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November 8, 2024

VIA ELECTRONIC FILING

Hon. David Jones, Chairman
c/o Ectory Lawless, Docket Room Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
TPUC.DocketRoom@tn.gov

Electronically Filed in TPUC Docket Room November 8, 2024 at 3:21 p.m.

RE: ***Petition of Tennessee-American Water Company to Modify Tariff, Change and Increase Charges, Fees, and Rates, and for Approval of a General Rate Increase,*** **TPUC Docket No. 24-00032**

Dear Chairman Jones:

Attached for filing please find *Tennessee-American Water Company's Response to Motion for Leave to File Two Additional [Discovery] Requests and to Set Expedited Schedule for Response* filed by the City of Chattanooga in the above-captioned matter.

As required, the original plus four (4) hard copies will follow. Should you have any questions concerning this filing, or require additional information, please do not hesitate to contact me.

Very truly yours,

BUTLER SNOW LLP

Melvin J. Malone

clw
Attachment
cc: Bob Lane, TAWC
Shilina Brown, Consumer Advocate Division
Victoria Glover, Consumer Advocate Division
Phillip Noblett, City of Chattanooga
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BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

PETITION OF TENNESSEE-AMERICAN WATER COMPANY TO MODIFY TARIFF, CHANGE AND INCREASE CHARGES, FEES, AND RATES, AND FOR APPROVAL OF A GENERAL RATE INCREASE	))))))	**DOCKET NO. 24-00032**

TENNESSEE-AMERICAN WATER COMPANY'S RESPONSE TO MOTION FOR LEAVE TO FILE TWO ADDITIONAL [DISCOVERY] REQUESTS AND TO SET EXPEDITED SCHEDULE FOR RESPONSE

Tennessee-American Water Company ("TAWC" or "Company") hereby respectfully submits its Response to the Motion for Leave to File Two Additional [Discovery] Requests and to Set Expedited Schedule for Response filed by the City of Chattanooga ("City of Chattanooga" or "Chattanooga"). For the reasons set forth below, TAWC respectfully requests that the Tennessee Public Utility Commission ("Commission" or "TPUC") deny the Motion for Leave to File Two Additional [Discovery] Requests and to Set Expedited Schedule for Response (the "*Motion*").

I.

DISCUSSION AND ARGUMENT

The *Motion* outlines the following two (2) requests: (1) "copies of bill impacts for TAWC's 20 largest customers reflecting the effect of TAWC's proposed rate changes[;]" and (2) "analysis of the relative impacts on TAWC customers of TAWC's proposed consolidation of rates among its rate areas as compared to TAWC's proposed shift of revenue recovery from fixed changes to variable charges." To be clear, both of these requests were first made during a settlement meeting among the Intervenors and the Company on October 24, 2024.

The *Motion* provides that "The agreement of counsel for TAWC was not contingent upon settlement or any other event." The Company agrees that providing the requested information to the Intervenors was not contingent upon settlement of this contested case, as there has never been a guarantee that the good faith settlement negotiations in this matter would lead to a settlement. On the other hand, however, the Company did not understand, and the City of Chattanooga did not disclose, when making these requests that the City of Chattanooga intended to use the information that arose during settlement negotiations outside and apart from the settlement discussions.

It is regretful that the parties' settlement discussions have spilled over into public discourse, as such can have an unintended chilling effect upon future settlement discussions in matters before the Commission. Unless expressly directed to do so by the Commission, the Company declines to voluntarily and knowingly join in publicly disclosing settlement conversations, except to maintain that the characterizations set forth in the City of Chattanooga's *Motion* are not fully representative of the private settlement conversations that are the subject of the *Motion*. The Company believes this is likely inadvertent, as opposed to intentional. Notwithstanding the foregoing, what is not in dispute here is that certain information disclosed *during* confidential settlement negotiations among the Intervenors and the Company led to the City of Chattanooga requesting the Company to provide that information to Chattanooga.

First, and succinctly put, it is well and long-settled that settlement negotiations and information shared in such discussions are confidential.[1] In fact, at the outset of the settlement

[1] *See* Tennessee Rule of Evidence 408: "Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations." *See also Vafaie v. Owens*, No. 92C-1642, 1996 WL 502133 (Tenn. Ct. App. Sep. 6, 1996) (Rule 408

meeting, the parties agreed without equivocation that the discussions were and would remain confidential so as to encourage an open and candid assessment of the parties' positions in a genuine effort to see if the case could be resolved. Next, it also appears that Chattanooga may intend on using the requested information outside of and apart from settlement discussions, including during the hearing on the merits.[2] Third, and in light of the foregoing two points, the Company is willing to provide the information requested by the City of Chattanooga during settlement negotiations if Counsel for the City of Chattanooga agrees that such information can and will only be used during and in relation to settlement negotiations and may not under any circumstances whatsoever be used, directly or indirectly, outside of settlement negotiations, including in any discussions with other persons not a party to this proceeding or at the hearing on the merits. This voluntarily offered resolution only goes to that certain information requested by the City of Chattanooga during settlement negotiations, not to the two (2) additional Discovery Requests referenced in the *Motion*.

TAWC recalls that the information discussed in the settlement negotiations and requested by Chattanooga was as follows: (1) the bill analysis of certain large customers that the Company had done when meeting with these customers; and (2) the amount of revenue shifted from other rate areas to Chattanooga. As to the first request, the Company had such informal meetings with seven (7) of its large customers, not twenty (20). So, under the circumstances presented herein the Company would agree to provide the bill analysis for those seven (7) customers, and to redact all private, personally identifying information.

"promotes settlement 'through a free exchange of offers and the recognition that an offer of settlement may not necessarily reflect the belief that the adversary's claim has merit.'") (attached). *See also cf.,* Tennessee Public Utility Commission Rule 1220-01-03-.04 and 1220-01-03-.05 (Alternative Dispute Resolution rules).

[2] *See Justice v. Nelson*, No. E2022-01540-COA-R3-CV, 2023 WL 6532955 (Tenn. Ct. App. Oct. 6, 2023) ("Evidence of conduct or statements made during settlement negotiations is also not admissible.") (attached).

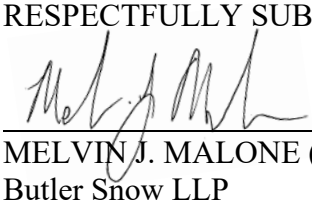
The foregoing good faith offer by the Company is a cooperative attempt to facilitate the exchange of the requested information at issue just as the issue emanated – within the confidential confines of settlement negotiations. To do otherwise may result in unintended consequences and undermine the likelihood of future settlement negotiations in matters pending before the Commission.

II.

CONCLUSION

For the foregoing reasons, TAWC requests that the Commission continue to encourage settlement negotiations between and among parties in matters pending before the Commission, refrain from taking action that may cause an unintended chilling effect on settlement negotiations, and deny the *Motion*.

RESPECTFULLY SUBMITTED,



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1996 WL 502133
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Afsoon VAFAIE (formerly
Jane Doe), Plaintiff/Appellant,
v.
Walter R. OWENS, III and wife, Cheryl
Roberts Owens, Defendants/Appellees.

No. 92C-1642.
|
Sept. 6, 1996.

From the Circuit Court of Davidson County at Nashville. Honorable Barbara N. Haynes, Judge

Attorneys and Law Firms

Lee Ofman, Franklin, for plaintiff/appellant.

Robert L. Trentham, Mark Tyler Seitz, Trabue, Sturdivant & DeWitt, Nashville, for defendants/appellees.

Before CRAWFORD, P.J., W.S, and HIGHERS, J.

Opinion

FARMER

***1** In this case, Plaintiff-Appellant, Dr. Afsoon Vafaie Elmore, appeals the trial court's grant of summary judgment to Defendant-Appellee, Dr. Walter R. Owens, III, with respect to Plaintiff's claims against Dr. Owens for assault, malicious harassment and civil conspiracy. Plaintiff also appeals the trial court's grant of summary judgment to Defendant-Appellee, Cheryl Roberts Owens as to Plaintiff's claims against Mrs. Owens for assault, malicious harassment, outrageous conduct and civil conspiracy. Plaintiff further appeals certain evidentiary rulings made by the trial court during the course of Plaintiff's jury trial against Dr. Owens in which the Plaintiff sought to recover damages for severe emotional distress, arising from the alleged outrageous conduct of Dr. Owens.

The following facts are undisputed: In 1985, while Plaintiff was attending dental school, Dr. Owens employed Plaintiff as a dental assistant at his business, American Dental Centers, P.C. (American Dental). Later that same year, Plaintiff and Dr. Owens, both single at the time, became romantically involved. When Plaintiff earned her license to practice dentistry in 1987, she began to work as a dentist at American Dental.

Sometime around 1986 or 1987, Dr. Owens started taking pictures and videotape of Plaintiff and himself engaged in various sexual acts.[1] Around 1990, their romantic relationship soured and, in June of 1990, their business relationship ended when Plaintiff left Dr. Owens' clinic and became self-employed. After their business relationship ended, the parties began to argue about who was responsible for certain debts incurred during the course of their business and personal relationship. The three major items of dispute concerned liability for (1) a bank note for a Mercedes-Benz automobile, purchased by the Plaintiff, upon which Dr. Owens was a cosigner; (2) a lab bill for $700, resulting from the loss of a temporary bridge, which had been ordered by Plaintiff; and (3) an Internal Revenue Service assessment of approximately $13,000, arising from an underpayment of Plaintiff's income taxes while she was working at American Dental.

In February, 1991, Plaintiff married Joe Elmore, and in March of 1991, Dr. Owens married Cheryl Roberts. In July, 1992, Plaintiff brought this lawsuit under the pseudonym of "Jane Doe" against Dr. and Mrs. Owens, alleging that Dr. and Mrs. Owens were attempting to coerce Plaintiff into paying the disputed debts by threatening to expose sexually explicit pictures of Plaintiff to Plaintiff's husband, neighbors and friends. She alleged that in June of 1991, Defendants mailed an envelope to her home, which contained photocopies of six pictures of Dr. Owens and Plaintiff engaged in sexual activity. Plaintiff further alleged that prior to and after the mailing of the envelope to her, Defendants had continually threatened to expose the pictures to others.

Plaintiff alleged that both Defendants and American Dental were liable to her for her injuries, pain and suffering, psychological injuries, severe emotional distress, humiliation and embarrassment, loss of pay, loss of income, and medical expenses experienced as a result of Defendants' outrageous conduct, intentional infliction of emotional distress, negligence *per se* and extortion.

***2** In response to Plaintiff's original complaint, Defendants and American Dental moved to dismiss for failure to state a cause of action under Rule 12.02 T.R.C.P. and for failure to include the name of the plaintiff under Rule 10.01 T.R.C.P. Following a hearing on both motions, the trial court dismissed Plaintiff's claims against American Dental and ordered the Plaintiff to substitute her legal name for "Jane Doe."

Plaintiff filed an Amended Complaint that inserted her legal name as the plaintiff. After substantial discovery, Plaintiff sought to further amend her Amended Complaint to allege civil assault, malicious harassment in violation of T.C.A. § 5-21-701, and civil conspiracy. The motion was granted and Plaintiff's Second Amended Complaint was filed on July 5, 1994.

Defendants moved for summary judgment as to all counts of Plaintiff's Second Amended Complaint. The trial court granted summary judgment on all counts in favor of Mrs. Owens and granted summary judgment in favor of Dr. Owens on all counts except outrageous conduct and intentional infliction of emotional distress.

The case went to trial on the issue of whether Dr. Owens was liable to Plaintiff for outrageous conduct and intentional infliction of emotional distress. The jury returned a verdict in favor of Dr. Owens.

Plaintiff has presented the following issues for our review:

> I. Whether or not the trial court properly dismissed all counts of the Second Amended Complaint as to Defendant Cheryl Roberts Owens and all counts except Count 3 as to Walter R. Owens, III, upon Defendants' motion for summary judgment.
>
> II. Whether or not Rule 408, Tennessee Rules of Evidence, properly excluded Plaintiff's letter to Defendant dated June 22, 1992.
>
> III. Whether or not Rule 408, Tennessee Rules of Evidence, properly excluded two letters written by Defendants' attorney, Clark Tidwell, to Plaintiff's attorney on August 24 and August 26, 1992.
>
> IV. Whether or not the trial court properly admitted into evidence the transcriptions of the video film.
>
> V. Whether the trial court properly admitted evidence of two sexual encounters with men other than Defendant and whether the court properly admitted evidence of two abortions.

As her first issue, Plaintiff argues that the trial court erred in granting summary judgment to Dr. Owens with respect to Plaintiff's claims for assault, malicious harassment and civil conspiracy. Plaintiff further argues that the trial court erred in granting summary judgment in favor of Mrs. Owens in respect to Plaintiff's claims for assault, malicious harassment, outrageous conduct and civil conspiracy.

We begin our review by noting that a trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56.03 T.R.C.P.; *Byrd v. Hall,* 847 S.W.2d 208, 210 (Tenn.1993); *Dunn v. Hackett,* 833 S.W.2d 78, 80 (Tenn.App.1992).

***3** When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff 's proof, that is, the "court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd,* 847 S.W.2d at 210-11. In *Byrd,* the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

Id. at 211 (emphasis in original).

The summary judgment process should only be used as a means of concluding a case when there are no genuine issues of material fact, and the case can be resolved on the legal

issues alone. *Id.* at 210 (citing *Bellamy v. Federal Express Corp.,* 749 S.W.2d 31, 33 (Tenn.1988)).

In counts one and two of her Second Amended Complaint, Plaintiff alleged that Dr. and Mrs. Owens were liable to her for assault. The criminal offense of assault is codified at T.C.A. § 39-13-101. Under the modern criminal statute, a person commits an assault who: (1) intentionally, knowingly or recklessly causes bodily injury to another; (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. T.C.A. § 39-13-101 (1991).

The criminal statute does not provide for a private cause of action. Therefore, to locate the elements of the civil cause of action for assault, one has to look to Tennessee common law. At common law, assault was defined as "any act tending to do corporal injury to another, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against that person." *Huffman v. State,* 292 S.W.2d 738, 200 Tenn. 487 (Tenn.1956) (overruled on other grounds by *State v. Irvin,* 603 S.W.2d 121 (Tenn.1980)); *Casey v. State,* 491 S.W.2d 90 (Tenn.Crim.App.1972).

In the instant case, Plaintiff alleged in an affidavit, filed in opposition to Defendant's motion for summary judgment, that Dr. Owens threatened the Plaintiff by telling her "that he would have [her] 'rubbed out by a Teamster member' "; that Plaintiff should watch where she goes and look behind the bushes and stay in public places; "that [Mrs. Owens'] mental patients/clients were liable to do anything and owed [Mrs. Owens] a lot of favors and would do anything [Mrs. Owens] told them to do."

***4** Even if the Plaintiff's allegations are true, we do not believe that, as a matter of law, she has presented sufficient facts to state a cause of action for assault against the Defendants. According to Plaintiff's affidavit, the alleged threats were always threats of future harm, and were not threats of immediate or imminent harm. In no instance, were the threats "coupled with the present ability to act," or, to borrow the words of the criminal statute, there was never a threat of "imminent bodily injury." As such, we do not believe that the allegations contained in Plaintiff's affidavit state a cause of action for assault. Accordingly, we hold that the trial court properly granted summary judgment to both Defendants as to the counts for assault.

In counts three and four of her Second Amended Complaint, Plaintiff alleged that Defendants' actions constituted outrageous conduct and intentional infliction of emotional distress. The trial court granted summary judgment in favor of Mrs. Owens on the claim of outrageous conduct while holding that summary judgment was not appropriate for Dr. Owens on the same claim. [2] Plaintiff argues that the trial court erred. We agree and reverse the trial court's ruling.

A cause of action for outrageous conduct was first recognized in this jurisdiction in *Medlin v. Allied Inv. Co.,* 217 Tenn. 469, 398 S.W.2d 270 (1966). In *Medlin,* the Court, adopting the rule as expressed in the Restatement (Second) of Torts § 46, stated:

> These factors are set out in the Restatement of Torts (2d), Sec. 46, "Outrageous Conduct Causing Severe Emotional Distress".
>
> > "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm."
>
> Clarification of this statement is found in the following comment:
>
> "d. *Extreme and Outrageous Conduct.* The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct is characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly untolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse

> his resentment against the actor, and lead him to exclaim, 'Outrageous.' "

Medlin, 398 S.W.2d at 274.

Pursuant to *Medlin,* liability for the tort of "outrageous conduct" exists only where (1) the conduct of the defendants has been so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society, and (2) the conduct results in serious mental injury. *Id.; Swallows v. Western Elec. Co., Inc.,* 543 S.W.2d 581, 582 (Tenn.1976); *Dunn v. Moto Photo, Inc.,* 828 S.W.2d 747, 752 (Tenn.App.1991). Liability for the tort does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. *Swallows,* 543 S.W.2d at 583-83.

***5** It is the trial court's responsibility to determine, in the first instance, whether the defendant's conduct as a matter of law is so extreme and outrageous as to permit recovery. *Alexander v. Inman,* 825 S.W.2d 102, 105 (Tenn.App.1991) (citing *Medlin,* 398 S.W.2d at 275).

In her affidavit filed in opposition to Defendants' motions for summary judgment, Plaintiff alleged that Defendants worked in tandem to coerce her to pay the disputed debts. She alleged that both Defendants sent her pictures through the mail and that they both threatened to expose the pictures to her husband if she did not comply with their demands. In addition, she alleged that Mrs. Owens threatened to call Joe Elmore, Plaintiff's husband and tell him that Plaintiff had been sleeping with Dr. Owens while Plaintiff and her husband were dating. Plaintiff further alleged that both Defendants' actions had caused her severe emotional distress, humiliation, psychological injuries and embarrassment.

Given that Plaintiff alleged that Mrs. Owens was complicit in all of Dr. Owens' actions that resulted in Plaintiff's damages, it is difficult to see how the trial court could have dismissed Plaintiff's cause of action against Mrs. Owens while allowing the same claim to go to the jury in regard to Dr. Owens.

Notwithstanding the fact that the jury found Dr. Owens not liable for outrageous conduct, this Court finds that reasonable minds might differ as to whether the acts of Mrs. Owens were sufficiently egregious to sustain a cause of action for outrageous conduct. Consequently, we reverse the trial courts grant of summary judgment in respect to Plaintiff's claim of outrageous conduct against Mrs. Owens.

In counts five and six of her Second Amended Complaint, Plaintiff alleged that the Defendants were liable to her for malicious harassment in violation of T.C.A. § 4-21-701.

Under T.C.A. § 4-21-701:

> (a) In addition to the criminal penalty provided in Sec. 39-17-313 [repealed], there is hereby created a civil cause of action for malicious harassment.
>
> (b) A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages.

T.C.A. § 4-21-701 (Supp.1995). This statute has a short, but clouded history. In 1990, the statute was enacted and contained a cross-reference to 39-17-313 (1991). In 1990, T.C.A. § 37-13-313 was repealed by the legislature and the crime of malicious harassment was recodified at T.C.A. § 37-17-309. 1990 Tenn. Pub. Acts ch. 984 § 2. In the 1991 replacement volume of Volume 2A of the Tennessee Code the cross-reference was changed to T.C.A. § 39-17-309. However, in the 1993 supplement to Volume 2A of the Tennessee Code, the cross-reference was returned to "Sec. 39-17-313 [repealed]." T.C.A. § 4-21-701 (Supp.1993). The Code Commission included the following note in the 1993 supplement:

> ***6** This section originally contained a reference to § 39-17-313. During the 1991 replacement of Volume 2A the publisher was instructed to change the reference from § 39-17-313 to § 39-17-309 since § 39-17-313 was repealed; however, that instruction has been superseded and the section returned to the original language.

T.C.A. § 4-21-701 (Supp.1993). Consequently, it is unclear whether the legislature intended that a private cause of action exists in Tennessee for the criminal act of malicious harassment as defined in T.C.A. § 39-17-309. *See Young v. State Farm Mut. Auto. Ins. Co.,* 868 F.Supp. 937, 942 (W.D.Tenn.1994) (noting that a question exists as to what section of the Tennessee criminal code provides a civil

remedy for malicious harassment). However, we do not think it necessary to address this issue because we find that Plaintiff has failed to state a cause of action under the underlying malicious harassment statute, T.C.A. § 39-17-309.

T.C.A. § 39-17-313 was replaced by § 39-17-309, which went into effect on April 12, 1990. 1990 Tenn. Pub. Acts ch. 984 § 2. Thus, T.C.A. § 39-17-309 was in effect almost a year prior to the acts of Defendants alleged in Plaintiff's complaint. T.C.A. 39-17-309 provides:

> (a) The general assembly finds and declares that it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment and bodily injury caused by the activities of groups and individuals. It is not the intent of this section to interfere with the exercise of rights protected by the constitution of the United States. The general assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any subject whatsoever and to associate with others who share similar beliefs. The general assembly further finds that the advocacy of unlawful acts by groups or individuals against other persons or groups for the purpose of inciting and provoking damage to property and bodily injury or death to persons is not constitutionally protected, poses a threat to public order and safety, and should be subject to criminal sanctions.
>
> (b) A person commits the offense of intimidating others from exercising civil rights who:
>
> (1) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee;
>
> (2) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee;
>
> (3) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee; or
>
> ***7** (4) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee.
>
> (c) It is an offense for a person to wear a mask or disguise with the intent to violate subsection (b).
>
> (d) A violation of subsection (b) is a Class D felony. A violation of subsection (c) is a Class A misdemeanor.
>
> (e) The penalties provided in this section for intimidating others from exercising civil rights do not preclude victims from seeking any other remedies, criminal or civil, otherwise available under law.

T.C.A. 39-17-309 (1991).

Clearly, Plaintiff has failed to state a cause of action under this statute. T.C.A. § 39-17-309 contains language indicating a purpose of protection from serious injury or threat of injury against a party for exercising his or her civil rights. Plaintiff does not allege in her complaint or in her affidavit filed in opposition to Defendant's motion for summary judgment that Defendants' actions were intended to prevent her from exercising any one of her civil rights nor has she alleged that Defendants' actions were motivated by anything other than their desire that she accept liability for the disputed debts. As such, Defendants' alleged conduct does not amount to an injury or a threat of injury or coercion as contemplated by the statute. Consequently, we hold that the trial court properly dismissed Plaintiff's claims for malicious harassment against both Dr. Owens and Mrs. Owens.

In count seven of her Second Amended Complaint, Plaintiff alleges that Defendants' acts constitute a civil conspiracy. Under Tennessee law, a civil conspiracy is a "combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." *Kirksey v. Overton Pub, Inc.,* 739 S.W.2d 230, 236 (Tenn.App.1987) (quoting *Dale v. Thomas H. Temple Co.,* 186 Tenn. 69, 208 S.W.2d 344, 347 (1948)). The requisite elements of the cause of action are common design, concert of action, and an overt act. *Braswell v. Carothers,* 863 S.W.2d 722, 727 (Tenn.App.1993); *Koehler v. Cummings,* 380 F.Supp. 1294, 1313 (M.D.Tenn.1974). Injury to person or property, resulting in attendant damage, must also exist. *Braswell,* 863 S.W.2d at 727.

Plaintiff's allegations, if true, would show that Dr. and Mrs. Owens participated in the common design of getting

Plaintiff to accept liability for the disputed debts; that they acted in concert by mutually threatening Plaintiff with the dissemination of the explicit photographs possessed by Dr. Owens; and that their alleged acts of extortion, [3] coupled with the mailing of the six pictures to Plaintiff, constituted an overt act. Furthermore, Plaintiff alleges that by these concerted actions she endured mental suffering. It is clear that damages for mental suffering constitute injury to a person and are recoverable in an action for civil conspiracy. *Id.; Lackey v. Metropolitan Life Ins. Co.,* 30 Tenn.App. 390, 206 S.W.2d 806 (1947). Based on the foregoing, we conclude that Plaintiff's alleged facts in her complaint that, if proven true, could have constituted a cause of action for civil conspiracy. We conclude that Plaintiff has stated a cause of action for civil conspiracy "to accomplish by concert" the unlawful purpose of extorting money. Consequently, we hold that the trial court erred in granting summary judgment to Defendants on the counts of civil conspiracy.

***8** As her second issue, Plaintiff argues that the trial court erred in excluding a letter, written by Plaintiff's attorney prior to the filing of Plaintiff's lawsuit, requesting that Dr. Owens turn over to Plaintiff all sexually explicit photographs and video film in exchange for Plaintiff's promise to not bring suit against Dr. and Mrs. Owens. Plaintiff attempted to offer this letter at trial to rebut Defendants' claims that Plaintiff had sued them out of vindictiveness and greed.

Under Tennessee Rule of Evidence 408,

> Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence actually obtained during discovery merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations.

Rule 408 is intended to encourage settlement of suits by forbidding a party from pointing to an opponents settlement offer as proof that the opponent thought that he would lose. *Evans v. Troutman,* 817 F.2d 104 (6th Cir.1987). The rule promotes settlement "through a free exchange of offers and the recognition that an offer of settlement may not necessarily reflect the belief that the adversary's claim has merit." *Bulaich v. AT & T Information Systems,* 778 P.2d 1031, 1036 (Wash.1989) (citing E. Cleary, *McCormick on Evidence* § 274 (3d ed.1984). However, when the settlement offeror is the same party attempting to gain the admission of the settlement letter into evidence, the threat of admissibility should not be a deterrent to the articulation of a settlement proposal. *Bulaich,* 778 P.2d at 1036; *Crues v. KFC Corp.* 768 F.2d 230, 233-34 (8th Cir.1985).

In the instant case, where the letter of compromise was offered by the same party, who had originally proposed the settlement, we think that the trial court erred in excluding the letter. However, we hold that the trial court's error was harmless in that we cannot find the exclusion of the evidence "more probably than not affected the judgment." Rule 36(b) T.R.A.P.

As her third issue, Plaintiff argues that the trial court erred in excluding two letters written by Defendants' legal counsel on August 24, 1992, and August 26, 1992. Plaintiff attempted to offer these letters to rebut Defendants' claim that the sexually explicit pictures of Plaintiff had been destroyed prior to the filing of Plaintiff's lawsuit. The Plaintiff offered the letters to show that the photographs had not been destroyed as Dr. Owens contended and to show that Dr. Owens could have sent the pictures. The trial court excluded the letters, finding that the letters were offers of compromise and settlement and were therefore inadmissable under Tennessee Rule of Evidence 408.

***9** As noted *supra,* Rule 408 prohibits the admission of evidence obtained during settlement negotiations when such evidence is offered to "prove liability for or invalidity of a civil claim or its amount." Tenn. R. Evid. 408. Plaintiff argues that the letters were not offered to prove Dr. Owens' liability, but were offered only to show that Dr. Owens was not being truthful when he claimed that he had destroyed the pictures prior to the filing of Plaintiff's lawsuit. As such, the letters would have necessarily tended to impeach the credibility of Dr. Owens. While Rule 408 does allow the admission of evidence from settlement negotiations when it is offered for a purpose other than to prove liability or invalidity, the rule provides that "a party may not be impeached by a prior inconsistent statement made in compromise negotiations." Consequently, we believe that the trial court properly excluded the letters of compromise when they were offered to impeach the testimony of Dr. Owens.

As her fourth issue, Plaintiff argues that the trial court erred in admitting a transcript of one of the videotapes made by Dr. Owens, which contained scenes of Plaintiff engaged in sexual activity. Plaintiff objected to the admission of the transcript on the basis of relevancy under Tennessee Rule of Evidence 401 and on the basis that its probative value was substantially outweighed by danger of unfair prejudice under Tennessee Rule of Evidence 403.

Tennessee Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In our opinion, the transcript was relevant. In her pleadings, Plaintiff contended that she had not consented to Dr. Owens taking pictures and videotaping their sex acts. Moreover, Dr. Phillip Chanin, Plaintiff's treating psychiatrist, testified that while he was evaluating Plaintiff's condition, she told him that the pictures and videotapes were made without her consent. Thus, we believe that Plaintiff, through her pleadings and expert testimony, opened the door to the issue of her consent.

Tennessee Rule of Evidence 403 excludes relevant evidence only when its probative value is substantially outweighed by the danger of unfair prejudice. The ultimate decision regarding admissibility and relevancy lies within the sound discretion of the trial judge and, absent an abuse of discretion, that decision will not be overturned on appeal. *See Wright v. Quillen,* 909 S.W.2d 804, 809 (Tenn.App.1995). Contrary to Plaintiff's allegations, the transcript from the videotape shows that Plaintiff was cognizant of the video camera and took an active, and sometimes directorial role in the videotaping of the couple's sexual activity. Thus, its probative value was relevant with respect to the issue of consent, particularly as it applied to the outrageousness of Defendants' conduct and to the validity of Dr. Chanin's psychological evaluation. In our opinion, the trial court did not abuse its discretion in admitting the transcript into evidence.

***10** As her final issue, Plaintiff argues that the trial court erred in allowing the introduction of evidence concerning the prior sexual encounters and elective abortions of Plaintiff. As noted *supra,* admissibility and relevancy are matters within the sound discretion of the trial judge. *Wright,* 909 S.W.2d at 809. In the instant case, Plaintiff sought compensation exclusively for psychological damage. In our opinion, evidence of Plaintiff's failed relationships, prior sexual encounters and elective abortions were all relevant under Rule 401 as to the issue of causation of Plaintiff's psychological and emotional damage in that they provided the jury with other plausible explanations for Plaintiff's mental condition. Consequently, we are unable to find an abuse of discretion.

In summary, we hold that the trial court erred in granting summary judgment to Mrs. Owens on the counts of outrageous conduct and intentional infliction of emotional distress. We hold that the trial court erred in granting summary judgment in favor of both Defendants on the count of civil conspiracy.

The judgment of the trial court is reversed in part, affirmed in part and remanded for further proceedings consistent with this opinion. Costs on appeal are taxed one-half to Appellant and one-half to Appellees for which execution may issue if necessary.

All Citations

Not Reported in S.W.2d, 1996 WL 502133

Footnotes

1 Plaintiff concedes that she was fully aware that Dr. Owens was making these movies and pictures, but argues that she did not formally consent to them.

2 The jury returned a verdict in favor of Dr. Owens as to outrageous conduct and intentional infliction of emotional distress.

3 In her Second Amended Complaint, Plaintiff alleges a violation of Tennessee's criminal extortion law, T.C.A. § 39-14-112, as the underlying “unlawful” act of Defendants' civil conspiracy. T.C.A. § 39-14-112 provides in pertinent part:

> (a) A person commits extortion who uses coercion upon another person with the intent to:
>
> (1) Obtain property, services, any advantage or immunity; or
>
> (2) Restrict unlawfully another's freedom of action.
>
> (b) It is an affirmative defense to prosecution for extortion that the person reasonably claimed:
>
> (1) Appropriate restitution or appropriate indemnification for harm done; or
>
> (2) Appropriate compensation for property or lawful services.

T.C.A. § 39-14-112 (1991). There is some confusion in this case as to whether Plaintiff is attempting to recover civilly for a violation of this criminal statute. It does not appear to this Court that Plaintiff contends that Defendants are civilly liable to Plaintiff solely for their alleged violation of the extortion statute. Instead, it appears that Plaintiff is attempting to recover for Defendants' civil conspiracy, which was based upon Defendants' concerted acts of extortion.

2023 WL 6532955
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT KNOXVILLE.

Loring JUSTICE et al.
v.
Kim NELSON et al.

No. E2022-01540-COA-R3-CV
|
June 22, 2023 Session
|
FILED October 6, 2023

Appeal from the Circuit Court for Knox County, No. 3-291-17, Deborah C. Stevens, Judge

Attorneys and Law Firms

Linn Guerrero, Knoxville, Tennessee, for the appellant, Loring E. Justice, individually and as Next Friend of N_____, a minor.

Gregory Brown and G. Alan Rawls, Knoxville, Tennessee, for appellees, David Valone; Law Office of David Valone; Martha Meares; Paul Dillard; and Meares and Associates and/or Meares and Dillard.

John McFarland, Kingston, Tennessee, for appellee, Kim Nelson.

D. Michael Swiney, C.J., delivered the opinion of the court, in which John W. McClarty and Thomas R. Frierson, II, JJ., joined.

OPINION

D. Michael Swiney, C.J.

***1** This appeal is the latest development in a protracted custody and visitation dispute between Loring Justice and Kim Nelson. After the Juvenile Court for Roane County ("the Juvenile Court") entered a judgment awarding Ms. Nelson custody and severely restricting Mr. Justice's parenting time, Mr. Justice filed a complaint in the Circuit Court for Knox County ("the Trial Court"). He alleged various claims against Ms. Nelson and the lawyers and law firms that represented her in the Juvenile Court. Ms. Nelson and her attorneys filed motions for sanctions, alleging that Mr. Justice's complaint violated Tennessee Rule of Civil Procedure 11. Months later, Mr. Justice filed a notice of voluntary dismissal. After entering an order of dismissal, the Trial Court granted Ms. Nelson and her attorneys their Rule 11 motions and ordered Mr. Justice to pay their attorney's fees and expenses. Mr. Justice has appealed. Discerning no reversible error, we affirm the Trial Court's judgment in all respects.

Background

This appeal derives from a custody and visitation dispute between Mr. Justice and Ms. Nelson over their son Noah Nelson. After the Juvenile Court awarded Ms. Nelson custody of their son and restricted Mr. Justice's co-parenting time, Mr. Justice filed a complaint against Ms. Nelson and her attorneys in the Trial Court on August 10, 2017. Mr. Justice made claims against Ms. Nelson; David Valone and the Law Office of David Valone ("Valone Defendants"); Martha Meares, Paul Dillard, Meares and Dillard, and/or Meares and Associates ("Meares Defendants"); and other "un-named co-conspirators" (collectively, "Defendants"). Mr. Justice claimed that on August 10 and 11, 2016, Ms. Nelson and her attorneys, Mr. Valone and Ms. Meares, "offered to **sell** unsupervised co-parenting time" to him for $400,000.00. Mr. Justice further alleged that he had "agreed under coercion" to pay Ms. Nelson $400,000.00 and that Ms. Nelson agreed to provide their son for unsupervised co-parenting time with Mr. Justice four days later if Mr. Justice provided to her proof of a cashier's check for $200,000.00 of the total $400,000.00 by the next day. Mr. Justice claimed that he had produced the cashier's check and as a result was permitted to see his son without supervision on August 14, 2016. Although not clearly stated in Mr. Justice's complaint, the contested $400,000.00 appeared to derive from Ms. Nelson's request for Mr. Justice to pay her attorney's fees.

Mr. Justice also claimed that his attorney met with Mr. Valone and Ms. Meares on August 17, 2016, "to attempt a final settlement agreement." According to Mr. Justice, Mr. Valone committed extortion by threatening that Mr. Justice's co-parenting time would revert back to supervised co-parenting

if Mr. Justice refused to pay the "alleged $400,000.00 in attorney fees." Mr. Justice alleged that the "$400,000.00 payment fell through," and consequently, Ms. Nelson ceased providing Mr. Justice with "unsupervised access" to their son. Mr. Justice alleged that his co-parenting time with their son continued to be supervised after the purported settlement agreement fell through. [1]

Based upon the alleged conduct by Ms. Nelson and her attorneys, Mr. Justice made claims against Defendants, including: (1) extortion, attempted extortion, and conspiracy to commit extortion; (2) intentional infliction of emotional distress; (3) tortious interference with parental rights and attempted interference with parental rights; (4) conspiracy; (5) coercion and/or common law coercion; (6) abuse of process and conspiracy to abuse process; (7) fraud and conspiracy to commit fraud; and (8) blackmail and conspiracy to commit blackmail. In his appellate brief, Mr. Justice has explained that these causes of action stemmed from Defendants' "offer to sell" Mr. Justice time with his son. Mr. Justice's complaint requested $1,000,000.00 in compensatory damages, $4,000,000.00 in punitive damages, and attorney's fees.

***2** Valone Defendants filed a motion to dismiss for failure to state a claim pursuant to Tennessee Rule of Civil Procedure 12.02(6). Thereafter, Ms. Nelson and Meares Defendants likewise filed motions to dismiss for failure to state a claim. Defendants argued, *inter alia*, that "settlement negotiations cannot be a basis for a claim" under Tennessee Rule of Evidence 408.

Meares Defendants also filed a memorandum of law in support of their motion to dismiss with certain court orders attached as exhibits. [2] Meares Defendants requested the Trial Court take judicial notice of these orders, some of which were issued by the Juvenile Court in the underlying case. They argued that these orders demonstrated that Mr. Justice had no viable case against Defendants. The first order was entered by the Knox County Chancery Court ("the Chancery Court"). Therein, the Chancery Court found that Mr. Justice had intentionally submitted a false fee petition to a federal court and testified falsely in federal court, justifying his disbarment from the practice of law.

The second exhibit was a 2017 order entered by the Juvenile Court, awarding custody of their son to Ms. Nelson and limiting Mr. Justice to supervised co-parenting time. The Juvenile Court also awarded to Ms. Nelson attorney's fees in the amount of $376,638.90. The Juvenile Court found that Mr. Justice had been physically and psychologically abusive to Ms. Nelson and psychologically abusive to their son. The Court also found that Mr. Justice had "intentionally manipulated this litigation in an attempt to 'financially ruin' Ms. Nelson."

The third exhibit was another Juvenile Court 2017 order awarding Ms. Nelson $45,238.85 in discretionary costs. The last exhibit was a 2017 order from the Juvenile Court denying Mr. Justice's motion seeking the sitting judge's recusal. The Juvenile Court also denied Mr. Justice's claim that the Juvenile Court had failed to address Mr. Justice's claim that Mother was holding their son hostage and was guilty of human trafficking.

In the Juvenile Court's order denying Mr. Justice's motion for recusal, the Juvenile Court addressed Mr. Justice's contention that the Juvenile Court had failed to address his allegation that Ms. Nelson had engaged in human trafficking and was holding their son hostage, specifically finding that:

> This Court has never accepted Mr. Justice's repeated allegation of hostage negotiation. This Court has previously ruled the settlement discussions between the parties are inadmissible [pursuant to Tennessee Rule of Evidence 408]. Once again, these issues can be addressed on appeal. There is simply no evidence of human trafficking no matter how many times Mr. Justice raises the allegation.

Mr. Justice appealed the Juvenile Court's custody order, and this Court affirmed the Juvenile Court's judgment in all respects. *See Nelson v. Justice*, No. E2017-00895-COA-R3-CV, 2019 WL 337040 (Tenn. Ct. App. Jan. 25, 2019). [3] On appeal, Mr. Justice argued that the Juvenile Court had erred by excluding evidence of his settlement negotiations with Ms. Nelson, which he characterized as hostage negotiations. This Court entered an opinion on January 25, 2019, rejecting Mr. Justice's argument, and explaining:

> ***3** This case involves a protracted and bitter custody dispute. The minor child at issue, Noah Nelson, was born in February 2005 to Kim Renae Nelson ("Mother") and

Loring E. Justice ("Father"). Mother and Father were never married, and their three-year relationship ended shortly after they learned of the pregnancy in the summer of 2004. Mother is an attorney employed as the public defender for Roane County. Father is a self-employed attorney.

* * *

Father next argues that the trial court erred in excluding a proposed agreed order and parenting plan. The proposed order and parenting plan were the result of lengthy settlement negotiations the parties entered into on August 10, 2016. Pursuant to the proposed order, Father would pay Mother $200,000 for her attorney fees and $200,000 for child support arrearages. Ultimately, the settlement negotiations failed and the parties did not sign the proposed order and parenting plan. At trial, Father took the position that Mother did not believe her contention that supervised visitation was necessary. Rather, she intended to allow Father unsupervised parenting time with Noah in exchange for $400,000. Father attempted to support this argument by entering the proposed order into evidence. The trial court found that the proposed order was evidence of settlement negotiations and excluded it under Tenn. R. Evid. 408.

Tennessee Rule of Evidence 408 provides that evidence of offering or accepting consideration in the compromise of a claim is "not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment." Evidence of conduct or statements made during settlement negotiations is also not admissible. TENN. R. EVID. 408. Rule 408 does not, however, "require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

In the present case, Father asserts that the proposed order should not have been excluded under Rule 408 because it was offered for a purpose other than proving liability on a civil claim or the monetary amount. Instead, he asserts it was offered to prove that Mother attempted to extort money from him during the settlement negotiations by holding Noah hostage and offering Father unsupervised visitation in exchange for $400,000. Relying on *Uforma/ Shelby Business Forms, Inc. v. N.L.R.B.*, 111 F.3d 1284, 1293 (6th Cir. 1997), Father argues that Rule 408 is inapplicable to wrongful acts committed during settlement negotiations.

Uforma involved a corporation charged with violating the National Labor Relations Act in various ways, including threatening the union. *Uforma*, 111 F.3d at 1287. At trial, the union supported this claim by introducing evidence that, during compromise negotiations, the corporation threatened to eliminate the third shift if the union pursued its grievance. *Id.* at 1287-88. The corporation argued this evidence should have been excluded as settlement negotiations. *Id.* at 1293. The Sixth Circuit Court of Appeals interpreted Federal Rule of Evidence 408, which is essentially identical to the Tennessee rule, and concluded that the rule "does not exclude evidence of alleged threats." *Id.* at 1294. As the court explained, " 'Rule 408 is ... inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions.' " *Id.* at 1293 (quoting 23 Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE: *Evidence* § 5314 (1st ed. 1980)).

***4** The present case is distinguishable from *Uforma*. Unlike in *Uforma*, none of the evidence Father sought to introduce tends to show that Mother engaged in extortion or holding Noah hostage. The proposed order allowed Father unsupervised parenting time but makes no reference to him paying Mother for that unsupervised parenting time. Rather, the proposed order provided he would pay Mother $200,000 for her attorney fees and $200,000 for child support arrearages. If hostage negotiations could be established merely by one parent offering parenting time to the other parent in connection with attorney fees and child support, every case involving parenting time with a child and a child support determination coupled with an award of attorney fees would constitute a hostage negotiation. Thus, we conclude that Father's offered proof fails to show that Mother committed a wrongful act that would render Rule 408 inapplicable.

Id. at *1, 15-16. At the time Mr. Justice filed his complaint in the Trial Court, this Court had not yet decided his appeal of the Juvenile Court decision. Mr. Justice's action in the Trial Court ran parallel to his appeal of the Juvenile Court decision.

In November 2017, Valone Defendants, Meares Defendants, and Ms. Nelson each filed a motion for Tennessee Rule of Civil Procedure 11.03 sanctions against Mr. Justice and his attorney, B. Chadwick Rickman. In each of the three Rule 11 motions, Defendants stated, *inter alia*, that there was no basis in law or in fact to support Mr. Justice's allegation that Defendants had offered to sell unsupervised co-parenting

time to Mr. Justice for $400,000.00, or committed extortion, hostage negotiation, or human trafficking. Defendants attached as exhibits to their Rule 11 motions the previously referenced orders that were attached to Meares Defendants' memorandum of law in support of their motion to dismiss.

In December 2017, Mr. Justice filed a response to Defendants' motions to dismiss. Defendants filed a joint reply to Mr. Justice's response, arguing that Mr. Justice's complaint was "rif[e] with inflammatory conclusory statements, conclusions of law and mischaracterizations of fact." As such, Defendants posited that the Trial Court was constrained to accept as true only the facts pled in the complaint—not Mr. Justice's characterizations of those facts or conclusory statements. Defendants noted that the only relevant facts pled by Mr. Justice were that Ms. Nelson and he "took part in prolonged litigation in the [Juvenile Court] for Roane County, Tennessee concerning a family law matter" and that during this case, "the parties conducted discussions as to whether [Mr. Justice] would pay for [Ms. Nelson's] attorney[']s fees." Defendants also noted that the case ultimately went to trial and that the Juvenile Court in that case found in favor of Ms. Nelson, awarding her approximately $377,000.00 in attorney's fees.

Mr. Justice filed an amended complaint on January 4, 2018, the date the Trial Court was scheduled to hear Defendants' motions to dismiss. Mr. Justice incorporated his original complaint as if set forth verbatim except where the two were inconsistent. Mr. Justice added two claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a claim that Defendants violated his parental rights under 42 U.S.C. § 1983, a claim that Defendants conspired to interfere with his civil rights under 42 U.S.C. § 1985, and a claim that Defendants conspired with public officials to deprive Mr. Justice of rights under color of state law.

Defendants subsequently filed a joint response in opposition to Mr. Justice's motion to amend his complaint, or alternatively, dismiss his amended complaint. Defendants referenced the Trial Court's oral dismissal of Mr. Justice's complaint at the January 2018 hearing. Defendants requested that the Trial Court deny Mr. Justice's amendment because the amendment would be futile. Defendants noted that although Mr. Justice had added several statements and claims, none of his additions stated a claim upon which relief could be granted and would not produce a result different from the Trial Court's oral dismissal of the original complaint. Defendants further claimed that the additional enumerated paragraphs in the amended complaint contained allegations that were contained in the original complaint.

***5** In February 2018, Mr. Justice filed a motion to amend, requesting leave to file a second amended complaint. In addition, Mr. Justice filed an objection to the Defendants' proposed order granting their motions to dismiss. Mr. Justice contended that despite being notified during the January 4, 2018 hearing that he had filed an amended complaint, the Trial Court proceeded to consider Defendants' motions to dismiss based solely on the original complaint. Defendants responded by filing a joint response to his objection to their proposed order. Defendants accused Mr. Justice of abusing the Tennessee Rules of Civil Procedure and the judicial system by filing a motion for first amended complaint during the hearing on the motions to dismiss and filing the second motion to amend on the eve of the Trial Court's entry of an order dismissing the complaint. In addition, Defendants filed a joint objection to Mr. Justice's motion to file a second amended complaint due to his failure to file the proposed amended complaint with his motion. Mr. Justice then filed a notice of withdrawal of his second motion to amend his complaint.

The Trial Court entered an order in March 2018. Therein, the Trial Court withdrew its oral ruling dismissing Mr. Justice's complaint at the January 4, 2018 hearing. Given that Defendants had not yet filed responsive pleadings, the Trial Court determined that Mr. Justice had maintained the right to file an amended complaint without leave of court. Therefore, the Trial Court stated that it would consider the amended complaint as the "complaint at issue."

In May 2018, Mr. Justice again filed a motion for leave to file a second amended complaint with the second amended complaint attached as an exhibit. Mr. Justice also filed a response to Defendants' supplemental brief to their motions to dismiss. Defendants' supplemental brief is not in the record. In Mr. Justice's response, he argued that Defendants had waived the protections of Tennessee Rule of Evidence 408 due to Ms. Nelson's counsel's references to the settlement proposal in his opening statement during the underlying case and Ms. Nelson's testimony about the settlement proposal during the underlying case. Mr. Justice also contended that the Trial Court should consider only the complaint in resolving Defendants' motions to dismiss, not their attached orders from the underlying case. Defendants filed a joint reply to Mr. Justice's response.

On May 15, 2018, Mr. Justice filed a notice of voluntary dismissal without prejudice pursuant to Tennessee Rule of Civil Procedure 41.01. On May 21, 2018, the Trial Court entered an order of voluntary dismissal without prejudice. On June 12, 2018, Defendants filed a motion to set a hearing on their Rule 11 motions for sanctions. The Trial Court set the hearing on the Rule 11 motions for September 7, 2018.

On September 6, 2018, Mr. Justice filed a "Response to Motion for Rule 11 Sanctions and Motion for Abeyance Until the Oral Argument and/or Opinion in the Underlying Matter Becomes Available and Motion for Abeyance for Discovery on Defendants Exaggerated Monetary Claims." Therein, Mr. Justice argued that the Trial Court lacked jurisdiction to sanction him given that he had voluntarily dismissed the action on May 15, 2018. In addition, Mr. Justice contended that his original complaint was superseded by his amended complaint, which Defendants had not challenged under Rule 11. Mr. Justice further posited that Defendants had filed their Rule 11 motions to attempt to force him to withdraw his complaint, which he claimed was an inappropriate use of the rule, and that their motions were too vague.

Mr. Justice also contended that his right to due process had been violated because Defendants had not submitted affidavits and time itemizations supporting their award of fees until a year after filing their Rule 11 motions. Therefore, he did not have a "legitimate opportunity to dispute both the propriety of sanctions and the amount of sanctions." He also posited that his complaint was not frivolous given that the Trial Court had held lengthy hearings on Defendants' motions to dismiss and that the Court of Appeals had asked numerous questions related to the Rule 408 issue during oral argument in his appeal of the underlying case. Mr. Justice requested that the Trial Court defer resolution of the Rule 11 motions until the Court of Appeals' decision was released. Mr. Justice also requested that the Trial Court hold the matter in abeyance to provide him with the opportunity to conduct discovery on whether Defendants had violated their duty to mitigate damages.

***6** On the same day, Mr. Justice filed a motion requesting that his attorney be permitted to "participate by telephone, or in the alternative to continue hearing, or in the alternative for permission to waive oral argument." The Court removed the hearing from the docket and determined that it would decide the motions based upon the filings without need for oral argument.

On October 18, 2019, the Trial Court entered an order granting Defendants' motions for sanctions against Mr. Justice pursuant to Rule 11.02 ("2019 Order"). The Court held that it had retained jurisdiction to consider the Rule 11 motions despite Mr. Justice's voluntary dismissal. The Court quoted *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990), in which the United States Supreme Court stated: "[T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated." The Court also determined that Defendants' Rule 11 motions applied to the original complaint as well as to the amended complaint insofar as the allegations of the original complaint had been incorporated into the amended complaint. Ultimately, the Court determined that sanctions were proper because Mr. Justice had submitted pleadings on grounds that he knew were without merit, citing the Juvenile Court's findings on Mr. Justice's litigation tactics and his allegations of hostage negotiation and human trafficking.

The Trial Court made the following findings in pertinent part:

> Mr. Justice was also aware that the judge in the underlying litigation at issue had ruled that the information involved in the settlement discussions were inadmissible and the trial judge in Roane County refused to accept as credible any allegation of human trafficking by the Defendant. Mr. Justice was also aware that the trial judge made a specific award of attorneys' fees to the defendant and found the fees to be reasonable. The issue of the settlement negotiations and attorneys' fees were the subject of [Mr. Justice]'s appeal of the judgment of the trial judge in the Roane County litigation.
>
> Since these issues had been litigated in the underlying Roane County litigation and findings had been issued, [Mr. Justice]'s avenue of redress was to seek an appeal, not to file a separate action. [Mr. Justice] chose to do both and ultimately the Court of Appeals upheld the trial judge on the very rulings upon which [Mr. Justice] asserts liability against the Defendants in this case.
>
> For all the foregoing reasons, this Court finds that [Mr. Justice] filed a pleading (the Complaint, as incorporated in the Amended Complaint) that contained allegations and other factual contentions that did not have evidentiary support and were presented for the improper purposes of harassment and needless increase in cost in the litigation.

> The filing of the pleading is a certification that the pleading is filed to the best of the person's knowledge, information and belief, formed after reasonable inquiry. This Court finds that such a certification could not be made in this case based upon rules of evidence and the prior rulings of the trial judge in the underlying litigation regarding the same facts alleged as a basis of liability in this case.

***7** (Internal footnote omitted.)

The Trial Court acknowledged that Defendants sought the cost of their attorney's fees and that these fees were substantial, but the Court found that they were justified. The Trial Court denied Mr. Justice's request for discovery regarding the propriety of Defendants' requested fees inasmuch as the action had been initiated for an improper purpose with the intent to harass and increase costs. The Court awarded Valone Defendants $28,699.50 in attorney's fees and expenses; Meares Defendants $17,454.00 in attorney's fees and expenses; and Ms. Nelson $6,300.00 in attorney's fees and expenses. The Court entered its sanction order against Mr. Justice, rather than his counsel, Mr. Rickman.

In November 2019, Mr. Justice filed a motion to alter or amend the Trial Court's order granting Defendants' motions for sanctions. Mr. Justice noted that he had refiled the action against Defendants in the United States District Court for the Eastern District of Tennessee ("the District Court") in May 2019, thereby depriving the Trial Court of jurisdiction. In addition, Mr. Justice argued, *inter alia*, that the Trial Court's order of voluntary dismissal did not reserve jurisdiction over the Rule 11 motions. Mr. Justice also argued that monetary sanctions could not be awarded against a represented party for a violation of Rule 11.02(2). In January 2020, the Trial Court entered an order acknowledging that it had been unaware that Mr. Justice refiled his claims in the District Court prior to entering its 2019 Order. It therefore vacated its 2019 Order for lack of jurisdiction.

In August 2021, Defendants' filed renewed motions for sanctions. Defendants explained that the District Court had dismissed all of Mr. Justice's claims with prejudice and that the Trial Court again had authority to decide whether to sanction Mr. Justice. Defendants attached several exhibits, one of which was the District Court's order of dismissal. Mr. Justice filed a response, again arguing that the Trial Court lacked jurisdiction to adjudicate the Rule 11 motions.

On October 3, 2022, the Trial Court entered an order on the renewed motions for sanctions ("2022 Order"). The Trial Court found the motions well-taken and reinstated its 2019 Order imposing Rule 11 sanctions upon Mr. Justice. Mr. Justice timely filed this appeal.

Discussion

Although not stated exactly as such, Mr. Justice presents the following issues for our review: whether the Trial Court lost jurisdiction to sanction Mr. Justice after he voluntarily dismissed his claims against Defendants; whether the Trial Court erred by failing to properly apply Tennessee Rule of Civil Procedure 11 in its sanctions order against Mr. Justice; whether the Trial Court erred by denying Mr. Justice the right to conduct discovery on Defendants' attorney's fees affidavits; whether the Trial Court's denial of discovery on Defendants' attorney's fees affidavits denied Mr. Justice due process of law; and whether the Trial Court erred by granting Defendants' motions for Rule 11 sanctions against Mr. Justice. These issues may be consolidated as three overarching issues: (1) whether the Trial Court had jurisdiction to adjudicate the Rule 11 motions, (2) whether the Trial Court erred in granting the Rule 11 motions, and (3) whether the Trial Court erred in denying Mr. Justice's request for discovery. Defendants raise an additional issue, which we have restated slightly as follows: whether Mr. Justice waived his issue related to due process of law by failing to brief the issue in accordance with Tennessee Rule of Appellate Procedure 27(a)(7).

A. Jurisdiction

***8** Mr. Justice first argues that the Trial Court lost jurisdiction to grant Defendants' Rule 11 motions after he voluntarily dismissed his action. Mr. Justice contends:

> On May 15, 2018, well before the Rule 11 motions were set for hearing, Appellant voluntarily dismissed his claims. This deprived the trial court of jurisdiction to sanction on the Rule 11 motions. Before 1993, a voluntary dismissal before adjudication of a Rule 11 motion did not deprive a court of authority to adjudicate the Rule 11 motion after the voluntary dismissal. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (allowing Rule 11 sanctions notwithstanding the plaintiff's voluntary dismissal). This holding was superseded based on a 1993 amendment to Rule 11. *See Gomes v. American Century Companies, Inc.*, 2010 WL 1980201 (E.D. Cal. 2010) (noting several district

> courts have concluded "the 1993 amendments [to Rule 11 of the Federal Rules of Civil Procedure] supersede the Court's holding in *Cooter & Gell* as it relates to voluntary dismissals.")[.]
>
> Tennessee courts have recognized Tennessee's Rule 11 is almost identical to the federal rule and Tennessee follows the federal case law. The 1993 amendment changes the *Cooter & Gell* doctrine, and a court cannot sanction after a voluntary dismissal.

Defendants contend that Mr. Justice misinterprets the amendment to Rule 11. Defendants argue instead that the amendment to Rule 11 created a safe harbor provision, which provides that the party seeking sanctions must serve the Rule 11 motion to the other party and then wait twenty-one days before filing the motion with the court to afford the offending party an opportunity to correct or withdraw its filing. Upon our review of the relevant law, we agree with Defendants that Mr. Justice misinterprets the amendment and that it does not overrule the United States Supreme Court's holding in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) to the extent proposed by Mr. Justice.

The United States Supreme Court held in *Cooter & Gell* that federal courts may enforce Rule 11 sanctions even after a plaintiff has filed a notice of voluntary dismissal. *Id.* at 395. The Court explained:

> The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing. As the "violation of Rule 11 is complete when the paper is filed," a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action. In our view, nothing in the language of Rule 41(a)(1)(i), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal.

***9** It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." ... Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Because a Rule 11 sanction does not signify a district court's assessment of the legal merits of the complaint, the imposition of such a sanction after a voluntary dismissal does not deprive the plaintiff of his right under Rule 41(a)(1) to dismiss an action without prejudice. "[D]ismissal ... without prejudice" is a dismissal that does not "operat[e] as an adjudication upon the merits," Rule 41(a)(1), and thus does not have a res judicata effect. Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint. Indeed, even if the Rule 11 sanction imposed by the court were a prohibition against refiling the complaint (assuming that would be an "appropriate sanction" for Rule 11 purposes), the preclusion of refiling would be neither a consequence of the dismissal (which was without prejudice) nor a "term or condition" placed upon the dismissal (which was unconditional), see Rule 41(a)(2).

* * *

Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. As noted above, a voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already

> occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers."

Id. at 395-98 (internal citations omitted). In arguing that *Cooter & Gell* is no longer applicable and that trial courts can no longer impose Rule 11 sanctions upon a party after a voluntary dismissal, Mr. Justice primarily relies upon *Gomes v. Am. Century Cos., Inc.*, No. 2:09-cv-02153-FCD/KJM, 2010 WL 1980201 (E.D. Cal. May 17, 2010) and *Ewan v. Hardison Law Firm*, 465 S.W.3d 124 (Tenn. Ct. App. 2014).

In *Gomes*, the plaintiff filed a notice of voluntary dismissal on January 22, 2010, and on February 4, 2010, the defendants filed a request to "reopen the case for the limited purpose of filing a motion for sanctions." *Gomes*, 2010 WL 1980201, at *1. "The court noted that the request was procedurally improper but allowed defendants to file a properly noticed motion for sanctions, which they did on March 18, 2010." *Id.* The *Gomes* Court denied the defendants' Rule 11 motion, concluding:

> To the extent [*Commercial Space Mgmt. Co., Inc. v.*] *Boeing* [*Co., Inc.*, 193 F.3d 1074 (9th Cir. 1999)] and *Cooter & Gell* [*v. Hartmarx Corp.*, 496 U.S. 384 (1990)] hold that a case can remain open after it has been voluntarily dismissed for purposes of imposing sanctions, neither case concludes that the moving party is relieved of his burden to comply with Rule 11's safe harbor provision.
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> ***10**
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> * * *
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> Under Rule 11, if a plaintiff voluntarily dismisses the action during the safe harbor period they will not be subject to monetary sanctions. Fed. R. Civ. Pro. 11(c)(2). To allow sanctions here, where plaintiff filed a voluntary dismissal *prior* to the sanctions motion being noticed, would be contrary to the spirit of Rule 11.

Id. at *2-3. *Gomes*, therefore, sets forth the proposition that a defendant must file a Rule 11 motion in compliance with the twenty-one-day safe harbor period and prior to a plaintiff's filing of a voluntary dismissal notice. *Gomes* is, however, silent as to Mr. Justice's proposition that a trial court cannot rule on a Rule 11 motion after the plaintiff files a notice of voluntary dismissal, even if it was properly filed in compliance with the twenty-one-day safe harbor and prior to the plaintiff's notice of voluntary dismissal. Rather, this Court interprets the *Gomes* Court as holding that a trial court cannot rule on a Rule 11 motion if the defendant filed the Rule 11 motion after the plaintiff already filed a notice of voluntary dismissal within the safe harbor period.

The facts in *Ewan* are also distinguishable. In *Ewan*, this Court described the procedural facts as follows:

> [T]he first pleading filed in this case by the Defendants was a motion for sanctions on May 4, 2009. The motion asserted that there was no legal basis for the suit, and that it was merely a vehicle to harass the Defendants and cause unnecessary expense. The trial court denied this motion by order of March 1, 2011. The trial court specifically found that the Ewans had "reasonable cause under the facts and circumstances of the case to file such pleadings." The Defendants did not again raise the issue of sanctions until their November 8, 2013 pleading entitled "Defendants' Opposition to [Ewans'] Entry of an Order of Voluntary Dismissal[,]" which was filed over two months after the Ewans' filed their written notice of nonsuit. In this pleading, the Defendants sought sanctions against the Ewans for allegedly "burden[ing] th[e] [trial] [c]ourt and the Defendants with needles[s] inconvenience, expense and delay ... despite adverse rulings against them in multiple courts of law."
>
> From the record, it appears that the trial court declined to award sanctions on the basis that the nonsuit foreclosed the right to seek sanctions. Mr. Martin [one of the defendants] argues that this was in error, citing federal caselaw on this issue. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (allowing Rule 11 sanctions notwithstanding the plaintiff's voluntary dismissal of the action).

Ewan v. Hardison Law Firm, 465 S.W.3d 124, 139 (Tenn. Ct. App. 2014). This Court affirmed the trial court's denial of the defendants' Rule 11 motion and determined that the defendants' reliance on *Cooter & Gell* was misplaced.

In reaching this conclusion, this Court noted that the holding in *Cooter & Gell* had been "called into question by a number of federal courts based on a 1993 amendment to Rule 11 of the Federal Rules of Civil Procedure adding a 'safe harbor' requirement to the rule," citing *Gomes* as an example. *Id.* This Court ultimately concluded that the trial court had acted properly due to the defendants' failure to comply with the

twenty-one-day safe harbor provision of Rule 11.03. *Id.* at 140. This Court explained:

> ***11** In this case, there is no indication in the record that the Defendants complied with the safe harbor provision in Rule 11.03. Nothing in the record shows that the Defendants served the Ewans with their motion for sanctions prior to filing their request with the trial court. Indeed, the record shows that, in direct violation of Rule 11.03(1)(a), the Defendants did not file their request for sanctions "separately from other motions or requests," but instead requested sanctions concurrent with their opposition to the Ewans' nonsuit. As previously discussed, the failure to comply with the safe harbor provision in Rule 11 is fatal to a request for sanctions. *See* [*Lindsey v.*] *Lambert*, [No. W2010-00213-COA-R3-CV,] 2011 WL 497248, at * 1 [(Tenn. Ct. App. Feb. 11, 2011)]; [*Brown v.*] *Shappley*, 290 S.W.3d [197] at 202 [(Tenn. Ct. App. 2008)]; *Mitrano* [*v. Houser*], 240 S.W.3d [854] at 862 [(Tenn. Ct. App. 2007)].
>
> Further, because the safe harbor provision provides that a party shall be given an opportunity to withdraw their claim or paper prior to the award of sanctions, federal courts applying a similar provision have held that the rule "appear[s] to preclude bringing sanctions after the party against which sanctions are sought has voluntarily dismissed its suit." [*Hockley by*] *Hockley* [*v. Shan Enters. Ltd. P'ship*], 19 F. Supp. 2d [235] at 240 [(D.N.J. 1998)] (holding that the ruling in *Cooter & Gell* conflicts with the safe harbor provision); *see also de la Fuente v. DCI Telecommunications, Inc.*, 259 F. Supp. 2d 250 (S.D.N.Y. 2003) (noting that "a court can no longer issue Rule 11 sanctions in a case where, as in *Cooter & Gell*, a complaint was voluntarily dismissed within 21 days of a request for Rule 11 sanctions."); *c.f.*, *Ridder v. City of Springfield*, 109 F.3d 288, (6th Cir. 1997) (holding that a party who waits until after final disposition of the case to request sanctions "has given up the opportunity to receive an award of Rule 11 sanctions" because the delay "deprive[s] [the opposing party] of the 'safe harbor' to which the rule says he is entitled.").

Id. at 140 (emphasis added). Again, like the federal district court in *Gomes*, the *Ewan* Court did not hold that a trial court cannot rule on a properly served, safe harbor compliant motion that was filed prior to the plaintiff's notice of nonsuit. The principle laid out in *Gomes* and *Ewan* is simply that a trial court cannot grant a party's Rule 11 motion if (1) the party did not comply with the safe harbor provision or (2) the opposing party corrected or withdrew the deficient pleading before the twenty-one-day safe harbor expired. Simply put, the cases cited by Mr. Justice hold only that a trial court cannot rule on a Rule 11 motion that is filed after the opposing party has filed a notice of voluntary dismissal. *See Hockley by Hockley v. Shan Enters. Ltd. P'ship*, 19 F. Supp. 2d 235, 240 (D.N.J. 1998) ("[T]he text of the current Rule 11 and current authority interpreting it indicate that a motion for sanctions under Rule 11 must be submitted prior to the dismissal of a case.").

This is not the situation before us now. It is undisputed that Defendants complied with the twenty-one-day safe harbor provision of Rule 11.03 and that Defendants filed their motions for sanctions prior to Mr. Justice's notice of voluntary dismissal. The Defendants in the present case filed their respective Rule 11 motions in November 2017 after providing Mr. Justice notice in October 2017. Mr. Justice did not file his notice of voluntary dismissal until May 2018. Therefore, Mr. Justice cannot contend that he acted within the twenty-one-day safe harbor, thereby depriving the Trial Court authority to adjudicate Defendants' Rule 11 motions.

***12** While we recognize that the safe harbor provision limits the holding in *Cooter & Gell* to the extent that a party may remedy a Rule 11 violation by correcting or withdrawing a pleading within the safe harbor period, we nevertheless conclude that the Trial Court maintained authority to rule on Defendants' Rule 11 motions, even after Mr. Justice voluntarily dismissed his case. *See Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997) ("Once a motion is properly filed with the court, the drafters prudently permit the court to defer ruling on the sanctions motion until after the final resolution of the case."). We instead interpret the safe harbor provision of Rule 11.03 as abrogating language in *Cooter & Gell* that suggests that the harm caused by filing a complaint in violation of Rule 11 cannot be remedied by correction or withdrawal. For instance, the *Cooter & Gell* Court explained:

> Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers."

Cooter & Gell, 496 U.S. at 398 (internal citations omitted). The safe harbor provision, in contrast, does allow a party to

"purge" the Rule 11 violation by correcting or withdrawing a pleading within the twenty-one-day safe harbor period. However, we are unable to conclude that the safe harbor provision somehow abrogates *Cooter & Gell*'s holding that a Rule 11 motion is a collateral issue subject to post-judgment adjudication.

Mr. Justice next argues that the Trial Court did not have jurisdiction to rule on Defendants' Rule 11 motions because it did not "reserve or retain" jurisdiction over the motions in its order of voluntary dismissal. Mr. Justice relies upon *Rose v. Bushon*, No. E2015-00644-COA-R3-CV, 2016 WL 7786449, at *4 (Tenn. Ct. App. Mar. 28, 2016), in which this Court held that a trial court erred when it decided to award attorney's fees "after plaintiff had functionally and effectively ended this action by exercising her right to take a voluntary nonsuit." Mr. Justice's reliance on this Court's holding in *Rose* is misplaced. Although *Rose* addresses a trial court's ability to award attorney's fees after a party files a notice of voluntary dismissal, the decision has little bearing on the issue presented before us: whether a trial court retains jurisdictions over a motion for Rule 11 sanctions after a party files a notice of voluntary dismissal outside of the safe harbor provision.

This Court held in *Rose*:

> It is also undisputed that plaintiff's notice of voluntary nonsuit was properly filed in the trial court on October 13, 2014, the same day plaintiff sent notice of same to defendants' counsel. Under the plain language of Rule 41.01 and the opinions construing it, the nonsuit was taken and occurred on that date, and all that remained was the "ministerial and procedural" step of entry of an order of dismissal without prejudice. The trial court took that step one week later by entry of its order on October 20, 2014. There is no subsequent order in the record that discusses, alters, amends, vacates, or otherwise disturbs this order. Under these circumstances, we conclude that it was error for the trial court to order the disqualification of plaintiff's counsel and award attorney's fees, after plaintiff had functionally and effectively ended this action by exercising her right to take a voluntary nonsuit.

Rose, 2016 WL 7786449, at *4.

***13** To extend the reasoning of *Rose* to the circumstances of the present case would defeat the purpose of Rule 11 and its twenty-one-day safe harbor provision. Tennessee Rule of Civil Procedure 11.03(1)(a) provides in pertinent part:

> 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.

Therefore, under Rule 11, a party who has been served with a Rule 11 motion has twenty-one days to correct or withdraw the challenged paper, claim, defense, counterclaim, allegation, or denial. To extend *Rose* to this case would suggest that a party could escape sanctions by filing a notice of voluntary dismissal at any time, even far outside the twenty-one-day safe harbor.

In this case, the Trial Court found that Mr. Justice had been served with Valone Defendants' Rule 11 motion on October 13, 2017, Ms. Nelson's Rule 11 motion on October 17, 2017, and Meares Defendants' Rule 11 motion on October 19, 2017. Yet, Mr. Justice did not file his notice of voluntary dismissal until several months later on May 1, 2018.[4] Mr. Justice, nevertheless, seems to request that he be granted the benefit of the safe harbor provision, despite filing his notice of voluntary dismissal months after the expiration of the safe harbor. If we were to hold, as urged by Mr. Justice, that a court loses jurisdiction to address a Rule 11 motion whenever a party files a notice of voluntary dismissal, even after expiration of the

twenty-one-day safe harbor, we would effectively defeat the purpose and effect of Rule 11 and its safe harbor provision. *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) ("The purpose of the safe harbor, however, is to give the offending party the opportunity, within 21 days after service of the motion for sanctions, to withdraw the offending pleading *and thereby escape sanctions*."). We therefore reject Mr. Justice's reliance on *Rose* given that *Rose* did not involve Rule 11 and that extending *Rose* to the present case would nullify the twenty-one-day safe harbor provision of Rule 11.

We conclude that the Trial Court retained jurisdiction to adjudicate the outstanding Rule 11 motions for sanctions despite Mr. Justice's voluntary dismissal. In doing so, we recognize that Defendants have argued that *Cooter & Gell*, at least in part, is still good law. Defendants contend that the *Cooter & Gell* holding that a Rule 11 motion is collateral to the underlying suit and that a court accordingly retains jurisdiction to adjudicate such a motion even after dismissal is still valid to the extent the party seeking sanctions complies with the safe harbor provision. We note that there is support for Defendants' contention. *See Hyde v. Irish*, 962 F.3d 1306, 1309 (11th Cir. 2020) ("The Supreme Court has told us that sanctions under Federal Rule of Civil Procedure 11 are a 'collateral' issue and thus a court may decide a Rule 11 sanctions motion even if it lacks jurisdiction over the underlying case."); *Gulf Coast Bank v. Designed Conveyor Sys., LLC*, No. CV 16-6644, 2016 WL 3952092, at *1 (E.D. La. July 22, 2016) ("Although a voluntary dismissal divests the court of jurisdiction to decide the merits of the action, '[i]t is well established that a federal court may consider collateral issues after an action is no longer pending.' ") (quoting *Cooter & Gell*); *VanDanacker v. Main Motor Sales Co.*, 109 F. Supp. 2d 1045, 1052 (D. Minn. 2000) (re-affirming *Cooter & Gell*'s holding that a Rule 11 motion is a collateral issue). Our Supreme Court has recently cited *Cooter & Gell* favorably, holding:

> ***14** Even when a case is dismissed for lack of subject matter jurisdiction, the court retains power to award attorney's fees and costs. [*Barry v. State Bar of Cal.*, 386 P.3d 788, 793 (Cal. 2017) (quoting *Rescue Army v. Mun. Ct.*, 171 P.2d 8, 10-11 (Cal. 1946))]. As the United States Supreme Court has explained, requests for attorney's fees are "collateral" and have "a distinct and independent character" from the underlying suit. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) (footnote omitted) (citation omitted). Courts should view a request for attorney's fees as an " 'independent proceeding supplemental to the original proceeding and not a request for modification of the original decree.' " *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (quoting *Sprague*, 307 U.S. at 170, 59 S.Ct. 777)[.]
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> *New v. Dumitrache*, 604 S.W.3d 1, 20 (Tenn. 2020). [5]

At the same time, we recognize that this Court has explicitly held that a motion for discovery sanctions is not a collateral issue. *See Menche v. White Eagle Prop. Grp., LLC*, No. W2018-01336-COA-R3-CV, 2019 WL 4016127, at *6 (Tenn. Ct. App. Aug. 26, 2019). In *Menche*, this Court soundly rejected the appellees' contention that a motion for discovery sanctions was collateral to the underlying suit, stating: "[N]o Tennessee rules or caselaw indicates that such a motion is collateral to the underlying merits of the case, in contrast to a motion for discretionary costs." *Id.* Nevertheless, even in *Menche*, this Court concluded that the trial court had maintained jurisdiction to address the appellees' motion for sanctions after the parties had agreed to a voluntary dismissal. *Id.* In so holding, the *Menche* Court concluded that the trial court's order of dismissal was not final until it adjudicated the pending motion for sanctions. *Id.* at *6, 9. ("Thus, in 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.... In the absence of disposition of the pending motion for sanctions ... the trial court's judgment was non-final."). The *Menche* Court held that the trial court had jurisdiction to adjudicate the pending motion for sanctions even after voluntary dismissal, citing Tennessee Rule of Appellate Procedure 3(a), which provides that "any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties." *Id.* at *10.

We note that *Cooter & Gell* seemingly contradicts the *Menche* Court's reiteration that a pre-judgment motion for sanctions or attorney's fees is not "ancillary" or "collateral." *Id.* at *5. We need not decide, however, whether an unadjudicated Rule 11 motion should be characterized as "collateral" to the underlying suit, or rather as an issue that renders an order non-final. A resolution to that question is unnecessary for our analysis to the issue before us. The Trial Court in the present case retained jurisdiction under either theory, whether we were to characterize the issue as collateral to the underlying merits or as necessary to render the dismissal order final.

***15** Mr. Justice next argues that his original complaint was superseded by his amended complaint. Mr. Justice accordingly argues that the Trial Court erred by granting Defendants' Rule 11 motions given that they were filed only in response to the original complaint. Upon our review of the record, we find Mr. Justice's argument unconvincing. We first note that Mr. Justice filed the amended complaint outside the twenty-one-day safe harbor provided for him to make any correction to his original complaint to avoid sanctions. Furthermore, Mr. Justice incorporated his original complaint into his amended complaint "fully, except to the extent it [was] inconsistent" with the amended complaint. On appeal, Mr. Justice attempts to rely on the limiting language "to the extent it [was] inconsistent" to suggest the amended complaint corrected the issues in the original complaint. However, Mr. Justice has not explained on appeal how his amended complaint corrected, changed, or altered the original complaint. Based upon our review of the amended complaint, it appears Mr. Justice merely added allegations to the original complaint. Therefore, the Rule 11 violation never was corrected to the extent that the amended complaint restated the same allegations in the original. We therefore reject this argument as well.

B. Rule 11 Sanctions

Having concluded that the Trial Court had jurisdiction to adjudicate Defendants' Rule 11 motions, we now address Mr. Justice's arguments that the Trial Court erred by granting these motions. Mr. Justice presents several arguments, contending that Defendants' Rule 11 motions were too vague, that Tennessee Rule of Evidence 408 did not preclude Mr. Justice's claims, that monetary sanctions should not have been awarded against him for a violation of Rule 11.02(2) given that he was a represented party, that the Trial Court's order imposed requirements on Mr. Justice not recognized by law, that the Trial Court granted the Rule 11 motions out of animosity it harbored against Mr. Justice, and that Defendants never moved for Rule 11 sanctions in federal court in response to Mr. Justice's same claims. Upon our careful review, we conclude that Mr. Justice's arguments are unavailing and that the Trial Court did not err by granting Defendants' Rule 11 motions.

This Court has previously explained the standard of review and applicable principles as follows:

> 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)). Our review of Rule 11 decisions is governed under this deferential standard since the question of whether a Rule 11 violation has occurred requires the trial court to make highly fact-intensive determinations regarding the reasonableness of the attorney's conduct. *Id.* We review the trial court's findings of fact with a presumption of correctness. *Id.*; Tenn. R. App. P. 13(d).
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> * * *
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> The Tennessee Supreme Court has noted that the main objective of Rule 11 is to deter attorneys from violating Rule 11.02. Its main purpose is to deter "abuse in the litigation process." *Andrews v. Bible*, 812 S.W.2d 284, 292 (Tenn. 1991). The supreme court has characterized Rule 11 as a "potent weapon that can and should be used to curb litigation abuses." *Id.* At the same time, however, the supreme court has advised the trial courts to impose Rule 11 sanctions only with "utmost care." *Id.*
>
> The courts are to apply a standard of "objective reasonableness under the circumstances" when determining whether conduct is sanctionable under Rule 11. *Hooker v. Sundquist*, 107 S.W.3d at 536 (citing *Andrews*, 812 S.W.2d at 288). "Sanctions are appropriate when an attorney submits a motion or other paper on grounds which he knows or should know are without merit, and a showing of subjective bad faith is not required." *Id.* (quoting *Boyd v. Prime Focus, Inc.*, 83 S.W.3d 761, 765 (Tenn. Ct. App. 2001)). However, when deciding whether to impose sanctions under Rule 11, the trial court should consider all the circumstances. *Id.* "[T]he trial judge should consider not only the circumstances of the particular violation, but also the factors bearing on the reasonableness of the conduct, such as experience and past performance of the attorney, as well as the general standards of conduct of the bar of the court." *Andrews*, 812 S.W.2d at 292 n. 4.

***16** *Brown v. Shappley*, 290 S.W.3d 197, 200, 202-03 (Tenn. Ct. App. 2008).

Mr. Justice first argues that the Trial Court should not have granted Defendant's Rule 11 motions because they were "too

vague." Rule 11.03(1)(a) provides that a motion for sanctions under Rule 11 "shall describe the specific conduct alleged to violate subdivision 11.02." Tenn. R. Civ. P. 11.03(1)(a). Mr. Justice specifically contends that the "motions made no effort to describe why Rule 408 cannot be waived, why it is frivolous to contend Rule 408 is inapplicable", and failed to address his "cited authority." Under this umbrella of vagueness, Mr. Justice also argues that "some" of the motions were not filed separately as required by Rule 11.03(1)(a). The record simply does not support Mr. Justice's assertions.

Valone Defendants, Meares Defendants, and Ms. Nelson each filed Rule 11 motions separately from any other filing or request. We accordingly find no merit in Mr. Justice's claim that this requirement of the rule was not followed. We also fail to discern how Defendants' motions were too vague. Each Rule 11 motion identified specific allegations in Mr. Justice's complaint that had no basis in law or fact. *See Schutt v. Miller*, No. W2010-02313-COA-R3-CV, 2012 WL 4497813, at *15 (Tenn. Ct. App. Sept. 27, 2012) (determining that the husband's Rule 11 motion "asserted specifically" that the wife "had no evidentiary support for the factual allegations in her motion to set aside provisions of the MDA" and rejecting the wife's argument that the husband had failed to "state what specific conduct" the wife engaged in to support his Rule 11 motion). Mr. Justice has not cited to any case that would support his contention. We therefore conclude that Defendant's Rule 11 motions were sufficiently separate and specific.

Mr. Justice also argues that the Trial Court erred by awarding monetary sanctions against him pursuant to Tennessee Rule of Civil Procedure 11.02(2). Rule 11.02 provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Mr. Justice contends that the Trial Court erred by awarding Defendants sanctions pursuant to this subsection in violation of Rule 11.03(2)(a), which provides that "[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision 11.02(2)."

***17** Mr. Justice argues: "The order solely sanctions Appellant (a represented party) and the order identifies, as the only cited legal ground, Rule 11.02(2)." Again, the record does not support Mr. Justice's assertions. The 2019 Order clearly reflects the Trial Court's decision to sanction Mr. Justice for violating subsections 11.02(1) and (3), in addition to subsection (2). The Trial Court specifically found that Mr. Justice had asserted allegations and "factual contentions that did not have evidentiary support [pursuant to Rule 11.02(3)] and were presented for the improper purposes of harassment and needless increase in cost in the litigation [pursuant to Rule 11.02(1)]." Furthermore, Mr. Justice's argument that he was a "represented party" is specious. Although he claims that he was represented by his law partner, Mr. Rickman, Mr. Justice signed the amended complaint and his motion to alter or amend the Trial Court's order granting motions for sanctions as if he were representing himself. For all intents and purposes, Mr. Justice was representing himself, and we find his claim otherwise to stretch credulity. [6]

Upon reviewing the substance of the Trial Court's 2019 Order, we conclude that the Trial Court did not abuse its discretion in granting the Rule 11 motions. In its 2019 Order, the Trial Court made extensive findings of fact, including findings related to the circumstances at the time Mr. Justice signed the original complaint. *See Andrews v. Bible,* 812 S.W.2d 284, 288 (Tenn. 1991) ("The test to be applied in deciding whether an attorney's conduct is sanctionable, is one of objective reasonableness under all the circumstances, and the reasonableness of the attorney's belief must be assessed in light of the circumstances existing at the time the document in question was signed.") (internal citations omitted). The Trial Court considered that Mr. Justice was an experienced trial attorney, that the underlying case had been "extremely adversarial as evidenced by the rulings of the" Juvenile Court, that the conduct complained of in the complaint and amended complaint arose out of the underlying case, and that "many of

the issues raised in the underlying litigation [were] the same or similar issues raised in the present case."

In rendering its decision, the Trial Court cited many of the Juvenile Court's findings in the underlying case, including that Mr. Justice had "intentionally manipulated the litigation in an attempt to 'financially ruin' Ms. Nelson", that it had "never accepted Mr. Justice's repeated allegations of hostage negotiation", that the "settlement discussions between the parties [were] inadmissible", that there was "simply no evidence of human trafficking no matter how many times Mr. Justice raise[d] the allegation", and that these issues could be addressed on appeal. Despite these findings, and the fact that he had appealed the Juvenile Court's decision, Mr. Justice filed a complaint alleging the same allegations in the Trial Court. The Trial Court found that Mr. Justice was "clearly aware of the specific language in the Order in the underlying litigation where [the trial judge] discussed 'repeated allegations of hostage negotiation' and his previous rulings on the inadmissibility of settlement negotiations."

***18** The Trial Court further explained:

> Based upon the standard of "objective reasonableness" set forth in *Ewan v. Hardison Law Firm, et al.*, 465 S.W.3d 124 (Tenn. App. 2014), this Court finds that [Mr. Justice] submitted pleadings to this Court on grounds that he knew or should know were without merit. Mr. Justice alleged that the Defendants were liable of "selling a child", extortion, coercion and blackmail, hostage negotiation and human trafficking. Each of these highly inflammatory charges is based upon discussions and offers made during settlement negotiation. As an attorney, Mr. Justice is charged with knowledge of the Tennessee Rules of Evidence and associated case law.
>
> Mr. Justice was also aware that the judge in the underlying litigation at issue had ruled that the information involved in the settlement discussions were inadmissible and the trial judge in Roane County refused to accept as credible any allegation of human trafficking by [Ms. Nelson]. Mr. Justice was also aware that the trial judge made a specific award of attorneys' fees to [Ms. Nelson] and found the fees to be reasonable. The issue of the settlement negotiations and attorneys' fees were the subject of [Mr. Justice]'s appeal of the judgment of the trial judge in the Roane County litigation.
>
> Since these issues had been litigated in the underlying Roane County litigation and findings had been issued, [Mr. Justice]'s avenue of redress was to seek an appeal, not to file a separate action. [Mr. Justice] chose to do both and ultimately the Court of Appeals upheld the trial judge on the very rulings upon which [Mr. Justice] asserts liability against the Defendants in this case.
>
> For all the foregoing reasons, this Court finds that [Mr. Justice] filed a pleading (the Complaint, as incorporated in the Amended Complaint) that contained allegations and other factual contentions that did not have evidentiary support and were presented for the improper purposes of harassment and needless increase in cost in the litigation. The filing of the pleading is a certification that the pleading is filed to the best of the person's knowledge, information and belief, formed after reasonable inquiry. This Court finds that such a certification could not be made in this case based upon rules of evidence and the prior rulings of the trial judge in the underlying litigation regarding the same facts alleged as a basis of liability in this case.

(Internal footnote omitted.) In sum, the Trial Court found that Mr. Justice had filed essentially the same allegations that had already been found by the Juvenile Court to be neither credible nor legally viable. The Trial Court correctly found Mr. Justice's complaint to be improper given that the proper avenue to challenge the Juvenile Court's findings was an appeal—not the re-filing of his allegations in a different court.

On appeal, Mr. Justice argues that Tennessee Rule of Evidence 408, one basis provided by the Juvenile Court to preclude Mr. Justice's evidence of extortion, did not preclude his claims as protected settlement negotiations. However, even if Mr. Justice were correct, the proper avenue to make such an argument would be an appeal of the Juvenile Court, not the re-filing and rearguing of this issue in a different trial court. We find his reliance on this argument on appeal to be unavailing, particularly given that this Court has already rejected his Rule 408 argument on appeal of the Juvenile Court's order. By the time of the present appeal, three different courts had rejected Mr. Justice's argument. Furthermore, notwithstanding the issue of Rule 408, the Juvenile Court found no evidence to support allegations that Mr. Justice later went on to raise in the Trial Court. We conclude that the Trial Court did not abuse its discretion in finding that Mr. Justice violated Rule 11 and granting Defendants' motions for sanctions.

***19** We further conclude that the Trial Court provided sufficient explanation for its reasoning behind the amount and nature of the sanction imposed. The 2019 Order belies Mr.

Justice's assertion that the Trial Court failed to adequately explain why it chose the amount and nature of the sanctions imposed. The Trial Court explained that it was aware that Defendants' request for attorney's fees was "substantial" but found them justified given the length of Mr. Justice's complaint as well as his litigation tactics. The Trial Court provided the following example:

> [T]he delay caused by the "tactic" of causing the attorneys to prepare for a hearing while apparently intending to file an amended complaint which [Mr. Justice] alleged could potentially cure the issues in the motion to dismiss. The Amended Complaint did not cure the issues but instead, restated the same issues, and then after causing the defendants to respond to the supplemental filing, [Mr. Justice] chose to take a nonsuit.

The Trial Court, in sum, explained that it had found that "the sanction of an award of all reasonable attorney's fees is appropriate and sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." We therefore find no merit in Mr. Justice's argument the Trial Court did not sufficiently explain its reasoning.

C. Denial of Discovery

We next address Mr. Justice's contention that the Trial Court erred by denying his request for the Court to hold the Rule 11 motions in abeyance to afford him an opportunity to conduct discovery with respect to Defendants' affidavits supporting their request for attorney's fees. We review a trial court's resolution of a discovery request under the abuse of discretion standard. *See Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004) ("Discovery disputes address themselves to a trial court's discretion[.]")

Mr. Justice argues that a party "opposing a sanctions award must have legitimate opportunity to dispute both the propriety of sanctions and the amount of sanctions." Mr. Justice claims that he was not provided such an opportunity to oppose the amount of attorney's fees requested by Defendants because he did not have an opportunity to conduct discovery. Mr. Justice does not cite to any law or case in support of his argument. Mr. Justice waived oral argument and requested, albeit in the alternative, that the Trial Court decide the Rule 11 motions on the filings. He made this request the day before the scheduled hearing on September 7, 2018. In addition, Mr. Justice filed multiple responses to Defendants' Rule 11 motions prior to the Trial Court's 2022 Order. As the Trial Court noted in the 2019 Order, Mr. Justice never "caused any affidavit to be filed indicating that the rates charged were outside the realm of reason nor has he caused any affidavit to be filed in which he has challenged any individual time entry as being unreasonable or unnecessary." We therefore cannot conclude that Mr. Justice did not have the opportunity to challenge the motions and affidavits. Given the Trial Court's finding that Mr. Justice filed his complaint for the improper purpose of harassment and increased litigation costs for Defendants, as well as the Juvenile Court's finding that Mr. Justice had manipulated litigation to ruin Ms. Nelson financially, we cannot conclude that the Trial Court abused its discretion by denying Mr. Justice's request for an abeyance to conduct discovery.

Mr. Justice further argues that he did not receive Defendants' affidavits of attorney's fees until fourteen days prior to the hearing on the motions. Mr. Justice claims that these affidavits were vague and exorbitant. To the extent Mr. Justice challenges the substance of these affidavits, we determine that Mr. Justice has waived such a challenge by failing to cite to the affidavits in the record. This may be due to the fact that they are not included in the record. This Court has previously instructed appealing parties as follows:

> ***20** It is well-settled that it is the appellant's duty to prepare a record for our review that includes everything contained in the trial court record that is necessary for our examination of the issues presented on appeal. To the extent that the absence of a full record precludes this Court from reviewing the appellant's issues, the trial court's ruling is presumed to be correct.

McAllister v. Rash, No. E2014-01283-COA-R3-CV, 2015 WL 3533679, at *8 (Tenn. Ct. App. June 5, 2015) (internal citation omitted). We have held before that " '[j]udges are not like pigs, hunting for truffles' that may be buried in the

record, or, for that matter, in the parties' briefs on appeal." *Nunley v. Farrar*, No. M2020-00519-COA-R3-CV, 2021 WL 1811750, at *6 (Tenn. Ct. App. May 6, 2021) (quoting *Cartwright v. Jackson Cap. Partners, Ltd. P'ship.*, 478 S.W.3d 596, 616 (Tenn. Ct. App. 2015)). We therefore do not find reversible error in the amount of the attorney's fees awarded to Defendants given Mr. Justice's failure to fully develop his argument on appeal, failure to cite to or include the affidavits in the record, and to present to the Trial Court any evidence to counter the affidavits filed by Defendants.

Although Mr. Justice raised as a separate issue whether his right to due process had been violated, we agree with Defendants that he has waived this issue by failing to adequately argue the issue in his brief. Tennessee Rule of Appellate Procedure 27(a)(7) provides:

> (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> * * *
>
> (7) An argument, which may be preceded by a summary of argument, setting forth:
>
> (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]

Mr. Justice's due process argument amounts to a single assertion: "Appellees made no effort to advocate for a precise amount of sanctions within such narrow limits and Appellant had no due process opportunity to dispute Appellees' self-serving affidavits." Mr. Justice does not develop this argument and has therefore waived it.

Further, the Trial Court sufficiently explained in its 2019 Order its reasoning for granting the attorney's fees requested by Defendants, stating:

> [Mr. Justice] has not caused any affidavit to be filed indicating that the rates charged were outside the realm of reason nor has he caused any affidavit to be filed in which he has challenged any individual time entry as being unreasonable or unnecessary. The Court has reviewed the affidavits that were submitted by counsel and reviewed the detailed time records and finds that the requested fees were reasonable and necessary under the circumstances of the case. The Court further finds that ... the sanction of an award of all reasonable attorney's fees is appropriate and sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Tennessee Rules of Civil Procedure, Rule 11.03(2).

We discern no reversible error in the Trial Court's reasoning or decision to grant the attorney's fees as supported by Defendants' affidavits.

Conclusion

The Trial Court's final judgment granting Defendants' motions for sanctions pursuant to Rule 11 is affirmed, and this cause is remanded to the Trial Court for the collection of costs below. Costs on appeal are taxed to the appellant, Loring E. Justice, and his surety, if any.

All Citations

Slip Copy, 2023 WL 6532955

Footnotes

1 Mr. Justice also made claims of extortion as far back as 2012, including (1) Ms. Nelson's 2013 purported threat to "push back" if Mr. Justice sought rights to their son after he attempted to schedule Ms. Nelson's deposition; (2) a 2013 act of purported extortion by Mr. Valone; (3) a 2014 act of extortion by Ms. Nelson

and Mr. Valone; (4) a 2012 act of extortion and coercion of a witness by Ms. Nelson; (5) an act of eliciting perjured testimony from Ms. Nelson by Mr. Valone and Ms. Meares in 2017; (6) Mr. Valone's harassment of a witness in 2015; (7) fraudulent attorney's fees and discretionary costs; and (8) an attempt in 2015 by Ms. Nelson to extract money from Mr. Justice.

2 Meares Defendants referred to and incorporated arguments made by Valone Defendants in their memorandum of law in support of their motion to dismiss. Valone Defendants' brief in support is absent from the record.

3 The portion of the opinion, *Nelson v. Justice*, No. E2017-00895-COA-R3-CV, 2019 WL 337040 (Tenn. Ct. App. Jan. 25, 2019), addressing the "missing witness rule" was overruled by the Tennessee Supreme Court in *In re Mattie L.*, 618 S.W.3d 335 (Tenn. 2021). *In re Mattie L.* did not negatively affect the portions of *Nelson v. Justice* cited in this Opinion.

4 We reject Mr. Justice's suggestion that his amended complaint corrected his original complaint given that his amended complaint incorporated his original complaint. In any event, Mr. Justice did not file his amended complaint until January 4, 2018, also outside the twenty-one-day safe harbor.

5 We recognize that *New v. Dumitrache*, 604 S.W.3d 1, 20 (Tenn. 2020) is not directly on point given that the case did not involve a Rule 11 motion for sanctions but rather involved a party's request for attorney's fees after a court determined that it did not have subject matter jurisdiction.

6 We recognize that Mr. Justice also argues that the Trial Court denied him a reasonable opportunity to respond to the Rule 11 motions, pursuant to Rule 11.03, which provides that the court may impose an appropriate sanction upon an attorney if he has been given "notice and a reasonable opportunity to respond." Mr. Justice complains that the Trial Court never held a hearing on the motions. However, Mr. Justice had ample opportunity to, and did, file a written response to the Rule 11 motions. Moreover, the day before the schedule hearing, Mr. Justice requested that the Trial Court allow his counsel permission to participate at the Rule 11 hearing by telephone, or alternatively to continue the hearing, or alternatively to grant Mr. Justice's request to waive oral argument. The Trial Court accordingly chose to make its ruling based upon the filings without a hearing, one of the options requested by Mr. Justice. In its order addressing Mr. Justice's motion, the Trial Court noted that, despite that the Rule 11 motions had been pending for more than nine months, Mr. Justice did not file his response until "less than 25 hours prior to the schedule hearing." We therefore conclude that Mr. Justice had a reasonable opportunity to respond to Defendants' motions.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 8th day of November 2024.

Melvin J. Malone