IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 18, 2023 Session

**ROBERT L. PRAGNELL ET AL. v. JOE D. FRANKLIN ET AL.**

**Appeal from the Circuit Court for Hamilton County**
**No. 21C216 W. Jeffrey Hollingsworth, Judge**

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**No. E2022-00524-COA-R3-CV**

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In this defamation lawsuit, the defendants filed a petition to dismiss pursuant to the Tennessee Public Participation Act ("TPPA"). Following the filing of various documents and declarations by the parties, the trial court denied the petition based upon its analysis of the burden-shifting framework outlined in the TPPA's dismissal procedure. The defendants have appealed. Determining that the trial court's analysis concerning the TPPA's dismissal procedure was incomplete, we vacate the trial court's judgment and remand for further proceedings. We affirm the trial court's determination that the defendants' petition to dismiss was not frivolous, and we accordingly decline to award attorney's fees and costs to the plaintiffs on appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

J. Scott McDearman, Chattanooga, Tennessee, for the appellants, Joe D. Franklin and Innovative Advisory Partners, LLC.

Donald J. Aho, Robert F. Parsley, and Jordan B. Scott, Chattanooga, Tennessee, for the appellees, Robert L. Pragnell, William Stuart Wood, Christopher A. Taylor, and Charles Jonathan Emanuel.

## OPINION

### I. Factual and Procedural Background

This case originated with the filing of a complaint by the plaintiffs, Robert L. Pragnell, William Stuart Wood, Christopher A. Taylor, and Charles Jonathan Emanuel (collectively, "Plaintiffs"), in the Hamilton County Circuit Court ("trial court") on February 16, 2021. Plaintiffs alleged that they were the "victims of an illicit, malicious, and vindictive scheme" executed by the defendants, Joe D. Franklin and Innovative Advisory Partners, LLC (collectively, "Defendants"), to "smear" the professional reputations of Plaintiffs and interfere with their contractual and business relationships. Plaintiffs and Mr. Franklin are registered financial advisors. Plaintiffs were formerly affiliated with Innovative Advisory Partners, LLC ("IAP"), and Mr. Franklin continues to be affiliated with IAP.

Plaintiffs averred that in mid-2020, they decided to terminate their relationships with Defendants and to form a new investment advisory firm, Apex Strategic Wealth, LLC ("Apex"). According to Plaintiffs, they had fully complied with their professional obligations during their tenure working with Defendants, and they sought to end their affiliation with Defendants in a professional manner.

Following Plaintiffs' exit from the company, Defendants caused the filing of a Form U5 Uniform Termination Notice ("U5") as to each of the Plaintiffs. These forms are required to be filed with the Investment Advisor Registration Depository, which is an electronic filing system utilized by investment advisors and sponsored by the Securities and Exchange Commission ("SEC"). Plaintiffs stated that certain information contained on the U5 is published on the SEC's Investment Advisor Public Disclosure website, which is utilized by industry professionals to obtain information concerning financial advisors before doing business with them. Plaintiffs averred that Defendants initially had made no negative comments about Plaintiffs on the U5s and had characterized Plaintiffs' termination of their affiliation with IAP as voluntary.

Subsequently, a dispute arose between Defendants and two of the plaintiffs, Mr. Pragnell and Mr. Wood, such that a lawsuit was filed against Defendants by those plaintiffs on December 9, 2020, in the Hamilton County Chancery Court. Approximately one month later, Defendants amended Plaintiffs' U5s to state that Plaintiffs had been "discharged" and to list as reasons for such discharge: "Violation of client privacy rights, misrepresentation and selling away."[1] Plaintiffs averred that such allegations were false.

[1] The United States Sixth Circuit Court of Appeals has defined "selling away" as "selling securities not approved or authorized by the firm." *See Brown v. Earthboard Sports USA, Inc*., 481 F.3d 901, 922 (6th Cir. 2007).

Plaintiffs further averred that they did not learn of the filing of the amended U5s until shortly before the filing of their complaint in the instant action.

Plaintiffs asserted that Defendants had made the purportedly false statements on the U5s maliciously and with actual knowledge that the statements were false. Plaintiffs also claimed that Defendants intended to defame Plaintiffs and to interfere with their business and contractual relationships. According to Plaintiffs, Defendants' publication of the false statements had caused Plaintiffs to suffer monetary losses, to lose business opportunities, and to endure baseless investigations and regulatory inquiries.

Alleging that Defendants were guilty of defamation, Plaintiffs sought damages and a restraining order enjoining Defendants from further publishing false information. Plaintiffs also sought to conduct expedited discovery and to receive temporary and permanent injunctive relief. Plaintiffs further claimed common law indemnity from Defendants. The trial court issued the requested temporary restraining order on February 16, 2021.

Defendants filed an answer to the complaint on March 29, 2021, denying Plaintiffs' defamation claims. Although Defendants acknowledged the filing of amended U5s, they denied that the information contained therein was false. Defendants averred that Plaintiffs had unclean hands because they had breached their agreement with Defendants, wrongfully solicited Defendants' clients, and stolen confidential information. Defendants thereby requested that Plaintiffs' complaint be dismissed with prejudice.

On April 27, 2021, Defendants filed a petition to dismiss the complaint based on the TPPA, which is codified at Tennessee Code Annotated § 20-17-101, *et seq*.[2] Defendants averred that Plaintiffs had filed the complaint in response to Defendants' exercise of their right to free speech, predicated on statements Defendants had made "while filing government-mandated forms disclosing important facts about Investment Advisor Representatives." According to Defendants, the speech related to a matter of

[2] Tennessee Code Annotated § 20-17-102 (2021) provides:

> The purpose of [the TPPA] is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by the Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

Tennessee Code Annotated § 20-17-104 (2021) specifically states that if "a legal action is filed in response to a party's exercise of the right of free speech," "that party may petition the court to dismiss the legal action."

public concern, and the statements were true. As such, Defendants posited that they would be able to make out a *prima facie* case that the complaint was filed in response to Defendants' exercise of the right to free speech pursuant to Tennessee Code Annotated § 20-17-105.[3]

In support, Defendants filed the affidavit of Mr. Franklin, who stated that he was the manager and CEO of IAP. Mr. Franklin related that in June 2020, he became aware that Plaintiffs had registered with another Investment Advisor Firm without disclosing this fact to IAP or receiving IAP's approval. Mr. Franklin explained that an investigation ensued and that he became aware that "Plaintiffs had engaged in various violations of IAP policies and SEC and FINRA rules and regulations." Mr. Franklin purportedly terminated Plaintiffs' relationship with IAP in late June 2020 while continuing to investigate their actions. During the investigation, Mr. Franklin concluded that Plaintiffs had violated customer privacy rights, made misrepresentations to their clients, and engaged in selling away. Moreover, Mr. Franklin averred that he "worked closely" with DCR Consulting Services, LLC ("DCR"), during the investigation and when amending Plaintiffs' U5 forms to ensure that the amended U5s were accurate. Mr. Franklin stated that he believed he was required to amend the U5s to accurately reflect the circumstances of Plaintiffs' terminations. He attached documentation that he claimed supported his statements.

In response to Defendants' filings, Plaintiffs filed additional documents, including a declaration from Mr. Pragnell. In his declaration, Mr. Pragnell asserted that Mr. Franklin's correspondence with DCR demonstrated that Mr. Franklin had filed the amended U5s in retaliation for Plaintiffs' "push back" with respect to IAP's failure to honor its obligations to them. Mr. Pragnell explained that although Plaintiffs attempted to leave IAP with their clients in a professional manner, IAP intentionally refused to

[3] Tennessee Code Annotated § 20-17-105 (2021) provides in pertinent part:

> (a) The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association.
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> (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.
>
> (c) Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.
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> (d) The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.

accommodate the transfer of accounts. Instead, according to Mr. Pragnell, Mr. Franklin attempted to change IAP's policy to prohibit Plaintiffs' dual affiliation with IAP and Apex during the transition and then relied on this purported policy violation when amending Plaintiffs' U5s to allege misconduct. Mr. Pragnell contended that the information provided on the amended U5s was false and intentionally defamatory. Mr. Pragnell also attached documentation in support of his statements.

Plaintiffs filed a declaration from E. Steve Scales, the owner and principal of Scales Consulting Group, a company providing litigation consulting and expert witness testimony in investment and securities industry matters. After reviewing the pleadings in this matter, including Mr. Franklin's declaration, as well as other related documents, Mr. Scales opined: 1) "Defendants acted contrary to industry standards and placed IAP's clients at unnecessary risk by failing to cooperate with Plaintiffs" during their departure from IAP; 2) "Defendants did not conduct a legitimate investigation of Plaintiffs' alleged misconduct" but instead "gathered scattered information that they attempt to rely upon to justify their misconduct"; 3) IAP had no policy that prohibited Plaintiffs from being registered with IAP and another firm; 4) "Defendants violated industry rules and standards by improperly using and weaponizing the Form U5s so that they inaccurately stated the reasons for the termination of Plaintiffs' affiliation with IAP and included false statements"; and 5) Plaintiffs had sustained actual harm due to Defendants' actions.

Plaintiffs also filed declarations from Mr. Emanuel, Mr. Taylor, and Mr. Wood stating that they had sustained harm due to Defendants' false and defamatory statements contained in the amended form U5s. Plaintiffs further submitted a declaration from David Babb, principal of Stone Bridge Asset Management, LLC ("Stone Bridge"), who indicated that he had engaged in discussions in the fall of 2020 with Mr. Pragnell and Mr. Wood regarding a business venture between Stone Bridge and Apex. Mr. Babb halted negotiations, however, after learning of IAP's filing of the amended U5s containing allegations of regulatory violations. Mr. Babb explained that although he believed Mr. Pragnell and Mr. Wood to be "honest professionals of high integrity who would not engage in such misconduct," the statements by Defendants in the amended U5s made it "untenable" for Stone Bridge to do business with Apex.

On August 31, 2021, Plaintiffs filed a brief in opposition to Defendants' petition to dismiss pursuant to the TPPA. Plaintiffs therein outlined their postulate that Defendants had filed the amended U5s containing false and defamatory statements in order to retaliate against Plaintiffs for leaving IAP and taking clients with them.

In response, Defendants filed a reply brief and a declaration of Henry "Hank" Sanchez, Jr., an expert consultant in the securities industry. Mr. Sanchez opined that Defendants "acted within industry rules and standards in conducting an investigation into the activities of Plaintiffs and in updating their Form U5s." Mr. Sanchez addressed the statements contained in Mr. Scales's declaration and took issue with his opinion

concerning certain points. Furthermore, Mr. Sanchez specifically opined that Mr. Franklin was required to amend the U5s upon learning information that rendered the initial filing inaccurate. In response to Mr. Sanchez's declaration, Mr. Pragnell filed a new declaration pointing out a factual inaccuracy in Mr. Sanchez's declaration. In addition, Mr. Taylor filed two new declarations describing how the allegedly false statements contained in the amended U5 filed by Defendants had impacted his business relationships.

On April 4, 2022, the trial court issued a "Memorandum Order" concerning this action. The court discussed the facts as presented by the parties and the burden-shifting analysis required when adjudicating a motion to dismiss filed pursuant to the TPPA. Upon determining that Defendants had met their burden of "making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech," *see* Tenn. Code Ann. § 20-17-105(a), the court proceeded to analyze whether Plaintiffs could establish a *prima facie* case for "each essential element of the claim in the legal action," *see* Tenn. Code Ann. § 20-17-105(b).

With reference to Plaintiffs' claims of defamation, the trial court elucidated that Plaintiffs would need to demonstrate that Defendants' statements were made with knowledge of the statements' falsity, reckless disregard for the truth, or negligence in failing to ascertain the truth of the statements. The court recited the following facts averred by Plaintiffs:

> Pragnell was the Chief Compliance Officer (CCO) for IAP in April of 2020, when Franklin says he first became aware of the Plaintiffs' plan to leave and their desire to be temporarily registered with both IAP and another firm. As CCO for IAP, Pragnell was very familiar with that firm's policies. He states there was no IAP policy prohibiting dual registration.
>
> Pragnell goes on to state that he and Plaintiff Wood notified Franklin of their intent to leave IAP in March, 2020, by way of a letter from their lawyer to Franklin's lawyer.
>
> In Paragraph 38-44 of his Declaration, Pragnell asserts that, if Franklin had evidence of wrong-doing by the Plaintiffs when the Original U-5 forms were filed, he was obligated by industry regulations to include those facts in the public posting. He did not do so.
>
> In Paragraphs 54-63 of his Declaration, Pragnell asserts that there is no evidence that the Plaintiffs engaged in "selling away" as that term is defined in the applicable industry rules and regulations, that they violated "client privacy rights," or that they engaged in misrepresentation of facts in this matter.

> Finally, the Plaintiffs point out that the allegedly false statements made in the Amended U-5 forms were made only after an email from Franklin complaining of "pushbacks" from the Plaintiffs and after the filing of the Chancery Court lawsuit.
>
> In his declaration, Pragnell points out that on July 16, 2020, Franklin sent his consultant an email stating that "Robert is continuing to fight us moving forward" and "If we continue to get push backs will (sic) will look to amend his U-5 to terminating for cause." Franklin and IAP supposedly continued their investigation, but it was not until January, 2021, a few weeks after the Chancery Court lawsuit was filed that the Amended U-5 forms were filed.

(Other internal citations omitted.) Based on these facts, the trial court concluded that Plaintiffs had demonstrated a "prima facie case that Defendants intentionally made false statements against them in retaliation for 'push backs' on the separation and for filing the Chancery law suit" and that these statements had been published when the amended U5s were filed.

With regard to Defendants' argument that Plaintiffs could not demonstrate actual harm, the trial court relied on the declarations of Mr. Babb and Mr. Scales, noting that Mr. Babb had represented that he ceased negotiations with Mr. Pragnell and Mr. Wood concerning a business venture after the filing of the amended U5s, resulting in a financial loss for all parties involved. Mr. Scales's declaration included that Plaintiffs had been forced to hire counsel, pay attorney's fees, and respond to inquiries from the State and regulatory agencies resulting from the filing of the amended U5s in addition to enduring damage to their professional reputation and other financial losses.

Based on the trial court's determination that Plaintiffs had established a *prima facie* case that Defendants intentionally published false statements about Plaintiffs that caused them harm, the court concluded that the petition to dismiss should be denied. With respect to attorney's fees, the court determined that the petition was not frivolous and thus denied the request for fees and costs. Defendants timely appealed.

## II. Issues Presented

Defendants present the following issues for our review, which we have restated slightly:

1. Whether the trial court erred by denying Defendants' petition to dismiss pursuant to the TPPA where the record demonstrates that

Defendants' statements were true and the court gave no consideration to Defendants' belief that their speech was true.

2. Whether the trial court erred by denying Defendants' petition to dismiss pursuant to the TPPA without addressing the third prong of the TPPA's burden-shifting framework, whether Defendants had "a valid defense to the claims in the legal action," pursuant to Tennessee Code Annotated § 20-17-105(c).

Plaintiffs present the following additional issues for review, which we have also restated slightly:

3. Whether Defendants met the burden of demonstrating a *prima facie* case that this legal action is "based on, relates to, or is in response to" Defendants' exercise of the right to free speech pursuant to Tennessee Code Annotated § 20-17-105(a).

4. Whether Defendants' petition to dismiss was frivolous or asserted for the sole purpose of delay such that Plaintiffs should have been awarded attorney's fees and costs in the trial court and should also be awarded attorney's fees and costs on appeal based on Tennessee Code Annotated § 20-17-107(b).

## III. Standard of Review

Defendants request that this Court review the trial court's denial of their petition to dismiss Plaintiffs' defamation claims, which petition was filed pursuant to the dismissal provision contained within the TPPA. Inasmuch as our analysis involves issues of statutory construction and interpretation, we will adhere to the following longstanding principles:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc*., 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G*., 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus*., *Inc*., 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is

> ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but "should be construed, if practicable, so that its component parts are consistent and reasonable." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that "would render one section of the act repugnant to another" should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

*In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009). "Moreover, when an issue on appeal requires statutory interpretation, we review the trial court's decision de novo with no presumption of correctness." *Nationwide Mut. Fire Ins. Co. v. Memphis Light, Gas & Water*, 578 S.W.3d 26, 30 (Tenn. Ct. App. 2018).

## IV. Denial of Defendants' Petition to Dismiss

Defendants urge that the trial court erred in denying their petition to dismiss, which petition was predicated on the dismissal provision contained in the TPPA. Defendants contend that the statements contained in the amended U5s were true and that the court gave no consideration to Defendants' belief that their speech was true. In contrast, Plaintiffs assert that Defendants failed to demonstrate that Plaintiffs' complaint was "based on, relates to, or is in response to" Defendants' exercise of the right to free speech pursuant to Tennessee Code Annotated § 20-17-105(a) (2021).

As this Court has recently explained with respect to the TPPA:

> The underlying matter involves the application of Tennessee's Anti-SLAPP law, the TPPA . . . . SLAPP suits are lawsuits used "as a powerful instrument of coercion or retaliation" against a defendant, George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 942 (1992) (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 740-41, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983)), and anti-SLAPP legislation such as the TPPA is designed to counteract such lawsuits and prevent "meritless suits aimed at silencing a plaintiff's opponents, or at least diverting their resources." John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993).

Enacted in 2019, the TPPA is designed to "encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury." Tenn. Code Ann. § 20-17-102. As with the typical design of anti-SLAPP statutes, the TPPA works to "discourage[] and sanction[] frivolous lawsuits and permits the early disposition of those cases before parties are forced to incur substantial litigation expenses." Todd Hambridge et al., *Speak Up*., 55 Tenn. B.J. 14, 15 (2019). Although it has been noted that Tennessee had a limited anti-SLAPP statute before the TPPA, the TPPA "broadens anti-SLAPP protection." *Id*.

The TPPA provides relief for parties who partake in protected activity constituting either the exercise of the right of association, the exercise of the right of free speech, or the exercise of the right to petition. Tenn. Code Ann. §§ 20-17-104(a), 20-17-105. Specifically, if the petitioning party makes a prima facie case that they have participated in protected activity under the TPPA, the court may then dismiss the action against them, "unless the responding party establishes a prima facie case for each essential element of the claim in the legal action." Tenn. Code Ann. § 20-17-105(a)(b). The TPPA also provides definitions as to what constitutes these forms of protected activity. For example, an "exercise of the right of association" is an "exercise of the constitutional right to join together to take collective action on a matter of public concern that falls within the protection of the United States Constitution or the Tennessee Constitution." Tenn. Code Ann. § 20-17-103(2). An "exercise of the right of free speech" means "a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution." Tenn. Code Ann. § 20-17-103(3). Finally, an "exercise of the right to petition" means "a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and: (A) Is intended to encourage consideration or review of any issue by a federal, state, or local legislative, executive, judicial, or other governmental body; or (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]" Tenn. Code Ann. § 20-17-103(4).

Notably, the definitions above reveal that both the "exercise of the right of association" and the "exercise of the right of free speech" require that the activity be connected with a "matter of public concern." Tenn. Code Ann. § 20-17-103(2-3). As defined by the statute, a "matter of public concern" includes issues relating to: "(A) Health or safety; (B)

> Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern." Tenn. Code Ann. § 20-17-103(6). As should be evident—and as some commentators have already observed—matters of public concern are "broadly defined" under the statute. Todd Hambridge et al., *Speak Up*., 55 Tenn. B.J. 14, 15 (2019). Unlike the enumerated categories pertaining to "the exercise of the right of association" and the "exercise of the right of free speech," the "exercise of the right to petition" contains no statutory qualifier requiring that the activity involve a "matter of public concern." Again, under the statute, "exercise of the right to petition" simply means a "communication" that is constitutionally protected and is "intended to encourage consideration or review of an issue" by some form of governmental body or is "intended to enlist public participation in an effort to effect consideration of an issue" by a governmental body. Tenn. Code Ann. § 20-17-103(4)(A),(B).

*Doe v. Roe*, 638 S.W.3d 614, 617-19 (Tenn. Ct. App. 2021) (footnote omitted). As further elucidated by this Court in *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 658 (Tenn. Ct. App. 2021): "Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction" (quoting *Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012)).

One relevant section of the TPPA, codified at Tennessee Code Annotated § 20-17-104 (2021), provides in pertinent part:

> (a) If a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.
>
> (b) Such a petition may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper.
>
> (c) 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 or, in the court's discretion, at any earlier time that the court deems proper.

Concerning the TPPA's dismissal procedure, Tennessee Code Annotated § 20-17-105 further provides:

(a) The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association.

(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.

(c) Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.

(d) The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.

(e) If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice.

(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.

This Court recently explained as follows concerning these provisions:

Although the TPPA is a relatively new statute, this Court has addressed issues concerning the proper application and construction of the TPPA in a few recent decisions. *See Doe*, 638 S.W.3d at 614; *Nandigam*, 639 S.W.3d at 651; *Charles v. McQueen*, No. M2021-00878-COA-R3-CV, 2022 WL 4490980 (Tenn. Ct. App. Sept. 28, 2022). Our review of these cases in conjunction with the TPPA's express language has revealed two general conclusions. First, when presented with a motion to dismiss filed pursuant to the TPPA, the threshold step in the trial court's analysis must be

> to determine whether the claim falls within the TPPA's parameters. This is determined by analyzing whether the petitioning party has demonstrated "a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise" of certain protected rights. Tenn. Code Ann. § 20-17-105(a); *Doe*, 638 S.W.3d at 619; *Charles*, 2022 WL 4490980, at *3. Second, if the court determines that the petitioning party has met such requirements of the statute, "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" or "if the petitioning party establishes a valid defense to the claims in the legal action." Tenn. Code Ann. § 20-17-105(a); *Nandigam*, 639 S.W.3d at 668; *Charles*, 2022 WL 4490980, at *10.

*Reiss v. Rock Creek Constr., Inc*., No. E2021-01513-COA-R3-CV, 2022 WL 16559447, at *6 (Tenn. Ct. App. Nov. 1, 2022) (footnote omitted). In the case at bar, the trial court determined that the statements contained in the amended U5 forms "were not intentional or reckless falsehoods" and were thus protected by the constitutional right to free speech predicated on the factual allegations presented in Mr. Franklin's affidavit.

We reiterate that "exercise of the right of free speech" is defined in the TPPA as "a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution." Tenn. Code Ann. § 20-17-103(3) (2021). The phrase, "matter of public concern," is also defined in the statute and includes issues related to a "good, product, or service in the marketplace." Tenn. Code Ann. § 20-17-103(6)(E) (2021).

On appeal, Plaintiffs posit that Defendants failed to demonstrate that the statements made in the amended U5s constituted protected speech under the United States Constitution or the Tennessee Constitution. Plaintiffs instead urge that Defendants' statements constituted commercial speech, which only enjoys limited protection under the First Amendment of each respective Constitution. Our review of the record in this matter, however, reveals that Plaintiffs failed to raise this question at the trial court level.

In both of their responses to Defendants' petition to dismiss, Plaintiffs raised various arguments in furtherance of their claims, none of which asserted or relied upon the position that the statements in the amended U5s were outside the realm of constitutional protection or that the TPPA was otherwise inapplicable hereto. Instead, Plaintiffs' responses were couched within the presupposition that the TPPA was applicable. Plaintiffs' failure to argue that the statements did not constitute protected speech at the trial court level forecloses our ability to address this question on appeal. *See Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991) (explaining that issues not raised in the trial court cannot be raised for the first time on

appeal); *Watson v. Waters*, 375 S.W.3d 282, 290 (Tenn. Ct. App. 2012) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal[.]").

Turning to Defendants' issues concerning the trial court's denial of their petition to dismiss, Defendants argue that the trial court erred by determining that Plaintiffs had established a *prima facie* case of defamation relative to the second step of the TPPA dismissal procedure. *See* Tenn. Code Ann. § 20-17-105(b). In order to establish a *prima facie* case of defamation in Tennessee, a plaintiff must demonstrate that:

> 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.

*Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999). A plaintiff must also demonstrate that the false statement(s) caused actual damages. *Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001). "In matters concerning defamation claims asserted by private individuals, Tennessee has previously adopted negligence as the standard." *Charles v. McQueen*, No. M2021-00878-COA-R3-CV, 2022 WL 4490980, at *10 (Tenn. Ct. App. Sept. 28, 2022) (citing *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978)).

Defendants assert that Plaintiffs failed to establish a *prima facie* case of defamation because "the record demonstrates that Defendants' statements were true and the court gave no consideration to Defendants' belief that their speech was true." Defendants' contention appears to be rooted in the trial court's substantial reliance on Mr. Pragnell's declaration during its analysis of this issue. However, the trial court also relied on the following facts as stated in its April 4, 2022 order:

> The Defendants claim that an investigation of the Plaintiffs' actions began as early as April, 2020, when Joe Franklin became aware that some advisors at IAP wished to leave and become affiliated with another firm. Franklin stated he became aware of "dual registrations" in June, 2020. Finally, Franklin declares that on the advice of DRC, he terminated the Plaintiffs from their positions with IAP in late June, 2020. Despite the knowledge Franklin claimed to have of the Plaintiff[s'] supposed violations of IA[P] policies and SEC regulations he admits he posted the initial U-5 forms showing the terminations as being "Voluntary."
>
> * * *

> Franklin and IAP supposedly continued their investigation, but it was not until January, 2021, a few weeks after the Chancery Court lawsuit was filed [by Mr. Pragnell and Solomon Wood, LLC] that the Amended U-5 forms were filed.

Nevertheless, Defendants argue that they presented proof establishing that Mr. Franklin believed the statements in the amended U5s to be true, thus negating the defamation element of "knowledge that the statement is false."

The TPPA's burden-shifting framework provides that "[i]f the petitioning party meets this burden [of 'making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech'], 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." Tenn. Code Ann. § 20-17-105(b). We note that the legislature did not define what constitutes a "*prima facie* case" within the TPPA's provisions. Therefore, we will rely on the following rule of statutory construction:

> Although we agree that words in a statute should be given their ordinary and natural meaning, our supreme court has recognized an exception to that practice. "When a term having a well-recognized meaning in the common law is used in a statute," we give the term that meaning in interpreting the statute, "unless a different sense is apparent from the context, or from the general purpose of the statute."

*In re Estate of Starkey*, 556 S.W.3d 811, 817 (Tenn. Ct. App. 2018) (quoting *Lively v. Am. Zinc Co. of Tenn.*, 191 S.W. 975, 978 (Tenn. 1917)).

Tennessee courts have defined the *prima facie* case standard in other contexts, thus rendering it a term with a well-recognized meaning in the common law. *See*, *e.g.*, *Anderson v. State*, 55 Tenn. 13, 14, 1873 WL 5945, at *1 (1873) ("*Prima facie* evidence is that evidence which is sufficient to establish a fact unless rebutted."); *Union Planters Corp. v. Harwell*, 578 S.W.2d 87, 93 (Tenn. Ct. App. 1978) ("As we understand it, a prima facie case is made out when some credible proof . . . is presented on the issues required to be offered in evidence by a plaintiff for a plaintiff's recovery."); *Pickard v. Berryman*, 142 S.W.2d 764, 769 (Tenn. Ct. App. 1939) (explaining that "prima facie case" "means merely that [the plaintiff's] evidence, assuming it to be true, is sufficient to prevent his suit being dismissed"); *Macon Cnty. v. Dixon*, 100 S.W.2d 5, 9 (Tenn. Ct. App. 1936) ("Prima facie evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed. It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for that purpose.").

In this cause, Plaintiffs demonstrated that Defendants made statements about Plaintiffs in the amended U5s, which were published when the forms were filed with a third-party regulatory body. *See Sullivan*, 995 S.W.2d at 571 ("'Publication' is a term of art meaning the communication of defamatory matter to a third person."). Plaintiffs also provided evidence by way of Mr. Pragnell's declaration (supported by the declarations of others) that the statements contained in the amended U5s were false. Furthermore, Plaintiffs provided evidence in the form of an email communication from Mr. Franklin stating that "[Mr. Pragnell] is continuing to fight us moving forward" and that "[i]f we continue to get push back [we] will look to amend his U5 to terminating for cause." The trial court considered this email, as well as the fact that the amended U5s were filed shortly after the Chancery Court lawsuit's filing, to be evidence that Defendants made the false statements intentionally and with knowledge of their falsity. We reiterate, however, that Plaintiffs, as private individuals, were only required to demonstrate that Defendants acted with negligence in publishing the statements at issue. *See Charles*, 2022 WL 4490980, at *10. We agree with the trial court's determination that Plaintiffs have satisfied their burden in that regard.

In addition, Plaintiffs demonstrated that they were actually damaged by the statements contained in the amended U5s. Plaintiffs' own declarations, as well as the declarations filed by Steve Scales and David Babb, reflected that Plaintiffs suffered financial harm and damage to their reputations as a result of the statements contained in the amended U5s. Following our review of the affidavits and other documents filed by Plaintiffs, we agree with the trial court's determination that Plaintiffs presented a *prima facie* case of defamation inasmuch as "some credible proof . . . is presented on the issues required to be offered in evidence by a plaintiff for a plaintiff's recovery." *See Union Planters Corp.*, 578 S.W.2d at 93.

In their initial brief on appeal, Defendants take issue with the trial court's determination that Plaintiffs had provided evidence that the statements in the amended U5s were made with knowledge of their falsity. Defendants urge that the trial court ignored the "knowing falsehood" element of defamation despite having previously found in its April 4, 2022 order that the statements in the amended U5s were not "intentional or reckless falsehoods." We disagree.

With respect to the first step of the TPPA dismissal analysis, determining whether Defendants had made a "prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech," *see* Tenn. Code Ann. § 20-17-105(a), the trial court reviewed the evidence submitted by Defendants, including Mr. Franklin's affidavit stating that his ongoing investigation had uncovered certain IAP policy violations by Plaintiffs resulting in his decision in January 2021 that the U5s needed to be amended. The court therefore stated that "[l]ooking at these facts 'on their face,' it can be said that the statements on the Amended U-5 forms were not intentional or reckless falsehoods."

Following its determination that Defendants had met their burden of establishing a *prima facie* case in step one, the trial court appropriately shifted the burden to Plaintiffs to establish a "prima facie case for each essential element of the claim in the legal action," *see* Tenn. Code Ann. § 20-17-105(b), which in this case would require establishment of a *prima facie* case of defamation. As previously explained, Plaintiffs met this burden of presenting a *prima facie* case, including that the statements were false and made with knowledge of their falsity. Again, we emphasize that each party's burden with respect to the first two steps of the TPPA dismissal procedure is to present a *prima facie* case, in other words, "some credible proof . . . on the issues required to be offered in evidence" by each party. *See Union Planters Corp.*, 578 S.W.2d at 93.[4]

Defendants' argument that the trial court ignored evidence that they presented concerning the truth of the statements actually relates to the third step of the TPPA's dismissal procedure—whether Defendants could "establish[] a valid defense to the claims in the legal action." *See* Tenn. Code Ann. § 20-17-105(c); *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 50 (Tenn. Ct. App. 2013) (explaining that "only statements that are false are actionable [in a defamation case]; truth is, almost universally, a defense.") (citing *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 645 (Tenn. 2001)). Tennessee Code Annotated § 20-17-105(c) provides that "the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." In the case at bar, however, the trial court never addressed this third and final step in the dismissal analysis.

Having determined that Defendants had demonstrated a "prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech," *see* Tenn. Code Ann. § 20-17-105(a), the trial court proceeded to analyze whether Plaintiffs had established a "prima facie case for each essential element of the claim in the legal action," *see* Tenn. Code Ann. § 20-17-105(b). At that point, after determining that Plaintiffs had met their *prima facie* burden, the trial court denied the petition to dismiss without further analysis of whether Defendants could establish "a valid defense to the claims in the legal action," *see* Tenn. Code Ann. § 20-17-105(c).

Although Plaintiffs acknowledge in their appellate brief that the trial court failed to expressly address this step of the analysis, they contend that the trial court "implicitly overruled [Defendants'] arguments on that point" by denying the petition to dismiss. We disagree. The analysis of whether Defendants are able to establish a valid defense to Plaintiffs' defamation claim is wholly independent from the trial court's determination of

[4] We note that the TPPA does not state that the evidence must be viewed in the light most favorable to a particular party, as is the case with summary judgment proceedings. *See Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011).

whether a *prima facie* case was presented by Defendants that the instant action "is based on, relates to, or is in response to [Defendants'] exercise of the right to free speech" or whether a *prima facie* case of defamation was then demonstrated by Plaintiffs.

We do, however, agree with Plaintiffs on one point. To the extent that the initial two steps of the dismissal procedure require only a *prima facie* showing pursuant to the express statutory language, *see* Tenn. Code Ann. § 20-17-105(a) and (b), and the third step does not contain that qualifying "prima facie" language, *see* Tenn. Code Ann. § 20-17-105(c), the rules of statutory construction instruct that we should infer "that if the Legislature had intended to enact a certain provision missing from the statute, then the Legislature would have included the provision. Thus, the missing statutory provision is missing for a reason—the Legislature never meant to include it." *Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681, 689 (Tenn. 2020). In other words, with respect to establishing a defense to the defamation claim, Defendants would be required to make more than a *prima facie* demonstration in order to achieve dismissal of the defamation claim.

Insofar as the trial court failed to address the third step of the TPPA's dismissal procedure by failing to expressly determine whether Defendants were able to establish a defense to the defamation claim, we conclude that we are constrained to vacate the trial court's order denying dismissal and remand for further analysis concerning this step. However, we affirm the trial court's determinations regarding the first two steps of the dismissal analysis.

## V. Attorney's Fees

Finally, Plaintiffs contend that Defendants' petition to dismiss was frivolous or asserted for the sole purpose of delay such that Plaintiffs should have been awarded attorney's fees and costs in the trial court. Plaintiffs further assert that they should similarly be awarded attorney's fees and costs on appeal for the same reason. The trial court determined that Defendants' petition to dismiss was not frivolous and denied Plaintiffs' request for an award of fees.

Plaintiffs base their claim for attorney's fees on Tennessee Code Annotated § 20-17-107(b) (2021), which provides:

> If the court finds that a petition filed under this chapter was frivolous or was filed solely for the purpose of unnecessary delay, and makes specific written findings and conclusions establishing such finding, the court may award to the responding party court costs and reasonable attorney's fees incurred in opposing the petition.

The statute provides no further assistance in analyzing whether a petition is frivolous or filed solely for delay.

Black's Law Dictionary defines "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful." BLACK'S LAW DICTIONARY 692 (8th ed. 2004). This term has been defined similarly in other statutory schemes that provide for sanctions for the filing of a frivolous lawsuit. For example, the Tennessee Consumer Protection Act, specifically Tennessee Code Annotated § 47-18-109(e)(2) (Supp. 2022), allows a defendant to request reasonable attorney's fees and costs in a private action upon the trial court's finding that the action was "frivolous, without legal or factual merit, or brought for the purpose of harassment." Tennessee Courts have defined this phrase as "utterly lacking in an adequate factual predicate as to make the filing of such a claim highly unlikely to succeed." *Milan Supply Chain Sols., Inc. v. Navistar, Inc*., 627 S.W.3d 125, 161 (Tenn. 2021); *Glanton v. Bob Parks Realty*, No. M2003-01144-COA-R3-CV, 2005 WL 1021559, at *9 (Tenn. Ct. App. Apr. 27, 2005) (also defining such claims as "baseless").

We note that Tennessee Code Annotated § 47-18-109(e)(2) of the Tennessee Consumer Protection Act provides that "upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs" (emphasis added). Accordingly, this Court has determined that the trial court has discretion concerning whether to award fees pursuant to the statute and reviews a trial court's decision regarding an award of attorney's fees for frivolous claims pursuant to Tennessee Code Annotated § 47-18-109(e)(2) under an abuse of discretion standard. *Lapinsky v. Cook*, 536 S.W.3d 425, 446 (Tenn. Ct. App. 2016); *Glanton*, 2005 WL 1021559, at *9.

Similarly, the fee-shifting statute at issue in this case, Tennessee Code Annotated § 20-17-107(b), provides that the trial court "may award to the responding party court costs and reasonable attorney's fees" upon a finding that the petition was frivolous or filed solely for the purpose of unnecessary delay (emphasis added). We therefore conclude that a trial court's determination with regard to a claim for fees pursuant to Tennessee Code Annotated § 20-17-107(b) is discretionary and should be reviewed by this Court under an abuse of discretion standard.

As our Supreme Court has instructed:

> An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an

> incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

*Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). In the instant case, the trial court denied Plaintiffs' request for an award of attorney's fees, determining that Defendants' petition to dismiss was not frivolous. Based upon our review, we cannot conclude that the trial court abused its discretion in this decision. Given the materials in the record before us, we do not find that the petition was baseless or "utterly lacking in an adequate factual predicate as to make the filing of such a [petition] highly unlikely to succeed." *See Milan Supply Chain Sols., Inc.*, 627 S.W.3d at 161.

With respect to Plaintiffs' request for an award of attorney's fees and costs on appeal, we likewise determine that such request should be denied. Plaintiffs again rely upon Tennessee Code Annotated § 20-17-107(b), propounding that because the petition to dismiss was frivolous, they should have been awarded attorney's fees and costs in the trial court and should also be awarded such fees and costs on appeal. *See*, *e.g.*, *Nandigam Neurology, PLC*, 639 S.W.3d at 670. Having concluded that the trial court properly exercised its discretion in determining that Defendants' petition was not frivolous, we decline to award attorney's fees on appeal pursuant to Tennessee Code Annotated § 20-17-107(b).

## VI. Conclusion

For the foregoing reasons, we vacate the trial court's order denying dismissal based upon the TPPA's dismissal procedure, and we remand for further consideration of the third step of the statutory analysis relative to Defendants' ability to establish "a valid defense to the claims in the legal action." We affirm the trial court's determinations concerning the first two steps of the dismissal analysis. We also affirm the trial court's determination that the petition to dismiss was not frivolous and did not warrant an award of attorney's fees and costs. Costs on appeal are assessed one-half to the appellants, Joe D. Franklin and Innovative Advisory Partners, LLC, and one-half to the appellees, Robert L. Pragnell, William Stuart Wood, Christopher A. Taylor, and Charles Jonathan Emanuel.

s/Thomas R. Frierson, II

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THOMAS R. FRIERSON, II, JUDGE