

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

ROBERT E. LEE FLADE,	§	
	§	
<i>Plaintiff-Appellee,</i>	§	
	§	
<i>v.</i>	§	Case No. _____
	§	
CITY OF SHELBYVILLE, <i>et al.</i> ,	§	Bedford County Circuit Court
	§	Case No.: 13837
<i>Defendants-Appellants.</i>	§	

**DEFENDANT-APPELLANT STEPHANIE ISAACS' TENN. R.
APP. P. 10(a) APPLICATION FOR EXTRAORDINARY APPEAL**

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**I. TENN. R. APP. P. 10(c)(1) STATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

This extraordinary appeal concerns the statutory stay of discovery imposed by Tenn. Code Ann. § 20-17-104(d)—a crucial provision of the Tennessee Public Participation Act (TPPA) that is designed to expedite dismissal of baseless speech-based tort claims and avoid undue expense. *See id.* (“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.”). In particular, this appeal concerns the following two questions:

1. Whether Tenn. Code Ann. § 20-17-104(d)’s statutory stay of discovery applies to “the legal action” as a whole (as Tenn. Code Ann. § 20-17-104(d) unambiguously states, *see id.*), rather than applying only to petitioning parties in the action (as the trial court held below); and

2. What factors, if any, govern a trial court’s determination that “good cause” exists to lift Tenn. Code Ann. § 20-17-104(d)’s statutory stay of discovery while a litigant’s TPPA petition is pending.

Adjudicating these questions is “necessary for complete determination of the action on appeal as otherwise provided in these rules” within the meaning of Tenn. R. App. P. 10(a). In particular, once parties have complied with a trial court’s order authorizing discovery under Tenn. Code Ann. § 20-17-104(d), the issue becomes moot and unreviewable on appeal in the normal course. Thus, this appeal presents an important issue of law that is collateral to the merits of this action and will only ever be subject to appellate review right now.

II. TENN. R. APP. P. 10(c)(2) STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF WHY AN EXTRAORDINARY APPEAL LIES

The Plaintiff, Robert E. Lee Flade, sued a host of Defendants principally over claims that he was illegally characterized as a “slum lord.” See **Ex. 1** (Pl.’s Compl.), at ¶ 9. As relevant to this appeal, several of the Plaintiff’s claims—including two criminal causes of action for “stalking and harassment,” *id.* at ¶ 13—also facially failed to state any conceivably meritorious claim upon which relief could be granted.

Defendant Stephanie Isaacs timely petitioned to dismiss the Plaintiff’s speech-based claims against her under Tenn. Code Ann. § 20-17-104(a)¹—the centerpiece of the recently enacted Tennessee Public Participation Act. See **Ex. 2** (Def. Isaacs’ TPPA Petition). Thereafter, the Plaintiff filed a response to Defendant Isaacs’ TPPA Petition, see **Ex. 3**, to which Defendant Isaacs replied, see **Ex. 4**. Thus, Defendant Isaacs’ TPPA Petition was fully briefed by the parties, and it was set for hearing on December 9, 2021.

As a result of Defendant Isaacs’ pending TPPA Petition, “all discovery” in the action was automatically stayed by statute. See Tenn. Code Ann. § 20-17-104(d). As this Court recently explained:

Once a TPPA petition is filed, “[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[,]” and “all discovery in the legal action is stayed upon the filing of a petition under” the TPPA. *Id.* § 20-17-104(c), (d).

¹ Defendant Bedford County Listening Project filed a TPPA petition as well.

Nandigam Neurology, PLC v. Beavers, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *5 (Tenn. Ct. App. June 18, 2021).

Notwithstanding Tenn. Code Ann. § 20-17-104(d)’s statutory stay of discovery, after Ms. Isaacs’ TPPA Petition was filed, the Plaintiff insisted that he was entitled to receive discovery from the Defendant City of Shelbyville regarding its unrelated motion to dismiss. *See Ex. 5*. Ms. Isaacs opposed the Plaintiff’s demands for discovery on two principal grounds. *First*, she noted that the statutory stay imposed by Tenn. Code Ann. § 20-17-104(d) prohibited any such discovery. *See Ex. 6* at 3–4. *Second*, she noted that discovery is categorically irrelevant to any party’s motion to dismiss, which must be adjudicated on the pleadings alone. *See id.* at 2–3.

At the Parties’ December 9, 2021 hearing, the trial court refused to adjudicate Ms. Isaacs’ TPPA Petition. *See Ex. 7*, p. 3 (“The Court declined to hear arguments on the merits for the remaining motions and petitions.”). Instead, the trial court deferred a ruling on Ms. Isaacs’ TPPA Petition, and it ruled that the Plaintiff could take discovery from the City of Shelbyville in the interim even though Ms. Isaacs’ unadjudicated TPPA Petition was pending. *See id.* As grounds for this ruling, the trial court specifically held:

1. That Tenn. Code Ann. § 20-17-104(d)’s discovery stay does not apply to “a non-petitioning party” in the action, *see id.* at 3, ¶ 8; and
2. That “based upon the agreement” made between the Plaintiff and the Defendant City of Shelbyville regarding discovery, *id.* at 2, ¶ 6, there was “good cause” to order discovery within the meaning of Tenn. Code Ann. § 20-17-104(d).

A transcript of the Parties’ December 9, 2021 hearing is attached to this Application for this Court’s review as **Ex. 8**. The order from that hearing—lodged today, December 14, 2021—has not yet been entered, but all Parties have agreed that the contents of the proposed order attached to this Application as **Ex. 7** are correct. *See Ex. 7* at 4–5.

III. TENN. R. APP. P. 10(c)(3) STATEMENT OF THE REASONS SUPPORTING AN EXTRAORDINARY APPEAL

In its order authorizing discovery notwithstanding Ms. Isaacs’ pending and unadjudicated TPPA Petition, the trial court did *not*:

a. Make any inquiry into whether or how discovery would or even could assist the Plaintiff in overcoming Defendant Isaacs’ TPPA Petition; or

b. Limit its order to “discovery relevant to the petition[,]” as Tenn. Code Ann. § 20-17-104(d) expressly and unambiguously requires.

Thus, the trial court’s interlocutory order authorizing discovery frustrates the entire purpose of Tenn. Code Ann. § 20-17-104(d)’s discovery stay, both by allowing other litigants to circumvent the stay by agreement and by untethering “discovery relevant to the petition” from the statute’s requirement that a litigant show “good cause” to seek it. *Id.*

To be clear: This is not what Tenn. Code Ann. § 20-17-104(d) contemplates or was designed to do. *See, e.g.,* Todd Hambidge, Robb Harvey, John Williams, Braden Boucek, Dan Haskell, *Speak Up. Tennessee’s New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, TENN. B.J., September 2019, at 14, 16 (“Upon the filing of a petition for dismissal, discovery is automatically stayed pending a ruling on the petition, unless the trial court determines that

the plaintiff has a need for specified and limited discovery in order to file an opposition. A petition based on legal grounds that do not require factual development will avoid expensive and time-consuming discover[y], which drives up litigation costs.”). Tenn. Code Ann. § 20-17-104(d)’s discovery stay expressly applies to the entire “legal action,” not just petitioning parties in the action. *Id.* Its provision that “[t]he court may allow specified and limited discovery relevant to the petition upon a showing of good cause” also is not plausibly met if the discovery sought by a plaintiff is not relevant to a pending TPPA petition and would not assist a plaintiff in overcoming it. *Id.* Further, “good cause” to take discovery is not possibly established just because another party’s counsel or other third party agrees to discovery. Such a holding undermines the entire function of Tenn. Code Ann. § 20-17-104(d)’s discovery stay and would impose significant expenses upon litigants that the General Assembly has instructed—by statute—should not have to incur them as a matter of right and public policy. *Id.* Cf. Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (2020), <https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/> (“Civil litigation is prohibitively expensive for the vast majority of Americans, roughly 40% of whom lack the means to pay even a \$400 emergency expense without going into debt. As a consequence, abusive litigants can frequently intimidate critics into silence by threatening or filing baseless SLAPP suits alleging claims like defamation, business disparagement, and any number of other speech-based torts. Understandably, when faced with the prospect of having to spend tens—if not hundreds—of thousands of dollars in legal fees to defend one’s right

to speak freely, for many people, agreeing to self-censor in exchange for avoiding or securing the dismissal of a SLAPP suit is an attractive proposition.”).

The instant case presents an especially extreme version of this scenario. The Plaintiff’s claimed need for discovery did not even purport to be relevant to Ms. Isaacs’ TPPA Petition. *See* **Ex. 5**. Because the Plaintiff asserted numerous facially non-cognizable claims such as “stalking and harassment,” *see* **Ex. 1**, ¶ 13, there is also no world in which the discovery that the Plaintiff sought would or could assist him in overcoming Ms. Isaacs’ TPPA Petition.

Instead, the Plaintiff sought discovery—and the trial court permitted it—strictly on the basis that the Plaintiff claimed to need it in order to respond to “Motions to Dismiss filed in this action[,]” *see* **Ex. 5** at 2, ¶ 10. However, Tennessee’s courts have long made clear that “[t]he resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone.” *Choate v. Choate*, No. E2020-01503-COA-R3-CV, 2021 WL 4944863, at *23 (Tenn. Ct. App. Oct. 25, 2021) (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (internal quotation marks and citations omitted)). Thus, even without Tenn. Code Ann. § 20-17-104(d)’s automatic statutory stay of discovery, ordering that discovery be provided in order to enable a plaintiff to respond to *a motion to dismiss* arguably departs so far “from the accepted and usual course of judicial proceedings” that it warrants intervention under Rule 10 by itself. *See* Tenn. R. App. P. 10(a). *See also* *State By & Through Pierotti v. Sundquist*, 1993 WL 166938, at *2, n.6 (Tenn. Ct. App. May 19, 1993)

(“Appellees filed an application for Extraordinary Appeal pursuant to Rule 10 T.R.A.P. with this Court, seeking to stay discovery, pending a determination of the motion to dismiss and/or for summary judgment. By order of this Court, discovery was stayed to allow the trial court time to rule on the motion.”), *aff’d sub nom. State By & Through Pierotti ex rel. Boone v. Sundquist*, 884 S.W.2d 438 (Tenn. 1994). *Cf. Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003) (“The very purpose of Fed. R. Civ. P. 12(b)(6) ‘is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.’”) (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.1987)).²

As far as Ms. Isaacs’ TPPA Petition was concerned, the only potentially relevant finding that the Court made in its order compelling discovery was that “the responses could result in Plaintiff amending the Complaint to clear up some of the facts, allegations, or causes of action.” *See Ex. 7* at 2, ¶ 7. This is not “good cause” within the meaning of Tenn.

² Given their comparable nature, the Tennessee Supreme Court has instructed that federal courts’ interpretation of federal rules of procedure guides the interpretation of Tennessee’s comparable rules. *See, e.g., Turner v. Turner*, 473 S.W.3d 257, 268–69 (Tenn. 2015) (“Furthermore, when interpreting our own rules of civil procedure, we consult and are guided by the interpretation that has been applied to comparable federal rules of procedure.”) (quoting *Thomas v. Oldfield*, 279 S.W.3d 259, 261–62 (Tenn. 2009), and citing *Williamson Cnty. v. Twin Lawn Dev. Co.*, 498 S.W.2d 317, 320 (Tenn.1973) (“[O]ur Rules having been taken from the Federal Rules of Civil Procedure, and the object of our virtual adoption of the federal rules being to have similar rules of procedure in state trial courts and federal district courts, it is proper that we look to the interpretation of the comparable Federal Rule.”)).

Code Ann. § 20-17-104(d), though, which functions to *prevent* such expensive and time-consuming fishing expeditions, rather than to enable them. *Cf. Nandigam Neurology, PLC*, 2021 WL 2494935, at *11, n.7 (“Plaintiffs admit to the sort of forum shopping and gamesmanship anti-SLAPP legislation seeks to prevent, inasmuch as Plaintiffs’ admitted strategy is to take as many bites at the apple as possible. As Defendant aptly notes in her principal brief, ‘the TPPA ... was designed to prevent and deter such abuse, not to enable it.’”). Extraordinary review of the trial court’s patently erroneous order—which does not respect or adhere to the terms of Tenn. Code Ann. § 20-17-104(d)—is warranted accordingly.

IV. TENN. R. APP. P. 10(c)(4) STATEMENT OF THE RELIEF SOUGHT

This Court should order the following relief:

1. On or before December 19, 2021,³ this Court should enter an order temporarily staying enforcement of the Circuit Court’s order compelling discovery until after this Application has been adjudicated;
2. This Court should thereafter hold that Tenn. Code Ann. § 20-17-104(d)’s discovery stay applies to the entire “legal action,” *see id.*, not just petitioning parties in the legal action, and that any discovery sought after a TPPA Petition has been filed must be relevant to the TPPA Petition;
3. This Court should additionally specify the standards that

³ The order at issue in this appeal provides that: “The City shall respond to Plaintiff’s First Set of Interrogatories and Requests for Production no later than **December 20, 2021**.” *See Ex. 7* at 3.

govern a finding that there is “good cause” to “allow specified and limited discovery relevant to the petition” under Tenn. Code Ann. § 20-17-104(d), and it should hold that those standards require—at minimum:

(a) That a plaintiff demonstrate with specificity how discovery will enable a plaintiff to establish a prima facie case for each speech-based tort claim asserted in the action; and

(b) That a plaintiff demonstrate with specificity how discovery will enable a plaintiff to overcome each asserted defense to liability raised in a TPPA petition.

Thereafter, this Court should vacate and reverse the Circuit Court’s order permitting any discovery to be taken until after Defendant Isaacs’ TPPA Petition to dismiss the Plaintiff’s hopelessly baseless claims is adjudicated.

V. TENN. R. APP. P. 10(c) APPENDIX OF EXHIBITS

For the Appellant’s “appendix containing copies of any order or opinion relevant to the questions presented in the application and any other parts of the record necessary for determination of the application,” *see* Tenn. R. App. P. 10(c), Ms. Isaacs has appended the following exhibits:

1. The Plaintiff’s Complaint (**Ex. 1**);
2. Defendant Isaacs’ Memorandum in Support of Her TPPA Petition (**Ex. 2**);
3. The Plaintiff’s Response to Defendant Isaacs’ TPPA Petition (**Ex. 3**);
4. Defendant Isaacs’ Reply (**Ex. 4**);
5. The Plaintiff’s Motion to Compel Discovery (**Ex. 5**);

6. Defendant Isaacs' Response in Opposition to the Plaintiff's Motion to Compel Discovery (**Ex. 6**);

7. The as-yet-unsigned order authorizing the Plaintiff to take discovery while Ms. Isaacs' TPPA petition is pending (**Ex. 7**); and

8. The transcript of the Parties' December 9, 2021 hearing (**Ex. 8**).

VI. CONCLUSION

For the foregoing reasons, Defendant-Appellant Isaacs' Rule 10 Application should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2021, a copy of the foregoing was sent via the Court's electronic filing system to the following parties or their counsel:

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