

**IN THE COURT OF APPEALS
FOR THE STATE OF TENNESSEE,
MIDDLE DIVISION, AT NASHVILLE**

MICHELLE FOREMAN,)

Appellant/Plaintiff,)

VS.)

DAVE ROSENBERG,)

Appellee/Defendant.)

Case No. M2024-00032-COA-R3-CV

BRIEF OF APPELLANT, MICHELLE FOREMAN

Respectfully Submitted,

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STATEMENT OF JURISDICTION

The Appellant Trial Counsel timely filed a Notice of Appeal, pursuant to Tenn. R. App. P. 3(a) (Appeal as of Right) with this Honorable Court on January 3, 2024, as to the Davidson County Circuit Court's December 4, 2023 Order. Appeal is proper with this Court, and this Court has proper jurisdiction to hear the issues presented.

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN AWARDING SANCTIONS AGAINST THE APPELLANT PURSUANT TO TENN. CODE ANN. § 20-17-107(a) OF THE TPPA
- II. WHETHER THE SANCTIONS AWARDED WERE EXCESSIVE OR ARBITRARY
- III. WHETHER THE TRIAL COURT'S SANCTION AWARD AGAINST THE APPELLANT VIOLATED HER RIGHTS UNDER ARTICLE I, § 14 OF THE TENNESSEE CONSTITUTION

REFERENCES TO RECORD AND PARTIES

In the following Brief:

- Michelle Foreman will be referred to by either her name or by “Plaintiff,” or by “Appellant.”
- Dave Rosenberg will be referred to by either his name or by “Defendant” or by Appellee.
- The Technical Record consists of eight (8) Volumes (1-8) and will be referred to as “TR”, along with the corresponding Volume and page number(s).
- References to Exhibits to Pleadings contained in the technical record will be referenced by the corresponding pleading, followed by the abbreviation “Ex”, along with the appropriate reference to the Technical Record.
- The Transcript of the Evidence consists of three (3) sequentially numbered Volumes, beginning at Volume 9 and continuing through Volume 11, and will be referred to in shorthand as simply “TE”, with reference made to the Volume Number from the Record on Appeal, along with the page number as reflected therein.
- There were no Exhibits admitted as evidence in this case, and none will be referenced herein.

STATEMENT OF THE CASE

This case arises from a Defamation action, originally filed by the Plaintiff/Appellant, Michelle Foreman against the Defendant/Appellee, Dave Rosenberg, in the Circuit Court for Williamson County on October 26, 2022 (T.R. Vol. 1, pp. 1-4). Venue was later ordered to be changed to Davidson County by Order entered April 16, 2023 (Id. at p. 46-50).

On April 25, 2023, the Defendant filed a Motion for Summary Judgment pursuant to Tenn. R. Civ. P. 56 in the Davidson County Circuit Court, along a supporting Memorandum of Law and Statement of Undisputed Material Facts with Exhibits (Id. at p. 57-103). On May 19, 2023, the Defendant filed a Motion for Voluntary Dismissal under Tenn. R. Civ. P. 41.02(1) for failure to amend the original complaint (Id. at p. 106-108). On May 31, 2023, the Plaintiff filed an Amended Complaint (Id. at p. 120-129). On the same day, the Defendant filed a withdrawal of his Rule 41.02(1) Motion to Dismiss (Id. at p. 130-131).

On June 2, 2023, the Defendant filed a second Motion for Summary Judgment (Id. at 132-134), along a supporting Memorandum of Law and Statement of Undisputed Material Facts with Exhibits (T.R. Vol. 2 p. 135-179). On June 12, 2023, the Defendant filed a “Motion to Dismiss and Petition and Tenn. Code Ann. § 20-17-104(a) Petition to Dismiss the Plaintiff’s Amended Complaint Pursuant to the Tennessee Public Participation Act” (the “TPPA”), (the “Petition” or the “Motion/Petition”) setting the same for a hearing on June 30, 2023 in the Eighth Circuit Court for Davidson County (Id. at p. 180-286, cont’d at T.R. Vol. 3 at p.

287-307). On June 26, 2023, Trial Counsel for the Plaintiff filed a Response in Opposition to the Motion/Petition (Id. at p. 308-312).

A Hearing was held on the Petition on June 30, 2023, Honorable Lynn T. Ingram presiding, wherein the Defendant's Petition was granted (see generally T.E. Vol. 9). An Order was entered to that effect on July 11, 2023, as well as granting the Defendant an award of mandatory attorney's fees and expenses pursuant to Tenn. Code Ann. § to 20-17-107(a)(1), while reserving ruling on the reasonableness of fees and the entire issue of a reward of sanctions under Tenn. Code Ann. § to 20-17-107(a)(2). (T.R. Vol. 4 at p. 422-427).

On August 11, 2023, the Defendant filed a Motion for Attorney's Fees and Costs and a Motion for Sanctions, both requesting relief under the applicable provisions of the TPPA. (Id. at 428 – 544, cont'd at T.R. Vol. 5 at p. 545-591).

On August 21, 2023, Trial Counsel for the Plaintiff filed a "Rule 54.02 Tenn. R. Civ. P. Motion to Revise/Reconsider or Alter or Amend the Court's July 11, Order, setting same for a hearing on September 29, 2023.

On August 25, 2023, a hearing was held on the Defendants respective Motions for Attorney Fees and Costs, as well as the Motion for Sanctions (see T.E. Vol. 10). The Court found the Defendant's Attorney Fees reasonable at \$34,961.00 and Costs in the amount of \$494.00 and entered Judgment in favor of the Defendant in the amount of \$35,455.00 on September 1, 2023. (T.R. Vol. 6 at p. 772-778). The Court later entered an Order Holding the Ruling on Sanctions in Abeyance on September 12,

2023, pending hearing and ruling on the Plaintiffs Rule 54.02 Motion (Id. at 779-781).

On September 29, 2023, a hearing was set for the Plaintiff's Rule 54.02 Motion, wherein it was ultimately decided that the parties would submit briefs on the Defendant's Motion (see T.E. Vol. 11).

On the same date, the Defendant filed a Motion to Certify Post August 11, 2023 Rulings as Final While Retaining Jurisdiction Over Defendant's Supplemental Claim for Supplemental Attorney Fees, with respect to the September 1, 2023 Order, wherein Judgment was entered for Attorney Fees and Costs, as well as the Court's forthcoming rulings on the Plaintiff's Rule 54.02 Motion and the Defendant's Motion for Sanctions (T.R. Vol. 7 at p. 806-828). On November 15, 2023 the Trial Court entered an Order granting Defendant's Motion, and declaring the Court's September 1, 2023 as Final pursuant to Tenn. R. Civ. P. 54.02, as well as the forthcoming further orders addressed in Defendant's Motion. (Id. at p. 861-864). On November 17, 2023 the Court entered an Order denying Plaintiff's Rule 54.02 Motion (Id. at p. 865-876).

On December 4, 2023, the Trial Court entered an Order granting Sanctions against the Plaintiff in the amount of \$100,000.00. (Id. at 877-894) pursuant to Tenn. Code Ann. § to 20-17-107(a)(2).

Trial Counsel timely filed a Notice of Appeal, pursuant to Tenn. R. App. P. 3(a) (Appeal as of Right) with this Honorable Court on January 3, 2024, as to the Davidson County Circuit Court's December 4, 2023 Order granting Sanctions. (T.R. Vol. 8 at p. 976-978).

STATEMENT OF THE FACTS

The facts in this case are overwhelmingly based on the pleadings filed by Counsel and Exhibits thereto, including collateral court filings, social media posts, statements made in publications and similar materials. The Trial Court held three (3) hearings, the transcripts of which have been made a part of the Record on Appeal, and will be incorporated herein by reference. These hearings consist almost exclusively of arguments of Counsel and rulings of the Trial Court.

The Plaintiff, Michelle Foreman, on October 22, 2022, the time of filing the original Complaint in the Williamson County Circuit Court, was “a Republican candidate for the open District 59 seat in the Tennessee Legislature” (T.R. Vol. 1, p. 1, ¶ 1). The Defendant, Dave Rosenberg, at the same time, was “a supporter of Foreman's Democrat opponent, Caleb Hemmer, for the open District 59 seat in the Tennessee Legislature”. (Id. at ¶ 2). The Plaintiff filed suit, by and through Counsel, for Defamation, citing the Defendant publishing false statements about her to third parties, namely that was a “COVID denier, anti-vaccine, supports Jan. 6 and election conspiracy theories, and is a pathological liar”. (Id. at p. 2 ¶ 5). The Prayer for Relief asked that “Plaintiff be awarded compensatory and punitive damages in an amount in excess of \$300,000.00 against the Defendant”. (Id. at p. 3). It should be noted that the Complaint was signed by Trial Counsel, and was not verified by the Defendant. (Id. at p. 4).

On November 23, 2022, Counsel for the Defendant filed a Motion for More Definite State pursuant to Tenn. R. Civ. P. 12.05 with respect

to venue, and further seeking the Plaintiff's compliance with Tenn. R. Civ. P. 10.03, as the statements complained of were founded upon a written instrument. (Id. at p. 9-14). In the Motion, Counsel for the Defendant stated "It should not be necessary to seek dismissal of this case regarding this defect". (Id. at 9. 12, ¶ 2) (emphasis added).

An Order was entered in the Circuit Court for Williamson County on February 21, 2023, and pursuant to Mr. Rosenberg's Motion ordering the Plaintiff, Ms. Foreman to allege that "venue is proper in Davidson County within 10 days of the entry of this Order", and also stating this "case shall be transferred to Davidson County Circuit Court". (T.R. Vol. 1, p. 20). Upon information and belief, this was an announcement made by Mr. Rosenberg's counsel based on the relief requested in his Motion for more Definite Statement, with Attorney Preston being *in absentia*, as Trial Counsel for the Appellant filed a "Motion to Revise" the "Order entered February 21, 2023" on February 24, 2023, stating he had not opposed Mr. Rosenberg's Rule 12.05 Motion which also sought compliance with Tenn. R. Civ. P. 10.03; however, the Order submitted by Defendant's Counsel "apparently took the liberty of seeking additional relief in Plaintiff's counsel's absence". (Id. at p. 18-19, ¶ 1). This Motion was set to be heard on March 30, 2023. (Id.). The day before the scheduled hearing, Counsel for the Defendant filed a Response to Plaintiff's Motion, along with a Motion to Transfer Venue under Tenn. R. Civ. P. 12.03. On April 16, 2023, the Williamson County Circuit Court entered an Order revising its February 21, 2023 Order to eliminate the rulings therein on the merits of Venue, and then ruled to Transfer Venue. (Id. at p. 46-47).

Thus, the record is apparent any delay in the transfer of Venue, or with regard to the Amended Complaint are actually due to the Defendant's Counsel, at least from the dates of February 21, 2023 until April 16, 2023.

Once the case was transferred to Davidson County, Counsel for the Defendant did file a Motion for Summary Judgment under Tenn. R. Civ. P. 56 on April 25, 2023. (Id. at 57-103). On the same date, the Clerk of Court did send Trial Counsel for the Plaintiff, as well as the Defendant, a Letter notifying that the removal was received on April 24, 2023, and the case had been assigned to the Eighth Circuit Court. (Id. at 104-105). The record is unclear as to when Trial Counsel may have received this letter, but this would be the first time Plaintiff's Counsel would have had a Court to file the Amended Complaint with since the entry of the Williamson County Circuit Court's February 21, 2023 Order, as that dispute was ongoing until that Court relinquished jurisdiction.

As previously stated herein, On May 19, 2023, the Defendant filed a Motion for Voluntary Dismissal under Tenn. R. Civ. P. 41.02(1) for failure to amend the original complaint (Id. at p. 106-108). On May 31, 2023, the Plaintiff filed an Amended Complaint, attaching the written instrument containing the alleged defamatory statements (Id. at p. 120-129). On the same day, the Defendant filed a withdrawal of his Rule 41.02(1) Motion to Dismiss (Id. at p. 130-131). On June 2, 2023, the Defendant did file a second Motion for Summary Judgment under Tenn. R. Civ. P. 56, including attachments, totaling 48 pages (Id. at p. 132 – T.R. Vol. 2, p. 179). The Plaintiff was unable to nonsuit the claim under this procedural posture.

The Defendant's Motion/Petition under the Tennessee Public Participation Act ("TPPA") was filed on June 12, 2023. The Motion/Petition requested an award of Attorney Fees, Costs and Sanctions. The Motion/Petition, with accompanying Memorandum and Exhibits thereto, was 127 pages. (Id. at p. 180-286, cont'd at T.R. Vol. 3 at p. 287-307). The Motion/Petition and Memorandum were 40 pages in length with 87 pages of attachment. The First 43 pages were documents from a lawsuit between the Appellant and ex romantic partner wherein he had made some sordid allegations against her of a private nature back in 1999, and in which the Plaintiff ultimately prevailed (T.R. Vol. 2, p. 220-243). The subsequent pages consisted of a couple of suits where Plaintiff had sued some individual in 2013 for some defective trail cameras, a list of election results and a slew of social media posts and items purporting to depict the Plaintiff's views on certain issues. (Id. at p.244 - 284).

The next Exhibit to the Motion/Petition was a Notice of Voluntary Nonsuit *Without Prejudice* in the Eighth Circuit Court for Davidson County in a matter styled Michelle Foreman v. Caleb Hemmer, et. al. bearing Docket Number 23C218, filed on March 10, 2023, followed by the Defendants Petition to Dismiss and related Motions pursuant to the TPPA. (Id. at p. 285 – T.R. Vol. at p. 295). On June 9, a "Proposed Order of Voluntary Dismissal with Conditions was entered in that case, wherein Judge Lynne Ingram did stating "If this matter is refiled, as announced by Plaintiff's counsel, the Court has further advised the parties that the Court is a constituent of this legislative district and asked if that posed any problem for the parties. Both parties

acknowledged before the Court this was not a conflict [sic]. (Id. at p. 299-302).

As stated, a hearing was held on the Motion/Petition on June 30, 2023 (see T.E. Vol. 10) wherein the Trial Court granted the Petition to Dismiss pursuant to the burden-shifting Provisions in Tenn. Code Ann. § 20-17-104, and determining an award of Attorney Fees was mandatory. The Trial Court reserved that issue of the reasonableness of the Attorney Fees, as well as the issue of Sanctions under Tenn. Code Ann. § 20-17-107, and entered an Order to that effect on July 11, 2023. (T.R. Vol. 4, p. 422-427).

On August 11, 2023, the Defendant filed a Motion for Sanctions under Tenn. Code Ann. § 20-17-107 (Id. at p. 516 – T.R. Vol. 5 at p. 545-594). The Motions stated grounds were that:

- “(1) the Plaintiff has filed multiple SLAPPsuits;
- (2) the Plaintiff still has a third SLAPP-suit pending against another critic right now;
- (3) the Plaintiff has strategically maximized litigation costs, including costs that are not subject to fee-shifting, during her SLAPP-suit campaigns in an effort to impose maximum expense on her critics;
- (4) the Plaintiff is a politician;
- (5) the Plaintiff has sought to exploit extra- judicial benefits from her SLAPP-suits;

(6) the Plaintiff is unrepentant and, to the contrary, views herself as a victim; and

(7) the Plaintiff has committed to maintaining and did maintain SLAPP suits even after being confronted with TPPA petitions in the past, severe sanctions are necessary to deter Ms. Foreman from repeating her misconduct”

(T.R. Vol. 4 at p. 517).

The Motion had more of the similar type of attachments which were attached the earlier Motion/Petition. Interestingly enough, one attachment was a lawsuit filed by Trial Counsel on behalf of some unknown party. (T.R. Vol. 5. At p. 549-553). Also attached were various documents purporting to illustrate loans made by the Plaintiff to her campaign, as well as documents purporting to show property owned by the Plaintiff. (Id. at 554 – 590). It should be noted that none of these documents were authenticated or moved into evidence, nor did any of them purport to state any liabilities outstanding for the Plaintiff.

On August 21, 2023, Trial Counsel for the Plaintiff filed a “Response (In) Opposition to Defendant’s Motion for Tenn. Code Ann. § 20-17-107(a)(2) Sanctions (T.R. Vol. 8, P. 600-603).

On August 25, 2023, a hearing was held on the Defendants respective Motions for Attorney Fees and Costs, as well as the Motion for Sanctions (see T.E. Vol. 10). With respect to the Motion for Sanctions, the Trial Court pronounced “the Court is not staying this motion. What the

Court is going to do is take it under advisement and rule as promptly as possible”. (Id. at p. 34, Lines 3:13).

On December 4, 2023, the Trial Court issued its ruling on the issue of Sanctions against the Appellant. (T.R. Vol. 7, p. 877 – 894). The Court set forth the Legal Standard, first reciting the provisions of Tenn. Code Ann. 20-1-107. (Id. at p. 877).

The Court then went on to define SLAPP Suits as “strategic lawsuits against public participation”, based on the language in this Court’s holding in Nandigam Neurology, PLC v. Beavers, 639 S.W.3d 651, 657 (Tenn. Ct. App. 2021). The Trial Court noted that, with respect to these suits, Plaintiffs in SLAPP suits aim to "chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction. Id.

The Trial Court then set forth factors to be used in a determination of the appropriate amount of sanction under the TPPA, stating “the Court has independently researched whether each of the fifty states has a public participation act, and if so, whether such act allows for an award of sanctions to deter repeat conduct by the party who brought the action” (T.R. Vol. 8 at p. 878, ¶ 2). The Court ultimately turned to the anti-SLAPP statutes in Kansas and then Texas for guidance on the issue.

The Court first examined “Kansas’s anti-SLAPP statute, the Public Speech Protection Act, is codified at Kan. Stat. Ann. § 60-5320”, noting that, “although a Kansas court has never granted an award of sanctions

to deter the conduct of the filer, Kansas case law provides persuasive authority to determine such an award” (T.R. Vol. 8 at p. 879 ¶ 2) (emphasis added). The Court, examining Kansas Legislative Intent, noted that “the intent of the Kansas Legislature was to protect against SLAPP suits which, for example, are used to *silence people of limited means* who exercise their first amendment rights of free speech”. Caranchini v. Peck, No. 18-2249-CM-TJJ, 2019 WL 4168801 (D. Kan. Sept. 3, 2019).

The Court then examined the Texas anti-SLAPP statute, “Texas Citizens Participation Act (“TCPA”), is codified at Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq. The Court in particular honed in a case with non-exhaustive factors, which was interpreting the Texas equivalent of the Tenn. R. Civ. P. 11 for that guidance. See generally, Landry's, Inc. & Houston Aquarium, Inc. v. Animal Legal Def. Fund 566 S.W.3d 41 *: 2018 Tex. App. LEXIS 8521 **: 2018 WL 5075116. (T.R. Vol. 8 at p. 881). The Court went on to discuss some local Trial Court decisions from Sumner County and Overton County, which noted that the goal of sanctions was to “deter repetition of the conduct by the party who brought the legal action or by others similarly situated”. (Id. at p. 883). The Court then went on to recite Procedural Posture of the case.

In its discussion and ruling, the Trial Court first made of list of the Landry’s factors it found applicable to the case. It should be noted that the Court did not apply factors (g) and (h) from Landry’s, with respect to “the relative culpability of client and counsel” and the “risk of chilling the specific type of litigation involved” (see Id. at 881 vs. 885).

When examining “Others Similarly Situated” with respect to trial Counsel, the Court declined to consider the “alleged SLAPP suit filed the same day the Court entered its Order Granting Defendant's Motion to Dismiss and T.C.A. § 20-17-104(a) Petition to Dismiss Plaintiff's Amended Complaint Pursuant to the TPPA for this purpose. (D's M. for T.C.A. § 20-17-107(a)(2) Sanctions, p. 11, No. 23C891 (Tenn. Cir. Ct. of Davidson Cnty. 2023)); however, the Court did, somehow, impute that conduct, from a suit completely unrelated to the Plaintiff noting that this “unequivocally demonstrate Plaintiff does not see anything wrong with this conduct and is likely to file similar lawsuits in the future”. (T.R. Vol. 8 at 888-889). The Court finally went on to examine the lawsuits actually involving the Plaintiff, holding that the Plaintiff had non-suited the *Foreman v. Hemmer* matter, and that the other case was still ongoing. The record is void of any adjudication on the merits for those cases. Finally, the Court imputed the venue delay to the Plaintiff, as well as delay in filing the Amended Complaint. (Id. at 889-892). There is no proof in the record to support that finding. Finally, the Court found that “Plaintiff is a politician, which the Court finds demonstrates Plaintiff's expertise surrounding the facts upon which she has based these frivolous lawsuits. Id. The Court also finds Plaintiff is not an indigent party or a school teacher, nor is she a victim. Plaintiff is a knowledgeable initiator, and the Court considers this when deciding the impact of the sanction on the offender and the offender's ability to pay a monetary sanction” (Id.)

The Court ultimately awarded sanctions against the Plaintiff in the amount of \$100,000.00

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING SANCTIONS AGAINST THE APPELLANT PURSUANT TO TENN. CODE ANN. § 20-17-107(a) of the TPPA

A. Standard of Review

Tennessee Courts have yet to interpret an award of sanctions under the Tennessee Public Participation Act (“TPPA”), at least to the extent Counsel is aware, upon diligent inquiry. As such, this may present novel issues, or matters of first impression with this Honorable Court. Appellant would argue that the *award* of sanctions under the TPPA is clearly discretionary with the Trial Court. The act states, in pertinent part,

“(a) If the court dismisses a legal action pursuant to a petition filed under this chapter, the court *shall award* to the petitioning party:

(1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; *and*

(2) *Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.*”

Tenn. Code Ann. § 20-17-107 (a) (emphasis added).

The plain language of the Statute leaves no room for interpretation that a prevailing Petitioner, filing under the TPPA, is granted mandatory relief under subsection (a)(1); however, relief under subsection (a)(2) is discretionary with the Trial Court to the extent it deems necessary *to deter repetitive conduct by the party who brought the legal action*, or in the alternative, to deter the repetition of the conduct by others similarly situated. Further, the plain language of the Statute does not compel an award of sanctions upon the Trial Court's determination that relief is necessary to deter any such repetitive conduct, as the Statute vests authority to award "Any additional relief". *Id (emphasis added)*.

As such, Appellant would state that the Trial Court's decision to award sanctions is subject to the standard of review as an award of sanctions under Tenn. R. Civ. P. 11.02. Tennessee Courts have held that "a trial court's ruling as to Rule 11 sanctions "under an abuse of discretion standard." Brown v. Shappley, 290 S.W.3d 197, 200 (Tenn. Ct. App. 2008).

Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 358 (Tenn. 2008). A trial court "abuses its discretion if it 'strays beyond the applicable legal standards.'" Ewan v. Hardison L. Firm, 465 S.W.3d 124, 139 (Tenn. Ct. App. 2014). (internal citations omitted).

B. The Trial Court Abused Its Discretion in Awarding Sanctions against the Appellant

The Tennessee Supreme Court has established the standard for determining whether an attorney's conduct is sanctionable under Rule 11 as one of objective reasonableness under the circumstances as they existed when the document was signed. Hooker v. Sundquist, 107 S.W.3d 532, 536 (citing Andrews v. Bible, 812 S.W.2d 284 at 288 (Tenn. 1991) at 288).

The Federal Eastern District Court of Tennessee, has held that the TPPA does not apply in Federal cases, as there are “Federal Rules of Civil Procedure answer the question in dispute—i.e., whether a claim may be dismissed pretrial”. Apex Bank v. Rainsford, No. 3:20-cv-198, 2020 U.S. Dist. LEXIS 261372, at *11-12 (E.D. Tenn. Sep. 16, 2020). Tenn. Code Ann. § 20-17-108 states “Nothing in this chapter” “(6) Creates a private of action”.

This Honorable Court has held that in “interpreting the TPPA and other states' decisions respecting similar anti-SLAPP statutes, we conclude that the dismissal provisions contained within the TPPA can be harmonized with the operation of Tennessee Rule of Civil Procedure 12. Reiss v. Rock Creek Constr., Inc., No. E2021-01513-COA-R3-CV, 2022 Tenn. App. LEXIS 416, at *23-24 (Ct. App. Nov. 1, 2022).

The TPPA does not foreclose a Plaintiff from filing a Voluntary Non-suit under Tenn. R. Civ. P. 41.02, absent the procedural methods employed in this case. Likewise, the TPPA lacks a “Safe Harbor” provisions similar to Tenn. R. Civ. P. 11.03. Indeed, in the Texas “TCPA”, the

Landry's factors were drawn the Texas Rule similar to Tenn. R. Civ. P. 11. In either event, the result of the appropriate analysis was not reached at the Trial Court in this case.

For the above reasons, the Trial Court erred in awarding any form of punitive sanction against the Plaintiff.

II. WHETHER THE SANCTIONS AWARDED WERE EXCESSIVE OR ARBITRARY

A. Standard of Review

Tennessee Courts have likewise yet to interpret the amount of an award of sanctions under the Tennessee Public Participation Act (“TPPA”), at least to the extent Counsel is aware, upon diligent inquiry. As such, this may present novel issues, or matters of first impression with this Honorable Court. Appellant would argue that the amount of the award of sanctions under the TPPA is discretionary with the Trial Court. The act states, in pertinent part,

“(a) If the court dismisses a legal action pursuant to a petition filed under this chapter, the court *shall award* to the petitioning party:

.....

(2) Any additional relief, including sanctions, *that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated*”.

Tenn. Code Ann. § 20-17-107 (a) (emphasis added).

The plain language of the Statute leaves no room for interpretation that a prevailing Petitioner is only entitled to relief under subsection (a)(2) to the extent the Trial Court it deems necessary *to deter repetitive conduct by the party who brought the legal action*, or in the alternative,

to deter the repetition of the conduct by others similarly situated”. *Id* (*emphasis added*).

As such, Appellant would state that the Trial Court’s decision to award sanctions is subject to the standard of review as an award of sanctions under Tenn. R. Civ. P. 11.02. Tennessee Courts have held that “a trial court's ruling as to Rule 11 sanctions "under an abuse of discretion standard." *Brown at 200 (Tenn. Ct. App. 2008)*.

Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka at S.W.3d 358 (Tenn. 2008)*. A trial court "abuses its discretion if it 'strays beyond the applicable legal standards.'" *Ewan v. Hardison L. Firm, 465 S.W.3d 124, 139 (Tenn. Ct. App. 2014)*. (internal citations omitted).

B. The Trial Court’s Award of Sanctions in the amount of \$100,000.00 is excessive and arbitrary and constitutes an abuse of discretion.

The Court had no admissible proof in the record regarding the application of the *Landry’s* factors it chose to apply. Furthermore, the Court incorrectly characterized lawsuits not yet adjudicated as “SLAPP suits” when making the finding of sanctions against the Plaintiff. The Court cited no authority, persuasive or otherwise which supported a finding of

Sanctions, at all, against the Plaintiff. The Court's Order simply stated in the record findings without any fact-intensive inquiry into the same. The case which laid out that very test noted "The trial court's discretion in assessing sanctions must terminate at some figure, beyond which the sanctions become excessive. *Landry's*, 566 S.W.3d 41, 73 (Tex. App. 2018).

The likelihood of a result like this chilling potential litigants from seeking redress from the Court should certainly have been addressed in the Trial Court's analysis. Just as likely, the Court's finding that the Plaintiff was a "Politician", without any serious inquiry into the Plaintiff's financial condition, should chill anyone from running for public office. For these reasons, the Court's award of sanctions should be vacated.

III. THE TRIAL COURT’S SANCTION AWARD AGAINST THE APPELLANT VIOLATED HER RIGHTS UNDER ARTICLE I, § 14 OF THE TENNESSEE CONSTITUTION

A. Standard of Review

The Appellant raises this issue, specifically, for the first time on Appeal. Appellant would assert that Court’s Sanction in this case violates her right to a jury trial under the Fifty-Dollar Fine Clause of Article VI, Section 14 of the Tennessee Constitution.

Trial Counsel made certain arguments regarding the Constitutionality of the TPPA in general in his “Response in Opposition to Defendant, Dave Rosenberg’s” Motion/Petition. (See T.R. Vol. I, p. 310, ¶ 2). The Trial Court, in its Order entered July 11, 2023, wherein dismissal of the action was granted, Denied as Waived, the Plaintiff’s Constitutional arguments, relying on Sneed v. Bd. of Pro. Resp. of Supreme Ct., 301 S.W.3d 603, 615 (Tenn. 2010)

The Tennessee Supreme Court has held that “*any errors affecting the constitutional right to trial by jury will result in such prejudice to the judicial process that automatic reversal is required*”. Tenn. R. App. P. 36(b). State v. Bobo, 814 S.W.2d 353, 358 (Tenn. 1991). The Bobo Court went on to note that such “violations are defects in the structure of the trial mechanism and thus defy analysis by harmless error standards”. *Id.* (quoting Arizona v. Fulminante, 111 S.Ct. 1246, 113 L.Ed.2d 302 (U.S.))

Issues of constitutional interpretation are questions of law, which we review de novo without any presumption of correctness given to the

legal conclusions of the courts below." Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008).

B. The Trial Court's Violation of the Defendant's Rights amount to Plain Error

This Court recently noted that "Tennessee's Fifty-Dollar Fine Clause is a unique constitutional provision", and that "[N]o other provision like it may be found either in the Federal Constitution or in any other modern state constitution. . . . Similar clauses did not appear in any colonial charter, in any early state constitution, including the 1776 North Carolina Constitution, or in the Constitution of the State of Franklin". Reguli v. Anderson, No. M2022-00705-COA-R3-CV, 2024 Tenn. App. LEXIS 176, at *78 (Ct. App. Apr. 22, 2024) (citing City of Chattanooga v. Davis, 54 S.W.3d 248, 257 (Tenn. 2001)).

The Tennessee Supreme Court "has also indicated that this constitutional provision applies to monetary assessments where "either the intended purpose or the actual purpose or effect of the monetary assessment is to serve as a punitive measure." Id. at 251. The line of demarcation between constitutionally fair and foul turns upon the remedial versus punitive nature of the monetary assessment. Barrett, 284 S.W.3d at 789 (noting that the test developed by the Tennessee Supreme Court "focuses on the distinction between punitive and remedial monetary penalties"); Town of Nolensville v. King, 151 S.W.3d 427, 433 (Tenn. 2004).

Truly remedial purposes of a monetary assessment "include those that [*81] (1) compensate for loss; (2) reimburse for expenses; (3) disgorge 'ill-gotten' gains; (4) provide restitution for harm; and (5) ensure compliance with an order or directive, either through the execution of a bond, or . . . through a prospectively coercive fine." City of Chattanooga, 54 S.W.3d at 270.

While acknowledging that remedial measures naturally have some aspect of deterrence, the Tennessee Supreme Court determined that "when the predominant purposes served by" the judicially imposed "penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes," which brings it into conflict with the Fifty-Dollar Clause. *Id.* The Tennessee Supreme Court emphasized this point, reiterating "that if the predominant 'remedial' purpose served by a monetary sanction is ensuring deterrence against future wrongdoing, then the sanction more properly appears to be punitive in actual purpose or effect." *Id.*

It is abundantly clear from the record that the sanction awarded against the Plaintiff/Appellant in this cause was punitive in nature. The Trial Court, again, cited no authority for such a finding, characterized unauthenticated exhibits to pleadings as facially frivolous, and sought out for authority to arrive at a punitive conclusion prior to arbitrarily arriving there.

Due to this violation of Plaintiff's rights under Article I, § 14, the award of sanctions should be reversed and the Judgment vacated.

CONCLUSION

For the foregoing reasons, Appellant/Plaintiff would ask this Honorable Court to Vacate the award of sanctions against her, or, in the alternative to remand to the trial Court with a significant remittitur, or as such other relief as this Honorable Court deems necessary and proper.

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Respectfully submitted,

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On this, the 27th day of June, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Tennessee Supreme Court Rule 46 § 3.02(a) because this brief contains 5,969 words, including the parts of the brief exempted by Tennessee Supreme Court Rule 46 § 3.02(a)(1).

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