

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 4, 2022 Session

**FILED**  
05/31/2023  
Clerk of the  
Appellate Courts

**AARON SOLOMON v. ANGELIA SOLOMON ET AL.**

**Appeal from the Circuit Court for Williamson County**  
**No. 2021-200 James G. Martin, III, Judge**

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**No. M2021-00958-COA-R3-CV**

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Plaintiff sued several defendants over social media posts and the unauthorized use of his and his child’s name, image, and likeness. Plaintiff requested both damages and injunctive relief. In response, defendants petitioned to dismiss under the Tennessee Public Participation Act. Plaintiff then filed notice of a voluntary nonsuit, which defendants opposed. The trial court dismissed the case without prejudice. Because we conclude that nothing in Tennessee Rule of Civil Procedure 41 precludes the voluntary dismissal, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and KENNY ARMSTRONG, J., joined.

J. Alex Little, Zachary C. Lawson, and Ross M. Johnson, Nashville, Tennessee, for the appellants, Kami Abbate, Wynn Hicks, and Anna Smith.

Hunter Fowler, Murfreesboro, Tennessee, for the appellant, Melanie Hicks.

Angelia Solomon, Franklin, Tennessee, pro se appellant.

Paige Waldrop Mills and Margaret V. Dodson, Nashville, Tennessee, for the appellee, Aaron Solomon.

## OPINION

### I.

Aaron Solomon sued Angelia Solomon, Melanie Hicks, Wynn Hicks, Anna Smith, and Kami Abbate (collectively, “Defendants”)<sup>1</sup> over social media posts. He asserted claims for defamation, false light, invasion of privacy, negligence, intentional infliction of emotional distress, civil conspiracy, violations of the Tennessee Personal Rights Protection Act, and false advertising. In addition to monetary damages and other relief, Mr. Solomon sought “a temporary and permanent injunction against all Defendants, their agents, employees, attorneys, and all persons acting in concert with them from any further use, posting, publicizing, dissemination, or distribution of false and defamatory content concerning Mr. Solomon, his marriage, his divorce, his ex-wife, or his children.”

Defendants petitioned to dismiss the motion for temporary injunctive relief under the Tennessee Public Participation Act (“TPPA”). *See* Tenn. Code Ann. § 20-17-104(a) (2021). The TPPA is characterized as an “Anti-SLAPP” statute, SLAPP being an acronym for Strategic Lawsuits Against Public Participation.<sup>2</sup> *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 657 (Tenn. Ct. App. 2021). Defendants argued that their speech was constitutionally protected and the injunction Mr. Solomon sought was an unconstitutional prior restraint.

Mr. Solomon responded to the petition to dismiss. Tenn. Code Ann. § 20-17-104(c). But later he filed a notice of voluntary nonsuit to dismiss his action without prejudice. *See* TENN. R. CIV. P. 41.01(1). Defendants objected. They argued that a legal action could not be voluntarily dismissed while a petition to dismiss under the TPPA is pending. And, even if Mr. Solomon could take a voluntary dismissal, Defendants were entitled to pursue their remedies under the TPPA, which included a dismissal with prejudice. *See* Tenn. Code Ann. § 20-17-105(e) (2021).

The trial court overruled Defendants’ objections and granted the voluntary dismissal. It concluded that Tennessee Rule of Civil Procedure 41.01 “grants a plaintiff an absolute, free, and unrestricted right to voluntarily dismiss an action without prejudice to

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<sup>1</sup> The suit also named as defendants John Does 1-25 that, “upon information and belief, have contributed to and assisted . . . with the tortious activities described [in the verified complaint].”

<sup>2</sup> Professor George Pring coined the term “Strategic Lawsuits Against Public Participation” to refer to lawsuits designed “to stop citizens from exercising their political rights or to punish them for having done so.” George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV’T. L. REV. 3, 5-6 (1989). “SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense.” *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992), *aff’d*, 616 N.Y.S.2d 98 (App. Div. 1994).

its refiling, except in limited and well-defined circumstances.” And none of the limited and well-defined circumstances applied.

## II.

Defendants make two arguments on appeal. First, they argue that a plaintiff cannot voluntarily dismiss his legal action while a petition to dismiss under the TPPA is pending. Second, they argue that a petition to dismiss under the TPPA survives an attempted nonsuit.

Resolution of these issues requires interpretation of procedural rules and the TPPA. Interpretation of procedural rules and statutes are questions of law, which we review de novo, with no presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011). We apply the same rules of interpretation to both rules and statutes. *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009).

### A.

Tennessee Rule of Civil Procedure 41.01 “grants a plaintiff an absolute right to voluntarily dismiss an action, without prejudice to its refiling,” subject to “limited and well-defined” exceptions. *Hurley v. Pickens*, 536 S.W.3d 419, 422 (Tenn. Ct. App. 2016) (quoting *Robles v. Vanderbilt Univ. Med. Ctr.*, No. M2010-01771-COA-R3-CV, 2011 WL 1532069, at \*2 (Tenn. Ct. App. Apr. 19, 2011)). Outside these exceptions, a voluntary dismissal may be taken “at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict.” TENN. R. CIV. P. 41.01; *Lacy v. Cox*, 152 S.W.3d 480, 484 (Tenn. 2004).

Among the exceptions, a party may not take a voluntary nonsuit in a class action case, in a shareholder derivative action, in a case in which a receiver has been appointed, or while an opposing party’s motion for summary judgment is pending. *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012). But none of those are at issue here. Instead, Defendants rely on the right to a voluntary dismissal being “[s]ubject to the provisions . . . of any statute.” TENN. R. CIV. P. 41.01. They also rely on “an implied exception which prohibits nonsuit when it would deprive the defendant of some vested right.” *Lacy*, 152 S.W.3d at 484.

Defendants claim that the TPPA is an express statutory restriction on the right to a voluntary dismissal. They note the mandatory language of the statute. If a party that petitions for dismissal meets its burden under the TPPA and the responding party cannot, “the court shall dismiss the legal action.” Tenn. Code Ann. § 20-17-105(b). Likewise, if the petitioning party can establish a valid defense to the claims, “the court shall dismiss the legal action.” *Id.* § 20-17-105(c). And, if a court dismisses a legal action on a TPPA petition, “the court shall award” costs, expenses, attorney’s fees, and other relief to the petitioning party. *Id.* § 20-17-107(a) (2021).

And Defendants note the statute’s purpose. Its purpose “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.” *Id.* § 20-17-102 (2021). In light of its purpose, they reason “that the TPPA would not allow Mr. Solomon to nonsuit his case after a well-supported TPPA petition ha[d] been filed.”

We conclude that the TPPA is not a statutory exception to the right to take a voluntary nonsuit under Rule 41.01. The reference to “any statute” in Rule 41.01 follows a list of Rules of Civil Procedure, all of which expressly limit a party’s right to take a voluntary dismissal. *Clark v. Werther*, No. M2014-00844-COA-R3-CV, 2016 WL 5416335, at \*4 (Tenn. Ct. App. Sept. 27, 2016). So the phrase “of any statute” refers only to those statutes that “specifically limit a party’s right to obtain a voluntary nonsuit or otherwise relate specifically to the effect of a voluntary nonsuit.”<sup>3</sup> *Id.* As we have previously explained, “[t]his construction complies with the purpose of Rule 41.01, which was to preserve the historically liberal practice of allowing voluntary nonsuits in circuit court.” *Id.* Nothing in the TPPA limits a party’s right to obtain a voluntary nonsuit or addresses the effect of a voluntary nonsuit. And, although we acknowledge the purpose behind the TPPA, “except in the rare case of an obvious scrivener’s error, purpose — even purpose as most narrowly defined — cannot be used to contradict text or to supplement it.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 57 (2012); *see also Rapanos v. United States*, 547 U.S. 715, 752 (2006) (recognizing “the textual limitations upon a law’s scope are no less a part of its ‘purpose’ than its substantive authorizations”).

Defendants also claim a vested right in having their petition to dismiss adjudicated on the merits. *See Lacy*, 152 S.W.3d at 484. The protection of “vested rights” is rooted in due process. *See Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978). And in the context of Rule 41.01, due process principles prevent a plaintiff from voluntarily dismissing a lawsuit when doing so would deprive a defendant of some right that vested during the pendency of the case. *Lacy*, 152 S.W.3d at 484; *Rickets v. Sexton*, 533 S.W.2d 293, 294-95 (Tenn. 1976). Tennessee courts have recognized such rights in several instances.

One instance involves condemnation actions after the condemner takes possession of the property. *See Anderson v. Smith*, 521 S.W.2d 787, 791 (Tenn. 1975). In that context, a property owner obtains a vested right in compensation that the condemner cannot deprive him of by voluntarily dismissing its claim. *Id.* Another instance involves a defendant’s

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<sup>3</sup> For example, a statute prohibits voluntary dismissal in suits for the abatement of a nuisance. *See* Tenn. Code Ann. § 29-3-107(a) (2012) (“No such proceeding shall be voluntarily dismissed except upon a written, sworn statement of the relator or relators of the reasons for dismissal.”).

“vested right of appellate review” that follows a trial court’s grant of a new trial. *Lacy*, 152 S.W.3d at 485 (quoting *Panzer v. King*, 743 S.W.2d 612, 614 (Tenn. 1988)). Once the trial court grants a new trial, a plaintiff cannot evade appellate review of that decision by voluntarily dismissing her claim. *Id.* And a third instance arises in the context of divorce. *See Shell v. Shell*, No. E2007-01209-COA-R3-CV, 2008 WL 2687529 at \*2-3 (Tenn. Ct. App. July 9, 2008). After the parties engage in mediation, sign a settlement agreement, and submit the settlement for court approval, the plaintiff cannot avoid enforcement of the agreement by voluntarily dismissing the divorce action. *Id.*

But a defendant does not obtain a vested right by simply filing a motion to dismiss. *See Rickets*, 533 S.W.2d at 294 (upholding the right of a plaintiff to take a voluntary nonsuit “in the face of the resistance of his adversary”); *see also Willbanks v. Trousdale Cty. Bd. of Educ.*, 1986 WL 1663, at \*2 (Tenn. Ct. App. Feb. 7, 1986) (finding “nothing in Rule 41.01 which takes away plaintiffs’ right to a voluntary nonsuit when defendant had moved to dismiss plaintiffs’ suit”). So a plaintiff can take a voluntary nonsuit even if a motion to dismiss is pending before the court. *Willbanks*, 1986 WL 1663 at \*2.

Like a motion to dismiss, we conclude that Defendants do not have a vested right to a decision on their TPPA petition. When the voluntary nonsuit was filed, the court had made no determination of whether Mr. Solomon had “establishe[d] a prima facie case for each essential element of the claim” or whether Defendants had “establishe[d] a valid defense to the claims.” *See* Tenn. Code Ann. § 20-17-105(b), (c). Due process does not demand that every TPPA petition be decided on its merits.

## B.

Finally, Defendants argue that, even if Mr. Solomon could voluntarily dismiss his claims, their TPPA petition “survives the attempted nonsuit.” Anti-SLAPP statutes in some states expressly provide that voluntary dismissal does not affect a petitioning party’s right to seek attorney’s fees and costs. *See, e.g.*, Haw. Rev. Stat. Ann. § 634G-6(b) (West, Westlaw through 2023 Reg. Sess.); Ky. Rev. Stat. Ann. § 454.472(2) (West, Westlaw through laws eff. Apr. 4, 2023); La. Code Civ. Proc. Ann. art. 971(C)(2) (Westlaw through 2023 1st Extraordinary Sess.); Wash. Rev. Code Ann. § 4.105.060(2) (West, Westlaw through 2023 Reg. Sess.). But the TPPA does not include such a provision. Defendants acknowledge the TPPA does not “[c]reate[] a private right of action.” Tenn. Code Ann. § 20-17-108(6) (2021). Still, they argue the TPPA “provide[s] for an affirmative claim that can be filed in response to a SLAPP suit.” In response to a legal action, a party “may petition the court to dismiss the legal action.” *Id.* § 20-17-104(a). Under the TPPA, the term “legal action” is defined to include a “petition” as well as a “counterclaim.” *Id.* § 20-17-103(5) (2021). So use of the word “petition,” rather than “motion,” suggests that the request to dismiss is akin to a counterclaim. Under Rule 41.01, if “a counterclaim has been pleaded by a defendant prior to the service upon the defendant of [a] plaintiff’s motion to

dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.” TENN. R. CIV. P. 41.01(1).

We find Defendants’ argument unavailing. The use of the term “petition” in the TPPA does not resolve the question. As Mr. Solomon notes, “[d]epending on the nature of a statutorily authorized ‘petition,’ the petition might be considered a ‘complaint’ for purposes of [the Rules of Civil Procedure], or it might be considered a motion relating to a pending civil action.” TENN. R. CIV. P. 3 advisory comm. cmt. (2013). So we must examine the nature of a TPPA petition to dismiss relative to what might be considered a counterclaim under Tennessee Rule of Civil Procedure 41.01.

In *Blake v. Plus Mark, Inc.*, our supreme court considered whether a “pleading set forth a counterclaim within the meaning of [Rule 41.01].” 952 S.W.2d 413, 416 (Tenn. 1997). Counterclaims “set up grounds for affirmative relief.” *Id.* The court then quoted with approval the following description of affirmative relief:

[a]s used in a particular statute or rule precluding dismissal where the adverse party has sought affirmative relief, the term “affirmative relief” requires the allegation of new matter that, in effect, amounts to a counterattack. The relief sought, if granted, must operate not as a defense, but affirmatively and positively to defeat the plaintiff’s cause of action. Thus, where the pleadings in a counterclaim constitute mere denials of the plaintiff’s cause of action and state no facts on which affirmative relief could be granted, the plaintiff’s right to voluntary termination of the suit is not affected.

*Id.* (quoting 24 AM. JUR. 2D *Dismissal* § 66 (1983)).

Based on this description of affirmative relief, we conclude that a TPPA petition is not a counterclaim within the meaning of Rule 41.01.<sup>4</sup> The TPPA contemplates that a defendant may petition for dismissal based on “a valid defense to the claims.” Tenn. Code Ann. § 20-17-105(c). So a TPPA petition operates as a defense in that sense, albeit a defense that comes with an award of attorney’s fees, expenses, and costs. *See id.* § 20-17-

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<sup>4</sup> After this case was argued, this Court reached the opposite conclusion in another case. *See Adamson v. Grove*, M2020-01651-COA-R3-CV, 2022 WL 17334223, at \*14 (Tenn. Ct. App. Nov. 30, 2022) (concluding that “Defendant’s TPPA Petition to Dismiss and request for attorney fees and sanctions would be considered a counterclaim within the meaning of Rule 41.01”). But we decline to follow that holding. First, the holding is dicta. *Flade v. City of Shelbyville*, No. M2022-00553-COA-R3-CV, 2023 WL 2200729, at \*22 (Tenn. Ct. App. Feb. 24), *perm. app. filed* (Tenn. Apr. 16, 2023). The Court determined that the “counterclaim” was filed after the notice of nonsuit. *Adamson*, 2022 WL 17334223, at \*15. So whether or not the TPPA petition was a counterclaim, the trial court had no jurisdiction over the petition. *Id.* Second, the holding misapprehends the nature of a TPPA petition to dismiss. *See id.* at \*13-14.

107(a). The TPPA also contemplates that a defendant may “mak[e] a prima facie case that a legal action against the [defendant] 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.” *Id.* § 20-17-105(a). But that is also not affirmative relief as described by *Blake*. Dismissal does not come after “affirmatively and positively” defeating the plaintiff’s cause of action. *Blake*, 952 S.W.2d at 416. Rather it is the plaintiff’s failure to “establishe[] a prima facie case for each essential element of the claim in the legal action” that leads to dismissal. Tenn. Code Ann. § 20-17-105(b).

Our conclusion that a TPPA petition is not a counterclaim within the meaning of Rule 41.01 is further supported by the “intent” and “effect” of the TPPA. The TPPA “is intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available.” *Id.* § 20-17-109 (2021). But the TPPA does not “[c]reate a private right of action.”<sup>5</sup> *Id.* § 20-17-108(6). And a TPPA petition cannot “result in findings or determinations that are admissible in evidence at any later stage of the underlying legal action or in any subsequent legal action.” *Id.* § 20-17-108(2). So the remedy only operates defensively, following a “legal action” as defined in the TPPA. *See id.* § 20-17-104(a) (providing that, “[i]f 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”).

### III.

Because this case does not involve any of the well-defined exceptions to Rule 41.01’s right of voluntary dismissal, the trial court properly dismissed the case without prejudice on Mr. Solomon’s notice of nonsuit. And a TPPA petition to dismiss is not a counterclaim. So, following the voluntary dismissal of Mr. Solomon’s claims, Defendants could not pursue their petition in the capacity of plaintiffs. The case is remanded for such further proceedings as may be necessary and consistent with this opinion.

s/ W. Neal McBrayer  
W. NEAL MCBRAYER, JUDGE

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<sup>5</sup> In this sense, a TPPA petition to dismiss is similar to a defendant’s request for damages for a Tennessee Consumer Protection Act (“TCPA”) claim that is “frivolous, without legal or factual merit, or brought for the purpose of harassment.” Tenn. Code Ann. § 47-18-109(e)(2) (Supp. 2022). We have held that, when a plaintiff voluntarily dismisses his TCPA claims, the claim for damages is extinguished. *Jasinskis v. Cameron*, M2019-01417-COA-R3-CV, 2020 WL 2765845, at \*5 (Tenn. Ct. App. May 27, 2020).