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

KEDALO CONSTRUCTION, LLC, and RANDY WHETSELL,	§	
Plaintiffs-Appellees,	§	
v.	§	Case No.: M2024-00224-COA-R3-CV
LINDA DUYGUL WARD and CALEDONIA FOREST, LLC,	§	Montgomery County Circuit Court Case No. 22-CV-1380
Defendants-Appellants.	§	

REPLY BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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A. THE PLAINTIFFS CONCEDE THE DISPOSITIVE ISSUE IN THIS APPEAL: THAT THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANTS DID NOT MEET THEIR BURDEN UNDER TENN. CODE ANN. § 20-17-105(a).

In the order giving rise to this appeal, the trial court ruled that the Defendants' Tennessee Public Participation Act (TPPA) petition to dismiss the Plaintiffs' Amended Complaint "should be, and is, respectfully denied."[1] As grounds for that ruling, the trial court held that the Defendants "have not met their burden" of making a prima facie case that the Plaintiffs' legal action was "based on, relates to, or is in response to" the Defendants' exercise of the right of free speech under Tenn. Code Ann. § 20-17-105(a).[2] The dispositive question presented in this appeal is whether that ruling—which was the sole basis for the trial court's denial of the Defendants' TPPA Petition[3]—was wrong.

Sixty-one pages into the Plaintiffs' Response Brief, the Plaintiffs concede the trial court's error. *See* Br. of Appellees at 61 ("Appellants Admit it is Undisputed that the TPPA was Triggered."); *see also id.* at 61–62 ("Appellees have never disputed that the TPPA was triggered"). This concession resolves the first four issues presented in this appeal. *See* Principal Br. of Appellants at 8. Thus, because the Plaintiffs do not defend the merits of the dispositive question presented in this appeal and concede error regarding it, *see* Br. of Appellees at 61–62, this Court should credit the Appellees' concession and reverse. *Cf. State ex rel. Wix*

[1] R. (Vol. 8) at 1064.
[2] *Id.*
[3] *Id.*

v. Sherrod, No. M2005-01318-COA-R3-CV, 2006 WL 2956516, at *1 (Tenn. Ct. App. Oct. 16, 2006) (noting that "the State concedes error regarding this issue" and reversing "[i]n light of the State's concession"); *Sibron v. New York*, 392 U.S. 40, 58 (1968) ("Confessions of error are, of course, entitled to and given great weight").

B. THIS COURT SHOULD NOT ADJUDICATE, IN THE FIRST INSTANCE, DISPUTED MERITS ISSUES THAT DEPEND ON AN UNRESOLVED EVIDENTIARY RECORD.

Where, as here, a trial court incorrectly denies a TPPA petition on the ground that a petitioner has not met its initial burden under section 20-17-105(a), this Court has held repeatedly that the "proper remedy" is to remand to the trial court to consider the remaining steps of the TPPA analysis. *See Garner v. Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC*, No. W2022-01636-COA-R3-CV, 2024 WL 1618897, at *13 (Tenn. Ct. App. Apr. 15, 2024) ("Here, the trial court denied Appellants' motion to dismiss solely on the basis that Appellants had not met the first prong of the TPPA burden-shifting framework. We therefore conclude that the proper remedy is to remand to the trial court for consideration of these remaining issues."); *Goldberger v. Scott*, No. M2022-01772-COA-R3-CV, 2024 WL 3339314, at *7 (Tenn. Ct. App. July 9, 2024) ("Because the trial court denied Mr. Scott's petition on the basis that Mr. Scott had not met the first step of the TPPA burden-shifting framework, we remand this case to the trial court for further proceedings, including consideration of whether Plaintiffs met their prima facia burden and, if so, whether Mr. Scott nonetheless established a valid defense."); *Cartwright v. Thomason Hendrix, P.C.*, No. W2022-01627-COA-R3-CV, 2024 WL 1618895, at *12

(Tenn. Ct. App. Apr. 15, 2024) (reversing and remanding to the trial court to reconsider the remaining steps of TPPA analysis). That remedy is proper because this Court "is a court of appeals and errors," so it is "limited in authority to the adjudication of issues that are presented and decided in the trial courts." *Cartwright*, 2024 WL 1618895, at *12 (quoting *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976)); *see also Hohenberg Bros. Co. v. Missouri Pac. R. Co.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979) ("This Court is a court of review, not a Trial Court[,]" and its function is "to Review the actions of the Trial Judge.").

Put another way: "[t]he jurisdiction of this Court is appellate only; [it] cannot hear proof and decide the merits of the parties' allegations in the first instance." *Reid v. Reid*, 388 S.W.3d 292, 294 (Tenn. Ct. App. 2012). Thus, this Court is "constrained to only review those issues that have been decided by the trial court in the first instance." *Whalum v. Shelby Cnty. Election Comm'n*, No. W2013-02076-COA-R3-CV, 2014 WL 4919601, at *3, n.3 (Tenn. Ct. App. Sept. 30, 2014); *cf. Cavin v. Michigan Dep't of Corr.*, 927 F.3d 455, 459 (6th Cir. 2019) ("As 'a court of review, not of first view,' . . . we will remand the case to the district court to resolve the point in the first instance.") (internal citation omitted). Litigants are "entitled to full consideration of" their claims by a trial court in the first instance, too. *Heun Kim v. State*, No. W2018-00762-COA-R3-CV, 2019 WL 921039, at *7 (Tenn. Ct. App. Feb. 26, 2019).

Despite the foregoing—and despite this Court's express instructions, including three times this year alone, that remanding is the "proper remedy" under the circumstances presented here, *see supra* at 8–

9—the Plaintiffs insist that this Court should adjudicate, in the first instance, a host of additional merits questions that the trial court has never considered. *See* Br. of Appellees at 29–61. For the reasons detailed below, this Court should reject that invitation.

"In general, this Court only reviews issues that are presented and decided by the trial court." *Cartwright*, 2024 WL 1618895, at *12 (citing *Dorrier*, 537 S.W.2d at 890; *In re Est. of Boykin*, 295 S.W.3d 632, 636 (Tenn. Ct. App. 2008) ("At the appellate level, we are limited in authority to the adjudication of issues that are presented and decided in the trial courts.") (cleaned up)). Thus, "when the trial court fails to address an issue in the first instance, this Court will not consider the issue, but will instead remand for the trial court to make a determination in the first instance." *Cartwright*, 2024 WL 1618895, at *12 (quoting *Mid-S. Maint. Inc. v. Paychex Inc.*, No. W2014-02329-COA-R3-CV, 2015 WL 4880855, at *14 (Tenn. Ct. App. Aug. 14, 2015)). "This rule has been applied even when [this Court's] review is de novo." *Id.* (citing *Johnson v. Rutherford Cnty.,* No. M2017-00618-COA-R3-CV, 2018 WL 369774, at *9 (Tenn. Ct. App. Jan. 11, 2018) ("[T]he trial court did not rule on [the] motion for summary judgment; therefore, this Court could not address it in the first instance." (in turn citing *Dorrier*, 537 S.W.2d at 890)); *see also Richman v. Debity*, No. E2022-00908-COA-R3-CV, 2023 WL 4285290, at *4 (Tenn. Ct. App. June 30, 2023) ("Because the trial court's written order does not contain the reasoning for its denial of the TPPA Petition, we vacate and remand for entry of an order explaining the trial court's decision."). This Court has routinely followed this "general" approach. *See, e.g., Farmers*

Mut. of Tennessee v. Atkins, No. E2011-01903-COA-R9-CV, 2012 WL 982998, at *4 (Tenn. Ct. App. March 21, 2012) (declining to consider a matter when no initial determination was made by the trial court); *Shaffer v. Memphis Airport Auth., Serv. Mgmt. Sys., Inc.*, No. W2012-00237-COA-R9-CV, 2013 WL 209309, at *4 (Tenn. Ct. App. Jan. 18, 2013) ("In an interlocutory appeal, as well as in an appeal as of right, the appellate court considers only questions that were actually adjudicated by the trial court."); *Davidson v. Myers,* No. C.A. 152, 1990 WL 198906, at *1 (Tenn. Ct. App. Dec. 12, 1990) (remanding to the trial court to consider the issues of damages and specific performance, which had not been determined by the trial court).

It is true that this Court has authority to affirm a trial court judgment on other grounds where the record supports affirmance and "'there exists no material controversy regarding matters of fact or law.'" *White v. Dozier*, No. M1999-02386-COA-R3-CV, 2000 WL 244229, at *2 (Tenn. Ct. App. Mar. 6, 2000) ("This appellate court 'may examine the record and affirm the [trial] court on other grounds if we determine that there exists no material controversy regarding matters of fact or law.'"). But that necessarily requires a settled "record," and here, there isn't one. *Id.*; *see also Baldus v. Rubin,* No. C.A. 1248, 1989 WL 45798, at *2 (Tenn. Ct. App. May 5, 1989) ("Where the appellate court concurs in the result reached by the lower court on one ground, an affirmance may be ordered upon a different ground *supported by the record*.") (emphasis added); *Underwood v. Johnson,* No. C.A. 1219, 1989 WL 3140, at *4 (Tenn. Ct. App. Jan. 20, 1989) (same); *cf. Brown v. Tidwell*, 169 F.3d 330, 332 (6th

Cir. 1999) ("This court can affirm a decision of the district court on any grounds *supported by the record*, even if different from those relied on by the district court.") (emphasis added) (citing *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994)).

As this Court has recently emphasized, TPPA petitions involve *evidentiary* claims. *PMC Squared, LLC v. Gallo*, No. E2023-00524-COA-R3-CV, 2024 WL 3757839, at *3–4 (Tenn. Ct. App. Aug. 12, 2024). Such claims must therefore be resolved based on "admissible evidence." *Id.* at *5. And a trial court's decision "to admit or exclude evidence" at the TPPA stage is reviewed for abuse of discretion. *See id.* at *3–5.

Here, the trial court has never made any evidentiary determinations concerning the Parties' competing claims at the second and third steps of the TPPA analysis.[4] That is because the trial court's analysis began and ended at step one.[5] Thus, the trial court had no need to adjudicate the Defendants' objections to the admissibility of the Plaintiffs' proffered evidence, given that the trial court concluded—wrongly, as the Plaintiffs now concede, *see supra* at 7—that the Defendants had not met their initial burden under section 20-17-105(a).[6]

The Parties do not agree on—and the trial court has never determined—what evidence should be admitted into the TPPA evidentiary record at the second and third steps of the TPPA's analysis, though. Thus, doing what the Plaintiffs ask would require this Court to

[4] *Compare* R. (Vol. 8) at 1064 (denying Defendants' TPPA Petition only under § 20-17-105(a)), *with* §§ 20-17-105(b)–(c).
[5] R. (Vol. 8) at 1064.
[6] *Id.*

receive and admit evidence in the first instance—something that would go far beyond its appellate function. *See, e.g., Watson v. Bradley Cnty. Sch. Bd.*, No. E2010-00964-COA-R3-CV, 2011 WL 332669, at *7 (Tenn. Ct. App. Jan. 28, 2011) ("As an appellate court, this Court does not hear new evidence and is limited to what is contained in the record."); *Rutledge v. Rutledge*, 268 S.W.2d 343, 344 (Tenn. 1954) ("Of course of appellate court is not a court of original jurisdiction and does not hear proof in such matters."). Thus, given the unresolved evidentiary record—and given this Court's repeat instructions that the proper remedy when a trial court errs at the first step of the TPPA analysis is to remand—this Court should remand instead. *See Garner*, 2024 WL 1618897, at *13; *Goldberger,* 2024 WL 3339314, at *7; *Cartwright*, 2024 WL 1618895, at *12.

C. IF THIS COURT DOES NOT REMAND, THEN IT SHOULD REVERSE, BECAUSE NONE OF THE PLAINTIFFS' EVIDENCE IS ADMISSIBLE.

If this Court opts not to remand, though, then this case is an easy reverse, and this Court should grant the Defendants' TPPA Petition. That is because the Plaintiffs' evidence is uniformly inadmissible, thereby precluding the Plaintiffs from meeting their evidentiary burden as to any element of any claim. *See Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 668 (Tenn. Ct. App. 2021).

The Plaintiffs' evidence falls into two categories: (1) declarations, and (2) Ms. Ward's full deposition transcript. As detailed below, however, none of the Plaintiffs' proffered evidence is admissible.

Beginning with the Plaintiffs' declarations: As the Defendants have

complained for years now,[7] the Plaintiffs' declarations—which are sworn deficiently "to the best of [the declarant's] knowledge, information and belief"[8]—are inadmissible. The Plaintiffs insisted otherwise based on a misbegotten belief that "this exact language is acceptable under Rule 72[.]"[9] To the extent there was ever any doubt about who had the better argument on the matter, though, this Court settled it while this appeal was pending. *PMC Squared, LLC*, 2024 WL 3757839, at *4 ("The TPPA Petition purports to be a verified pleading; however, Ms. Leveille's verification of the TPPA Petition is made upon 'the best of [her] information, knowledge and *belief*.' . . . It is well settled that " '[a] Petitioner's own belief does not constitute 'such facts as would be admissible in evidence' as required by Rule 56.0[6]' and cannot be considered as evidence.") (cleaned up).

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[7] R. (Vol. 4) at 482–83 (lodging that objection in written response); *see also* R. (Vol. 8) at 1043:12–16 (lodging that objection during the Parties' TPPA hearing).

[8] R. (Vol. 1) at 135 (verification to Amended Complaint stating "that the facts set forth above are true and correct to the best of my knowledge, information and belief. Furthermore, those allegations made 'on information and belief' have been made to the best of my knowledge, based on readily available information."); R. (Vol. 3) at 418 (Whetsell Declaration stating that its assertions "are true and correct to the best of my knowledge, information, and belief"); *id.* at 412 (Nichols Declaration stating that its assertions "are true and correct to the best of my knowledge, information and belief"); *cf.* R. (Vol. 4) at 504–05 (Amended Declaration of Whetsell submitted in support of motion for temporary injunction that does not state it is based on personal knowledge and expressly asserts that allegations in it are based "upon information and belief").

[9] R. (Vol. 8) at 1053:21–22.

The Defendants' complaint that the Plaintiffs' affidavits are deficient is not some surprise "gotcha," either. The Defendants have been complaining about the inadmissibility of the Plaintiffs' deficient declarations *for years*.[10] More than that: the deficiencies in the Plaintiffs' declarations are not merely technical. Instead, the problem is that the Plaintiffs' declarants genuinely attest to their mere "belief" about matters the declarants know nothing about.

One example suffices to illustrate the point. The Plaintiffs tendered a sworn-on-"belief" declaration of a man named Matthew Nichols, which the Plaintiffs introduced to establish that the Defendants "used the extra tile to tile an office/storage room the [sic] back of the property, as shown in [a] photo" that appears in Mr. Nichols' declaration.[11] The Plaintiffs also continue to emphasize the claims made in that declaration in their briefing here. *See* Br. of Appellees at 22.

The problem with this declaration is that Mr. Nichols has no personal knowledge supporting what he "believes." And as Ms. Ward—who *does* have personal knowledge of the matter—testified, the referenced photo is of a back hallway that the Plaintiffs were paid to tile but never completed, not "an office storage room in the back of [Ms. Ward's] property."[12] In fact, Ms. Ward and her company have "never tiled anything in [their] store."[13] Thus, the admissible evidence in the TPPA record established that Mr. Nichols' "belief[s]" about the matters asserted

[10] R. (Vol. 4) at 482–83.
[11] R. (Vol. 3) at 413.
[12] R. (Vol. 5) at 645–74.
[13] *Id.* at 657:14–15.

in his declaration are wrong, and, in fact, he did "not know what he [was] talking about[.]"[14]

Stripped of their inadmissible declarations, the Plaintiffs are left with only one item of evidence: Ms. Ward's full deposition transcript. But setting aside that the full transcript does not supply prima facie proof of each element of the Plaintiffs' claims (or anything close to it), the Plaintiffs did not even timely admit it. Thus, it cannot be considered.

The chronology of events here is undisputed. Over a week before the second hearing on the Defendants' TPPA Petition, the Defendants timely filed an excerpt from Ms. Ward's deposition to support their valid defenses.[15] The Plaintiffs, by contrast, did not file Ms. Ward's deposition before hearing—either in whole or in part.

Instead, on November 2, 2023—the night before the Parties' Nov. 3, 2023 TPPA hearing—the Plaintiffs filed an (untimely, unpermitted) "Surreply" to the Defendants' (timely, permitted) Reply brief.[16] The Plaintiffs' Surreply referenced additional testimony from Ms. Ward's deposition beyond that included in the excerpt the Defendants had filed the week before.[17] But the Plaintiffs did not actually file the rest of Ms. Ward's deposition transcript, so it was nowhere in the record.

During the Parties' hearing the following morning, the Defendants noted their objection to all of this. Their counsel stated:

I do want to make sure that I get this objection on the record.

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[14] *Id.* at 657:19–22.
[15] R. (Vol. 5) at 641–674.
[16] Supp. R. at 6–19.
[17] *Id.*

> There was a filing last night, which is not timely under the TPPA, which is not timely under the rules for filing replies. And just as a sur-reply anyway, which is improper in its own right.
>
> That filing makes reference to deposition testimony that is not in the record, that we haven't filed, that they never filed. So it can't be considered. So we object to all of that.[18]

During the same hearing, the Defendants' counsel emphasized that "[t]he statute requires admissible evidence to be submitted at least five days before hearing" and that "[o]ur position is that we have submitted some, and they have submitted none."[19]

At hearing, the Plaintiffs did not respond to the Defendants' objection or attempt to argue against it.[20] Instead—*after the hearing ended*; notwithstanding the Defendants' objection; notwithstanding the TPPA's unambiguous timing requirements; and without either seeking or obtaining leave from the trial court—the Defendants' filed what they called a "Notice of Filing" that contained Ms. Ward's entire deposition transcript.[21]

The Plaintiffs do not seriously defend this misbehavior as permissible under the TPPA, given that section 20-17-104(c)'s five-days-before-hearing requirement forbade it. Instead, the Plaintiffs assert that the Defendants' timeliness objection to the Plaintiffs' evidence is "waived" because (they claim) the Defendants "did not make this argument below." Br. of Appellees at 63.

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[18] R. (Vol. 8) at 1045:8–17.
[19] *Id.* at 1041:16–19.
[20] *Id.* at 1040:6–1057:20.
[21] R. (Vols. 7–8) at 752–1035.

The Defendants did object to the timeliness of the Plaintiffs' proposed evidence, though. Indeed, the Defendants' counsel stated specifically that he wanted "to make sure that I get this objection on the record" when making it.[22] Defendants' counsel also expressly argued that "[t]he statute requires admissible evidence to be submitted at least five days before hearing" and that "[o]ur position is that we have submitted some, and they have submitted none."[23]

That is not "waiver." Indeed, it does not even resemble waiver.

The Plaintiffs offer two other arguments purporting to justify their transparent violation of the TPPA's timing requirements, neither of which is persuasive.

First, the Plaintiffs insist that—despite the Defendants' pending, timely objection to the Plaintiffs illicit attempt to introduce new evidence in contravention of the TPPA's timing requirements—the Defendants *also* should "have moved to strike the deposition transcript or otherwise brought this to the trial court's attention after it was filed." *See* Br. of Appellees at 63. But "repetitious objections are not required." *In re Est. of Lang*, No. E2006-00279-COA-R3-CV, 2007 WL 2198449, at *6 (Tenn. Ct. App. July 31, 2007); *see also Gulf Ref. Co. v. Frazier*, 83 S.W.2d 285, 299 (Tenn. Ct. App. 1934) ("repetition of similar exceptions is not to be required, if, indeed, to be tolerated."). And here, the Defendants specifically objected at hearing to the Plaintiffs' "not timely under the TPPA" deposition evidence, which the Defendants argued "can't be

[22] R. (Vol. 8) at 1045:8–17.
[23] *Id.* at 1041:16–19.

considered."[24] There also is no rule that, to avoid waiver, a Defendant who is being victimized by a SLAPP-suit must object repeatedly to recurring misbehavior by filing new, unnecessary motions to strike and seeking hearings on them in response to serial misconduct; instead, the rule is that "[o]ne objection to a line of testimony is sufficient." *Burke v. Arnold*, 836 S.W.2d 99, 101 (Tenn. Ct. App. 1991); *see also In re Est. of Lang*, 2007 WL 2198449, at *6 ("repetitious objections are not required."). Allowing misbehaving plaintiffs to benefit from serially violating the TPPA's timing requirements by forcing defendants to respond repetitively to attempts to violate them or risk waiver also would reward the very "delay, expense, and distraction" the TPPA aims to deter, thereby robbing the TPPA of its utility. *Nandigam Neurology*, 639 S.W.3d at 658. Simply put: "'the TPPA ... was designed to prevent and deter such abuse, not to enable it.'" *Id.* at 666, n.7.

Second, the Plaintiffs suggest that, even though section 20-17-104(d) instructs that "[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[,]" the Plaintiffs had a right to file an evidence-laden Sur-Reply—or any other filing containing new evidence—after that deadline expired because the TPPA "says nothing" about such filings and "is silent regarding what happens" when an initial TPPA hearing is reset. *See* Br. of Appellees at 64–65. This "one weird trick"[25]

[24] R. (Vol. 8) at 1045:8–17.

[25] *One weird trick*, WIKIPEDIA, https://en.wikipedia.org/wiki/One_weird_trick (last modified Feb. 29, 2024).

that the Plaintiffs imagine allows them to circumvent the TPPA's timing requirements is not supported by anything in the TPPA's text, though. More importantly, in this Court's very first TPPA decision, this Court unanimously rejected the Plaintiffs' unusual theory. *Nandigam Neurology*, 639 S.W.3d at 668 (trial court was "well-founded in its conclusion" to exclude untimely evidence appended to a "supplementary answer" filed the afternoon before a reset TPPA hearing). Thus, the Plaintiffs' second proposed justification for filing untimely evidence does not hold water, either.

For these reasons, the Plaintiffs did not get any admissible evidence into the TPPA record. And they have no one to blame for that but themselves. *Cf. Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 559 (Tenn. 2013) ("Plaintiff—not Defendants—was responsible for complying with the requirements of [the statute]."). Appropriately, this Court also has not seen it as its role to save other TPPA litigants from similar missteps. *PMC Squared, LLC*, 2024 WL 3757839, at *5 ("PMC's TPPA Petition was the only evidence offered by PMC. Because it did not contain any admissible evidence, PMC failed to satisfy its prima facie burden required by section 20-17-105(a)."). Thus, if this Court opts to reach the merits of the Defendants' TPPA Petition as the Plaintiffs insist, then the trial court's order denying the Defendants' TPPA Petition should be reversed with instructions to grant it. *See Nandigam Neurology*, 639 S.W.3d at 668 (when a TPPA petitioner has met its initial burden under section 20-17-105(a), a respondent's failure to introduce admissible evidence into the record requires dismissal because it is tantamount to "fail[ing] to respond to [the] TPPA

petition at all.").

D. THIS COURT SHOULD EXCLUDE THE PLAINTIFFS' UNTIMELY POST-HEARING EVIDENCE.

Because the trial court appears to have considered—in the first instance—"the transcript of [Ms. Ward's] deposition" when adjudicating the Defendants' TPPA Petition,[26] it is appropriate for this Court to consider now whether Ms. Ward's full transcript was properly admitted. For the reasons set forth in the Defendants' Principal Brief, it was error for the trial court to admit Ms. Ward's full deposition transcript, because the Plaintiffs filed that transcript in contravention of section 20-17-104(c)'s five-day rule after the Parties' second TPPA hearing ended. Principal Br. of Appellants at 39–41.

As detailed above, the Plaintiffs' contrary arguments—that they had a right to file new evidence outside the TPPA's five-day deadline, including after hearing—are baseless and foreclosed by controlling precedent. *See supra* at 16–20; *see also Nandigam Neurology*, 639 S.W.3d at 668. Thus, the trial court's order considering "the transcript of [Ms. Ward's] deposition" should be reversed with instructions to consider only evidence that was introduced "no less than five (5) days before the hearing" as section 20-17-104(c) requires when determining what evidence is admissible.

E. AT MINIMUM, THIS COURT SHOULD REMAND WITH EXPRESS INSTRUCTIONS TO ADJUDICATE ALL CLAIMS REGARDING THE DEFENDANTS' TPPA PETITION WITHIN THIRTY DAYS.

The Plaintiffs do not respond to the Defendants' argument that this

[26] R. (Vol. 8) at 1064.

case should be reassigned on remand, other than to assert that this Court should "deny Appellants' request[.]" *See* Br. of Appellees at 9. Nor do they respond to the Defendants' alternative request that Judge Wallace be ordered to "adjudicate all outstanding claims concerning the Defendants' TPPA Petition within no more than thirty days of this Court's mandate issuing." *Compare* Principal Br. of Appellants at 38, *with* Br. of Appellees. The Plaintiffs do concede that Judge Wallace erroneously adjudicated—adversely to the Defendants, after more than a year of delay, and without explanation—an issue so simple that "Appellees have never disputed" it, though. Br. of Appellees at 61–62.

This Court has authority to grant the Defendants' remand-related requests under its "'inherent power to administer the system of appeals and remand.'" *Culbertson v. Culbertson*, 455 S.W.3d 107, 158 (Tenn. Ct. App. 2014) (quoting 5 Am.Jur.2d Appellate Review § 754 (2007)). And at minimum, this Court should remand with express instructions that Judge Wallace adjudicate all claims regarding the Defendants' TPPA Petition within thirty days. Judicial ethics rules—which Judge Wallace has violated—require such diligence. *See* Tenn. Sup. Ct. R. 10, RJC 2.5(A) (requiring judges to "perform judicial . . . duties competently, promptly and diligently."), *id.* at cmt. 5 ("A judge is required by law to promptly dispose of cases."); Tenn. Sup. Ct. R. 11, § III(d) ("No case may be held under advisement in excess of sixty days and no motion, or other decision of the trial judge that delays the date of trial or final disposition in the trial court, shall be held under advisement for more than thirty days, absent the most compelling of reasons."). It also is unacceptable for a judge—whether due to inattentiveness, disinterest, or any other

reason—to subject a litigant to years of unnecessary delay based on an inarguably wrong conclusion that its order does not explain and which is so simple that the "Appellees have never disputed" it. Br. of Appellees at 61–62. Such behavior impairs confidence in the judiciary as an institution, and this Court's remand order should make clear that the Court of Appeals does not countenance it. Thus, to promote the "expedient[] resol[ution]" the TPPA was designed to ensure, *Nandigam Neurology*, 639 S.W.3d at 666—and to protect Ms. Ward from the possibility of being forced to suffer a *third* TPPA hearing, followed by another extended delay, after years of delay already—this Court should order Judge Wallace to adjudicate all outstanding claims concerning the Defendants' TPPA Petition based on the closed evidentiary record within no more than thirty days of this Court's mandate issuing.

F. THE PLAINTIFFS ARE NOT ENTITLED TO FEES IN THIS APPEAL.

The Plaintiffs assert that they are "entitled to recover their attorneys' fees and costs on remand" under section 20-17-107(b), *see* Br. of Appellees at 67–68, though they only seek their "appellate attorneys' fees and costs[.]" *Id.* at 7. But the Plaintiffs are not at risk of prevailing on any issue in this appeal. The Plaintiffs also concede error regarding the dispositive issue presented in it. *Id.* at 61–62. And it is only by conceding the dispositive issue in this appeal—which the Plaintiffs call a "red herring" in contravention of every known definition of that phrase, *see id.* at 61—that the Plaintiffs will avoid having this Court rule against them on a host of other issues that they are wrong about, which are now pretermitted. *Compare, e.g., id.* at 62 (asserting that a trial court need

not include reasoning in an order denying a TPPA petition), *with Richman*, 2023 WL 4285290, at *4 ("Because the trial court's written order does not contain the reasoning for its denial of the TPPA Petition, we vacate and remand for entry of an order explaining the trial court's decision.").

At any rate, there is nothing "frivolous" about the concededly meritorious appeal that the Defendants have taken here. Further, pairing the concededly meritorious nature of the Defendants' appeal with the fact that the trial court did not grant the Plaintiffs relief under section 20-17-107(b) in the first instance,[27] the Plaintiffs' claim for appellate fees has no chance of success. As such, it should be rejected for what it is: another attempt to "use the threat of money damages" to discourage the Defendants from lawfully exercising their First Amendment rights—here, to petition this Court for concededly meritorious relief. *Cf. Nandigam Neurology*, 639 S.W.3d at 658. Thus, the Plaintiffs' request should be denied. If the Defendants have their TPPA Petition granted on remand, though, an award of appellate fees must come with it. *See Small v. Law*, No. M2024-00255-COA-R3-CV, 2024 WL 3665755, at *1 (Tenn. Ct. App. Aug. 6, 2024) ("We have interpreted [the TPPA's mandatory] language as authorizing 'an award of reasonable attorney's fees incurred on appeal' as well as at those incurred in the trial court. . . . The party seeking fees, costs, or expenses need only present a request to the appellate court.").

[27] R. (Vol. 8) at 1064.

IV. CONCLUSION

For the foregoing reasons, the trial court's ruling that the Defendants did not meet their burden under section 20-17-105(a) should be reversed; this case should be remanded; and this Court's remand order should contain, at minimum, express instructions to adjudicate all claims regarding the Defendants' TPPA Petition within thirty days. The trial court's order that Ms. Ward's entire deposition may be considered also should be reversed with instructions to consider only evidence that was introduced "no less than five (5) days before the hearing" as section 20-17-104(c) requires. Further, this Court should order that the Defendants have a right to recover their appellate attorney's fees and costs should the Defendants prevail on remand.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 4,991 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2024, a copy of the foregoing was served via the Court's electronic filing system, via email, and/or via USPS mail, postage prepaid, to the following parties:

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