IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 1, 2023

JANE DOE v. JOHN DAVID ROSDEUTSCHER, M.D., ET AL.

Appeal from the Circuit Court for Davidson County
No. 21C2305 William B. Acree, Senior Judge

No. M2022-00834-COA-R3-CV

All of the claims asserted in this action arise from a prior healthcare liability action in which Jane Doe ("Plaintiff") sued Dr. John Rosdeutscher and his medical group for damages resulting from breast reduction surgery. In the action now on appeal, the complaint asserts claims for invasion of privacy, abuse of process, intentional or reckless infliction of emotional distress, and breach of contract against Dr. Rosdeutscher, his medical group, and the attorneys who represented them in the prior healthcare liability action. All of Plaintiff's claims pertain to the fact that the defendants filed Plaintiff's medical records in the healthcare liability action, which included nude photographs of Plaintiff and details about her sexual and mental health history—information that Plaintiff contends had "nothing to do" with her healthcare liability claims. The defendants responded to the complaint by serving a Tennessee Rule of Civil Procedure 11 notice on Plaintiff's counsel. Shortly thereafter, the defendants filed a Tennessee Rule of Civil Procedure 12.02 motion to dismiss all claims on various grounds. The trial court granted the Rule 12 motion, dismissed all claims, and assessed $10,000 in damages pursuant to Tennessee Code Annotated § 20-12-119 against Plaintiff. The trial court also assessed Rule 11 sanctions against Afsoon Hagh, Plaintiff's attorney, in the additional amount of $32,151.67. Plaintiff appealed; her attorney did not. Finding no error, we affirm. We also find this appeal to be frivolous and remand for further proceedings consistent with this opinion, including a determination of the reasonable and necessary attorney's fees and expenses incurred by the defendants in defending this appeal and entry of judgment thereon.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KRISTI M. DAVIS, JJ., joined.

Afsoon Hagh, Nashville, Tennessee, for the appellant, Jane Doe.

Dixie W. Cooper and Matthew H. Cline, Brentwood, Tennessee, for the appellees, John David Rosdeutscher, M.D.; Cumberland Plastic Surgery, P.C.; Dixie Cooper, Esq., Matthew H. Cline, Esq.; and Cumberland Litigation, PLLC.

OPINION

FACTS AND PROCEDURAL HISTORY

This civil action arises from a prior healthcare liability action in the Davidson County Circuit Court. *See [Doe] v. Rosdeutscher*, No. 18C1229 (Davidson Cty. Cir. Ct. Dec. 29, 2021), *affirmed and remanded*, No. M2021-00157-COA-T10B-CV, 2021 WL 830009 (Tenn. Ct. App. Mar. 4, 2021).[1] The defendants in the prior action were John David Rosdeutscher, M.D., and his medical practice, Cumberland Plastic Surgery, P.C. Attorneys Dixie Cooper and Matthew Cline represented Dr. Rosdeutscher and Cumberland Plastic Surgery in the healthcare liability action.

Following extensive discovery, discovery disputes, and numerous contested hearings on motions, Plaintiff filed a notice of voluntary dismissal of the healthcare liability case on January 12, 2020. An order to that effect was entered on March 26, 2020. Nevertheless, the trial court retained jurisdiction over the issue of sanctions, the motions for which were pending when the notice of voluntary dismissal was filed. *See Menche v. White Eagle Prop. Grp., LLC, et al*., No. W2018-013360-COA-R3-CV (Tenn. Ct. App. Aug. 26, 2019) ("[I]n the typical case wherein the trial court enters judgment for one party, the judgment does not become final unless and until a pending motion for sanctions is adjudicated."). Following additional hearings, the trial court assessed Tennessee Rule of Civil Procedure 37 discovery sanctions and Tennessee Rule of Civil Procedure 11 sanctions against Plaintiff's counsel, Afsoon Hagh and Brian Manookian. Plaintiff's counsel appealed the assessment of sanctions against them; Plaintiff did not. Their appeals, which were consolidated, were pending at the time of this decision. *See [Doe] v. Rosdeutscher*, *appeal docketed*, Nos. M2021-00449-COA-R3-CV, M2022-00130-COA-R3-CV (Tenn. Ct. App. Apr. 6, 2023).

Plaintiff commenced this action on December 30, 2021. The defendants in this action are Dr. Rosdeutscher, Cumberland Plastic Surgery, Dixie Cooper, Matthew Cline, and their legal practice, Cumberland Litigation, PLLC (collectively "Defendants"). In pertinent part, the complaint in this action alleges:

> 10. In November of 2016, Ms. Doe presented to Cumberland Plastic Surgery for consultation regarding the removal of implants in her right and left breasts as well as reduction of the right breast.

[1] Plaintiff filed the present action under a pseudonym, so we have omitted her name from the prior lawsuit caption as well.

11. As part of her evaluation, Ms. Doe disclosed highly personal and highly sensitive medical information to Dr. Rosdeutscher and Cumberland Plastic Surgery. Dr. Rosdeutscher and Cumberland Plastic Surgery additionally insisted on taking nude photographs of Ms. Doe; to which she eventually consented with the assurances that such photographs would not be improperly disseminated.

12. In January of 2017, Dr. Rosdeutscher performed surgery on Ms. Doe. During the surgery, and throughout the follow-up care, Dr. Rosdeutscher repeatedly committed professional malpractice which significantly injured Ms. Doe and resulted in life-long disfigurement.

13. In the Spring of 2018, Ms. Doe filed suit against Dr. Rosdeutscher, bringing health care liability claims pursuant to Tennessee law and requesting damages up to $750,000.

14. Dr. Rosdeutscher and Cumberland Plastic Surgery hired Dixie Cooper, Matthew Cline, and Cumberland Litigation ("the Insurance Defense Attorneys") to defend Ms. Doe's medical malpractice suit against them. At all times that the Insurance Defense Attorneys took actions in the medical malpractice case, they did so on behalf of Dr. Rosdeutscher and Cumberland Plastic Surgery and as their agents-in-fact. At all times that Dixie Cooper or Matthew Cline took actions in the medical malpractice case, they additionally did so on behalf of Cumberland Litigation.

15. The Insurance Defense Attorneys held and hold a deep personal animus for Ms. Doe's attorneys in the medical malpractice action. Together with Dr. Rosdeutscher and Cumberland Plastic Surgery they conspired, and, indeed carried out a plan, to humiliate, embarrass, and terrorize Ms. Doe: all in retaliation for retaining her specific attorneys; for filing the medical malpractice case; and to discourage Ms. Doe from further pursuing her lawsuit.

16. To that end, the Insurance Defense Attorneys gathered sensitive and inflammatory medical information about Ms. Doe as well as the nude photographs that Dr. Rosdeutscher and Cumberland Plastic Surgery had insisted upon taking of Ms. Doe with the plan of placing the information and photographs into the public arena for the sole purpose of attacking, humiliating, and demeaning Ms. Doe. They did so on behalf of, and with the blessing and assistance of Dr. Rosdeutscher and Cumberland Plastic Surgery.

17. On March 30, 2021, Matthew Cline spent hours preparing a Supplemental Brief for Sanctions to which he appended as exhibits (a) nude

photographs of Ms. Doe, (b) medical records documenting that Ms. Doe had herpes, and (c) medical records documenting that Ms. Doe was being treated with an antipsychotic medication for a serious mental health issue. Dixie Cooper documented that she spent significant time reviewing and approving of the scheme to attack and demean Ms. Doe prior to its execution.

18. Notably, the nude photographs, herpes diagnosis, and mental health information had absolutely nothing to do with the particular motion to which they were attached, or even the case at issue (which was concerned solely with a botched breast reduction surgery). Rather, the only purpose in publicly filing nude photographs of Ms. Doe as well as announcing to the world that she had herpes and was being treated with an antipsychotic medication for a mental health disorder was to humiliate, terrorize, embarrass, and demean Ms. Doe.

19. On March 31, 2021, Dixie Cooper, Matthew Cline, Dr. Rosdeutscher, and Cumberland Plastic Surgery executed on their plan; publicly filing nude photographs of Ms. Doe, as well as medical records stating that she had herpes, and medical records which stated her precise mental health diagnosis and treatment (hereinafter "the Nude and Retaliatory Filing") into an open court file which is accessible to any member of the public and media, both on-demand and available online twenty-four hours a day.

. . . .

24. There was no legitimate purpose in making the Nude and Retaliatory Filing. The underlying case involved a botched breast reduction surgery. The particular pleadings to which the Defendants appended the Nude and Retaliatory Filing had no imaginable connection to nude photographs of Ms. Doe, Ms. Doe's status as herpes-positive, or Ms. Doe's mental health status and treatment. Rather, the entire motivation was to retaliate against Ms. Doe for retaining her specific attorneys and for filing suit against Rosdeutscher and Cumberland Plastic Surgery, as well as to discourage her from further pursuing her meritorious medical malpractice action.

Based on these and other allegations, Plaintiff asserted claims against Defendants for invasion of privacy, abuse of process, and intentional or reckless infliction of emotional distress. Plaintiff also asserted a breach of contract claim against Dr. Rosdeutscher and his medical practice. The breach of contract claim, as stated in the complaint, reads:

39. On November 12, 2016, Rosdeutscher and Cumberland Plastic Surgery agreed in writing that any photographs of Ms. Doe's nude body would only

be used for proper purposes and only in such a way that Ms. Doe's identity would not be revealed.

40. On March 31, 2021 and April 23, 2021, Rosdeutscher and Cumberland Plastic Surgery exhibited, disseminated, and distributed the same nude photographs of Ms. Doe in breach of their agreement.

41. The breach of contract by Rosdeutscher and Cumberland Plastic Surgery has resulted in severe emotional, mental, and psychological injuries, including, but not limited to, extreme humiliation and distress to Ms. Doe.

Defendants responded to the complaint by serving on Plaintiff's counsel a motion for sanctions under Tennessee Rule of Civil Procedure 11 on January 14, 2022.[2] One week later, on January 21, 2022, Defendants filed a Rule 12 motion to dismiss the complaint, which also sought recovery of attorney's fees and expenses pursuant to Tennessee Code Annotated § 20-12-119(c).

The judge initially assigned to the case recused herself on January 24, 2022. The successor judge assigned to the case set Defendants' motion to dismiss for April 14, 2022. In the interim, numerous motions were filed.

Then, on April 14, 2022, the trial court conducted a hearing on the pending motions, including Defendants' motion to dismiss. At the conclusion of the hearing, the court announced its decision to dismiss the case for failure to state a claim upon which relief could be granted.

Thereafter, on May 16, 2022, Defendants submitted their request for attorney's fees under Tennessee Code Annotated § 20-12-119(c). They requested that the court determine the amount of attorney's fees and expenses Defendants were entitled to recover but to stay the award of attorney's fees and expenses pending appeals. *See* Tenn. Code Ann. § 20-12-119(c). In support of their request, Defendants submitted a declaration from their attorney, Dixie Cooper, which detailed the services rendered. Plaintiff did not file any response or objection to Ms. Cooper's declaration nor did Plaintiff request a hearing to dispute the attorney's fees and expenses requested.

[2] Acting pursuant to Rule 11, the motion for sanctions was served directly on Plaintiff's counsel but not filed with the court until February 10, 2022. *See* Tenn. R. Civ. P. 11.03(1)(a) ("A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.").

Pursuant to an order entered on June 7, 2022, the trial court found that Defendants had incurred attorney's fees and expenses, which it found to be reasonable and necessary, that exceeded the statutory maximum of $10,000 in defending the dismissed claims.

Defendants' motion for Rule 11 sanctions was set for an evidentiary hearing on June 27, 2022. In preparation for the evidentiary hearing on Rule 11 sanctions, Defendants issued a subpoena for Plaintiff's counsel, Ms. Hagh, to testify at the hearing. Ms. Hagh retained attorney Craig Gabbert to represent her. Following some disagreements as to whether Ms. Hagh had been served with the subpoena, Mr. Gabbert agreed to accept service of the subpoena on Ms. Hagh's behalf, and the subpoena was served upon Mr. Gabbert. To confirm service, the trial court entered an order finding that Ms. Hagh had been served with the subpoena; the order also stated that the motion for Rule 11 sanctions would proceed as scheduled on June 27, 2022.

On June 17, 2022, Defendants filed the exhibits they intended to present at the Rule 11 sanctions hearing. Neither Plaintiff nor Ms. Hagh filed any exhibits nor did they submit any objections to Defendants' exhibits.

The hearing on the motion for Rule 11 sanctions came as scheduled on June 27, 2022. On the morning of the hearing, Mr. Gabbert informed Defendants' counsel that he no longer represented Ms. Hagh and would not attend the hearing. Although she had been subpoenaed to appear, Ms. Hagh did not attend the hearing, and no one appeared on her behalf. When the motion came on for hearing, the trial court elected to proceed with the hearing despite Ms. Hagh's absence.

The court heard testimony from Dixie Cooper and Matthew Cline. The essence of their testimony was that the allegations in the complaint were false and submitted for the improper purpose of harassing and intimidating Defendants for pursuing sanctions against Plaintiff's counsel in the previous healthcare liability case. The testimony of Ms. Cooper and Mr. Cline was uncontradicted because no one appeared to challenge their testimony or their exhibits.

After presenting their evidence concerning the merits of the Rule 11 motion, Defendants submitted their attorneys' billing statements for the trial court to consider in determining the amount of monetary sanctions to assess against Ms. Hagh. After taking the matter under advisement, the trial court granted Defendants' Rule 11 motion for sanctions and assessed a monetary sanction against Ms. Hagh in the amount of $32,151.67. In pertinent part, the order awarding sanctions, entered on August 5, 2022, reads as follows:

> As previously stated, the Court dismissed this case because it found that the Complaint failed to state a claim upon which relief can be granted. There was no law whatsoever to support the contentions being made by Plaintiff in this

case. *See* Tenn. R. Civ. P. 11.02(2). This suit is frivolous; the Court does not know if it has ever seen a suit that is as a frivolous as this case.

Based upon the record before the Court, there is no evidentiary basis for the factual allegations of the Complaint. *See* Tenn. R. Civ. P. 11.02(3). The Court finds that the reason the suit was filed was as retaliation to Defendants and to intimidate them based on the prior interactions with Ms. Hagh in the underlying healthcare liability action. As previously stated, in the underlying medical malpractice case, Judge [Kelvin] Jones awarded sanctions of approximately $70,000 against Ms. Hagh and her husband, Mr. Manookian. In the viewpoint of this Court and based upon the evidence presented, this suit was filed simply in retaliation for the sanctions entered against Ms. Hagh and Mr. Manookian in the prior case. *See* Tenn. R. Civ. P. 11.02(1).

The Court finds that sanctions under Rule 11 are appropriate in this case, in addition to the $10,000 provided for under Tenn. Code Ann. § 20-12-119. The Court also finds that the full amount of attorneys' fees is necessary under Rule 11 to deter repetition of such conduct by others simply situated and also to deter repetition of such conduct by Ms. Hagh in the future.

The Court has reviewed the attorney billing invoices submitted under seal by Defendants and finds that those fees are reasonable and were necessarily incurred as a direct result of Ms. Hagh's violation of Rule 11. Those fees, including expenses, total $42,151.67. Defendants are awarded attorney fees in that amount against Ms. Hagh and Hagh Law PLLC, less the $10,000 provided for under Tenn. Code Ann. § 20-12-119, for a total of $32,151.67, for which execution may issue if necessary. Ms. Hagh shall pay these sanctions within 30 days of entry of this Order.

This appeal by Plaintiff followed.[3]

ISSUES

[3] On June 21, 2022, which was weeks before the entry of the final judgment, Plaintiff filed a notice of appeal with this court. Thus, the appeal was premature. On August 4, 2022, Defendants filed a motion to dismiss the appeal as premature. On August 22, 2022, this court denied the motion to dismiss, explaining:

> The trial court retains jurisdiction to dispose of the remaining claims. The notice of appeal shall be treated as filed as of the date the trial court enters a final judgment disposing of all remaining claims. All proceedings on appeal are stayed pending entry of a final judgment. The relevant time periods provided by Tenn. R. App. P. 24 shall begin to run once a final judgment is entered and the notice of appeal becomes effective.

See Tenn. R. App. P. 4(d) ("A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.").

The issues as stated by Plaintiff read as follows:

1. Whether the Trial Court erred in granting a Motion to Dismiss for failure to state a claim where [Plaintiff's] claims were sufficiently pled as a matter of law and where the Trial Court instead adjudicated the case on what it believed to be the merits by purporting to weigh the substance of outside "evidence" for which it "took judicial notice."

2. Whether the Trial Court erred in then granting a Motion for Rule 11 Sanctions based upon [Plaintiff's] Complaint where: (a) [Plaintiff's] Complaint is supported by extensive factual bases and existing law; (b) Defendants failed to file a standalone motion as required by Rule 11; (c) Defendants failed to identify any specific violation of Rule 11.02 as required by Rule 11; and (c) Defendants failed to provide the required 21-day notice period as required by Rule 11.

3. Whether the Trial Court erred in awarding attorney's fees consequent to its dismissal and sanctions orders where it failed to provide process, an opportunity to cross-examine, an opportunity to object, or even an opportunity to review the alleged fees.

The issues as stated by Defendants read:

1. Did the Trial Court err in granting Defendants' Motion to Dismiss for failure to state a claim based upon the expiration of the statute of limitations and multiple other common law doctrines barring Plaintiff's claims?

2. Did the Trial Court abuse its discretion in granting Defendants' Motion for Sanctions and awarding attorney's fees against [Ms. Hagh] for filing a frivolous Complaint for an improper purpose?

3. Does Plaintiff have standing to challenge sanctions assessed only against [Ms. Hagh]?

4. Should this Court award sanctions against Plaintiff for filing a frivolous appeal?

STANDARD OF REVIEW

A trial court's decision to grant a Rule 12.02(6) motion to dismiss is a question of law that we review de novo with no presumption of correctness. *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

We review a trial court's ruling on a Rule 11 motion under an abuse of discretion standard. *Hooker v. Sundquist*, 107 S.W.3d 532, 535 (Tenn. Ct. App. 2002). "An abuse of discretion occurs when the decision of the lower court has no basis in law or fact and is therefore arbitrary, illogical, or unconscionable." *Id*. (citing *State v. Brown & Williamson Tobacco Corp*., 18 S.W.3d 186, 191 (Tenn. 2000)).

ANALYSIS

I. PLAINTIFF'S TORT CLAIMS

The complaint asserted three tort claims: invasion of privacy, abuse of process, and intentional or reckless infliction of emotional distress. Each of these claims arises from, as the complaint states, the public filing of "sensitive and inflammatory medical information about Ms. Doe as well as the nude photographs that Dr. Rosdeutscher and Cumberland Plastic Surgery had insisted upon taking of Ms. Doe with the plan of placing the information and photographs into the public arena for the sole purpose of attacking, humiliating, and demeaning Ms. Doe." Additionally, paragraph 19 of the complaint reads:

> On March 31, 2021, Dixie Cooper, Matthew Cline, Dr. Rosdeutscher, and Cumberland Plastic Surgery executed on their plan; publicly filing nude photographs of Ms. Doe, as well as medical records stating that she had herpes, and medical records which stated her precise mental health diagnosis and treatment (hereinafter "the Nude and Retaliatory Filing") into an open court file which is accessible to any member of the public and media, both on-demand and available online twenty-four hours a day.

Plaintiff argues in her appellate brief that the trial court was restricted to considering March 31, 2021, as the operative date for the public filing of the sensitive information at issue. As Plaintiff states in her brief,

> The Complaint identifies specific dates for each of its claims on which it alleges that tortious conduct occurred. All of those dates are within one-year of the filing of this lawsuit. Rather than treat those specifically-pled allegations as true, the Trial Court—on its own accord—held that the Defendant's tortious conduct occurred on different dates, more than a year prior.

In their motion to dismiss, Defendants noted that the nude photographs and sensitive medical information at issue were made public in 2019 when Defendants filed them in the

healthcare liability case in support of a motion for discovery sanctions.[4] Because the filing was part of the court record in the healthcare liability case in the Circuit Court of Davidson County, Tennessee, the trial court took judicial notice of the fact that the nude photographs and sensitive information that formed the basis of Plaintiff's tort claims had been made a part of the public record in December of 2019. Based on the fact that the photographs and sensitive information at issue had been made public in 2019 instead of 2021, the trial court found that "Plaintiff's tort claims accrued in December 2019, and the one-year statute of limitations had expired prior to the filing of the Complaint in December 2021."

Plaintiff contends this was error. More specifically, Plaintiff contends that the trial court failed to adhere to the correct legal standard in adjudicating the motion to dismiss because the trial court did not analyze the sufficiency of the claims as "asserted in the complaint." Instead, she contends the trial court improperly considered facts outside the complaint.

Generally, as Plaintiff contends, "[t]he resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone." *Webb*, 346 S.W.3d at 426. However, Defendants counter this argument by noting that courts "may consider 'items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case . . . without converting the motion into one for summary judgment.'" *Stephens v. Home Depot U.S.A., Inc*., 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (quoting *Haynes v. Bass*, No. W2015-01192-COA-R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016)); *see* Tenn. R. Evid. 201 (setting forth the procedure for judicial notice and the type of information of which a trial court may take judicial notice). Moreover, Defendants insist that the facts the trial court considered, which were of record in the healthcare liability case records, were a proper subject of judicial notice.

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[4] As Defendants explained in their Motion to Dismiss:

> [I]n December 2019, Defendants filed a motion for sanctions against Plaintiff's counsel in the health care liability action and attached Dr. Higdon's response to the subpoena in support of the motion. As noted above, Dr. Higdon's document production included Dr. Rosdeutscher's medical records and photos. After the Court directed Defendants to conduct additional discovery, Defendants filed a supplemental brief in support of their motion for sanctions in March 31, 2021, which essentially provided a reset for the Court on the sanctions issues because more than a year had elapsed due to COVID-19 and efforts by Plaintiff's counsel to delay entry of sanctions against them. Defendants filed many of the same exhibits to the supplemental brief as the original motion for sanctions to make it easy for the Court to locate the exhibits, which included Dr. Higdon's document production containing Dr. Rosdeutscher's medical records and photos. After a hearing on the motion for sanctions, the Court ordered Defendants to submit a proposed order on the motion for sanctions. Defendants complied with this order—submitting a proposed order with a number of exhibits, which included Dr. Higdon's document production containing Dr. Rosdeutscher's medical records and photos.

Tennessee Rule of Evidence 201 governs judicial notice of adjudicative facts. Pursuant to the rule, the kind of facts that may be judicially noticed are those that are "not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. of Evid. 201(b). Items appearing in the record of the court case are the types of records for which a court may take judicial notice. *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016); *Haynes*, 2016 WL 3351365, at *4.

A court is permitted to take judicial notice, whether requested or not, and "shall take judicial notice if requested by a party and supplied with the necessary information." Tenn. R. Evid. 201(c). "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Tenn. R. Evid. 201(d). And "[j]udicial notice may be taken at any stage of the proceeding." Tenn. R. Evid. 201(f).

As requested by Defendants, the trial court considered items **appearing in the record** of the healthcare liability case. Specifically, the trial court found that the nude photographs and sensitive medical records at issue had been filed in the healthcare liability case as early as 2019. Accordingly, the trial court acted within its discretion by taking judicial notice of this fact. *See Hooker*, 107 S.W.3d at 537; *see also Buck v. Thomas M. Cooley L. Sch.*, 597 F.3d 812, 816 (6th Cir. 2010) ("[A] court may take judicial notice of other court proceedings." (citing *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008))). Thus, contrary to Plaintiff's contention, the trial court did not fail to adhere to the correct legal standard in adjudicating the motion to dismiss.

Moreover, although it was permissible to consider items appearing in the public record of the healthcare liability case, we note that it was unnecessary for the trial court to take judicial notice of the initial filing of the nude photographs and medical records in the healthcare liability case because Plaintiff's counsel conceded in open court that Defendants placed the photographs and medical records in the public record in 2019 by filing them in the healthcare liability case. As the trial court noted in its order granting the motion to dismiss:

> Additionally, the Court finds that Plaintiffs tort claims for invasion of privacy, abuse of process, and infliction of emotional distress are barred by the one-year statute of limitations. Plaintiff has not disputed that these claims are subject to a one-year statute of limitations. **Plaintiff's counsel conceded at oral argument that she was aware the medical records had been filed into the public record in December 2019** and that there was never any objection raised in the health care liability action to the filing of the records.

(Emphasis added).

Based on the foregoing, the trial court found that "Plaintiff's tort claims accrued in December 2019, and the one-year statute of limitations had expired prior to the filing of the Complaint in December 2021."

As noted above, Plaintiff does not dispute that each of the tort claims is subject to a one-year statute of limitations. *See* Tenn. Code Ann. § 28-3-104(a)(1) ("Except as provided in subdivision (a)(2), the following actions shall be commenced within one (1) year after the cause of action accrued: (A) Actions for libel, injuries to the person, false imprisonment, malicious prosecution, or breach of marriage promise . . . ."); *see also Mackey v. Judy's Foods, Inc*., 867 F.2d 325, 329 (6th Cir. 1989) ("The claim for intentional infliction of emotional distress is most closely analogous to an action for injury to the person, and thus the one-year statute of limitations applies. Tenn. Code Ann. § 28-3-204."). Accordingly, we affirm the dismissal of Plaintiff's claims for invasion of privacy, abuse of process, and intentional or reckless infliction of emotional distress as time barred.[5]

II. PLAINTIFF'S BREACH OF CONTRACT CLAIM

Plaintiff also asserted a claim for breach of contract against Dr. Rosdeutscher and Cumberland Plastic Surgery. In pertinent part, the complaint states:

> 39. On November 12, 2016, Rosdeutscher and Cumberland Plastic Surgery agreed in writing that any photographs of Ms. Doe's nude body would only be used for proper purposes and only in such a way that Ms. Doe's identity would not be revealed.
>
> 40. On March 31, 2021 and April 23, 2021, Rosdeutscher and Cumberland Plastic Surgery exhibited, disseminated, and distributed the same nude photographs of Ms. Doe in breach of their agreement.

Although not quoted in the complaint, the contract that Plaintiff relies upon reads as follows:

> I, [Jane Doe] hereby authorize Dr. John David Rosdeutscher and his staff to examine and perform diagnostic procedures and provide other care necessary to diagnose and/or treat my condition. I understand any pictures taken if they do not reveal my identity may be used for advertising, or medical display. I understand that unless submitted in writing, this office may leave messages on my answering machine or voice mail at the numbers I have given them.

[5] Because we have affirmed the dismissal of these claims on the basis of the statue of limitations, the other grounds for dismissal of the tort claims are pretermitted as being moot.

Significantly, the parties' written contract makes no reference to the rights and responsibilities of the parties should litigation ensue between Plaintiff and Dr. Rosdeutscher. Thus, we find no basis on which to conclude that Dr. Rosdeutscher breached the foregoing written contract by filing her medical records in the healthcare liability action or this action. Nevertheless, other legal principles establish the respective rights and responsibilities of the parties concerning the issue of patient confidentiality. We begin with the most important of the competing interests.

> A patient's expectation that his or her medical records will remain private has constitutional, statutory, and decisional protection in Tennessee. Patients have a constitutionally protected interest in avoiding the disclosure of private, personal information, *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977), and their medical records fall within the sphere of constitutionally protected private information. *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d Cir. 1987); *Dr. K. v. State Bd. of Physician Quality Assurance*, 98 Md.App. 103, 632 A.2d 453, 459 (1993). The Tennessee General Assembly, recognizing the sensitivity of medical records, has enacted statutes limiting their disclosure. *See, e.g.,* Tenn. Code Ann. § 63-2-101(b)(1) (Supp. 2006); Tenn. Code Ann. §§ 68-11-1502, 68-11-1503 (2006). While Tennessee has never recognized a common-law physician-patient privilege, the Tennessee Supreme Court has recognized the existence of an implied covenant of confidentiality between physicians and their patients. *Givens v. Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 407 (Tenn. 2002).

McNiel v. Cooper, 241 S.W.3d 886, 894–95 (Tenn. Ct. App. 2007). Nevertheless, and as the trial court noted, a party may waive the confidentiality of medical information by putting the party's physical or mental condition at issue. *See Doe by Doe v. Brentwood Acad. Inc.*, 578 S.W.3d 50, 55 (Tenn. Ct. App. 2018); *see also Bray v. Khuri*, 523 S.W.3d 619, 622 (Tenn. 2017).

The records of which the trial court took judicial notice in the healthcare liability case reveal that the filing of the nude photographs and medical records was necessary to establish that Plaintiff had misrepresented the nature of her relationship with Dr. Higdon. Plaintiff's counsel had represented to Defendants and the trial court that Dr. Higdon was simply her treating physician; however, records Defendants obtained from Dr. Higdon by means of a subpoena revealed that Plaintiff had retained Dr. Higdon as an expert witness. To establish this misrepresentation, Defendants found it necessary to attach those medical records—records from Dr. Rosdeutscher's office that Plaintiff's counsel had provided to Dr. Higdon—to their motion for discovery sanctions in 2019 and, thereafter, in support of the motion for Rule 11 sanctions against Plaintiff's counsel, Ms. Hagh. As explained by Defendants in their motion to dismiss:

> During discovery in the health care liability action, a dispute arose as to whether Plaintiff had retained a treating physician, Dr. Higdon, as an expert witness. Plaintiff's counsel affirmatively represented to the Court on numerous occasions both verbally and in writing that Dr. Higdon had never been retained as an expert witness and insisted that he was solely a treating physician. Defendants' subpoena to Dr. Higdon revealed otherwise. Dr. Higdon produced documents demonstrating Plaintiff's counsel communicated in writing with Dr. Higdon about retaining him as an expert witness; sent him a check for expert witness review; and also sent him a copy of Dr. Rosdeutscher's medical records, which directly contradicted an earlier representation by Plaintiff's counsel to the Court that Plaintiff's counsel only provided a few pages of records to Dr. Higdon. Moreover, providing outside medical records to a treating physician converts that physician into a Rule 26 expert under Tennessee law.
>
> As a result, in December 2019, Defendants filed a motion for sanctions against Plaintiff's counsel in the health care liability action and attached Dr. Higdon's response to the subpoena in support of the motion. As noted above, Dr. Higdon's document production included Dr. Rosdeutscher's medical records and photos. After the Court directed Defendants to conduct additional discovery, Defendants filed a supplemental brief in support of their motion for sanctions in March 31, 2021, which essentially provided a reset for the Court on the sanctions issues because more than a year had elapsed due to COVID-19 and efforts by Plaintiff's counsel to delay entry of sanctions against them. Defendants filed many of the same exhibits to the supplemental brief as the original motion for sanctions to make it easy for the Court to locate the exhibits, which included Dr. Higdon's document production containing Dr. Rosdeutscher's medical records and photos. After a hearing on the motion for sanctions, the Court ordered Defendants to submit a proposed order on the motion for sanctions. Defendants complied with this order—submitting a proposed order with a number of exhibits, which included Dr. Higdon's document production containing Dr. Rosdeutscher's medical records and photos.

Thus, as the trial court found, the record reveals that the filing of the sensitive information was both necessary and relevant to the issues in the case:

> The Court finds that filing the medical records into the record was necessary to defend the health care liability action. It is common practice for medical records to be produced and filed in order to defend cases involving personal injuries, including health care liability actions. Plaintiff placed her physical and mental condition at issue by filing the health care liability action. Indeed, the photographs at issue would be particularly relevant to defend the health

care liability action because Plaintiff contended Dr. Rosdeutscher improperly performed surgery and caused injury to her breast. **Plaintiff's counsel conceded at oral argument that the photographs will be introduced at the trial of the health care liability action (which was re-filed after a voluntary dismissal and remains pending) to show the condition of Plaintiff before and after surgery.**

The Court also finds that filing the medical records was necessary on the issues related to whether Dr. Higdon was a treating physician or expert witness, and Defendants' Motion for Sanctions on this issue. The Court further finds that filing the medical records was necessary on the Motion for Sanctions on the issues related to the representations made by Plaintiff's counsel to the Court. Finally, it was necessary to file the medical records in the Court's Order assessing sanctions against Plaintiff's counsel. The Trial Court in the health care liability action ultimately relied on those medical records in its Order granting the Motion for Sanctions.

Accordingly, the Court finds that there is no legal basis for Plaintiffs claims premised on the filing of medical records in the health care liability action, and the claims are subject to dismissal as a result.

. . . .

Finally, the Court finds that Plaintiff's breach of contract claim against Dr. Rosdeutscher and Cumberland Plastic Surgery, P.C., is also subject to dismissal. The alleged contract does not preclude introducing Plaintiff's medical records in the circumstances discussed above. The breach of contract claims is dismissed for this reason as well.

We agree with the reasoning as expressed by the trial court above. We also find disingenuous Plaintiff's contention that Defendants breached her confidentiality agreement by filing her nude photographs with the court when Plaintiff's counsel admitted in open court, as noted in the order quoted above, that "the photographs will be introduced at the trial of the health care liability action . . . to show the condition of Plaintiff before and after surgery."

For the foregoing reasons, we affirm the dismissal of the breach of contract claim.

III. Rule 11 Sanctions Assessed Against Plaintiff's Attorney

Plaintiff contends that the trial court erred by assessing Rule 11 sanctions against her attorney, Afsoon Hagh, "where the underlying pleading is properly based on extensive [sic] fact and existing law, and where [Defendants] failed to meet any of the three (3)

prerequisites to prevailing upon [a motion for Rule 11 sanctions]." Significantly, however, Ms. Hagh did not file a separate appellate brief, nor did she file a notice pursuant to Tennessee Rule of Appellate Procedure 27(j) of her intent to join in Plaintiff's brief to challenge the Rule 11 sanctions against Ms. Hagh.[6]

Defendants contend that Plaintiff does not have standing to challenge the assessment of Rule 11 sanctions against her attorney, Afsoon Hagh. In making this point, Defendants focus on the fact that "[t]he Motion for Sanctions sought sanctions only against Plaintiff's counsel, and the sanctions Order entered only monetary sanction against Plaintiff's counsel." Stated another way, Defendants contend that the Rule 11 sanctions were not assessed against Plaintiff, only her lawyer. Thus, Plaintiff has no dog in this fight. The argument as articulated by Defendants reads:

> "[O]nly an aggrieved party has [the] right to prosecute an appeal." *Koontz v. Epperson Elec. Co*., 643 S.W.2d 333, 335 (Tenn. Ct. App. 1982) (internal citations omitted). An aggrieved party is one "having an interest recognized by law which is injuriously affected by the judgment [] or whose property rights or personal interest are directly affected by its operation." *Id*. (internal citations omitted).
>
> Here, Plaintiff is not "aggrieved" by the Order requiring her attorney to pay monetary sanctions. Thus, Plaintiff does not have standing to prosecute an appeal of the sanctions Order.

The issue concerning whether Plaintiff has standing to challenge the Rule 11 sanctions assessed against her counsel was properly raised by Defendants in their appellees' brief. *See* Tenn. R. App. P. 27(b). Under the statement of the issues in Defendants' brief, the third issue reads: "Does Plaintiff have standing to challenge sanctions assessed only against Plaintiff's counsel?" (Emphasis in original).

Tennessee Rule of Appellate Procedure 27(c) provides that "[t]he appellant may file a brief in reply to the brief of the appellee." Here, Plaintiff did file an appellant's reply brief; however, in that brief Plaintiff does not address the issue of standing. Moreover, Plaintiff's attorney, Ms. Hagh, did not join in either of Plaintiff's briefs, nor did she file a

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[6] In the underlying healthcare liability case in which Rule 11 sanctions were also assessed against Ms. Hagh for her representation of Ms. Doe, Ms. Hagh and Hagh Law filed a notice pursuant to Tennessee Rule of Appellate Procedure 27(j) of her intent to join in Ms. Doe's brief challenging the assessment of Rule 11 sanctions against Ms. Hagh and Hagh Law. "In cases involving multiple parties, . . . any number of parties may join in a single brief, and any party may adopt by reference any part of the brief of another party. Parties may similarly join in reply briefs." Tenn. R. App. P. 27(j). In this appeal however, Ms. Hagh did not file a separate appellate brief nor did she file a notice pursuant to Tennessee Rule of Appellate Procedure 27(j) of her intent to join in Plaintiff's brief to challenge the Rule 11 sanctions against Ms. Hagh in this case.

separate brief to challenge the imposition of Rule 11 sanctions or to address the standing issue. Thus, the only party challenging the Rule 11 sanctions against Ms. Hagh is Plaintiff, and neither Plaintiff nor Ms. Hagh has presented any argument that Plaintiff has standing to challenge the assessment of Rule 11 sanctions against Ms. Hagh.

This court has repeatedly held that a party's failure to argue the issues in the body of its brief constitutes a waiver on appeal. *See Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006)). Thus, it appears that Plaintiff and Ms. Hagh have conceded the fact that Plaintiff does not have standing to challenge the assessment of Rule 11 sanctions against Ms. Hagh. Nevertheless, for completeness, we shall address the issue.

> In order to establish standing, a party must demonstrate three essential elements. *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't of Nashville and Davidson County,* 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). First, the party must demonstrate that it has suffered an injury which is "distinct and palpable," *Metropolitan Air Research Testing Auth., Inc.,* 842 S.W.2d at 615, and not conjectural or hypothetical. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. Second, the party must establish a causal connection between that injury and the conduct of which he complains. *Metropolitan Air Research Testing Auth., Inc.,* 842 S.W.2d at 615. Third, it must be likely that a favorable decision will redress that injury. *Id.* These elements are indispensable to the plaintiff's case, and must be supported by the same degree of evidence at each stage of litigation as other matters on which plaintiff bears the burden of proof. *Lujan,* 504 U.S. at 560, 112 S. Ct 2130. The party, and not the merits of the case, is the major focus of a determination of standing. *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't of Nashville and Davidson County,* 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992).

Petty v. Daimler/Chrysler Corp., 91 S.W.3d 765, 767–68 (Tenn. Ct. App. 2002). Significantly, the party claiming standing bears the burden of establishing these elements. *Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.*, 645 S.W.3d 141, 149 (Tenn. 2022) (citations omitted).

Here, Plaintiff has not demonstrated that she suffered an injury that is "distinct and palpable" as a consequence of the trial court's imposition of Rule 11 sanctions against Ms. Hagh. *See id.; see also Metro. Air Rsch. Testing Auth., Inc.*, 842 S.W.2d at 615. Because this is an essential element of establishing standing, we conclude that Plaintiff lacks standing to challenge the assessment of Rule 11 sanctions against Ms. Hagh.

Moreover, and significantly, Ms. Hagh did not join in Plaintiff's brief or file a separate brief on her own behalf to challenge the imposition of Rule 11 sanctions against her. Thus, like Plaintiff, Ms. Hagh failed to present any argument on her own behalf to challenge the trial court's assessment of Rule 11 sanctions, which constitutes a waiver of the issue. *See Forbess*, 370 S.W.3d at 355; *see also Newcomb*, 222 S.W.3d at 401 (failure "to . . . construct an argument regarding [a] position on appeal" constitutes a waiver of the issue).

Accordingly, we affirm the imposition of Rule 11 sanctions against Ms. Hagh.

IV. ATTORNEY'S FEES FOR FRIVOLOUS APPEAL

Defendants seek to recover the attorney's fees and expenses incurred in defending this appeal pursuant to Tennessee Code Annotated § 27-1-122. As stated in their brief:

> Defendants request attorneys' fees and expenses for litigating this frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122. Because the Trial Court correctly dismissed the Complaint and determined it to be frivolous, it follows that this appeal is likewise frivolous. E.g., *White v. Myers*, No. E1999-02642-COA-R3-CV, 2001 WL 1337569, at *9 (Tenn. Ct. App. Oct. 31, 2001) (awarding damages for frivolous appeal after affirming grant of Rule 11 motion for sanctions) no perm. app. filed.

As the statute provides, when it appears that the appeal was frivolous or taken solely for delay, we may award "damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal." Tenn. Code Ann. § 27-1-122. Whether to award damages for a frivolous appeal rests solely in our discretion. *Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009). We exercise our discretion to award fees under this statute "sparingly so as not to discourage legitimate appeals." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017) (quoting *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006)). Nevertheless, "[s]uccessful litigants should not have to bear the expense and vexation of groundless appeals." *Whalum*, 224 S.W.3d at 181 (quoting *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977)).

"A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that it can ever succeed." *Indus. Dev. Bd. of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995) (citation omitted). This appeal was so devoid of merit that it had no prospect of success. In fact, as noted in our decision, in arguing the tort claims and the breach of contract claim, Plaintiff conceded certain facts that were fatal to some of her claims.

Accordingly, we exercise our discretion to grant Defendants' request for attorney's fees and costs in defense of this appeal because Plaintiff's appeal was so devoid of merit as to be characterized as frivolous. *See* Tenn. Code Ann. § 27-1-122.

IN CONCLUSION

The judgment of the trial court is affirmed in all respects, and this matter is remanded for further proceedings consistent with this opinion, including a determination of the reasonable and necessary attorney's fees and expenses incurred on appeal and entry of judgment thereon. Costs of appeal are assessed against the appellant, Jane Doe.

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FRANK G. CLEMENT JR., P.J., M.S.