

**IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE  
AT MURFREESBORO**

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JONATHAN GILBERT,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 23CV-81200
	)	Judge B. Jo Atwood
DAYLAN LANGFORD,	)	
Defendant.	)	

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**ORDER ON DEFENDANT’S TENN. CODE ANN. § 20-17-104(a) PETITION TO  
DISMISS THE PLAINTIFF’S COMPLAINT PURSUANT TO THE TENNESSEE  
PUBLIC PARTICIPATION ACT**

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This cause came before the Court on November 29, 2023, upon Defendant’s Motion to Dismiss and Petition to Dismiss Pursuant to the Tennessee Public Participation Act (“TPPA”). Before the 9:00 a.m. docket call, the Court received notice that the Plaintiff had filed a notice and order of voluntary dismissal attempting to dismiss all of his claims against the Defendant without prejudice. At 9:00 a.m., the Court called the docket. Counsel for the Defendant was present. Counsel for the Plaintiff was not. Having received no notice that counsel for the Plaintiff was late, the Court heard from Defendant’s counsel.

Therein, the Defendant objected to the voluntary dismissal and requested the Court to rule on his TPPA petition. Specifically, the Defendant argued that his pending summary judgment motion abrogated the Plaintiff’s right to an unrestricted voluntary nonsuit under Rule 41.01(1). Additionally, the Defendant argued that his TPPA petition alone prevented the Plaintiff from taking a voluntary nonsuit.

At approximately 9:11 a.m., Plaintiff’s counsel appeared. The Plaintiff argued that the Defendant’s summary judgment motion was not proper—and filed in bad faith—

because a statement of concise material facts was not filed as specified in Rule 56.03. In the alternative, the Plaintiff requested the Court to rule on the motion for summary judgment before ruling on the TPPA petition.

The Court held its ruling in abeyance until the Tennessee Supreme Court ruled in *Flade v. City of Shelbyville* (“*Flade II*”), 699 S.W.3d 272 (Tenn. Oct. 9, 2024)—a case considering the interplay between the TPPA and Rule 41.01(1). In *Flade II*, the Tennessee Supreme Court ruled that a TPPA petition alone does not abrogate a plaintiff’s right to take a voluntary nonsuit under Rule 41.01(1). *Id.* at 302. However, the Supreme Court did not disturb the reality that a pending motion for summary judgment filed by an adverse party limits the availability of a voluntary nonsuit. *Id.* at 283, fn.14. In addition, on November 25, 2024, the Tennessee Court of Appeals in *Garramone v. Dugger, et al.*, M2023-00677-COA-R3-CV, 2024 WL 4880377 (Tenn. Ct. App. Nov. 25, 2024), held that a pending motion for summary judgment prevents a plaintiff from taking a voluntary nonsuit pursuant to Rule 41.01(1)—“with” or “without” prejudice. *Id.* at \*6-7.

In this case, the Defendant filed a motion for summary judgment on August 10, 2023, which was still pending on the day the TPPA petition was set for hearing. The Plaintiff did not respond to the summary judgment motion nor was the motion set for hearing.<sup>1</sup> The Court finds no basis to hear the summary judgment motion first. Furthermore, the Court finds the Plaintiff’s argument that the summary judgment was filed in bad faith unpersuasive. Rule 56.02 states, in relevant part, “[a] party against whom a

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<sup>1</sup> The Court notes that the Plaintiff filed a motion to strike Defendant’s motion for summary judgment on January 12, 2024. Because this motion was filed 44 days after the TPPA petition was set for hearing, the Court will not consider any arguments made in the motion. *See* Tenn. Code Ann. § 20-17-104(c) (“A response to the petition . . . may be served and filed by the opposing party no less than five (5) days before the hearing . . .”).

claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.” Rule 56.03 requires the party seeking summary judgment to provide “a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial.” However, this function is to assist the trial court. *See* Rule 56.03. Moreover, the Court has discretion to waive certain rule requirements. *See Owens v. Bristol Motor Speedway*, 77 S.W.3d 771, 774-75 (Tenn. Ct. App. Dec. 19, 2001) (citing *Butler v. Diversified Energy, Inc.*, C/A No. 03A01-9804-CV-00146, 1999 WL 76102, at \*3 (Tenn. Ct. App. Jan. 28, 1999)). Based on the foregoing, the Court finds Plaintiff’s position that he should be permitted to take a voluntary nonsuit in this circumstance to be without merit. The Court finds that the plain language of Rule 41.01(1) prohibits this Court from entering the Order of Voluntary Dismissal filed by the Plaintiff.

### **TPPA PETITION ANALYSIS**

The Court will now proceed to the merits of the Defendant’s TPPA petition. “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.’” *Charles v. McQueen*, 693 S.W.3d 262, 267 (Tenn. 2024) (quoting Tenn. Code Ann. § 20-17-105(a)). If the petitioner succeeds, the Court must dismiss the legal action unless the respondent establishes a prima facie case for each essential element of his claim. *Id.* at 267-68. If the respondent meets this burden, the court must deny the petition unless the petitioning party establishes a valid defense to the claims. *Id.* When ruling on the petition, a court may consider “supporting and opposing sworn affidavits stating admissible evidence” and “admissible evidence

presented by the parties.” *Id.* at 268 (quoting Tenn. Code Ann. § 20-17-105(d)). Importantly, a response to the petition must be filed five days before the hearing. *See Kedalo Construction, LLC v. Linda Ward*, No. M2024-00224-COA-R3-CV, 2024 WL 4892032 at \*3 (Tenn. Ct. App. Nov. 26, 2024).

The Court will first consider whether the Plaintiff’s claims were filed in response to the Defendant’s exercise of his right to free speech. The entire complaint arises from the Defendant’s actions of protesting outside the Plaintiff’s auto mechanic shop after the Defendant hired the Plaintiff to perform work on his truck. The TPPA defines the exercise of the right of free speech as “a communication made in connection with a matter of public concern . . . that falls within the protection of the United States Constitution or the Tennessee Constitution. *Id.* § 20-17-103(3). A “matter of public concern” is defined in several ways including, issues involving “[a] good, product, or service in the marketplace.” *Id.* § 20-17-103(6). Clearly, the Defendant’s communications stemmed from his poor customer experience at the Plaintiff’s auto repair shop, i.e., a service in the marketplace. The Defendant submitted ample evidence that he was sued for his speech on a matter of public concern—which the Plaintiff does not dispute. For these reasons, as well as the reasons stated in the Defendant’s Memorandum of Law in Support of his TPPA petition, the Court finds that the Defendant has met his burden under Tenn. Code Ann. § 20-17-105(a).

At step two, the burden *shifts* to the Plaintiff to establish a prima facie case for each essential element of his claims. *See Charles*, 693 S.W.3d at 267-68. Under the TPPA, the Court is required to dismiss the legal action unless the plaintiff meets their burden. *Id.* In this case, the Plaintiff did not respond to the Defendant’s TPPA petition. In addition, the

Plaintiff made no argument as to the merits of the TPPA petition at the November 29<sup>th</sup> hearing. The Court finds that the Plaintiff waived any argument. As a result, the Plaintiff has failed to establish a prima facie case for any of his claims. Therefore, the Court is mandated to dismiss the Plaintiff's legal action with prejudice. *See* Tenn. Code Ann. § 20-17-105(e). Under Tenn. Code Ann. § 20-17-107, the Defendant is awarded the mandatory court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition, which the Defendant shall quantify, file with the Court, and by motion, set for hearing on the reasonableness of the fees. The Defendant shall file briefing on sanctions within 60 days of the entry of this order. The Plaintiff shall have 30 days to respond. Thereafter, a hearing shall be scheduled with the Court.

The Defendant's Motion to Dismiss and Motion for Summary Judgment is now moot.

**IT IS SO ORDERED.**

**THE COURT'S JUDICIAL SIGNATURE SHALL ATTACH  
ELECTRONICALLY HERETO**

**Case Title:** Jonathan Gilbert vs Daylan Langford

**Case Number:** 23CV-81200

**Type:** JUDGE PREPARED ORDER

So ordered,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

/s/ B. Jo Atwood