

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

KIMBERLY KLACIK,

Plaintiff,

v.

CANDACE OWENS,

Defendant.

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Case No. _____

Trial Court Case No. 21C1607

**DEFENDANT’S TENN. R. APP. P. 9(c) APPLICATION TO
APPEAL BY PERMISSION OF THE TRIAL COURT**

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**I. TENN. R. APP. P. 9(d)(1) STATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

This application to appeal by permission of the trial court presents the following two questions for this Court’s review regarding the Tennessee Public Participation Act—Tennessee’s novel “anti-SLAPP”¹ statute:

- i. “When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate Tenn. Code Ann. § 20-17-105(b)’s ‘prima facie’ standard?”²
- ii. “What factors govern a trial court’s determination to ‘allow specified and limited discovery relevant to the petition upon a showing of good cause’ under Tenn. Code Ann. § 20-17-104(d), and has the Plaintiff made that showing here?”³

On March 22, 2022, the Circuit Court for Davidson County, Tennessee, granted the Defendant’s application for permission to seek this Court’s review of both questions.⁴ For the reasons detailed below, this Court should grant the Defendant’s application and accept review.

¹ “The term ‘SLAPP’ stands for ‘strategic lawsuits against public participation,’ meaning lawsuits which might be viewed as ‘discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff’s right.” *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651 (Tenn. Ct. App. 2021) (quoting Todd Hambidge, et al., *Speak Up. Tennessee’s New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14, 15 (Sept. 2019)).

² See Ex. 1, Mar. 22, 2022 Order at 1..

³ *Id.*

⁴ *Id.*

**II. TENN. R. APP. P. 9(d)(2) STATEMENT OF THE FACTS
NECESSARY TO AN UNDERSTANDING OF WHY AN APPEAL
BY PERMISSION LIES**

A. Aspiring Congresswoman Klacik’s defamation lawsuit.

Plaintiff Kimberly Klacik is a public figure and failed candidate for U.S. Congress. The Plaintiff has sued Defendant Candace Owens—a prominent political commentator—for defamation, seeking “in no event less than \$20,000,000” in damages.⁵

In particular, the Plaintiff sued Ms. Owens after Ms. Owens truthfully exposed the Plaintiff’s past work as a stripper and raised legitimate questions about whether the Plaintiff had violated federal campaign finance law during her run for Congress.⁶ To support her claim, the Plaintiff’s Complaint isolated a tiny portion of Ms. Owens’ much larger publication; it miscast the isolated statements as Ms. Owens’ own allegations; it stripped the isolated statements of essential context; and it recast the statements as “Criminal Allegations.”⁷ It also failed to disclose that Ms. Owens had *repeatedly reached out to the Plaintiff for comment regarding the allegations at issue in advance of publication*, but that the Plaintiff had refused to answer Ms. Owens’ questions each time.⁸

Following Ms. Owens’ exposé, the Plaintiff admitted that the most reputationally damaging allegation that Ms. Owens reported—that the

⁵ See Ex. 2, Pl.’s Compl. at 12.

⁶ See *generally* Ex. 3, Def.’s Candace Owens’s Memo. of Law in Supp. of Her Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. Pursuant to the Tennessee Public Participation Act.

⁷ *Id.* at 24–32.

⁸ *Id.* at 14–17.

Plaintiff had worked as a stripper before rebranding herself as a Republican defender of “conservative values” and “moral culture”⁹—was “true.”¹⁰ Shortly after Ms. Owens’ exposé, the Federal Election Commission also determined that the Plaintiff had, in fact, committed multiple violations of federal campaign finance law, and it fined the Plaintiff’s congressional committee \$12,081.00 for doing so.¹¹

B. Defendant Candace Owens’ Tennessee Public Participation Act Petition.

In response to the Plaintiff’s Complaint, Ms. Owens filed a petition to dismiss the Plaintiff’s defamation claim under the Tennessee Public Participation Act (TPPA).¹² Following a hearing, the Circuit Court determined that Ms. Owens had “met her burden of making a prima facie case that the Plaintiff’s legal action against her is based on her exercise of free speech” under Tenn. Code Ann. § 20-17-105(a).¹³ Thus, by statute, the Plaintiff’s defamation claim must be dismissed unless the Plaintiff establishes—with admissible evidence at the TPPA stage—“a prima facie case for each essential element of the claim in the legal action.” *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.”).

⁹ *See id.* at 1 (citing Ex. A to Def.’s Memo. in Supp. of TPPA Pet.).

¹⁰ *See id.* at 36 (citing Ex. 4 to Pl.’s Compl. at 6:6–16).

¹¹ *See id.* at 20 (citing Exs. F–G to Def.’s Memo. in Supp. of TPPA Pet.).

¹² *See* Ex. 3.

¹³ *See* Ex. 4, Mar. 2, 2022 Order at 2, ¶ 3.

Based on extensive and uncontested admissible evidence, Ms. Owens' TPPA Petition asserted that the Plaintiff's defamation claim must be dismissed for (among other reasons) the clear absence of actual malice.¹⁴ For instance, Ms. Owens introduced uncontested and admissible evidence demonstrating that she had repeatedly reached out the Plaintiff for comment before reporting on the allegations at issue, but that in response, the Plaintiff refused to answer Ms. Owens' questions or to be interviewed regarding them, retorting:



I don't care about you or your questions. You are trash person. Get lost

Jun 20, 2021, 1:46 PM

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Ms. Owens also introduced uncontested and admissible evidence demonstrating that the Plaintiff had refused to answer Ms. Owens' questions specifically because the Plaintiff *hoped* that Ms. Owens would say something false, thereby enabling the Plaintiff to sue her, crowing:



You do all the work yourself. So when you say something as fact, that is false, I can take you & the Daily Wire to court. Good luck 😊

Jun 20, 2021, 2:18 PM

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Ms. Owens further introduced uncontested and admissible evidence demonstrating that—following additional investigation and after posing

¹⁴ See Ex. 3 at 40–57.

¹⁵ *Id.* at 51 (quoting Ex. B to Def.'s Memo. in Supp. of TPPA Pet.).

¹⁶ *Id.* at 53 (quoting Ex. B to Def.'s Memo. in Supp. of TPPA Pet.).

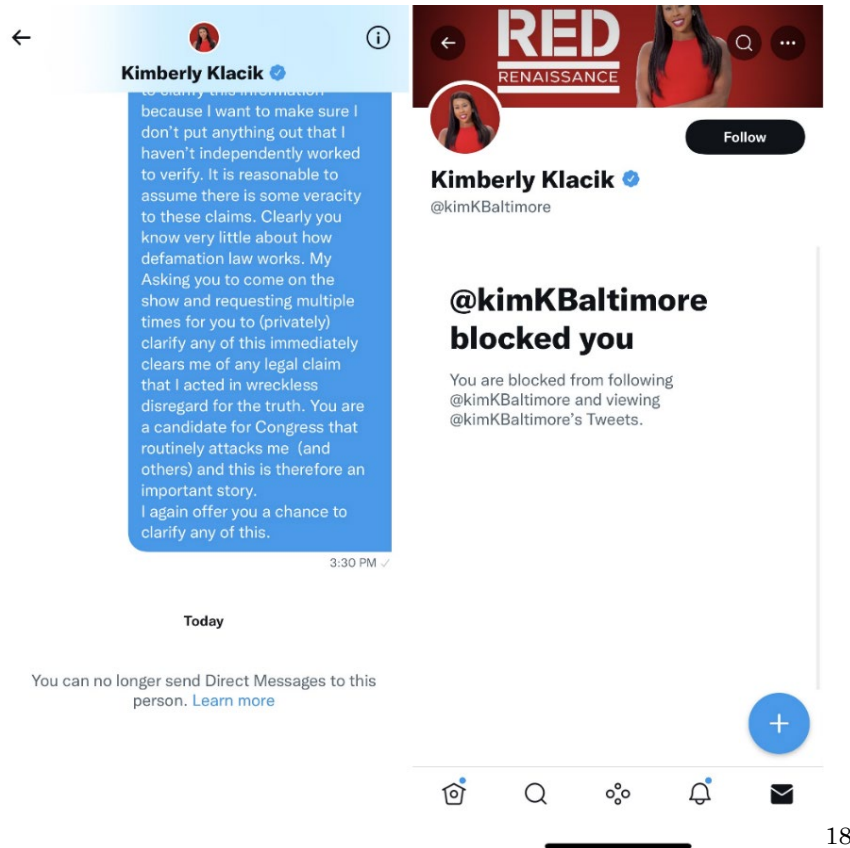
specific questions to the Plaintiff about the Plaintiff's campaign vendors—the Plaintiff continued to ignore Ms. Owens' invitations to answer her questions about the Plaintiff's use of campaign funds, including by ignoring the following text message correspondence:

Hi Kim—I've been trying to get in touch [with] Fox and Lion LLC which is the company you hired for canvassing. Bizarrely, none of the numbers on the website work. Andy Pierre, the former democrat candidate who owns the business is not reachable. And the business is not in good standing with the state, despite having only opened June of last year.

Also—your FEC filings indicate that you gave \$119,000 for a “meet and greet” to Pearl Events. Very odd. Because Pearl Events had its business license revoked years ago. And the man that owns it—lawyer Dusky Holman, had his law license suspended. Would you like to point me to your treasurer to answer these questions?¹⁷

Ms. Owens additionally introduced uncontested and admissible evidence demonstrating that in response to Ms. Owens' continuing requests for a response from the Plaintiff and invitation “to clarify any of this[,]” the Plaintiff again refused to answer Ms. Owens' questions and then affirmatively blocked Ms. Owens from corresponding with her any further:

¹⁷ *Id.* at 44 (quoting Ex. C to Def.'s Memo. in Supp. of TPPA Pet.).



Further still, Ms. Owens introduced uncontested and admissible evidence demonstrating:

1. That the allegations that Ms. Owens recounted came from a source who represented that she had personal knowledge of them,¹⁹ and thus, that they were “not a figment of [the Defendant’s] imagination,” *cf. Elsten v. Coker*, No. M2019-00034-COA-R3-CV, 2019 WL 4899759, at *5 (Tenn. Ct. App. Oct. 4, 2019);

2. That *after* Ms. Owens’ exposé, the Plaintiff admitted that the most reputationally damaging allegation that Ms. Owens recounted—that the Plaintiff had worked as a stripper before rebranding herself as

¹⁸ *Id.* at 45 (quoting Ex. D to Def.’s Memo. in Supp. of TPPA Pet.).

¹⁹ *Id.* at 40–41 (quoting Ex. J to Def.’s Memo. in Supp. of TPPA Pet.).

a defender of “conservative values” and “moral culture”²⁰—was “true[,]”²¹ thereby confirming the reliability of Ms. Owens’ source and giving Ms. Owens “no reason to disbelieve” her source’s allegations, *cf. Finney v. Jefferson*, No. M2019-00326-COA-R3-CV, 2020 WL 5666698, at *6 (Tenn. Ct. App. Sept. 23, 2020);

3. That following Ms. Owens’ exposé, several of the allegations that Ms. Owens had recounted were confirmed as true by independent reporting;²² and

4. That following Ms. Owens’ exposé, the Federal Election Commission itself determined that the Plaintiff had committed extensive federal campaign finance violations and fined the Plaintiff’s congressional committee \$12,081.00 for doing so.²³

The Plaintiff responded in opposition to Ms. Owens’ Petition,²⁴ urging its denial based on a single affidavit supplied by the Plaintiff.²⁵ The Plaintiff’s affidavit contained no admissible evidence of actual malice. Instead, it was premised upon the Plaintiff’s “belie[f]” alone, asserting that: “I *believe* that Ms. Owens made the accusations referenced herein knowing that they were false, or at least made the

²⁰ See *id.* at 1 (citing Ex. A to Def.’s Memo. in Supp. of TPPA Pet.).

²¹ See *id.* at 36 (citing Ex. 4 to Pl.’s Compl. at 6:6–16).

²² See *id.* at 12 (citing Ex. E to Def.’s Memo. in Supp. of TPPA Pet.).

²³ See *id.* at 49 (citing Exs. G–H to Def.’s Memo. in Supp. of TPPA Pet.).

²⁴ See Ex. 5, Opp’n to Def. Candace Owens’s Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. pursuant to the Tennessee Public Participation Act.

²⁵ See Ex. 6, Aff. of Kimberly Klacik.

statements with a reckless disregard for their truth.”²⁶

Because the Plaintiff’s affidavit did not contain admissible evidence of actual malice, and because the extensive admissible evidence *negating* actual malice that Ms. Owens introduced was uncontested, Ms. Owens asserted that the Plaintiff’s defamation claim must be dismissed.²⁷ In particular, Ms. Owens asserted that dismissal was warranted because the Plaintiff failed to introduce any admissible evidence of actual malice—an essential element of her claim—in response to Ms. Owens’ TPPA Petition. *See* Tenn. Code Ann. § 20-17-105(b). Ms. Owens additionally asserted that the admissible evidence that *she* had introduced negated actual malice, thereby “preclud[ing] a finding of actual malice as a matter of law.”²⁸

C. The Plaintiff’s failure to move for permission to take discovery, and the Circuit Court’s order allowing discovery.

In advance of the hearing on Ms. Owens’ TPPA Petition, the Plaintiff did not file a motion seeking permission to take discovery under Tenn. Code Ann. § 20-17-104(d)—a provision that allows for “specified and limited discovery relevant to the petition upon a showing of good cause.” *See id.* *But see Justice v. Nelson*, No. E2018-02020-COA-R3-CV, 2019 WL 6716300, at *3, n.5 (Tenn. Ct. App. Dec. 10, 2019) (holding that a litigant must “*actually file[]* a motion” to obtain relief); Tenn. R. Civ. P.

²⁶ *See id.* at 2, ¶ 17 (emphasis added).

²⁷ *See* Ex. 7, Def.’s Reply in Supp. of Def.’s Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. Pursuant to the Tennessee Public Participation Act at 5–8.

²⁸ *See id.* at 5.

7.02(1) (“An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.”). At the hearing on Ms. Owens’ TPPA Petition, though, Plaintiff’s counsel made the following general statement on the matter:

Even if the Tennessee statute is applied, we’ve met the burden under the statute and with any question marks on to the actual malice standard because that necessarily in part – we’re lucky we have what we do, but it does necessarily in part inquire into the Defendant’s state of mind that cannot be developed without discovery, which is precisely why your statute here in Tennessee, which although I don’t think it applies, if it does, that’s the precise reason why the statute does permit some discovery because otherwise no plaintiff having to prove an actual malice standard -- not no plaintiff - many plaintiffs having to prove that wouldn’t be able to do so because like here, without finding on the internet that what was presented to the Court was truncated in a very significant way, without, you know, analyzing the information that we do have, we think there’s more, and that the motion should be denied.²⁹

Over Ms. Owens’ objection, the Circuit Court construed this non-specific statement as an oral motion for discovery made during a “trial.”³⁰ Thereafter, the Circuit Court found good cause to allow specified and limited discovery under Tenn. Code Ann. § 20-17-104(d), and it ordered that the Parties take “depositions” regarding the limited issue of actual

²⁹ See Ex.4 at Attach. 1, 39:9–40:3.

³⁰ See *id.* at 3, ¶ 8 (The Court additionally finds that the Court’s February 18, 2022 proceedings qualify as a trial within the meaning of Tenn. R. Civ. P. 7.02(1), and that a motion for discovery was made by the Plaintiff during trial.”).

malice in order to enable the Court to make a credibility determination.³¹ Following entry of the Court's order, the Plaintiff then served nineteen (19) Requests for Production of Documents and eleven (11) multi-part interrogatories³² that sought (among other things) to compel disclosure of communications from the Plaintiff's political opponents and sought to compel source correspondence.³³

D. The Defendant's Rule 9 Application.

Ms. Owens timely applied to the Circuit Court for permission to appeal the following two questions to this Court:

- i. "When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate Tenn. Code Ann. § 20-17-105(b)'s 'prima facie' standard?"³⁴
- ii. "What factors govern a trial court's determination to 'allow specified and limited discovery relevant to the petition upon a showing of good cause' under Tenn. Code Ann. § 20-17-104(d), and has the Plaintiff made that showing here?"³⁵

"As grounds for seeking interlocutory review of the [first] question presented, the Defendant asserted that there is substantial need to develop a uniform body of law regarding it, given: (i) the inconsistent

³¹ See *id.*; *id.* at Attach. 1, 63:11–20.

³² See Ex. 8.

³³ See *id.* at Interrog. #10, RFP #9.

³⁴ See Ex.9, Def.'s App. for Perm. to Appeal Interlocutory Orders and to Stay Disc. Pending Appeal.

³⁵ *Id.*

orders on the issue by trial courts within this judicial district and elsewhere,”³⁶ (ii) “several different definitions of ‘prima facie evidence’ from Tennessee’s appellate courts in a wide variety of contexts;”³⁷ and (iii) “the ambiguity arising from the interaction between (a) the ‘clear and convincing’ standard necessary to sustain a claim of actual malice; (b) Tenn. Code Ann. § 20-17-105(b)’s ‘prima facie’ standard; and (c) Tenn. Code Ann. § 20-17-105(f)’s reference to ‘establish[ing] a likelihood of prevailing on a claim”³⁸ The Defendant further asserted that “appellate review and clarity regarding the question presented for review will prevent needless, expensive, and protracted litigation over whether the relevant standard has been met or negated in this case, and that if appellate review concludes that actual malice has been negated on the present record, then this litigation will end entirely, thereby resulting in a net reduction in the duration and expense of the litigation if the challenged order is reversed.”³⁹

Separately, “[a]s grounds for seeking interlocutory review of [the second] question,”

the Defendant asserted in her Application that there is a need to develop a uniform body of law regarding the issue, given the existence of inconsistent orders on the issue among lower courts, *see* Def.’s App. at 8–9, and given that a central purpose of the Tennessee Public Participation Act is to enable courts “to expediently resolve [SLAPP-suits] prior to the often-expensive discovery phase” *See* Def.’s App. at 8 (quoting

³⁶ *See* Ex. 1, Mar. 22, 2022 Order at 2–3, ¶3 (citing Def.’s App. at 4-6).

³⁷ *See id.* (citing Def.’s App. at 3–4).

³⁸ *See id.* (citing Def.’s App. at 5–7).

³⁹ *See id.* (citing Def.’s App. at 6–7).

Nandigam Neurology, PLC v. Beavers, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *10 (Tenn. Ct. App. June 18, 2021)). The Defendant further asserted that if her position that the Plaintiff has not satisfied the relevant standard for obtaining discovery prevails, then review of this Court's order authorizing discovery will be ineffective upon entry of a final judgment, because the discovery will already have been taken. *See id.* at 9. The Defendant additionally asserted that if the Court's order authorizing discovery is reversed on appeal, then interlocutory review will prevent needless, expensive, and protracted discovery from being taken, thereby resulting in a substantial net reduction in the duration and expense of this litigation. *See id.* The Defendant also asserted that if the Defendant's position prevails, then failure to grant interlocutory review will cause the Defendant to suffer an irreparable injury that can never be reviewed in the normal course. *See id.*⁴⁰

Upon review, the Circuit Court granted the Defendant permission to appeal both questions for the reasons set forth in her application.⁴¹ This timely application followed.

III. TENN. R. APP. P. 9(d)(3) STATEMENT OF THE REASONS SUPPORTING AN IMMEDIATE APPEAL

A. INTERLOCUTORY REVIEW IS WARRANTED TO ASCERTAIN THE QUANTUM OF EVIDENCE SUPPORTING ACTUAL MALICE THAT A LITIGANT MUST INTRODUCE TO SATISFY OR NEGATE TENN. CODE ANN. § 20-17-105(b)'S "PRIMA FACIE" STANDARD IN PUBLIC FIGURE DEFAMATION CASES.

After a petitioning party has met her initial burden under Tenn. Code Ann. § 20-17-105(a), Tenn. Code Ann. § 20-17-105(b) provides that

⁴⁰ *See id.* at 4, ¶ 6.

⁴¹ *See id.* at 1.

“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.” *Id.* Where, as here, a public figure plaintiff is required to prove actual malice by clear and convincing evidence to sustain a defamation claim, though, ascertaining the specific quantum of evidence that a plaintiff must introduce to satisfy Tenn. Code Ann. § 20-17-105(b)’s “prima facie” standard is an unusually difficult task, for several reasons.

To begin, as the Tennessee Supreme Court once observed, “prima facie’ may be used in various senses, with a range of meaning” *State v. Bryant*, 585 S.W.2d 586, 589 (Tenn. 1979). In some circumstances, Tennessee’s courts have held that: “Prima facie evidence is defined as evidence good and sufficient; such evidence as, in the judgment of the law, is sufficient to establish a given fact.” *State v. Funzie*, No. 30, 1986 WL 3184, at *2 (Tenn. Crim. App. Mar. 12, 1986) (quoting *Black’s Law Dictionary*, Revised Fourth Edition). In others, “[p]rima facie evidence’ may be defined as ‘[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” *State v. Bishop*, 431 S.W.3d 22, 59 n.30 (Tenn. 2014) (quoting *Black’s Law Dictionary* 638–39 (9th ed.2009)). More recently, after noting that “Tennessee courts have not specifically defined the prima facie requirement in the context of establishing personal jurisdiction,” *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 383 (Tenn. 2015), the Tennessee Supreme Court defined “prima facie” evidence, in that context, as evidence that establishes a fact with “reasonable particularity.” *Id.* (“we adopt a similar definition of a prima facie case of personal jurisdiction.

Under Tennessee law, the factual allegations in the plaintiff's complaint must establish sufficient contacts between the defendant and this state with reasonable particularity."). Jurors, when charged with applying a prima facie evidence standard, have been given an altogether different definition still. *See, e.g., State v. Seltzer*, No. C.C.A. 69, 1987 WL 4867, at *4 (Tenn. Crim. App. May 27, 1987) ("The trial judge went on to define prima facie evidence. He stated: 'Prima facie evidence as outlined in the statute means that you, the Jury, may but need not, infer from the evidence that the defendant and the individual named in the prior convictions are the same.' The trial court's charge was correct.").

Complicating the matter further, Tenn. Code Ann. § 20-17-105(f) strongly implies that "prima facie evidence," within the meaning of the Tenn. Code Ann. § 20-17-105(b), means evidence that establishes "a likelihood of prevailing" on a claim. *See* Tenn. Code Ann. § 20-17-105(f) ("If the court determines the responding party established **a likelihood of prevailing on a claim**: (1) The fact that the court made that determination and the substance of the determination may not be admitted into evidence later in the case; and (2) The determination does not affect the burden or standard of proof in the proceeding.") (emphasis added). With the foregoing in mind, another Circuit Court of Davidson County recently held that a public-figure plaintiff who seeks to overcome a TPPA petition in a defamation case must come forward with evidence of actual malice that demonstrates "a reasonable probability" of prevailing, ruling that "there must be a showing of reasonable probability that [a plaintiff] will be able to prove malice by clear and convincing proof

at the summary judgment stage or at trial.”⁴² By contrast, during the proceedings below, the Circuit Court determined that “prima facie” evidence, within the meaning of the Tenn. Code Ann. § 20-17-105(b), embodies a much lesser standard, reflecting “something less than a preponderance of the evidence and something more than simply notice pleading.”⁴³

Complicating the matter even further still, at the summary judgment stage, this Court has routinely instructed that whether a plaintiff has come forward with evidence sufficient to sustain a finding of actual malice is a question of *law*. As this Court explained in *Tomlinson v. Kelley*, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997), for instance:

Summary judgments are proper in virtually any civil case that can be resolved on legal issues alone. *See Byrd v. Hall*, 847 S.W.2d at 210. They are particularly well-suited for defamation cases because the determination concerning whether the plaintiff is a public figure **is a question of law**, see *McDowell v. Moore*, 863 S.W.2d 418, 420 (Tenn.Ct.App.1992), **as is the determination concerning whether a public figure has come forward with clear and convincing evidence that the defendant was acting with actual malice**. *See Trigg v. Lakeway Publishers, Inc.*, 720 S.W.2d 69, 74 (Tenn.Ct.App.1986).

Id. (emphases added). Several other decisions are in accord. *See, e.g., Piper v. Mize*, No. M2002-00626-COA-R3CV, 2003 WL 21338696, at *4 (Tenn. Ct. App. June 10, 2003) (“If the person allegedly libeled is a ‘public

⁴² *See* Ex. 10, Order Granting Petition to Dismiss Complaint Under the Tennessee Public Participation Act at Doc. 184, 16: 14–24, SmileDirectClub, Inc. v. NBCUniversal Media, Inc., Case No. 20C1054 (Davidson Cty, Tenn. Cir. Ct. Dec. 10, 2021).

⁴³ *See* Ex. 4 at 2–3, ¶ 7.

official or public figure,’ **only clear and convincing proof of actual malice on the part of the defendant will survive a motion for summary judgment.**”) (emphasis added); *Finney v. Jefferson*, No. M2019-00326-COA-R3-CV, 2020 WL 5666698, at *2 (Tenn. Ct. App. Sept. 23, 2020) (“Summary judgment is ‘particularly well-suited’ for defamation claims because ‘whether the plaintiff is a public figure’ and ‘whether a public figure has come forward with clear and convincing evidence that the defendant was acting with actual malice’ are questions of law.”) (cleaned up).

In keeping with this authority, one trial court that has adjudicated a TPPA petition in an actual malice case has expressly done so by reference to a “clear and convincing” standard.⁴⁴ This Court, for its part, has additionally made clear that actual malice can be *negated* as a matter of law—something that Ms. Owens has asserted that she did based on the uncontested admissible evidence set forth above. *See Finney*, 2020 WL 5666698, at *6 (“Not only are those statements not hearsay, but **they establish, as a matter of law, that the Jeffersons did not act with actual malice.** The Jeffersons stated in their affidavits that, based on their experience, they found the school staff members who told them about Ms. Finney’s alleged conduct to be honest people. They had no reason to disbelieve them.”) (emphases added).

Given this context, interlocutory review is warranted to ascertain the specific evidentiary standard that governs the Plaintiff’s claim of

⁴⁴ *See* Ex. 11, Order of the Court at 8, *Lee v. Mitchell et al.*, Case No. 2020-CV-50 (Overton Cty, Tenn. Cir. Ct. Dec. 10, 2021); *id.* at 8, n.9.

actual malice at the TPPA petition stage. Appellate review and clarity regarding this question will prevent needless, expensive, and protracted litigation over whether the relevant standard has been met or negated in this case. Additionally, if this Court concludes that actual malice has been negated on the present record, then this litigation will end entirely. *See* Tenn. R. App. P. 9(a)(2) (considering “whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed.”).

Further, there is substantial need to develop a uniform body of law on the issue, given:

1. Inconsistent orders on the question presented by trial courts both within this judicial district and elsewhere, *compare* Ex. 10 at 16:14–24 (requiring “reasonable probability” of prevailing) *with* Ex. 4 at 2–3, ¶ 7 (requiring “something less than a preponderance of the evidence and something more than simply notice pleading.”); *with* Ex. 11 at 8, n.9 (requiring clear and convincing evidence of actual malice);

2. Several different definitions of “prima facie evidence” from Tennessee’s appellate courts in a wide variety of contexts, *see supra* at 13–14; and

3. Ambiguity arising from the interaction between: (a) the “clear and convincing” standard necessary to sustain a claim of actual malice; (b) Tenn. Code Ann. § 20-17-105(b)’s “prima facie” standard; and (c) Tenn. Code Ann. § 20-17-105(f)’s reference to “establish[ing] a likelihood of prevailing on a claim”

In light of the foregoing, this Court should grant the Defendant’s application by permission to appeal the following question: When a public

figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate Tenn. Code Ann. § 20-17-105(b)'s "prima facie" standard?

B. INTERLOCUTORY REVIEW IS WARRANTED TO ASCERTAIN THE FACTORS THAT GOVERN A TRIAL COURT'S DETERMINATION TO "ALLOW SPECIFIED AND LIMITED DISCOVERY RELEVANT TO THE PETITION UPON A SHOWING OF GOOD CAUSE" UNDER TENN. CODE ANN. § 20-17-104(d).

In its limited existing TPPA jurisprudence, this Court has observed that a central purpose of the Tennessee Public Participation Act is to enable courts "to expediently resolve [SLAPP-suits] prior to the often-expensive discovery phase" *Nandigam Neurology, PLC*, 2021 WL 2494935, at *10. *See also id.* (noting sponsor's goal of preventing defendants from having "to spend tens of thousands of dollars defending themselves during the discovery process" and to "allow a judge to look at the suit before the very expensive discovery portion of the suit comes up, and decide whether the suit has merit.") (quoting *S. Floor Sess. on S.B. 1097 Before the S.*, 111th Gen. Assemb. (Tenn. Mar. 18, 2019) (statement of Sen. Dickerson)). As a result, the TPPA includes an automatic statutory discovery stay that provides that:

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.

Tenn. Code Ann. § 20-17-104(d).

Determining both: (1) *how* a litigant must demonstrate good cause

(the Defendant takes the position that a movant must, at minimum, file a motion stating that the movant cannot meet her burden on the present record, that she needs specified discovery to do so, and explain why she expects the specified discovery will enable her to meet her burden) and (2) *what* constitutes “a showing of good cause” under Tenn. Code Ann. § 20-17-104(d) are unsettled questions. *Id.* Some courts—including the Circuit Court below—have determined that good cause exists to allow discovery under Tenn. Code Ann. § 20-17-104(d) essentially whenever a plaintiff bears the heavy burden of proof regarding actual malice and lacks evidence to support an otherwise unsubstantiated allegation regarding it.⁴⁵ Other courts have permitted essentially unrestricted third-party discovery while a TPPA petition is pending.⁴⁶ Ultimately, though, the specific standard that governs a trial court’s determination to “allow specified and limited discovery relevant to the petition upon a showing of good cause” under Tenn. Code Ann. § 20-17-104(d) is unresolved.

Thus, interlocutory review is warranted to ascertain the factors that govern a trial court’s determination to “allow specified and limited discovery relevant to the petition upon a showing of good cause” under Tenn. Code Ann. § 20-17-104(d). If the Defendant’s position that the

⁴⁵ See, e.g., Ex. 4 at Attach. 1, 59:10–14 (“I think the Plaintiff needs fact discovery on the issue of actual malice in order to get into the details that are required for the Plaintiff to make a prima facie case for actual malice.”); Ex. 11 at 1 (“At the conclusion of the arguments, the Court granted the Plaintiff’s motion to have the opportunity to take limited discovery.”).

⁴⁶ See Ex. 12, Order Compelling City Responses to Discovery and Continuing Hearing Date at 3, ¶ 8, *Flade v. City of Shelbyville et al.*, Case No. 13837 (Bedford Cty, Tenn. Cir. Ct. Dec. 20, 2021).

relevant standard was not satisfied is correct, then review of the Circuit Court's order authorizing discovery will be ineffective upon entry of final judgment, because the ordered discovery will already have been taken. In the same vein, if the Circuit Court's order authorizing discovery is reversed by this Court, interlocutory review will prevent needless, expensive, and protracted discovery from being taken, thereby resulting in a substantial net reduction in the duration and expense of this litigation. Further, if the Defendant's position is correct, then *failure* to grant interlocutory review will cause the Defendant to suffer an irreparable injury that can never be reviewed in the normal course. *Cf. Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017) ("Summary proceedings are essential in the First Amendment area because if a suit entails long and expensive litigation, then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.") (cleaned up).

As importantly, interlocutory review is warranted:

1. In order to develop a uniform body of law, given the importance of the question and the existence of inconsistent orders of lower courts; and

2. Because an order authorizing discovery to be taken will never be reviewable upon entry of final judgment, given that the issue will necessarily become moot if and when the discovery is taken.

Further, whatever the specific standard that applies, it must *at least* be as high as the standard that applies to claims that discovery is needed in response to summary judgment, given that Tenn. Code Ann. § 20-17-104(d) reflects a statutory presumption and public policy that

discovery *not* be had. *Cf. Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004) (holding that a litigant “must state with ‘some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment.’”) (quoting *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed.Cir.1996)); *Reed v. Gulf Coast Enterprises*, No. 3:15-CV-00295-JHM, 2016 WL 79998, at *6 (W.D. Ky. Jan. 6, 2016) (“The affidavit or declaration filed in support of the nonmovant’s request **must [1] identify specific information that the nonmovant seeks to discover and that is essential to his opposition to the summary judgment motion.** Further, the affidavit or declaration **must [2] state exactly how and why the nonmovant expects the information sought will help him** in opposing summary judgment, either by raising a genuine dispute of material fact or by demonstrating that the summary judgment movant is not entitled to judgment as a matter of law.” (emphases added) (citation omitted)); *see also Harris v. Caruso*, 465 F. App’x 481, 487 (6th Cir. 2012) (“When a motion for summary judgment is filed, the party opposing the motion may explain why he is entitled to additional discovery. **The request must specify what facts might be revealed by this additional discovery.** [Plaintiff] stated that he needed discovery to demonstrate an issue of fact, but failed to specify which facts he hoped to discover.” (emphasis added) (citation omitted)). Because even that minimal standard was not met here—during the proceedings below, the Plaintiff did not file a motion seeking discovery *at all*, let alone specify how, specifically, she expects that discovery will

assist her—there is also a substantial likelihood that the Circuit Court’s order authorizing discovery will be reversed. The ease with which a plaintiff maintaining a SLAPP-suit can nullify the public policy underlying the TPPA’s discovery stay and other Tennessee public policy has also been demonstrated in spades by the Plaintiff here, as evidenced by her attempt to propound nineteen broad Requests for Production of Documents and eleven multi-part interrogatories⁴⁷ that sought (among other things) to compel disclosure of communications from the Plaintiff’s political opponents and to compel source correspondence.⁴⁸

For all of these reasons, interlocutory review by permission is warranted regarding the following question: What factors govern a trial court’s determination to “allow specified and limited discovery relevant to the petition upon a showing of good cause” under Tenn. Code Ann. § 20-17-104(d), and has the Plaintiff made that showing here?

IV. CONCLUSION

For the foregoing reasons, the Defendant’s application to appeal by permission of the trial court should be granted. The Defendant’s appendix follows hereafter.

⁴⁷ See Ex. 8.

⁴⁸ Compare Ex. 8, Interrog. #10, #5; RFP #9 (demanding “All Communications between You and ‘the source who confirmed that the photo was genuine and reported personal knowledge of the Plaintiff’s work in the adult entertainment industry’”), with *Funk v. Scripps Media, Inc.*, 570 S.W.3d 205, 222 (Tenn. 2019) (“the exception to the shield law allows a court to compel disclosure of the source of a media defendant’s information—*how* media defendants know something; it does not authorize a court to compel media defendants to disclose the information the source provided.”) (citing Tenn. Code Ann. § 24-1-208(b)).

V. APPENDIX

Pursuant to Tenn. R. App. P. 9(d), the Defendant has appended an “an appendix containing copies of: (1) the order appealed from, (2) the trial court’s statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal” that includes the following documents:

1. The Circuit Court’s Mar. 22, 2022 Order (Ex. 1), which includes the trial court’s statement of reasons;

2. Pl.’s Compl. (**Ex. 2**);

3. Def. Candace Owens’s Mem. of Law in Supp. of Her Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. Pursuant to the Tennessee Public Participation Act and Exhibits (**Ex. 3**);

4. The Circuit Court’s Mar. 2, 2022 Order and Tr. Attach. 1 to Order (Ex. 4), which contains the orders appealed from;

5. Opp’n to Def. Candace Owens’s Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. Pursuant to the Tennessee Public Participation Act (**Ex. 5**);

6. Aff. of Kimberly Klacik (**Ex. 6**);

7. Def’s. Reply in Supp. of Def.’s Mot. to Dismiss and Tenn. Code Ann. § 20-17-104(a) Pet. to Dismiss the Pl.’s Compl. Pursuant to the Tennessee Public Participation Act (**Ex. 7**);

8. Pl. Kimberly Klacik’s First Set of Req. for Produc. of Doc. to Def. Candace Owens and Pl. Kimberly Klacik’s First Set of Interrog. to Def. Candace Owens (**Ex. 8**);

9. Def.'s App. For Perm. to Appeal Interlocutory Orders and to Stay Disc. Pending Appeal (**Ex. 9**);

10. Order Granting Petition to Dismiss Complaint Under the Tennessee Public Participation Act, SmileDirectClub, Inc. v. NBCUniversal Media, Inc., Case No. 20C1054 (**Ex. 10**).

11. Order of the Court, Lee v. Mitchell et al., Case No. 2020-CV-50 (Overton Cty, Tenn. Cir. Ct. Dec. 10, 2021)(**Ex. 11**);

12. Order Compelling City Responses to Discovery and Continuing Hearing Date, Flade v. City of Shelbyville et al., Case No. 13837 (Bedford Cty, Tenn. Cir. Ct. Dec. 20, 2021) (**Ex. 12**).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2022, a copy of the foregoing was served via the Court's e-filing system upon:

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