 2005)); *Halpern v. PeriTec Biosciences, Ltd.*, 383 F. App’x 943, 948 (Fed. Cir. 2010) (“**[A]n injunction is an equitable remedy for a violation of a right, and any injunction therefore must be predicated on a viable cause of action.**” (citation omitted); *Isaacs v. Trustees of Dartmouth Coll.*, No. 17-CV-040-LM, 2017 WL 4857433, at *13 (D.N.H. Oct. 24, 2017) (“**Injunctive relief is not a cause of action; it is a remedy.**”); *Loder v. Maine Intel. Analysis Ctr.*, No. 2:20-CV-00157-JDL, 2021 WL 816470, at *9 (D. Me. Mar. 3, 2021) (“[A] nebulous separate claim for injunctive relief cannot stand.”); *Philips Med. Sys. Puerto Rico, Inc. v. Alpha Biomedical & Diagnostic Corp.*, 2020 WL 7029014, at *10 (D.P.R. Nov. 30, 2020) (“**Preliminary and permanent injunctions are remedies; neither constitutes ‘a standalone cause of action.’**” (quoting *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 197 (D.R.I. 2016)); *Louisiana Crisis Assistance Ctr. V. Marzano-Lesnevich*, 878 F. Supp. 2d 662 (E.D. La. 2012) (collecting extensive cases); *Firehole River Cap., LLC*

v. Supurva Healthcare Grp., Inc., No. 2:21-CV-00153-DBB, 2021 WL 4291087, at *7 (D. Utah Sept. 21, 2021) (“**Injunctive relief is available as a remedy only where a party prevails on a separate legal theory.**”); *Scott v. Wells Fargo Bank, N.A.*, No. CIV. 10-3368 MJD/SER, 2011 WL 3837077, at *11 (D. Minn. Aug. 29, 2011) (“**Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.**” (citation omitted)); *Archundia v. Chase Home Fin. LLC*, No. 09-CV-00960-H AJB, 2009 WL 1796295, at *7 (S.D. Cal. June 23, 2009) (“[A]n injunction is merely a remedy and is not a cause of action. *Shamsian v. Atl. Richfield Co.*, 107 Cal.App.4th 967, 984–85, 132 Cal.Rptr.2d 635 (2003). **A cause of action must exist before injunctive relief may be granted.**”); *Transatlantic, LLC v. Humana, Inc.*, No. 8:13-CV-1925-T-17TBM, 2014 WL 5039667, at *9 (M.D. Fla. Sept. 30, 2014) (“**An injunction is not a cause of action, but rather a remedy.**”); *Gulamhussein v. Bank of Am.*, No. 2:10-CV-01906-RLH, 2011 WL 1431659, at *3 (D. Nev. Apr. 14, 2011) (“An injunction is a remedy, not a cause of action.”); *Chancellor v. OneWest Bank*, No. C 12-01068 LB, 2012 WL 1868750, at *17 (N.D. Cal. May 22, 2012) (“[I]njunctions are a remedy, not a cause of action.”) (citing *Marlin v. Aimco Venezia, LLC*, 154 Cal.App.4th 154, 162, 64 Cal.Rptr.3d 488 (2007) (‘A “cause of action” must be distinguished from the remedy sought.... [T]he relief is not to be confounded with the cause of action, one not being determinative of the other. **An injunction is a remedy, not a cause of action.**’ (citations omitted))); *Obi v. Chase Home Fin., LLC*, No. 11-CV-3993, 2012 WL 1802450, at *4 (N.D. Ill. May 15, 2012) (“‘[Plaintiff], however, fails to state a claim merely by stating that he is entitled to injunctive relief. **An injunction is a remedy, not a cause of action.**’” (quoting *Noah v. Enesco Corp.*, 911 F.Supp. 305, 307 (N.D.Ill.1995))); *Affiliated Foods Midwest Coop, Inc. v. Supervalu Inc.*, No. 8:16CV465, 2017 WL 2222916, at *2 (D. Neb. May 19, 2017) (“It is well-settled that, ‘[N]o independent cause of action for injunction exists.’” (quoting *Plan Pros, Inc. v. Zych*, No. 8:08CV125, 2009 WL 928867, at *2 (D. Neb. Mar. 31, 2009))); *Whitfield v. Am. Fed’n of Gov’t Emps.*, No. 5:18-CV-00229-KGB,

Without an “underlying claim,” though—which is missing in this case and has been from its inception—injunctive relief is not available. *See City of Lebanon ex rel. Craighead*, 2018 WL 2027239, at *5. As this Court has explained:

“Injunctive relief ... is a remedy, not an independent cause of action.” *Henke v. ARCO Midcon, LLC*, 750 F. Supp. 2d 1052, 1059–60 (E.D. Mo. 2010). So **a permanent injunction is available as a remedy only if an applicant prevails on the merits of a claim.** *Curb Records, Inc. v. McGraw*, No.

2020 WL 1310547, at *9 (E.D. Ark. Mar. 18, 2020) (“**An injunction is a remedy, not a separate cause of action.**”) (citation omitted); *Henke*, 750 F. Supp. 2d at 1059-60 (“**Injunctive relief, however, is a remedy, not an independent cause of action.**”) (citation omitted); *Vance v. Amazon.com Inc.*, 525 F. Supp. 3d 1301, 1316 (W.D. Wash. 2021) (“**The court agrees with Amazon that ‘[i]njunctive relief is a remedy, not a cause of action.’**”) (quoting *Edifecs Inc. v. TIBCO Software Inc.*, No. C10-0330RSM, 2011 WL 1045645, at *3 (W.D. Wash. 2011)); *Pierson v. Orlando Reg’l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1288 (M.D. Fla. 2009), *aff’d*, 451 F. App’x 862 (11th Cir. 2012) (“**This count fails for a more fundamental reason: an injunction is not a cause of action but a remedy.**”) (collecting cases); *Payrovi v. Wells Fargo Bank, NA*, No. 4:17-CV-02480, 2017 WL 4950066, at *3 (S.D. Tex. Oct. 31, 2017) (“**injunctive relief without a cause of action supporting entry of a judgment must be dismissed.**”) (citing *Barcenas v. Fed. Home Loan Mortg. Corp.*, No. CIV.A. H–12–2466, 2013 WL 286250, at *9 (S.D. Tex. Jan. 24, 2013) (collecting cases); *Moore v. John Deere Health Plan, Inc.*, No. 3:07-CV-484, 2010 WL 908924, at *20 (E.D. Tenn. Mar. 11, 2010), *aff’d sub nom. Moore v. John Deere Health Care Plan, Inc.*, 492 F. App’x 632 (6th Cir. 2012)(The Court notes that “**injunctive relief**” is not a separate cause of action, but is instead a form of equitable relief.); *Buckman Lab’ys, Inc. v. Solenis, LLC*, No. 215CV02063JPMTMP, 2016 WL 4708257, at *5 (W.D. Tenn. May 10, 2016)).

M2011–02762–COA–R3–CV, 2012 WL 4377817, at *4 (Tenn. Ct. App. Sept. 25, 2012); *see also* 42 AM. JUR. 2D Injunctions § 11, Westlaw (database updated Feb. 2018) (“For a permanent injunction to issue, the plaintiff must prevail on the merits of his or her claim and establish that equitable relief is appropriate in all other respects.”).

Id. (emphasis added).

Here, the Plaintiffs have repeatedly represented throughout this litigation that their civil warrant is exclusively a request for a restraining order.⁴² They have also expressly disavowed asserting any actual tort claim or cause of action in this proceeding.⁴³ Accordingly, this Court should have little difficulty concluding that the Plaintiffs failed to meet their evidentiary burden of establishing “a prima facie case for each essential element” of any claim, because no actual claim is being asserted. *See* Tenn. Code Ann. § 20-17-105(b).

The Defendants’ argument on the matter is not some sort of “gotcha,” either. Instead, because the Plaintiffs appeared as though they might be asserting tort claims, the Defendants’ TPPA Petition

⁴² *See* R. at 1 (Civil Warrant seeking a “Restraining Order”); R. at 28 (“Plaintiff’s basis for requesting a restraining order...”); R. at 29 (“[Plaintiff Richman] immediately sought legal representation and filed, through counsel, a request for non-emergent restraining order”); R. at 31 (“Plaintiffs filed a request for civil warrant restraining order”).

⁴³ *See* Tr. of Mar. 4, 2022 Hearing at 155:16–19 (“this is not an action based on – **the causes of action are not invasion of privacy and harassment. The cause of action here is a restraining order.**”) (emphasis added). *See also* Tr. of Mar. 4, 2022 Hearing at 157:21–24 (“I want to go back a little bit to this underlying claim and then what we’re here for because the petition concerns what we filed. What we filed is a restraining order.”).

specifically responded to tort claims, and it asserted that the Plaintiffs had failed to state a cognizable claim for relief based on the Plaintiffs' underlying allegations.⁴⁴ When the Trial Court conducted an evidentiary hearing, the Defendants similarly addressed harassment and invasion of privacy claims and advanced arguments about why the Plaintiffs had failed to support them.⁴⁵ In response, though, the Plaintiffs expressly disavowed asserting any such tort claims, maintaining instead that “the causes of action are not invasion of privacy and harassment” and that “[t]he cause of action here is a restraining order” alone.⁴⁶

In sum: Although this action was initiated in response to protected speech, the Plaintiffs have made clear at every possible opportunity that this action is not one that asserts any actual claim or cause of action at all. As a result, there can be no (serious) dispute that the Plaintiffs failed to “establish[] a prima facie case for each essential element of the claim in the legal action” as Tenn. Code Ann. § 20-17-105(b) required, given that the Plaintiffs have not asserted any cognizable claim to begin with. As such, even if this Court determines that the live testimony permitted by the Trial Court can be considered, this action should still be dismissed,

⁴⁴ See R. at 12 (“The factual allegations in the Plaintiffs’ warrant fail to state a cognizable claim for relief as a matter of law for either harassment or invasion of the Plaintiffs’ privacy[.]”).

⁴⁵ Tr. of Mar. 4, 2022 Hearing at 147:4-6 (“Their cause of action is for – it says defendants have harassed plaintiffs and invaded privacy by those means.”).

⁴⁶ *Id.* at 155:16-19 (“this is not an action based on – the causes of action are not invasion of privacy and harassment. The cause of action here is a restraining order.”).

because the Defendants met their initial burden under the TPPA, and the Plaintiffs failed to establish each essential element of any cognizable claim in response.

D. SHOULD THE DEFENDANTS PREVAIL, THEY ARE ENTITLED TO RECOVER THEIR APPELLATE ATTORNEY’S FEES AND COSTS.

Prevailing TPPA Petitioners are entitled to recover their full expenses incurred in defending against a SLAPP suit, *see* Tenn. Code Ann. § 20-17-107(a)—including attorney’s fees incurred on appeal when they are properly requested. *See Nandigam Neurology, PLC*, 639 S.W.3d at 669 (“Defendant asserts that she is entitled to her appellate attorney’s fees because such an award is in keeping with section 20-17-107, which provides for costs and attorney’s fees when a case is dismissed under the TPPA. . . .we agree with Defendant.”). As this Court recently explained:

We are required to construe the TPPA “broadly to effectuate its purposes and intent.” Tenn. Code Ann. § 20-17-102. As discussed at length already, the TPPA is largely intended to deter SLAPP lawsuits and prevent litigants from spending thousands of dollars defending themselves in frivolous litigation. Consequently, as a matter of first impression, we conclude that the TPPA allows for an award of reasonable attorney's fees incurred on appeal, provided that the court dismisses a legal action pursuant to a petition filed under this chapter and that such fees are properly requested in an appellate pleading. *See* Tenn. Code Ann. § 20-17-107; *Killingsworth*, 205 S.W.3d at 409. Because we conclude that Plaintiffs’ legal action was properly dismissed under the TPPA, and because Defendant properly requested her appellate fees in this case, Defendant's request for attorney’s fees is well-taken. We remand this matter to the general sessions court for a determination of the proper amount of reasonable fees incurred by Defendant during this appeal.

Id. at 670.

Given the foregoing, if the Defendants prevail in this appeal, then upon remand, this Court should order that the Defendants are entitled to an award of appellate attorney's fees, given that:

1. The Defendants have expressly raised their entitlement to such fees in their Statement of the Issues in this case, *see id.*; *see also supra* at 12; *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 412 (Tenn. 2006) (“We hold that a plaintiff who establishes a violation of one or more of the provisions of the Tennessee Consumer Protection Act may be awarded reasonable attorney’s fees generated during appeal(s) of the matter. In order to be awarded such fees, a plaintiff must initially request them in his or her appellate pleadings in a timely manner.”); 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.”).

As a result, in the event that the Defendants’ TPPA Petitions are granted, this Court should instruct the Trial Court to award the Defendants not only the Defendants’ attorney’s fees incurred in the Trial Court, but also their attorney’s fees incurred in prosecuting this appeal.

X. CONCLUSION

For the foregoing reasons, the Trial Court’s judgment should be **REVERSED**. Thereafter, this Court should remand this case with instructions to:

1. Grant the Defendants’ TPPA Petitions; and

2. Award the Defendants their attorney's fees, costs, and expenses—including their attorney's fees, costs, and expenses incurred in prosecuting this appeal.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief (Sections III–X) contain 8,391 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 the 10th day of November, 2022, 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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