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**STALKING BY WAY OF THE COURTS:
Tennessee’s Abusive Civil Action Law
and Why All States Should Adopt
a Similar Approach to Abusive Litigation
in the Family Law Context**

Anna McLemore

ABSTRACT

Domestic violence is a serious issue in the United States. In abusive relationships, an abuser seeks to control the victim through a variety of means, including physical, psychological, sexual, and financial abuse. Even after a domestic violence survivor escapes an abusive relationship, abusers utilize the court system to maintain control of and access to the survivor long after their relationship has ended. Abusers instigate court proceedings with the real purpose of harassing, intimidating, and maintaining control over the survivor, a practice known as “abusive litigation.” These often-meritless proceedings force survivors to continually face their abusers in court and spend thousands of dollars in court fees, ultimately leading to further financial and emotional burdens on survivors. Although courts have existing means of addressing abusive litigation, these remedies do not specifically address issues unique to abusive litigation where there has been a history of domestic violence. In 2018, however, Tennessee became the first state to address this issue by enacting a law specifically addressing abusive litigation, in the family law context, that allows courts to impose prefiling restrictions on abusers who are found to be misusing the court system to harass survivors. This Article analyzes the issue of abusive litigation in the family law context, addressing prior and existing remedies to abusive litigation, and discussing why these remedies are not enough to curb abusive litigation in the family law context. It also dissects Tennessee’s law on abusive civil actions, specifically focusing on the sanctions this law imposes. Finally, this Article suggests potential amendments to the Tennessee law, and proposes that each state should adopt similar laws in order to curb this type of abusive litigation.

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INTRODUCTION

After Staci Jones filed for divorce,¹ her former husband, Fred Auston Wortman III, attempted to kill her three times.² Wortman’s first attempt involved sneaking into Jones’s home and poisoning a tube of her toothpaste.³ Jones and one of the children she shared with Wortman both used the toothpaste.⁴ Afterward, they both noticed a strange burning sensation, and Jones saved the toothpaste tube.⁵ When investigators informed Jones that Wortman had been using his work computer to search for plant-based poisons and how to pay for a hitman using Bitcoin, Jones drew a connection to the

1. Jennifer Pignolet, *Staci Wortman Describes Her Life During Period When Her Husband Tried Three Times to Kill Her*, THE COMMERCIAL APPEAL, (Nov. 10, 2015), <http://archive.commercialappeal.com/news/crime/staci-wortmans-life-as-her-husband-tried-three-times-to-kill-her-24352af8-fbdd-33e5-e053-0100007f170-345095072.html>.

2. Jennifer Pignolet and Yolanda Jones, *Her Husband Tried to Kill Her Three Times. Three Years Later, He’s Still Taking Her to Court.*, MEMPHIS COMMERCIAL APPEAL, (July 2, 2018, 7:00 AM), <https://www.commercialappeal.com/story/news/crime/2018/07/02/new-state-law-seeks-protect-domestic-violence-victims-against-stalking-lawsuits/739937002>.

3. Pignolet, *supra* note 1; Jessica Holley, *Collierville Mother Fights to Keep Ex-Husband in Prison*, WMC ACTION NEWS 5, (July 10, 2019, 5:05 PM), <https://www.wmctionnews5.com/2019/07/10/collierville-mother-fights-keep-ex-husband-prison/#:~:text=COLLIERVILLE%2C%20Tenn.,ex%2Dwife%20three%20separate%20times>.

4. Pignolet, *supra* note 1.

5. *Id.*

toothpaste incident.⁶ Investigators tested the toothpaste and found that it contained aconitum—a plant-based poison.⁷

The police informed Jones of Wortman's second attempt on her life during their daughter's sixth birthday party.⁸ Only hours after Wortman FaceTimed their daughter for her birthday, he attempted to hire an undercover Tennessee Bureau of Investigation agent to kill Jones and provided the agent with money and detailed instructions on how to end her life.⁹ The final attempt occurred from prison, where Wortman offered a fellow inmate his championship University of Tennessee football ring in exchange for killing his former wife.¹⁰ In 2015, Wortman ultimately accepted a combined plea deal of thirty years in jail for these attempts on Jones's life.¹¹

Over four years after he was sentenced for these attempts on Jones's life, Wortman continues to file lawsuits against Jones.¹² Although Wortman no longer has custodial parental rights over his children, he has filed continuous motions regarding his children, including a motion to force them to visit him at a prison event. One of the most recent motions he has filed was to gain access to the children's information, such as their report cards, attendance records, extracurricular events, and doctor's visits.¹³ These lawsuits have involuntarily compelled Jones to continue appearing in court, submit to cross-examination by her attempted murderer, and spend over \$100,000 in legal fees to defend against these lawsuits.¹⁴ In a public comment, Jones expressed her fear that these court proceedings would continue until her husband got out of prison,¹⁵ saying, "It seems like he has more rights . . . than I do."¹⁶

In July 2018, Tennessee enacted a law to combat this specific form of abusive litigation, which is an ongoing problem in family law cases, especially those where there has been a history of

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Pignolet and Jones, *supra* note 2.

11. *Attorney Who Tried to Kill Wife 3 Times Apologizes to Family*, WMC ACTION NEWS 5, (Nov. 10, 2015, 10:59 PM), <https://www.wmcactionnews5.com/story/30486443/attorney-apologizes-to-family-for-trying-to-kill-his-wife-3-times>; Holley, *supra* note 3.

12. Pignolet and Jones, *supra* note 2.

13. *Id.*

14. Sheila Burke, *New State Law Seeks to Stop "Stalking by Way of the Courts,"* ASSOCIATED PRESS NEWS, (June 25, 2018), <https://apnews.com/0249e6d67b1d419b9787cb6adb297cb7>.

15. Pignolet and Jones, *supra* note 2.

16. Burke, *supra* note 14.

domestic violence. Tennessee's abusive civil action law is a necessary step forward in combatting abusive litigation in the family law context because it gives judges the authority to address abusive civil actions and impose prefiling restrictions on abusive civil action plaintiffs. Tennessee's law, which applies only to cases in which the parties have or had an intimate relationship,¹⁷ allows a judge to hold a hearing to determine whether the plaintiff has filed the lawsuit(s) "primarily to harass or maliciously injure the defendant."¹⁸ Once a plaintiff is found to be an abusive civil action plaintiff under this law, the plaintiff's abusive civil actions shall be dismissed and the judge shall enforce prefiling restrictions to restrict future actions the abusive civil action plaintiff attempts to file against the defendant for at least four, but no longer than six, years.¹⁹ These prefiling restrictions crucially shift the burden to the plaintiff—whom the court has found to have abused the courts to harass and financially devastate the defendant—to prove that the lawsuit the plaintiff is seeking to file actually has merit. This prefiling restriction makes the Tennessee Abusive Civil Action Law unique and effective as it establishes a clear path to actually stopping further abusive litigation, rather than relying on current methods judges are often hesitant to impose. Tennessee's Abusive Civil Action Law is a step in the right direction towards preventing abusive litigation and the other forty-nine states, and Washington D.C., should adopt similar laws that specifically address such abusive litigation in the family law context.

Part I of this Article presents background information about domestic violence, which is often a precursor to an abuser's use of the court system as a means to control the victim. Part I also provides background information on abusive litigation, describes current remedies to abusive litigation in the absence of a specific law tailored to cases involving domestic violence, and explains why these remedies are ultimately ineffective in addressing abusive litigation in the family law context. Part II thoroughly examines the Tennessee Abusive Civil Action Law, discusses claimants and sanctions, and focuses on the prefiling restrictions requirement. Finally, Part III explains why the Tennessee Abusive Civil Action Law is an

17. The Tennessee law refers to this relationship as a civil action party relationship, which is a current or former marital, cohabitating, dating, sexual, familial, or adoptive relationship. TENN. CODE ANN. § 29-41-101(5)(A)-(F) (West 2018).

18. *Id.* § 29-41-101(1).

19. *Id.* § 29-41-106(b)(3). It is important to note that this prefiling restriction requirement does not completely cut off the civil action plaintiff's access to the court. *See Id.* § 29-41-107(c)(4).

effective approach to abusive litigation and argues that all states should adopt a similar approach.

I. BACKGROUND

A. *Domestic Violence and Control*

Especially prior to the 1970s, domestic violence was often thought of as a private family matter that was not challenged due to the husband's right to exercise authority and control over his wife and children.²⁰ In 1862, a North Carolina court held in *Joyner v. Joyner* that if spousal violence was presented as the grounds for divorce, the wife had to specify in her petition *what she said and did* both right before and during the violence.²¹ Although the Mississippi Supreme Court in *Bradley v. State* held in 1824 that a husband could be convicted of committing assault and battery against his wife, the court also found that a husband should still be allowed to "moderately chastise" his wife in emergencies without being subjected to prosecutions that would discredit and shame *both* parties.²² Further, most states did not consider spousal rape to be a crime until the late 1970s, and North Carolina law did not recognize marital rape as a crime until 1993.²³ A series of early studies²⁴ additionally highlighted misconceptions about domestic violence and implied that domestic violence was somehow caused by the survivor's provocation of the abuser, rather than the abuser's actions.²⁵ During the 1970s, the battered women's movement emerged and

20. ESTELLE B. FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* 292 (2002). Eighteenth century scholar William Blackstone articulated the belief at the time that a woman was considered to be her husband's property, similar to a farm mule; Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 715 (2004).

21. *Joyner v. Joyner*, 59 N.C. 322, 326 (1862) (emphasis added). The court further held that there are circumstances in which a husband could strike his wife with a switch or horsewhip hard enough to leave marks on her that would not be sufficient grounds to grant her a divorce; *Id.*

22. *Bradley v. St.*, 1 Miss. 156 (1824) (emphasis added) (cited in Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992).

23. *Spousal Rape Laws: 20 Years Later*, THE NAT'L. CTR. FOR VICTIMS OF CRIME, (2004) http://www.ncdsv.org/images/NCVC_SpousalRapeLaws20YearsLater_2004.pdf.

24. DEBORAH H. BELL, *BELL ON MISSISSIPPI FAMILY LAW* 111 (2d ed. 2011) (internal citations omitted); Rachel Louise Snyder, *The Particular Cruelty of Domestic Violence*, THE ATLANTIC, (May 8, 2019), <https://www.theatlantic.com/family/archive/2019/05/no-visible-bruises-domestic-violence/588631>.

25. Bell, *supra* note 24; Snyder, *supra* note 24.

law enforcement, social services, and the healthcare industry began dedicating significant resources to aiding domestic violence survivors—including training police officers to properly respond to domestic violence-related calls; establishing battered women’s shelters to enable survivors and their children escape abusive situations; and educating healthcare providers to recognize domestic violence signs in patients.²⁶ This decade served as a catalyst for societal recognition of domestic violence as a serious issue in the United States and led to further advances, including the formation of the first Coalition against Domestic Violence and widespread recognition of stalking as a punishable crime.²⁷

Although there have been significant advances in domestic violence laws since the *Joyner* case, domestic violence is still an important societal problem that cuts across race, class, gender, age, and national lines.²⁸ According to the American Medical Association, physical violence against women has been considered a major health issue since 1991 and as many as one-third of all police calls in the United States are domestic violence-related.²⁹ In fact, between 2014 and 2019, nearly sixty percent of the shootings, in which four or more people were killed, “involved an aggressor with a history of—or in the act of—domestic violence.”³⁰ Additional-

26. Snyder, *supra* note 24; FREEDMAN, *supra* note 20, at 295–96; Bell, *supra* note 24.

27. Bell, *supra* note 24; *Domestic Violence Timeline*, THE PA. CHILD WELFARE RESOURCE CTR., <http://www.pacwrc.pitt.edu/Curriculum/310DomesticViolenceIssuesAnIntroductionforChildWelfareProfessionals/Handouts/HO3DomesticViolenceTimeline.pdf>.

28. Bell, *supra* note 24; FREEDMAN, *supra* note 20, at 294; *See Teen, Campus & Dating Violence*, NAT’L. COALITION AGAINST DOMESTIC VIOLENCE (2015), https://assets.speakcdn.com/assets/2497/dating_abuse_and_teen_violence_ncadv.pdf; *See Domestic Abuse in Later Life*,

NAT’L. COALITION AGAINST DOMESTIC VIOLENCE (2015), https://assets.speakcdn.com/assets/2497/abuse_in_later_life.pdf; *See Domestic Violence and the LGBTQ Community*, NAT’L. COALITION AGAINST DOMESTIC VIOLENCE, (2018) <https://ncadv.org/blog/posts/domestic-violence-and-the-lgbtq-community>; *See Male Victims of Intimate Partner Violence*, NAT’L. COALITION AGAINST DOMESTIC VIOLENCE, https://assets.speakcdn.com/assets/2497/male_victims_of_intimate_partner_violence.pdf; *See generally* Kara Bellew, *Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 WOMEN’S RTS. L. REP. 39 (2005).

29. FREEDMAN, *supra* note 20, at 293, 295.

30. Jackie Gu, *Deadliest Mass Shootings Are Often Preceded by Violence At Home*, BLOOMBERG (June 30, 2020), <https://www.bloomberg.com/graphics/2020-mass-shootings-domestic-violence-connection>. The deadlier the shooting is (the higher the amount of casualties), the more likely that the assailant had a history of domestic violence. In shootings with no deaths, only fifteen percent of assailants “had records of beating, harassment[,] or other acts

ly, one-in-four women and one-in-nine men will be subjected to “severe intimate partner physical violence, . . . sexual violence, and/or intimate partner stalking” in their lifetime,³¹ and nearly half of all men and women have been psychologically abused, at least once, by a romantic partner.³²

Domestic violence takes many forms, including physical, sexual, psychological, and financial abuse.³³ Although each of these forms of abuse present differently, they all have a common objective: the abuser’s desire to control the victim.³⁴ In order to analyze the issues that are central to domestic violence and its continuation through abusive litigation, it is crucial to understand that domestic violence is truly about control.³⁵ Abusers often inflict multiple forms of abuse during a relationship. This may include using psychological abuse to break their partner down and, when the victim tries to stand up to the abuser, resorting to physical abuse—such as slapping, kicking, or restraining—to physically intimidate and maintain their control.³⁶ In sexual abuse, perpetrators might either physically force or pressure victims into performing sexual acts against their will.³⁷ Whereas, psychological abusers use tactics such

of brutality at home. In shootings with six or more deaths, that number shot up to [seventy percent].”; *Id.*

31. Alanna Vagianos, *30 Shocking Domestic Violence Statistics That Remind Us It’s An Epidemic*, HUFFPOST (Oct. 23, 2014, 9:25AM), https://www.huffpost.com/entry/domestic-violence-statistics_n_5959776; *Get the Facts & Figures*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/statistics> (last visited Dec. 17, 2019); *National Statistics*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (last visited Dec. 17, 2019).

32. *Facts about Domestic Violence and Psychological Abuse*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE (2015), https://assets.speakcdn.com/assets/2497/domestic_violence_and_psychological_abuse_ncadv.pdf (last visited Dec. 17, 2019).

33. Charles Montaldo, *The Different Types of Abuse*, THOUGHTCO. (June 13, 2019), <https://www.thoughtco.com/different-types-of-domestic-abuse-973311>.

34. Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN’S L.J. 41, 41 (2017); Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers’ Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1059 (2011).

35. White, *supra* note 20, at 716–17. This illustrates why preventing an abuser from filing further lawsuits is such an impactful and necessary element of the Tennessee law. The assumption that a domestic abuser will cease bringing new litigation once the surface issues are resolved misunderstands that, for an abuser, control over the victim is the primary goal. *See* Part III.B.

36. Przekop, *supra* note 34, at 1059.

37. *Id.*

as isolating victims from their support system of family and friends; humiliation; stalking; and “undermining the victim’s . . . sense of self-worth”³⁸ in order to intimidate and control the victim.³⁹ Finally, financial abuse may involve an abuser controlling the victim’s access to financial resources, such as forcing the victim to quit her job or controlling access to bank accounts, credit cards, or even health insurance.⁴⁰

While financial and psychological abuse do not necessarily present the physical danger inherent in other forms of violence, they are still devastating forms of abuse that significantly impact the victim’s life and well-being. Specifically, financial abuse renders victims unable to financially support themselves, leaving them dependent on their abusers.⁴¹ This issue is of particular concern for homemakers or survivors whose abusers forced or persuaded them to leave their careers.⁴² Financial dependence makes it even more difficult for survivors to leave an abusive relationship, especially when it renders them financially unable to support their children without their abusive partner.⁴³ Moreover, psychological abuse creates a sense of “learned helplessness,” in which the victim feels powerless to leave the abusive relationship.⁴⁴ Over time, psychological abuse can break the victim down, destroy any sense of self-worth, and ultimately lead to a depressive state.⁴⁵ Once a survivor is able to safely leave an abusive relationship, however, some abusers turn to abusive litigation to maintain financial and psychological control, which can ultimately cost survivors thousands of dollars in legal fees to defend against an abuser’s claims.⁴⁶

38. An abuser undercuts the victim’s sense of self-worth using: “insults, name-calling, put-downs, criticizing, and other demeaning language designed to bully, intimidate, frighten, humiliate, degrade, and diminish the victim’s” sense of safety and self-worth. *What is Verbal Abuse?*, NAT’L RESOURCE CENTER ON DOMESTIC VIOLENCE, <https://www.nomoreverbalabuse.org/what-is-verbal-abuse>, (last visited Dec. 16, 2019).

39. Przekop, *supra* note 34, at 1059; *Facts about Domestic Violence and Psychological Abuse*, *supra* note 32.

40. *Facts about Domestic Violence and Economic Abuse*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE (2015), https://assets.speakcdn.com/assets/2497/domestic_violence_and_economic_abuse_ncadv.pdf.

41. Przekop, *supra* note 34, at 1059.

42. FREEDMAN, *supra* note 20, at 294–95.

43. *Id.* at 293–95. “Those leaving violent relationships often have limited options to support themselves and their children, and face poverty and isolation.” *Id.* at 294 (internal citations omitted).

44. White, *supra* note 20, at 723.

45. *Id.*; Przekop, *supra* note 34 at 1059; *Facts about Domestic Violence and Psychological Abuse*, *supra* note 32.

46. David Ward, *In Her Words: Recognizing and Preventing Abusive*

B. *Abusive Litigation*

Abusive litigation—also referred to as paper or separation abuse,⁴⁷ “legal bullying, court-related abuse and harassment, and judicial terrorism”⁴⁸—occurs when a perpetrator files multiple frivolous lawsuits against a former romantic partner for the purpose of harassment or intimidation, to financially devastate the victim,⁴⁹ or to force the victim to appear in court to face the perpetrator.⁵⁰ After the passage of the Tennessee Abusive Civil Action Law, media sources have referred to abusive litigation in the family law context as “stalking by way of the courts,”⁵¹ which is a painfully accurate description of the abusive litigation process. As the result of an abuser’s use of abusive litigation, the victim is repeatedly compelled to face the abuser in court, sometimes for years after escaping the relationship, and can be forced to incur thousands of dollars in attorney’s fees and other costs associated with defending against these claims.⁵²

In cases where the domestic violence survivor has an order of protection against the abuser, the court system becomes the only remaining means of contact that the abuser has with the survivor. One survivor stated “[h]e had me in court constantly to have contact with me so he could threaten and harass me,” and another added that “[t]he only power he had over me was to keep me in the courtroom.”⁵³ Abusive litigation occurs often in family law cases involving domestic violence, and an advocate for domestic violence

Litigation Against Domestic Violence Survivors, 14 SEATTLE J. FOR SOC. JUST. 429, 454–56 (2015).

47. Jessica Klein, *How Domestic Abusers Weaponize the Courts*, THE ATLANTIC, (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086>.

48. Ward, *supra* note 46, at 432–33 (internal citations omitted).

49. These frivolous and meritless claims can ultimately cost victims thousands of dollars in legal fees. Ward, *supra* note 46, at 451–53.

50. Ward, *supra* note 46, at 432.

51. Klein, *supra* note 47; Burke, *supra* note 14; Emilie Munson, *Woman, Advocates, Seek End to ‘Stalking’ Through Court System*, CTPOST (Nov. 26, 2018 9:13PM), <https://www.ctpost.com/local/article/Woman-advocates-seek-end-to-stalking-13417249.php>.

52. In reflecting on her husband’s use of abusive litigation, Michele Weldon stated “I spent nearly the equivalent of three college educations . . . for my children on hearings, motions, pleadings, mediations, complaints, violations, and attempted settlements. And I am still spending. I thought once the divorce was over there would be no more legal battles. I was wrong.” MICHELE WELDON, *I CLOSED MY EYES: REVELATIONS OF A BATTERED WOMAN* 138 (Hazeldon, 1999) (cited in Kara Bellew, *Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 WOMEN’S RTS. L. REP. 39, 45 (2005)).

53. Ward, *supra* note 46, at 454.

survivors stated that abusive litigation is “the least understood and most overlooked form of abuse that I know of.”⁵⁴

C. *Traditional Abusive Legislation Remedies*

1. State Sanctions Under Rule 11

In federal courts, Federal Rule of Civil Procedure 11 governs sanctioning a party or attorney for filing a frivolous or improper claim.⁵⁵ Specifically, Rule 11(b)(1) requires that, by presenting a claim before the court, an attorney or *pro se* litigant represent that “it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”⁵⁶ Additional grounds for sanctions under Rule 11 include filing pleas, motions, or other court filings that contain factual allegations without an evidentiary basis, or asserting claims not based on good law or a non-frivolous argument that the law should be changed.⁵⁷ However, most claims brought under the Tennessee Abusive Civil Action Law are in family court and, therefore, state law applies.⁵⁸ Although many state courts have enacted state rules that parallel their federal counterpart in Rule 11,⁵⁹ state sanctioning laws can vary greatly.⁶⁰ These state sanctioning laws generally fall into one of three categories: (1) the “high threshold model that favors the interest of preserving free courts;” (2) the “low threshold model that favors the interest of reducing perceived litigation abuse;” and (3) the “hybrid model that borrows elements from both the high threshold and low threshold models.”⁶¹

54. *Supra* note 47; Maleaha Brown, *De-Weaponizing the Courts: Attorney’s Fees May Help Deter Litigation Abuse Against Domestic Violence Survivors*, A.B.A. (Oct. 29, 2019), https://www.americanbar.org/groups/family_law/committees/domestic-violence/litigation-abuse/; Przekop, *supra* note 34 at 1056; *New Tennessee Law Seeks to Stop ‘Stalking By Way of the Courts,’* CHATTANOOGA TIMES FREE PRESS (June 25, 2018), <https://www.timesfreepress.com/news/breakingnews/story/2018/jun/25/new-tennessee-law-seeks-stop-stalking-way-courts/473759>.

55. FED. R. CIV. P. 11.; Przekop, *supra* note 34, at 1088.

56. *Id.*

57. FED. R. CIV. P. 11. These additional grounds are mirrored in the Tennessee Rules of Civil Procedure. See TENN. R. CIV. P. 11.02.

58. Przekop, *supra* note 34, at 1088.

59. Tennessee’s Rule 11, for an example, follows the Federal Rule 11. TENN. R. CIV. P. 11.03 advisory commissioner’s comment to 1995 amendment.

60. Przekop, *supra* note 58 at 1088 n.177 (citing Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994)).

61. *Id.*

The high threshold model is the most lenient model for abusive litigation plaintiffs and the most restrictive on judges who want to impose sanctions on plaintiffs.⁶² This model uses a “subjective bad faith standard” and “require[s] some kind of subjective bad faith—or the absence of good faith—as a condition to an award of sanctions.”⁶³ Because this model seeks to preserve a litigant’s free access to the court, its sanctioning scheme is directed “against the most egregious litigation abuse” with the hope that, by restricting the availability of sanctions to the most severe instances of litigation abuse, parties will not be deterred from bringing valid claims due to the fear of potential sanctions.⁶⁴ As a result, this model can cause great frustration for defendant-survivors who are subjected to repeated abusive litigation, their attorneys, and judges who are left without an effective way to remedy ongoing abusive litigation under this model.⁶⁵

While the high threshold model uses a “subjective bad faith standard,” both the low threshold model and the hybrid model mandate that the judge use an objective standard in order to award sanctions.⁶⁶ Because this objective standard functions as a basic reasonableness test, the judge must determine whether the litigant acted unreasonably, which can occur even in the absence of specific bad faith.⁶⁷ Although this objective standard provides judges more flexibility to impose sanctions and potentially curb abusive litigation, it can also lead to unpredictable results.⁶⁸ For example, while a potentially abusive litigant’s argument might appear to be completely unreasonable and unconvincing to one judge, another judge could find it to be reasonable.⁶⁹

Nevertheless, state sanctioning rules are limited in their effectiveness in stopping abusive litigation because of courts’ hesitancy to impose sanctions on attorneys,⁷⁰ and especially on the parties

62. Keeling, *supra* note 60, at 1095; Przekop, *supra* note 34, at 1088.

63. *Id.*

64. Keeling, *supra* note 60, at 1098 (internal citations omitted).

65. Przekop, *supra* note 34, at 1101.

66. Keeling, *supra* note 60, at 1103, 1111; Przekop, *supra* note 34, at 1089.

67. *Id.*

68. Keeling, *supra* note 60, at 1105–06; Przekop, *supra* note 34, at 1089.

69. Keeling, *supra* note 60, at 1106; Przekop, *supra* note 34, at 1089. A survivor and her attorney stated that her abuser would file a lawsuit and, when he did not get the outcome that he wanted, he would either get the judge recused or split the cause of action and file the same lawsuit in another county; Ward, *supra* note 46, at 439–40.

70. This hesitancy has several causes, such as a judge’s reluctance to embarrass or negatively impact an attorney’s career. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 192 (1988).

themselves.⁷¹ Courts are, also, often reluctant to impose sanctions on *pro se* litigants, who are commonly involved in family law cases,⁷² “Courts tend to be reluctant to take steps that prohibit anyone from accessing the courts[.]”⁷³ Thus, regardless of whether a state uses the high threshold model, the low threshold model, or the hybrid model, a fee award—rather than any type of prefiling restriction—is the most common form of sanction.⁷⁴

2. Courts’ Inherent Authority to Impose Sanctions for Frivolous Actions

The U.S. Supreme Court has held that federal courts have an inherent authority “to impose sanctions on both a party and his attorney who files and pursues a frivolous action . . . or one who uses certain procedural actions, including pleadings and motions, to accomplish an improper ulterior purpose.”⁷⁵ State courts also have inherent authority under the contempt power⁷⁶ to “punish parties who have ‘acted in bad faith, vexatious, wantonly or for oppressive reasons.’”⁷⁷ This authority is meant to fill in the gaps of the Federal Rules of Civil Procedure and its state equivalents in order to “enable[] courts to respond to the changing realities of litigation[.]”⁷⁸

Although the courts’ inherent power extends beyond its authority under state equivalents of Rule 11, it is almost entirely discretionary.⁷⁹ As a result, courts are likely to hesitate to impose sanctions through their inherent authority, similar to their reluctance to utilize the state versions of Rule 11.⁸⁰ Moreover, even with this extended authority, judges have still expressed their frustration with the difficulty of curbing abusive litigation in the family law context. In one case, the judge lamented that he did not know any other way to stop the abusive litigant other than sentencing him to

71. Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 273 (1979).

72. Przekop, *supra* note 34, at 1089.

73. Ward, *supra* note 46, at 439.

74. Przekop, *supra* note 34, at 1089. Even while fee awards are the most commonly used sanctions, courts are very hesitant to use them, let alone other sanctions, such as prefiling restrictions. *Id.*

75. Przekop, *supra* note 34, at 1089 n.184 (internal citations omitted).

76. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Ex parte Robinson*, 86 U.S. 505, 510, 22 (1873)).

77. Przekop, *supra* note 34, at 1090 (quoting *Chambers*, 501 U.S. at 44–51).

78. Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36, 56 (2017).

79. *Id.* at 56–57.

80. Przekop, *supra* note 34, at 1090.

ten days in jail for contempt, and the judge did not think even that would stop him.⁸¹ The Tennessee law largely resolves this hesitancy issue because it imposes sanctions on the abusive litigant directly⁸² and, once the court finds that the plaintiff has engaged in abusive civil actions, sanctions are required and the judge has discretion only over how long the pre-filing restriction will last, not over whether or not to impose sanctions at all.⁸³ As a result of courts' reluctance to exercise its power to sanction, their inherent authority is not an effective means of stopping abusive civil litigation.

3. Tort Remedies

Another remedy for abusive litigation is for victims to file a tort claim against their abusers, in order to stop the abusive litigation.⁸⁴ Victims trying to bar abusive litigation most often bring malicious prosecution or abuse of process claims, both of which “allow victims of frivolous or improper lawsuits [to] seek compensation for injuries caused by the improper use of judicial proceedings.”⁸⁵ Abusive litigants can be liable for malicious prosecution when they file a frivolous claim without any legal justification and for abuse of process when they file a claim with an “improper motive,” such as to harass the victim or to augment the victim's legal fees, even though the claim may have been legally merited.⁸⁶

Although tort remedies can help victims of abusive litigation recover financial resources lost as a result of the ongoing litigation, they do not truly solve the problem.⁸⁷ First, these remedies only look to resolve the immediate financial issues and do not actually prevent an abuser from filing further lawsuits, which essentially is the equivalent of treating the symptom without curing the underlying disease.⁸⁸ While recovering lost financial resources is certainly crucial, “domestic violence victims being pursued relentlessly [by their abusers] through the courts” would likely choose to stop the

81. *Hearing on HB 1793 Before the H. Comm. on Civ. Justice*, 2018 Leg., 110th Sess. (Tn. 2018) (hereinafter “*Item 1793*”) (statement of Mike Carter, H. Comm. on Civ. Justice), http://tnga.granicus.com/MediaPlayer.php?view_id=354&clip_id=14988 [<https://perma.cc/CB4X-DYKL>].

82. As opposed to potentially imposing sanctions on his or her attorney.

83. See TENN. CODE ANN. § 29-41-106(b)(1)-(3) (West 2018).

84. Przekop, *supra* note 34, at 1090.

85. *Id.*; Leah J. Pollema, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, UMKC L. REV. 1107, 1107 (2007).

86. *Id.* at 1108.

87. Przekop, *supra* note 34, at 1091.

88. *Id.*

continuous litigation, rather than merely obtaining financial remedies, as the most immediate solution.⁸⁹

Second, tort claims force victims—who seek to end the continuous litigation—to file additional lawsuits.⁹⁰ A victim of repeated abusive litigation may no longer have the necessary financial resources to continue litigating in court, especially to file lawsuits that may inevitably lead to further litigation and even more attorney’s fees, missed work days, and increased contact with an abuser, even if there is the potential for some limited monetary relief.⁹¹ Thirdly, bringing tort claims is complicated by the fact that “the adversary system itself can promote injustice if one side has superior knowledge of the system and harbors the inclination to bend the rules.”⁹² This is demonstrated in cases where the perpetrator is either a current or former attorney who abuses his knowledge of the legal system to harass and financially devastate a former partner.⁹³ As a result, these tort claims do not effectively address or curb abusive litigation.

4. Creative Remedies⁹⁴

Some judges have recognized when an abusive litigant has filed continuous lawsuits for the purpose of forcing the victim to repeatedly face the abuser in court and judges used their discretion to implement creative solutions to prevent the victim from having to continue physically appearing in court. These solutions include allowing the survivor to attend hearings remotely by telephone⁹⁵ or online through videoconference.⁹⁶ This can help ease the psycho-

89. *Id.*

90. *Id.*

91. *Id.*

92. Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 908 (1984).

93. This was the case with Staci Jones’s former husband, who is a former attorney. *Attorney Who Tried to Kill Wife 3 Times Apologizes to Family*, *supra* note 11.

94. Here, the term “creative remedies” refers to a judge’s use of his or her discretion to implement nontraditional remedies, such as allowing a defendant to testify through videoconference. Another judge required a woman’s former husband to complete classes on childcare and a domestic violence treatment program before he could file another motion. Ward, *supra* note 46, at 461.

95. Klein, *supra* note 47; Przekop, *supra* note 34, at 1093.

96. Klein, *supra* note 47. A Kentucky judge once told an abusive litigant, who repeatedly filed motions from jail in order to see his victim in court, that he could attend the next hearing by videoconference. Although it was an empty threat, he stopped filing claims because “[h]e wasn’t interested in a change in

logical trauma of having to repeatedly face an abuser in court and prevents the victim from taking additional time off of work to physically appear in court. While the lack of physical proximity to the victim might dissuade some abusive litigants from continuing to file frivolous lawsuits, nevertheless, remote appearances do not address the problem of the ongoing financial strain on the victim or actually prevent abusers from filing further meritless claims.

5. Why These Methods are Ineffective

These existing methods of addressing abusive litigation in states without a provision similar to the Tennessee Abusive Civil Action Law are not the most effective means of dealing with abusive litigation in the family law context. Specifically, these remedies are compromised by the court's hesitancy to impose sanctions on abusive litigants,⁹⁷ are merely a temporary solution to the larger issues of abusive litigation, and do not provide the remedy truly sought by victims of abusive litigation; which is to put an end to the continuous and expensive litigation.⁹⁸ In light of these significant obstacles that current remedies to abusive litigation face, it is apparent that another solution is needed to curb abusive litigation: the Tennessee Abusive Civil Action Law.

II. THE TENNESSEE ABUSIVE CIVIL ACTION LAW

A. *Background and Policy*

Tennessee Governor Bill Haslam signed the Tennessee Abusive Civil Action Law in May 2018.⁹⁹ This law was, in part, inspired by Staci Jones and the continuous lawsuits that her former husband filed against her, regarding issues like access to their children's report cards, after his numerous attempts to kill her.¹⁰⁰ Notably, Tennessee legislators were likely motivated to pass a law aimed at aiding domestic violence survivors due to Tennessee's high rates of domestic-violence-related homicides over the past decade.¹⁰¹ According to a recent survey by the Violence Policy Center, Tennessee is fifth

circumstances-he just wanted to be in the room with [his victim].” *Id.*

97. Przekop, *supra* note 34, at 1089.

98. *Id.* at 1091.

99. Burke, *supra* note 14.

100. *Id.*

101. Pignolet and Jones, *supra* note 2. Between 2005 and 2016, Tennessee consistently ranked within the ten states with the highest rates of women murdered by men. Press Release, Metro Off. of Family Safety, Tennessee Ranks 5th for Men Murdering Women (Sept. 19, 2019), <https://ofs.nashville.gov/tennessee-ranks-5th-for-men-murdering-women>. [<https://perma.cc/TA8N-C8PM>].

in the nation for the highest rates¹⁰² of domestic-violence-related homicides,¹⁰³ and nearly 78,000 domestic violence offenses were reported in Tennessee in 2017.¹⁰⁴

According to the legislative proceedings prior to the passage of the Tennessee Abusive Civil Action Law, the drafters of the law also used the filing sanction against John Jay Hooker as a model for the prefiling restrictions included in the Tennessee law.¹⁰⁵ Hooker was a lawyer and politician who lost several gubernatorial and general elections from 1966 to 2014.¹⁰⁶ After these losses, he filed a series of claims¹⁰⁷ against Tennessee elected officials, including the Tennessee Governor and Lieutenant Governor.¹⁰⁸ Hooker claimed that these officials violated a state constitutional provision on bribing electors through fundraisers, at which they “served meat and drink in the process of party-giving to voters, lobbyists and friends ‘to be elected,’”¹⁰⁹ and sought to disqualify a candidate for governor on this basis.¹¹⁰ He even argued, in one claim, that he should be the

102. “Rate” here refers to rate of domestic violence homicides with a male assailant and a female victim. *When Men Murder Women: An Analysis of 2017 Homicide Data*, VIOLENCE POL’Y CTR., 10 (Sept. 2019), <https://vpc.org/studies/wmmw2019.pdf>. [https://perma.cc/ES9M-949F].

103. Kim St. Onge, *More Females Murdered in Tennessee Than Almost Any Other State*, WSMV NEWS4 NASHVILLE, (Sept. 18, 2018), https://www.wsmv.com/news/more-females-murdered-in-tennessee-than-almost-any-other-state/article_38fb47b6-bb8c-11e8-9c99-d836701e73f8.html. [https://perma.cc/HL9T-AXDD]; *When Men Murder Women: An Analysis of 2015 Homicide Data*, VIOLENCE POL’Y CTR., 4 (Sept. 2017), <https://vpc.org/studies/wmmw2017.pdf>. [https://perma.cc/5TGH-835M]; Michael W. Aldrich, *Tennessee Ranks in Top 5 for Rate at which Men Kill Women in Domestic-Related Homicides*, THE TENNESSEAN, (June 26, 2018 at 4:01 PM), <https://www.tennessean.com/story/news/2018/06/26/tennessee-top-5-men-killing-women-domestic-related-homicides-violence-cleveland-lamont-bell/731167002>. [https://perma.cc/F8WT-D8V5].

104. Alexandra Koehn, *Tennessee Ranks Top 10 for Domestic-Related Homicides*, NEWSCHANNEL5, (June 24, 2018), <https://www.newschannel5.com/news/tennessee-top-10-for-domestic-related-homicides>.

105. *Item: HB 1793*, *supra* note 81.

106. *See* Bill Haltom, *Hooker v. Bredesen et Al: How to Sue Your Way to the Governor’s Mansion*, 33 Jan Tenn. B.J. 37 (2002); *Chronology of John Jay Hooker Jr.’s Life*, THE TENNESSEAN, (Jan. 24, 2016), <https://www.tennessean.com/story/news/2016/01/24/chronology-john-jay-hooker-jrs-life/79225456>.

107. Notably, Hooker represented himself pro se as a licensed attorney during the proceedings. *Hooker v. Sundquist*, 107 S.W.3d 532, 537 n.1 (Tenn. Ct. App. 2002).

108. *See* Haltom, *supra* note 106; *Hooker v. Sundquist*, 107 S.W.3d 532 (Tenn. Ct. App. 2002); *Hooker v. Bredesen*, 114 S.W. 3d 539 (Tenn. Ct. App. 2002); *Hooker v. Sundquist*, 150 S.W.3d 406 (Tenn. Ct. App. 2004).

109. *Hooker v. Sundquist*, 107 S.W.3d 532, 534 (Tenn. Ct. App. 2002).

110. *Hooker v. Bredesen*, 114 S.W. 3d 539 (Tenn. Ct. App. 2002).

governor.¹¹¹ His allegations were denied in multiple proceedings due to lack of merit and in finding that the relevant constitutional provision “did not apply to [the] mere provision of food and drink at a fundraising event.”¹¹²

By the time the case reached the Court of Appeals of Tennessee in *Hooker v. Sundquist*, it was Hooker’s fourth in a series of lawsuits filed for the alleged purpose of reforming Tennessee’s elections.¹¹³ At least one of these prior lawsuits involved the same issue as *Hooker v. Sundquist* regarding the alleged bribery through serving food and drinks at fundraisers.¹¹⁴ In *Hooker v. Sundquist*, the Court of Appeals of Tennessee reversed the trial court’s decision not to impose sanctions on Hooker and remanded the case to determine sanctions.¹¹⁵

On remand, the circuit court ordered Hooker to pay outstanding court costs associated with litigating his prior cases and, notably, imposed a form of prefiling restrictions.¹¹⁶ The circuit court found that until Hooker paid these outstanding court costs, he would not be allowed to file any further lawsuits in circuit or chancery court in that judicial division in Tennessee against any elected officials, either in their individual or official capacity, or against the State of Tennessee.¹¹⁷ Additionally, the court held that any complaint that Hooker tried to file for the next two years in any state trial court in the 20th Judicial Division had to be “submitted by the Clerk of the Special Master of the Circuit Court *who shall determine* whether the complaint allege[d] violations of Article X Section 3 of the Tennessee Constitution and/or Section 2–19–126 T.C.A.,” and whether the filings were legally frivolous or repeating matters that had already been litigated.¹¹⁸ Hooker appealed these sanctions to the Court of Appeals of Tennessee, which held that this form of sanction under Federal Rule of Civil Procedure 11 was “narrowly tailored, short in duration, and fully warranted given the attorney’s undisputed history of filing repetitive or frivolous lawsuits.”¹¹⁹

The drafters of the Tennessee Abusive Civil Action Law modeled its language on this sanction imposed on Hooker, specifically

111. See Haltom, *supra* note 106.

112. *Hooker v. Bredesen*, 114 S.W. 3d 539 (Tenn. Ct. App. 2002).

113. *Hooker v. Sundquist*, 107 S.W.3d at 534 n.1.

114. See *Hooker v. Bredesen*, 114 S.W. 3d 539 (Tenn. Ct. App. 2002).

115. *Hooker v. Sundquist*, 107 S.W.3d at 537.

116. *Hooker v. Sundquist*, 150 S.W.3d 406, 409 (Tenn. Ct. App. 2004).

117. *Id.* This requirement is significant because it would require any further claims that Hooker brought to be reviewed before it would be able to proceed.

118. *Id.* (emphasis added).

119. *Id.* at 406.

the requirement that further lawsuits be reviewed to determine whether they were frivolous or repetitive actions of the same issues.¹²⁰ Further, the drafters maintain a similar justification for imposing prefiling restrictions on abusive litigants in the family law context: it is due to their history of repeated and frivolous lawsuits, especially because they are filed with the intent to harass or financially devastate the victim-defendant.¹²¹

B. *Important Terms in Abusive Civil Action Litigation*

1. Who are the Parties?

There are two parties in an abusive civil action: the abusive civil action plaintiff and the civil action defendant(s). For an abusive civil action claim to be brought, the relationship between both parties must be a “civil action party relationship.”¹²² This means that the abusive civil action plaintiff and the civil action defendant’s relationship must fall into one of the following categories:

Adults who are current or former spouses; adults who live together or who have lived together; adults who are dating or who have dated or who have or had a sexual relationship¹²³ . . . ; adults related by blood or adoption; adults who are related or were formerly related by marriage; or adult children of a person in a relationship that is described in [the preceding categories].¹²⁴

It is important to note that these are the same categories of people that Tennessee law defines as domestic abuse victims, who may seek an order of protection against their abusers.¹²⁵ This parallel definition of the applicable parties further demonstrates the Tennessee legislature’s intent to protect domestic violence survivors from abusive litigation through the Tennessee Abusive Civil Action Law.¹²⁶

120. *See Id.* at 406.

121. *Item: HB 1793*, *supra* note 81.

122. TENN. CODE ANN § 29–41–101(5) (West 2018).

123. Here, the terms “dating” and “dated” do not include business or social fraternization. *Id.* § 29–41–101(5)(C).

124. *Id.* § 29–41–101 (5)(A)-(F). This law only applies to civil actions “filed by a plaintiff against a defendant or defendants with whom the plaintiff shares a civil action party relationship.” *Id.* § 29–41–102.

125. *Id.* § 29–41–101(5)(A)-(F); § 36–3–601 (5)(A)-(F); *Hearing on SB 1601 Before the S. Judiciary Comm.*, 2018 Leg., 110th Sess. (Tn. 2018) (hereinafter “*Item: SB 1601*”) (statement of Ken Yager, S. Judiciary Comm.), http://tnga.granicus.com/MediaPlayer.php?view_id=354&clip_id=15034. [perma.cc/9L36-544C].

126. When the Tennessee Abusive Civil Action Law was presented before the Senate Judiciary Committee by Tennessee Senator Ken Yager on April 2, 2018, the legislators raised the concern that the law could potentially be abused

2. What is an Abusive Civil Action?

An abusive civil action is “a civil action filed by a plaintiff against a defendant with whom the plaintiff shares a civil action party relationship primarily to *harass or maliciously injure* the defendant.”¹²⁷ The Tennessee Abusive Civil Action Law lays out seven ways a potentially abusive civil action can be found to have been filed primarily to harass or maliciously injure the defendant.¹²⁸ Under this requirement, the victim can show intent to “harass or maliciously injure” if the civil action was “filed with the intent or was primarily designed to” do any one of seven different specifically-stated abusive tactics.

The first way to show intent to harass or maliciously injure is if the action was filed with the intent or primary design to “exhaust, deplete, impair, or adversely impact the civil action defendant’s financial resources.”¹²⁹ This occurs if, for example, an abusive civil plaintiff filed multiple lawsuits against his former wife for the purpose of financially harming her in retribution for her ending their relationship.¹³⁰ The second method is if the plaintiff filed the action to either prevent or interfere with the civil action defendant’s raising of the children in her legal custody in the way that she sees fit, absent a plaintiff’s lawful right and good faith basis to do so.¹³¹ For example, an abuser might falsely report the victim to Child Protective Services for child abuse in an attempt to get the victim’s children taken away.¹³² In fact, many abusers make false claims to Child Pro-

if it were applied too broadly to any civil lawsuit. *Item: SB 1601, supra* note 125. Limiting the law’s application narrowly to people in these civil party action relationships addressed this concern regarding potential extension of this law to general litigation. *Id.; Item: HB 1793, supra* note 81.

127. TENN. CODE ANN § 29–41–101(1) (West 2018) (emphasis added).

128. *Id.* § 29–41–101(6)(A)-(G).

129. *Id.* § 29–41–101(6)(A). Unless “punitive damages are appropriate or a change [of the parties’] circumstances provides a good faith basis to seek a change to a financial award, support, or distribution of resources[.]” § 29–41–101(6)(A)(i)-(ii).

130. During a Senate Judiciary Committee meeting on Senate Bill 1601, which ultimately became the Tennessee Abusive Civil Action Law, Kim Nelson testified about her personal experience with abusive litigation. When she decided to leave an abusive relationship in 2004, her abuser threatened to take her to court and financially break her if she ended the relationship. Since 2004, he has filed numerous lawsuits against Nelson and her current husband in multiple Tennessee counties, which has resulted in nearly six thousand pages of testimony and hundreds of thousands of dollars in legal fees. *Item: SB 1601, supra* note 125; *Nelson v. Justice*, No. E2017-00895-COA-R3-CV 2019 WL 337040 at *4 (Tenn. Ct. App. 2019).

131. TENN. CODE ANN § 29–41–101(6)(B) (West 2018).

132. Ward, *supra* note 46, at 443.

tective Services about survivors, “with claims ranging from issues with a new [romantic partner]” to neglect, child abuse, or drug use.¹³³ The third way is if the plaintiff filed the action to “[f]orce, coerce, or attempt to force or coerce the civil action defendant” to make or agree to “concessions concerning financial, custodial, support, or other issues when the issues in question have been previously litigated and decided” in the civil action defendant’s favor[.]¹³⁴ This would occur in a situation where the plaintiff filed multiple lawsuits with the knowledge that the civil action defendant could not financially afford to defend against them and then agreed to drop all of the charges only if the defendant gave the plaintiff full custody of their child.¹³⁵ An additional example would be if an abuser used a survivor’s immigration status and the threat of potential deportation to make the survivor agree to make concessions favorable to the abuser regarding child support.¹³⁶ A victim of abusive litigation highlighted this tactic well, saying that her experience with her abuser was summarized as “do what I want or you will go to jail, or be deported, or I will kill you.”¹³⁷

The fourth approach to show intent to harass or maliciously injure is if the plaintiff actually or attempted to “force or coerce the civil action defendant to alter, engage in, or refrain from engaging in conduct” that is lawful and within the civil action defendant’s right to do.¹³⁸ This would occur if an abuser filed lawsuits as retaliation for the defendant beginning a new romantic relationship and only agreed to drop the lawsuits if the defendant ended the relationship. The fifth method is if the lawsuits were filed to “[i]mpair, or attempt to impair” either the civil action defendant or a dependent’s health or well-being[.]”¹³⁹ The sixth way is if the plaintiff were to “[p]revent, interfere, or adversely impact” the civil action defendant’s ability to “maintain a livelihood or lifestyle at the same or better standard” that the defendant had before the action was filed.¹⁴⁰ This occurs in situations where an abuser makes false reports to the defendant’s professional licensing agencies in order to cause the defendant to lose her professional license or job.¹⁴¹ Finally, the seventh approach

133. *Id.*

134. TENN. CODE ANN § 29–41–101(6)(C) (West 2018).

135. Abusers often use the threat of taking custody of the children as a means of intimidating their former partners by the potential devastation of losing their children. Ward, *supra* note 46, at 434.

136. *Id.* at 449.

137. *Id.*

138. TENN. CODE ANN § 29–41–101(6)(D) (West 2018).

139. *Id.* § 29–41–101(6)(E).

140. *Id.* § 29–41–101(6)(F).

141. Ward, *supra* note 46, at 449. In interviews with abusive litigation

would occur if the plaintiff filed a lawsuit with the intent or purpose to negatively impact “the civil action defendant’s reputation in the community or alienate the civil action defendant’s friends, colleagues, attorneys, or professional associates by subjecting parties” that either lack knowledge of or are not “reasonably relevant to the civil action” to “unreasonably or unnecessarily” complicated, long, or “intrusive interrogatories or depositions.”¹⁴² An all too common situation of this method occurs when abusers threaten retaliatory lawsuits against survivors’ friends, family, or attorneys in order to isolate survivors from their support systems.¹⁴³ This is a tactic abusers use in an attempt to “not only punish survivors . . . [but] control and punish anyone who tries to help them.”¹⁴⁴

These definitions are loose enough to close the loopholes that occur in overly-specific laws, allowing judges to discern the malicious intentions of the abusive civil action plaintiff, and specific enough to prevent the law from being extended to general civil cases.¹⁴⁵ This is especially crucial in domestic violence cases where the abuser is using lawsuits as a last remaining resort to maintain control over the survivor, which can include filing these lawsuits with the true intention of controlling aspects of the survivor’s life.¹⁴⁶

In addition to the requirement that the abusive civil action was filed with the intent or primary purpose to harass or maliciously injure the defendant,¹⁴⁷ the abusive civil action must meet an additional requirement. Specifically, it must meet at least one of the three following conditions: (1) the legal claims or allegations are unwarranted by a legal argument, whether under existing law or

survivors, several stated that their abusers falsely reported them to their professional licensing boards. One woman’s abuser submitted a false report that she had committed fraud in an attempt to “get her professional license revoked.” Another woman’s abuser falsely accused her of abusing him to her licensing board in order to get her fired. *Id.* Additionally, Kim Nelson’s abuser attempted to have her removed from her elected position as a court clerk. *Nelson*, 2019 WL 337040 at 2.; *Item: SB 1601*, *supra* note 125.

142. TENN. CODE ANN § 29–41–101(6)(G) (West 2018).

143. Ward, *supra* note 46, at 445. This threat of retaliation against the people in a survivor’s life often “has the effect of isolating the survivor from her support network because they fear the abuser harming them.” *Id.* at 445–46.

144. *Id.* at 445–46.

145. These categories are also specifically defined to limit the application of this law and prevent abuse of this protection, which reflected a concern in the drafting of this law regarding access to the courts. *Item: SB 1601*, *supra* note 125.

146. These definitions, however, could be further strengthened by adding an eighth way to show intent to harass or maliciously injure: finding that the civil action was filed “with the intent or was primarily designed to” maintain contact with the civil action defendant. *See* § 29–41–101(6).

147. TENN. CODE ANN § 29–41–101(6) (West 2018).

a reasonable basis for modifying, extending, or reversing, or establishing law; (2) the allegations lack evidentiary support; or (3) the legal claim is related to issues that have been previously filed and decided against the plaintiff.¹⁴⁸ This requirement enables the defendant to establish that the plaintiff's claim against her is frivolous, meritless, or has already been decided against the plaintiff.

C. *Bringing an Abusive Civil Action and Abusive Civil Action Hearings*

If a victim-defendant believes that a plaintiff's claim against the defendant is an abusive civil action, the defendant may raise an abusive civil action claim either (1) as an answer to the civil action or (2) by making a motion at any point during the civil action.¹⁴⁹ Additionally, the court is within its authority to require a hearing to determine whether the plaintiff's action is an abusive civil action.¹⁵⁰ Once it has been alleged, either through the defendant's answer or motion or the court's own motion, that an action is an abusive civil action, the court shall hold a hearing to determine whether the action is an abusive civil action.¹⁵¹ If the hearing is scheduled in response to the defendant's answer or motion,¹⁵² the court will hear testimony and may require any relevant records, such as affidavits and other records.¹⁵³

At this hearing, a rebuttable presumption that "the civil action is an abusive civil action and that the person filing the action is an abusive civil action plaintiff and prefiling restrictions should be imposed upon the plaintiff" is established through evidence of any of the following four conditions.¹⁵⁴ Specifically, these conditions include whether (1) the issues in the allegedly abusive civil action against the civil action defendant are the "same or substantially similar" as those that have already been litigated in another court against the civil action defendant, or a substantially similar party, within the past five years and were either "dismissed on the merits or with prejudice against the civil action plaintiff,"¹⁵⁵ (2) the issues in the abusive civil action are the "same or substantially similar" as those that have been the basis for a complaint against the civil action defendant to a regulatory or licensing board, and the

148. *Id.* § 29-41-101(1)(A)-(C); *Item: SB 1601, supra* note 125.

149. *Id.* § 29-41-103(a)(1)-(2).

150. *Id.* § 29-41-103(2)(b).

151. *Id.* § 29-41-103.

152. *Id.* § 29-41-104(a).

153. *Id.* § 29-41-104(b).

154. *Id.* § 29-41-105.

155. *Id.* § 29-41-105(1).

board dismissed the complaint after a hearing pursuant to the Uniform Administrative Procedures Act;¹⁵⁶ (3) “the allegedly abusive civil action plaintiff has [previously] been sanctioned under Rule 11 of the Tennessee Rules of Civil Procedure,” or a state or federal equivalent within the last ten years, for filing at least one “frivolous, veracious, or abusive civil action” that involved the “same or substantially similar” issues and parties as the current allegedly abusive civil action;¹⁵⁷ or (4) another court found that “a civil action filed against the civil action defendant was an abusive civil action” and prefiling restrictions either were or are currently in place in that district.¹⁵⁸ This is an impactful aspect of the Tennessee law because, if one of these conditions are met, it shifts the burden to the perpetrator—rather than the victim—early in the process.

D. *Sanctions*

If the court finds by a preponderance of the evidence that the plaintiff is an abusive civil plaintiff, that has filed an abusive civil action against the defendant, it will dismiss the action.¹⁵⁹ Additionally, the court must impose the following sanctions: (1) tax the costs of any pending abusive civil action “at the time of the court’s finding against the abusive civil action plaintiff;” (2) award attorney’s fees and “all reasonable costs of defending the abusive civil action” to the civil action defendant; and (3) “impose *prefiling restrictions* upon any civil action the abusive civil action plaintiff attempts to file” for no more than 48 months, four years, but no more than 72 months, six years.¹⁶⁰ This requirement, regarding imposing prefiling restrictions on the abusive civil plaintiff, is the most unique element of this law as a means of curbing abusive litigation in the family law context, and it represents an affirmative step towards actually preventing further abusive civil actions from being filed against the civil action defendant.¹⁶¹

Once the court has determined that a plaintiff is an abusive civil action plaintiff, that plaintiff is prohibited from filing another civil action against the civil action defendant during the prefiling restrictions period, “or from continuing a civil action that was instituted against the same civil action defendant prior to the date the person was determined to be an abusive civil action plaintiff.”¹⁶²

156. *Id.* § 29–41–105(2).

157. *Id.* § 29–41–105(3).

158. *Id.* § 29–41–105(4).

159. *Id.* § 29–41–106(a).

160. *Id.* § 29–41–106(b)(1)-(3) (emphasis added).

161. *Item: SB 1601, supra* note 125.

162. TENN. CODE ANN. § 29–41–107(a) (West 2018).

For example, if the court found the plaintiff to be an abusive civil action plaintiff and imposed pre-filing restrictions against him for the next five years, the plaintiff would not be able to file another civil action against the civil action defendant for the next five years, absent permission from the court.

E. *Applications for Permission to Institute a Civil Action*

If the abusive civil action plaintiff wants to file a civil action during the pre-filing restriction period, the plaintiff “must appear before the *same judge who imposed the pre-filing restrictions* to make an application for permission to institute the civil action.”¹⁶³ This provision seeks to keep the matter in front of a judge who is familiar with the history of the case and the plaintiff’s past attempts to file abusive civil actions against the defendant.¹⁶⁴ In order to determine if the subsequent action is an abusive civil action based on reasonable and legitimate grounds, the judge may examine witnesses, including the abusive civil action plaintiff and the civil action defendant.¹⁶⁵ If any of the defendants in the proposed civil action were defendants in the original case, that resulted in the plaintiff being declared an abusive civil action plaintiff, there is a rebuttable presumption that the proposed civil action is an abusive civil action.¹⁶⁶ If the judge finds that the proposed civil action will be an abusive civil action, the judge will deny the application and determine a time when the plaintiff may apply to file another civil action.¹⁶⁷ If the judge, however, “reasonably believes” the action is not an abusive civil action, the judge may grant the application and permit the filing. The order allowing the filing “shall be attached to the front of the complaint when the abusive civil action plaintiff files the civil action with the clerk,”¹⁶⁸ and, when the complaint is served, the defendant to the action shall be served with a copy of the judge’s order.¹⁶⁹ Moreover, the judge’s findings are recorded in writing and made a part of the record in the case.¹⁷⁰

163. *Id.* § 29–41–107(c)(1) (emphasis added).

164. Although the Tennessee Abusive Civil Action Law seeks to keep a case before the same judge, this is not always possible because a judge may retire, step down, or no longer serve in the same judicial district. “If the judge who imposed the pre-filing restrictions is no longer serving in the same capacity in the same judicial district where the restrictions were placed, any other judge in that judicial district may perform the review[.]” *Id.* § 29–41–107(g).

165. *Id.* § 29–41–107(2)(A).

166. *Id.* § 29–41–107(2)(B).

167. *Id.* § 29–41–107(3)(A).

168. *Id.* § 29–41–107(3)(B).

169. *Id.*

170. *Id.* § 29–41–107(4).

If the order from the judge granting permission for the abusive civil action plaintiff to file an action during the pre-filing restrictions period is not attached to the defendant's complaint or served to the defendant, the defendant is not required to "respond to the complaint, answer interrogatories, appear for depositions, or any other responsive action required by rule or statute in a civil action."¹⁷¹ Instead of forcing civil action defendants to respond to every action their abusers file against them, this provision states that a civil action defendant does not have to respond to the charges until the judge reviews the claim for merit and the defendant receives a copy of that order. As a result, this law shifts the burden from defendant-survivors having to continuously face their abusers in court to the abusive civil action plaintiff, who the court has found to have abused the courts to harass and financially devastate, to prove that the proposed lawsuit against the defendant actually has merit.

If the abusive civil action plaintiff disagrees with the judge's findings, the plaintiff may appeal the case to the presiding judge of the sanctioning judge's judicial district or, if the sanctioning judge *is* the presiding judge in that district, the judge will randomly select two other judges in the judicial district to review the sanctioning judge's findings.¹⁷² If either the presiding judge or both of the other reviewing judges believe the abusive civil action plaintiff's proposed action is not an abusive civil action, the sanctioning judge's findings will be overruled where, "both judges shall sign an order permitting the fining of the action[.]" and the order will be "entered and attached to the complaint."¹⁷³ Additionally, the defendant will be served a copy of the order when the complaint is served.¹⁷⁴

Even after the abusive civil action plaintiff is granted judicial permission to file the civil action, if the judge with jurisdiction over the action finds that the abusive civil action plaintiff is attempting to amend the complaint, add parties, or otherwise alter the issues and parties involved in a way that "the judge reasonably believes" would convert the action into an abusive civil action, "the judge may order an continuance or nonsuit of the action and return it to the presiding judge for further disposition."¹⁷⁵ This provision allows the judge, who ultimately presides over the action, to prevent an abusive civil action plaintiff who filed a non-abusive civil action to

171. *Id.* § 29-41-107(f)(3) (emphasis added).

172. *Id.* § 29-41-107(4). "If there are not two (2) judges in the judicial district available, the presiding judge may select a judge from an adjoining judicial district to review the findings." *Id.*

173. *Id.*

174. *Id.*

175. *Id.* § 29-41-107(e).

get it into the court from subsequently turning it into an abusive claim through amending it, adding parties or claims, or other means of altering the initial claim with ill intent. If an abusive civil action plaintiff files an action against the civil action defendant in a judicial district where the plaintiff has *not* been found to be an abusive civil action plaintiff, and the complaint that the civil action defendant receives does not have an attached copy of the sanctioning judge's prefiling restrictions order, the civil action defendant "may obtain a certified copy of the order . . . and send it to the judge where the new civil action was filed and the judge who imposed the prefiling restrictions."¹⁷⁶

The Tennessee Abusive Civil Action Law also contains a provision describing what will happen if the abusive civil action plaintiff violates the prefiling restrictions. If the court finds¹⁷⁷ that the abusive civil action plaintiff has violated the prefiling restrictions, by filing a subsequent civil action or continuing a legal proceeding either in "the sanctioning judge's district or in another judicial district" without the sanctioning judge granting the plaintiff's application to do so "or the abusive civil action plaintiff has attempted to file an action through another party," the court where the civil action is pending shall "dismiss the action or revoke the continuance."¹⁷⁸ The Tennessee Abusive Civil Action Law gives the judge broad authority if this occurs and states the "sanctioning judge may take whatever action against the abusive civil action plaintiff [is] deemed necessary for a violation of the court's order."¹⁷⁹

F. *If the Plaintiff is Not Found to be an Abusive Civil Action Plaintiff*

If the court finds by a preponderance of the evidence that an allegedly abusive civil action plaintiff or action is not abusive, the court may grant the plaintiff remedies, including a judgment or partial judgment in favor of the plaintiff or factual interpretations that favor the plaintiff.¹⁸⁰ Additionally, the court may tax costs related to litigating the abusive civil action claim to the defendant and award reasonable attorney's fees and costs to the plaintiff.¹⁸¹ This provision gives a potential form of relief if a plaintiff is wrongly accused

176. *Id.* § 29-41-107(f)(1).

177. *Id.* § 29-41-107(f)(2). Whether through its own motion or it is brought to the court's attention, such as if the civil action defendant alleged in court that the plaintiff violated the prefiling restrictions. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* § 29-41-106(c).

181. *Id.* § 29-41-106(d)(1)-(2).

of filing an abusive civil action, erroneously found to be an abusive civil action plaintiff, or if it is discovered that a perpetrator has attempted to falsely assert this claim against a victim.

III. ARGUMENT

A. *The Tennessee Abusive Civil Action Law is a Necessary Step in the Right Direction*

The Tennessee Abusive Civil Action Law is a unique remedial approach to abusive litigation, or stalking by way of the court, in the family law context. Unlike previous approaches, the Tennessee law creates a specific remedy for abusive litigation which is uniquely suited for the issues that arise in family law and interpersonal relationships, especially in cases involving domestic violence. The Tennessee law is a model that should be adopted in the other forty-nine states and Washington D.C. because it is narrowly focused to protect a uniquely vulnerable group, imposes real consequences on abusive civil action plaintiffs in order to curb abusive civil actions, requires the same judge to oversee any lawsuit the abusive civil action plaintiff attempts to file during the prefiling restriction period, and specifies the defendant is not required to respond to an abusive civil action plaintiff's attempted motion until the judge reviews it.

1. The Tennessee Law is Narrowly Focused to Protect a Uniquely Vulnerable Group

The Tennessee Abusive Civil Action Law is narrowly tailored to protect a limited, but particularly vulnerable, group of people—those in a current or former marital, cohabitating, dating, sexual, familial, or adoptive relationship¹⁸²—while still preserving court access for more general litigation. By limiting the law's application to people in these specific types of intimate personal relationships¹⁸³ in which there is a unparalleled potential for violence and control that does not generally occur outside of intimate relationships, the Tennessee legislature narrowly constructed this law in order to ensure that these specific parties are protected.¹⁸⁴ In enacting this law, the Tennessee legislature sought to curb abusive litigation in the family law context, primarily in cases involving domestic violence.¹⁸⁵ This is especially apparent in this law's definition of a civil

182. *Id.* § 29–41–101(5)(A)-(F).

183. *Id.*

184. *Item: SB 1601, supra* note 125.

185. *See id.*

action party relationship,¹⁸⁶ which falls in the same category of parties that Tennessee law defines as domestic violence victims.¹⁸⁷

Further, federal and state governments have recognized the uniquely dangerous potential for abuse that domestic violence victims are subjected to through granting them specific remedies—such as orders of protection—that are not available to the general public.¹⁸⁸ The Tennessee Abusive Civil Action Law serves as an additional protection for domestic violence victims from abusers’ attempts to further control, harass, and maliciously injure them. Narrowly tailoring this law to parties in a civil action party relationship is also important because it prevents its application from being extended to other types of civil actions, which addresses a concern raised during the law’s drafting—that extending this law to more general litigation might inadvertently prevent people from accessing the courts.¹⁸⁹

Furthermore, the Tennessee Abusive Civil Action Law specifically requires that, in order for the action to be considered an abusive civil action, it must have been filed with the intent or primary design to “harass or maliciously injure” the defendant.¹⁹⁰ The law specifies seven different circumstances that may meet this requirement in order to accommodate the many different forms abusive litigation may take.¹⁹¹ Additionally, the law recognizes that abusive litigation in the family law context is different from ordinary frivolous civil litigation, due to the plaintiff’s specific intent to harass or financially injure the defendant.

2. The Tennessee Law Imposes Real Consequences on Abusive Civil Action Plaintiffs

Prior to the Tennessee Abusive Civil Action Law, both abusive litigation victims and their attorneys emphasized that, in order to curb abusive litigation effectively, “abusers who manipulate the legal system to control and harass survivors” must face real consequences.¹⁹² Under the Tennessee law, once a court finds that a plaintiff is an abusive civil action plaintiff, it must dismiss the action,

186. TENN. CODE ANN. § 29–41–101(5)(A)-(F) (West 2018).

187. TENN. CODE ANN. § 36–3–601(5)(A)-(F) (West 2019). The primary difference being that the domestic violence victim definition also includes minors; *Id.*

188. *See* 18 U.S.C. § 2262 (2018); *See* 18 U.S.C. § 2265 (2013); *See* ALA. CODE § 13A–6–142 (2019); *See* TENN. CODE ANN. § 36–3–604 (West 2010); *See* MISS. CODE ANN. § 93–21–15 (West 2019).

189. *Id.*

190. TENN. CODE ANN. § 29–41–101(6) (West 2018).

191. *Id.* § 29–41–101(6)(A)-(G).

192. Ward, *supra* note 46, at 459.

tax all costs to the abusive civil action plaintiff, award reasonable attorney fees and all reasonable costs of defending the civil action to the defendant, and implement prefiling restrictions that prevent the plaintiff from filing another abusive civil action for at least four, but not more than six, years.¹⁹³

It is significant that this law mandates awarding the civil action defendant not only attorney's fees, but all reasonable costs associated with defending against the action.¹⁹⁴ This is a major step in recognizing the extreme financial burden that frivolous and meritless abusive litigation places on defendants.¹⁹⁵ This award not only includes legal fees—which are in themselves substantial—but also costs such as loss of career opportunities and jobs, childcare expenses, and other financial burdens related to defending against these lawsuits.¹⁹⁶

The most notable sanction under the Tennessee law, however, is the prefiling restrictions that prevent the abusive civil action plaintiff from filing another such action, against the civil action defendant, for four to six years.¹⁹⁷ This is a novel method of addressing abusive litigation in the domestic violence context because it actually prevents abusive civil action plaintiffs from filing further actions for the purpose of controlling, harassing, and financially breaking survivors.¹⁹⁸ The non-mandatory remedies available in other states—such as verbal admonition or the use of Rule 11—fail to deter repeat offenders because they do not literally prevent filing future suits.¹⁹⁹ Additionally, judges often hesitate to sanction these abusive plaintiffs, which further motivates abusers who repeatedly file abusive lawsuits, because they realize that the courts will not do anything to actually prevent them from filing these lawsuits. The Tennessee legislature met this obstacle by mandating that the abusive civil action plaintiff be sanctioned,²⁰⁰ which imposes real

193. TENN. CODE ANN. § 29-41-106(b)(1)-(3) (West 2018).

194. *Id.* § 29-41-106(b)(2).

195. Ward, *supra* note 46, at 452.

196. *Id.* at 451. Some victims of abusive litigation have had to declare bankruptcy as a result of the costs associated with defending against these continuous lawsuits. *Id.*

197. TENN. CODE ANN. § 29-41-106(b)(1)-(3).

198. Ward, *supra* note 46, at 452, 456.

199. Ward, *supra* note 46, at 452, 456.

200. TENN. CODE ANN. § 29-41-107(f)(2) (West 2018); § 29-41-107(b)(1)-(3). This shift from sanctioning the abusive plaintiff's attorney to focusing the sanctions on the abusive plaintiff allows judges to impose these sanctions without concerns about embarrassing the attorney or impacting the attorney's career. *See Vairo, supra* note 70, at 192.

consequences on abusers that exploit the court system in order to inflict further psychological and financial harms.

The Tennessee Abusive Civil Action Law also creates a process for abusive civil action plaintiffs to request permission from the sanctioning judge to institute a claim against the civil action defendant during the prefiling restrictions period, and addresses the consequences for plaintiffs that ignore this process.²⁰¹ Once a court discovers that an abusive civil action plaintiff has filed a new claim or moved to continue an existing civil action against the civil action defendant without permission, or has used a third party to file a civil action on his behalf,²⁰² it “*shall* dismiss the action or revoke the continuance.”²⁰³ The Tennessee law also provides the sanctioning judge broad authority to sanction the abusive civil action plaintiff for blatantly disregarding the prefiling restrictions and to “take whatever action . . . [is] deemed necessary for a violation of the court’s order.”²⁰⁴ This provision gives “teeth”²⁰⁵ to the Tennessee Abusive Civil Action Law and sends a strong message that courts will not allow abusive civil action plaintiffs to simply ignore the court’s prefiling restrictions order.

The Tennessee law’s provision, giving judges the ability to issue sanctions, is necessary because abusive civil action plaintiffs are classified as such *because* they have a history of abusing the court system. In addition to filing frivolous lawsuits, these plaintiffs often prolong litigation, through violating court orders by failing to respond to witness lists or subpoenas, often with no consequences.²⁰⁶ This provision recognizes abusive civil action plaintiffs’ history of violating court orders and seeks to end this behavior by creating consequences for abusing the judicial system in this manner.²⁰⁷

3. The Tennessee Law Requires the Same Judge to Oversee Any Lawsuit the Abusive Civil Action Plaintiff Attempts to File During the Prefiling Restrictions Period

The Tennessee law requires that—when feasible—the judge who initially found the plaintiff to be an abusive civil action plaintiff evaluate all of the plaintiff’s future attempts to file a lawsuit

201. *Id.* § 29–41–107(f)(2).

202. *Id.*

203. *Id.* (emphasis added).

204. *Id.*

205. Ward, *supra* note 46, at 442.

206. *Id.*

207. *Id.* at 460.

during the prefiling restrictions period.²⁰⁸ Many abusive litigation victim-defendants identify appearing in front of multiple judges who are unfamiliar with their cases' history as a significant barrier to relief because the unfamiliar judges fail to recognize the abuser is utilizing abusive litigation.²⁰⁹ An attorney who represents victims of abusive litigation compares this situation to patients at a doctor's office: just as a doctor knows each patient's treatment history, a judge should be familiar with the history of the victim's case, including the abuser's many attempts to use abusive litigation.²¹⁰ The Tennessee law's answer to this issue is to keep the matter in front of the same judge that imposed the prefiling restrictions.

The Tennessee Abusive Civil Action Law further addresses another tactic of abusers by allowing the judge who oversees the proposed action to ensure that the abusive civil action plaintiff does not later convert the proposed action into an abusive civil action.²¹¹ This occurs when a plaintiff files a non-abusive claim, that survives judicial scrutiny, and then later amends the complaint to add parties, claims, or otherwise alter the issues in a manner that would constitute an abusive civil action.²¹² If the judge reasonably believes that a complaint's subsequent amendments make the action abusive, the judge may order a "continuance or a nonsuit of the action and return [the matter] to the presiding judge."²¹³ By adding this provision, the Tennessee legislature closed another loophole that abusive civil action plaintiffs use to abuse the judicial system.

4. The Tennessee Law Specifies that the Defendant is Not Required to Respond to an Abusive Civil Action Plaintiff's Attempted Motion Until the Judge Reviews it for Merit

The Tennessee law requires that a judge who imposes prefiling restrictions on a plaintiff review the merits of all civil actions that the plaintiff tries to bring during the restriction period.²¹⁴ Once the judge allows the action to move forward, based on the judge's reasonable belief that it is not an abusive action, the victim-defendant is served the complaint with a copy of the judge's order attached to the front.²¹⁵ But until the judge makes this determination that the

208. TENN. CODE ANN. § 29-41-107(c)(1) (West 2018).

209. Ward, *supra* note 46, at 458.

210. *Id.* at 459.

211. TENN. CODE ANN. § 29-41-107(e) (West 2018).

212. *Id.*

213. *Id.*

214. TENN. CODE ANN. § 29-41-107(c)(1) (West 2018).

215. *Id.* § 29-41-107(c)(3)(B).

action is not abusive, the defendant is not required to respond to the complaint.²¹⁶ Furthermore, if the judge's order is not attached to the complaint, or a defendant is not served the complaint, "the defendant is under no obligation or duty to respond to the complaint, answer interrogatories, appear for depositions, or [take] any other responsive action required by rule or statute in a civil action."²¹⁷ This provision will potentially provide abusive litigation defendants significant relief, as they would normally be forced to respond to each action that the abusive plaintiff filed—even if it was filed for an abusive purpose, such as to harass or financially burden the defendant. The Tennessee law saves defendants the psychological stress of continually facing their abusers in court, and the financial burden—including taking time away from work to appear in court and childcare expenses—of responding to these actions.²¹⁸

B. *Proposed Improvements to the Tennessee Abusive Civil Action Law*

1. Addressing a Potential Unintended Consequence

Even when legislators pass laws with a sincere intent to remedy issues prevalent in domestic violence cases, abusers still exploit the law, turning it around on survivors. Unfortunately, "with every attempt to provide a solution, the law creates a tool for misuse."²¹⁹ For example, domestic violence abusers can portray themselves as victims in court, painting a survivor as the actual abuser, or may allege the survivor committed other wrongs that the abuser himself committed.²²⁰ With respect to the Tennessee law, scholars have expressed concern that it puts survivors who take abusers to court for legitimate reasons—such as endangering their child, refusing to pay child support, or failing to comply with other court orders²²¹—at risk of abusers using these valid claims to file lawsuits against them for malicious prosecution or abuse of the legal process.²²²

216. *Id.*; § 29–41–107(f)(3).

217. *Id.* § 29–41–107(f)(3).

218. Ward, *supra* note 46, at 451.

219. Bell, *supra* note 24, at 127.

220. Ward, *supra* note 46, at 435–36. One survivor stated that when the police responded to her domestic violence call, her abuser claimed she was the actual abuser, resulting in her false arrest for domestic violence. *Id.* at 436. Some abusers even injure themselves or wait until the victim acts in self-defense before calling the police and claiming that the victim was the original assailant. Andrea Vollans, *Court-Related Abuse and Harassment* 1, 6 (2010), <http://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf>.

221. Ward, *supra* note 46 at 442; Burke, *supra* note 14.

222. Abusers have used this tactic to win millions of dollars in lawsuits

Thus, the Tennessee law could enable an abuser to allege that valid claims against them are in fact abusive civil actions in an attempt to have the survivor declared an abusive civil action plaintiff.

Although the law does ensure a judicial hearing for abusive civil actions, during which a judge would hopefully see through an abuser's tactics, the Tennessee legislature and states adopting similar laws could close this potential loophole by specifying that the law does not apply to good faith inquiries about a child's welfare.²²³ This would prevent survivors from being declared abusive civil action plaintiffs when bringing charges against an abuser, based on their child's safety or child support.²²⁴ It is also an important to distinguish that this provision would only apply to *good faith* inquiries, ensuring that abusers who purposefully file false reports to Child Protective Services against survivors in bad faith would still be declared abusive civil action.

2. Adding an Eighth Potential Way to Show Intent to "Harass or Maliciously Injure"

The Tennessee Abusive Civil Action Law provides defendants seven ways to show that an abuser-plaintiff, in filing the suit, intended to harass or maliciously injure the defendant²²⁵ by exhausting the defendant's financial resources²²⁶ or interfering with the defendant's pre-suit standard of living.²²⁷ In January 2020, Washington state proposed a law containing many similarities to the Tennessee Abusive Civil Action Law, such as the length of the prefiling restrictions period and the process for an abuser to seek a court's permission to file a motion during that period.²²⁸ Washington's law, however, also contains a provision that defines abusive litigation as litigation that is "primarily for the purpose of harassing, intimidating, or maintaining contact with the other party."²²⁹

In abusive relationships, the abuser's primary motivation is to control the victim. Once the relationship has ended, the court system is often the only means of the contact with the victim available to the abuser and, as such, the only means the abuser has through

against victims. Burke, *supra* note 14.

223. *Id.*

224. *Id.*

225. TENN. CODE ANN. § 29-41-101(6) (West 2018).

226. *Id.* § 29-41-101(6)(A). Unless "punitive damages are requested and appropriate or a change [of the parties'] circumstances provides a good faith basis to seek a change to a financial award, support, or distribution of resources[.]" § 29-41-101(6)(A)(i)-(ii).

227. *Id.* § 29-41-101(6)(F).

228. See S.B. 6268, 66th Leg., Reg. Sess. (Wash. 2020).

229. *Id.* (emphasis added).

which to continue controlling that person.²³⁰ Consequently, the Washington statute's language, regarding maintaining contact, will potentially curb abusive litigation filed for the purpose of maintaining contact with and controlling the victim. Therefore, Tennessee and states adopting similar laws should add a provision that would allow the abusive plaintiff's intent to "harass or maliciously injure" to be proven through finding that the civil action was "filed with the intent or was primarily designed to" maintain contact with the other party. Adding this eighth way to show that a plaintiff, in filing the suit, intended to harass or maliciously injure the victim-defendant²³¹ would strengthen the Tennessee Abusive Civil Action law and make it even more effective in curbing abusive litigation.

C. *Implementing Abusive Litigation in Judicial Domestic Violence Training*

Another significant step to curbing abusive litigation would be to incorporate abusive litigation into judicial training on domestic violence. Many people and potential jurors have preconceived notions regarding domestic-violence-related matters, such as how a domestic violence survivor is likely to act in court and why a survivor could not simply leave an abusive partner.²³² However, these misconceptions are often not based on fact, especially because people react differently to trauma.²³³ Additionally, many abusers put on a facade in court, presenting themselves as charming, kind, family men²³⁴ or even as the true victim.²³⁵ One scholar explained:

The abuser is likely to be confident, assertive, calm and "in control." He puts on a good appearance in court. Conversely, the victim is likely to be frightened, shaken, nervous, uncertain[,] and often depressed. Knowing that the abuser has successfully managed to manipulate others to maintain control, the victim realistically fears the abuser can also manipulate the legal system; consequently, the victim may appear paranoid when she is merely fearful that the abuser will again be successful in the manipulation of those around him.²³⁶

230. See Ward, *supra* note 46, at 454.

231. TENN. CODE ANN. § 29-41-101(6) (West 2018).

232. See White, *supra* note 20, at 721-23.

233. Ed Finkel, *The Traumatized Client*, 108 ILL. B.J. 24, 25 (2020).

234. Ward, *supra* note 46, at 437.

235. *Id.* at 435-36.

236. Elizabeth Lehmann, *One Family, One Judge, Ten Lawyers: The Need for Attorney Training in the New York Integrated Domestic Violence Courts*, 69 SYRACUSE L. REV. 635, 653 (2019) (citing Nancy S. Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 FORDHAM URB. L.J. 817, 832 (2000) (internal footnote omitted)). Domestic violence survivors sometimes recant their testimony or minimize their abuse on the stand as a

Such perceptions of survivors are not limited to potential jury members. Judges also bring their own preconceived notions of how survivors and perpetrators will act.²³⁷ As a result, it is necessary for judges to be trained on the dynamics of domestic violence—such as the impact domestic violence has on survivors and their children, abusive litigation,²³⁸ victim recanting,²³⁹ and the myths of false reporting²⁴⁰—in order to prevent these misconceptions from resulting in rulings adverse to survivors.²⁴¹ Such training is also crucial because it helps judges “identify common abusive litigation tactics, the impact on survivors, and the steps [judges] can take to restrain abusive litigation while upholding constitutional rights of access to the courts[.]”²⁴² Although this judicial training on domestic abuse²⁴³ has been implemented across the country and many states now have mandatory judicial training on these issues,²⁴⁴ as of 2014, not every state requires judicial training on domestic violence.²⁴⁵

result of trauma. See Cynthia Lynn Barnes, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R. 5th 315 (1998).

237. See generally Marla N. Greenstein, *Can a Judge Be Impartial and Passionate in Domestic Violence Matters*, AMERICAN BAR ASSOCIATION, (Apr. 1, 2014), https://www.americanbar.org/groups/judicial/publications/judges_journal/2014/spring/can_a_judge_be_impartial_and_passionate_in_domestic_violence_matters [<https://perma.cc/AL5W-CWFU>].

238. Ward, *supra* note 46, at 462–63.

239. Peter Jaffe, *Enhancing Judicial Skills in Domestic Violence Cases: A Process and Outcome Evaluation of a National Judicial Education Program*, CENTRE FOR RESEARCH AND EDUCATION ON VIOLENCE AGAINST WOMEN AND CHILDREN, <https://www.futureswithoutviolence.org/wp-content/uploads/ejs-report-nov-12.pdf>, <https://perma.cc/7DNG-SKHA>], 8, (2010).

240. This is based on the presumption that “victims will false[ly] report to gain leverage in custody proceedings.” Ward, *supra* note 46, at 462.

241. Erickson, *supra* note 236, at 832.

242. Ward, *supra* note 46, at 463.

243. The movement to establish judicial training on the complexities of domestic abuse has emerged over the past twenty years. See *About Us*, NATIONAL JUDICIAL INSTITUTE ON DOMESTIC VIOLENCE, <https://njidv.org/about-us.html> [<https://perma.cc/BC86-MMEG>], (accessed Sept. 21, 2020); see also *Judicial Education*, FUTURES WITHOUT VIOLENCE, <https://www.futureswithoutviolence.org/judicial-education> [<https://perma.cc/V5T2-TC32>], (accessed Sept. 21, 2020).

244. See CAL. GOV'T CODE § 68555 (West 2019); See Mass. Gen. Laws Ann. ch. 211B, § 9B (West 2015); See W. VA. CODE ANN. § 48–27–1104 (2001); *Mandatory Domestic Violence Training for Judges*, Resource Center on Domestic Violence: Child Protection and Custody, a project of the Family Violence and Domestic Relations Program (FVDR) of the National Council of Juvenile and Family Court Judges (NCJFCJ), <https://www.rcdvpc.org/resources/resource-library/resource/mandatory-dv-training-for-judges.html>, (last updated Dec. 31, 2014).

245. *Mandatory Domestic Violence Training for Judges*, *supra* note 244.

Therefore, every state should require judicial training on domestic violence, especially for judges in specialized family and domestic violence courts who regularly hear cases involving domestic abuse. Additionally, this training should include education on abusive litigation because it is such a prevalent, yet specific, area of domestic abuse.²⁴⁶ The Tennessee Abusive Civil Action Law, in particular, highlights the importance of judicial awareness of abusive litigation through a provision that allows courts, on their own motion, to hold a hearing to determine whether an action brought against a defendant is an abusive civil action.²⁴⁷ If judges are trained to recognize abusive litigation, they will be able to use their authority to intervene in such cases—even if defendants and their attorneys are unaware of this law—and prevent plaintiffs from filing further abusive civil actions in their cases. If each state adopted a law similar to the Tennessee Abusive Civil Action Law, as well as incorporated education on abusive litigation into judicial domestic violence training, it would be a significant step towards preventing an abuser from using abusive litigation to further financially and psychologically abuse a former partner.

CONCLUSION

Abusive litigation, or stalking by way of the courts, is best understood as a form of financial and psychological abuse in which an abuser utilizes the court system in an effort to continue controlling a former romantic partner.²⁴⁸ An abuser's use of abusive litigation against the survivor often continues even after the parties' relationship has ended, especially in cases where the court system has become the abuser's only remaining means of contact,²⁴⁹ and can cost survivors thousands of dollars in legal fees to defend against these claims.²⁵⁰ Although courts currently have means to address abusive litigation, judges are often hesitant to impose even financial sanctions on abusers, let alone pre-filing restrictions, to effectively curb abusive litigation.²⁵¹ Abusers often see the courts' reluctance to stop these frivolous filings and believe this means that

Some states do not have mandatory judicial training on domestic violence matters, some only require that the training be offered, and some only require the training for judges working in specialized courts. *Id.*

246. Ward, *supra* note 46, at 463.

247. TENN. CODE ANN. § 29-41-103(b) (West 2018).

248. Vollans, *supra* note 220, at 20.

249. Ward, *supra* note 46, at 453-54.

250. *Id.* at 454, 456.

251. Przekop, *supra* note 34, at 1089.

they can get away with it,²⁵² which further encourages abusers to continue this prolonged harassment.²⁵³

The Tennessee legislature recognized this problem, saw that current remedies were not enough to curb abusive litigants, and passed the Tennessee Abusive Civil Action Law to combat abusive civil actions. Tennessee and future states enacting similar laws should go further by adding a provision excluding good faith inquiries about a child's welfare, as well as adding an eighth way for a survivor to show an abuser's intent to "harass or maliciously injure:" if the action was "filed with the intent or . . . primarily designed to" maintain contact with the other party.²⁵⁴ Moreover, judicial training on domestic violence issues should also include abusive litigation to enable judges to recognize abusive litigation and use their authority to intervene in these cases. The Tennessee law takes a significant step in curbing abusive litigation in cases involving domestic violence, and the other forty-nine states and Washington D.C. should adopt similar laws²⁵⁵ that include targeted remedies to prevent abusers from using the court system as a weapon.²⁵⁶

252. Vollans, *supra* note 220 at 20.

253. *Id.*

254. On January 14, 2020, Senate Bill 6268 was introduced in the Washington State Senate. Through this bill, the sponsors seek to provide a specific remedy to curb abusive litigation arising from a domestic abuser's misuse of the court system to control a domestic violence survivor. This bill contains many similarities to its Tennessee predecessor, such as the length of the prefiling restrictions period and the process for an abuser to seek the court's permission to file a motion during the prefiling restrictions period. *See* S.B. 6268, 66th Leg., Reg. Sess. (Wash. 2020). There are, however, several notable differences, such as the additional specification that the allegedly abusive litigation is "primarily for the purpose of harassing, intimidating, or *maintaining contact with the other party*["] the requirement that the party instigating the abusive litigation must have "been found by a court to have committed domestic violence against the other party["] and an additional section related to a permanent parenting plan. Wash. S.B. 6268 § 2 (1)(b); Wash. S.B. 6268 § 2 (1)(c) (emphasis added); Wash. S.B. 6268 § 7 (1)-(7).

255. If Senate Bill 6268 is enacted, Washington will become the second state to adopt a specific law to curb abusive litigation and it will be a significant step in ensuring that every state's law contains a provision designed to stop abusive litigation.

256. *Item: SB 1601, supra* note 125.