

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 8, 2022 Session

**FILED**  
01/10/2023  
Clerk of the  
Appellate Courts

**MONSIEUR SHAWNELLIAS BURGESS v. BRADFORD HILLS HOA ET  
AL.**

**Appeal from the Circuit Court for Davidson County  
No. 20C1835 Joseph P. Binkley, Jr., Judge**

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**No. M2020-01565-COA-R3-CV**

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A homeowner sued his homeowners' association in general sessions court. Upon motion of the homeowner's association, the case was removed to circuit court. After the case was removed to circuit court, the homeowner amended his complaint to add an attorney for the homeowner's association as a defendant. The homeowner's association and the attorney sought to dismiss the amended complaint. The circuit court granted the motions to dismiss but allowed to the homeowner to file a second amended complaint against the attorney in order to state a claim for negligent misrepresentation. Ultimately, the circuit court granted the attorney a judgment on the pleadings after concluding that the second amended complaint failed to allege facts satisfying all of the elements of a claim for negligent misrepresentation. The homeowner appealed. Discerning that the circuit court erred in granting the homeowner's association's motion to dismiss, we vacate that portion of the court's judgment and remand for further proceedings. We affirm the circuit court's judgment in all other respects.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and JEFFREY USMAN, JJ., joined.

Monsieur Shawnellias Burgess, Nashville, Tennessee, pro se.

Christopher Brice Fowler, Benjamin E. Goldammer, R. Dale Bay, and Brad W. Craig, Nashville, Tennessee, for the appellees, Bradford Hills HOA and Lynn Hills Burka.

Dayne Paul Geyer and Austin Tyler Warehime, Nashville, Tennessee, for the appellee, Scott D. Weiss.

## OPINION

### FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves a dispute between a residential homeowners' association and the owner of a lot in the subdivision. In 2010, Monsieur Shawnellias Burgess purchased Lot 231 in the Bradford Hills subdivision. Since that time, Mr. Burgess has kept Rottweilers on the property and has placed signs outside of his home warning that the dogs are "guard dogs." He has also placed noise-making devices and lights on the property.

Lot 231 is encumbered by the Declaration of Covenants, Conditions and Restrictions for Bradford Hills of record with the Register's Office for Davidson County in Record Book 8069, page 170 ("CCRs"). The CCRs provide that all of the properties in the subdivision are subject to several restrictions, including the following: (1) "[n]o noxious or offensive activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood," (2) homeowners shall avoid making or permitting "objectionable noises" or using "devices in such a manner as may disturb or tend to disturb" other lot owners, and (3) homeowners are prohibited from placing signs on their properties "except one (1) sign of not more than five (5) square feet advertising the property for sale or rent."

Timmons Property Inc. ("Timmons") manages the Bradford Hills Homeowners' Association ("HOA"). In May 2020, a Timmons employee, Lynn Burka, began sending Mr. Burgess notices informing him that the signs, noise-making devices, and lights on his property violated the above-mentioned restrictions in the CCRs. He responded to the notices and adamantly insisted that he was not violating the CCRs because he had never received a citation from the city for a nuisance violation due to the noise-making devices or lights and because the signs on his property were required by the Code of the Metropolitan Government of Nashville and Davidson County "(Metro Code)" § 8.08.020, which states, in relevant part:

It is unlawful for any person to place or maintain guard dogs in any area of the metropolitan government for the protection of persons or property unless the following provisions are met:

- A. The guard dog shall be confined; or
- B. The guard dog shall be under the absolute control of a handler at all times when not confined by way of lead or leash.
- C. The owner or other persons in control of the premises upon which a guard dog is maintained shall post warning signs stating that such a dog is on the premises. At least one such sign shall be posted at each driveway or entranceway to said premises. Such signs shall be in lettering clearly visible from either the curb line or a distance of fifty feet, whichever is less . . . .

Metro Code § 8.08.020. Furthermore, because he posted his signs to comply with this ordinance, Mr. Burgess insisted that he was, in fact, complying with the CCRs' restriction requiring homeowners with pets to comply with "[a]ll local laws, ordinances and/or regulations."

When the HOA and Ms. Burka disregarded his various responses to the notices, Mr. Burgess initiated this lawsuit in the General Sessions Court for Davidson County. In the civil warrant filed with the general sessions court, Mr. Burgess alleged that the HOA and Ms. Burka violated the CCRs by assessing him fines for the signs and nuisance issues in the amount of \$100. He requested that the court issue an "injunction from fines and court costs." Nine days after Mr. Burgess filed the civil warrant, he received a letter from Scott Weiss, an attorney for the HOA, titled "Violation Notice (4th)." In this letter, Mr. Weiss reiterated that the HOA believed the conditions on Mr. Burgess's property violated the CCRs and warned that the HOA would take legal action if he continued not to comply with the rules. Soon thereafter, Chris Fowler, another attorney for the HOA as well as Ms. Burka, filed a motion to remove the case to the Circuit Court for Davidson County on the basis that removal would "avoid duplicative and unnecessary litigation" because the defendants had "compulsory counterclaims for (1) an injunction and (2) declaratory judgment to determine the rights, status, and legal relations of the parties." The general sessions court granted the motion, and the case was removed to the circuit court on August 18, 2020.

On August 31, 2020, Mr. Burgess filed a motion requesting the court's permission to file an amended complaint pursuant to Tenn. R. Civ. P. 15.01. He attached to his motion a copy of the amended complaint and, on September 18, 2020, the circuit court entered an order granting the motion to amend the complaint. In the amended complaint, Mr. Burgess again claimed that the HOA and Ms. Burka violated the CCRs by fining him for the above-mentioned conditions on his property, and he added Mr. Weiss as a defendant. Mr. Burgess alleged several claims against Mr. Weiss, including that he breached a contract, that he was complicit in the HOA's and Ms. Burka's actions, and that his communications to the HOA constituted legal malpractice. Mr. Burgess also alleged in the amended complaint that the court should assess sanctions against Mr. Fowler under Tenn. R. Civ. P. 11 because the motion to remove the case to the circuit court was not supported by any legal basis. Thus, Mr. Burgess asserted, Mr. Fowler filed the motion "as a delay tactic."

On September 22, 2020, Mr. Burgess filed a motion for default judgment against the HOA and Ms. Burka asserting that he was entitled to default judgment because they failed to file an answer to the amended complaint within fifteen days of being served with it on August 31. One week later, on September 29, 2020, Mr. Burgess again filed his amended complaint—this time as a standalone document. That same day, he also filed a motion reiterating his request that the court sanction Mr. Fowler under Rule 11 for filing the motion to remove the case to the circuit court. On October 7, 2020, Mr. Burgess filed a motion for default judgment against Mr. Weiss asserting that Mr. Weiss failed to file an

answer to the amended complaint within thirty days. Mr. Weiss responded to Mr. Burgess's motion by filing a motion to dismiss on October 13, 2020. The HOA and Ms. Burka also responded by filing a motion to dismiss on October 14, 2020.

The circuit court heard all of these motions on November 6, 2020, and entered separate orders for each motion on December 3, 2020. The court denied both of Mr. Burgess's motions for default judgment based on its finding that the amended complaint did not become operative until Mr. Burgess filed it as a standalone document on September 29 and that all of the defendants filed their motions "well within 30 days of the standalone plaintiff's amended complaint." The circuit court then granted Mr. Weiss's motion to dismiss the amended complaint as to him because the court found that: (1) Mr. Burgess failed to state a claim for breach of contract "as there are no allegations in the Amended Complaint that there was a contract between Mr. Burgess and Mr. Weiss" and (2) Mr. Burgess failed to state a claim for legal malpractice "because there was no attorney-client relationship between Mr. Burgess and Mr. Weiss." The court also granted the HOA's and Ms. Burka's motion to dismiss the amended complaint as to them based on the court's determination that the cause of action Mr. Burgess asserted was "that Bradford Hills HOA and Lynn Burka do not have the power to illegally assess fines. Therefore, since the Bradford Hills HOA is a non-profit corporation, the Tennessee Non-profit Corporation Act" controls. As a result, the court concluded that "the gravamen of Mr. Burgess's amended complaint against the HOA and Ms. Burka was a derivative action" and that the amended complaint failed to state a derivative cause of action. Lastly, the circuit court denied Mr. Burgess's motion for Rule 11 sanctions against Mr. Fowler because Mr. Burgess failed to give Mr. Fowler adequate notice before requesting the sanctions.

During the November 6 hearing, Mr. Burgess made an oral motion requesting permission to file a second amended complaint to add a new claim against Mr. Weiss for negligent misrepresentation based on the statements Mr. Weiss made in the letter titled "Violation Notice (4th)." The court granted the motion, and Mr. Burgess filed the second amended complaint on January 29, 2021. When Mr. Weiss failed to respond to the second amended complaint within fifteen days, Mr. Burgess filed a motion for default judgment on February 17, 2021.<sup>1</sup> Mr. Weiss filed a response to the motion for default judgment acknowledging that he failed to file a timely response but arguing that default judgment was not appropriate due to excusable neglect. Specifically, Mr. Weiss argued that his attorney "lost track of some deadlines" after the death of a family member.

In making his excusable neglect argument, Mr. Weiss relied on Tenn. Rs. Civ. P. 55.02, 59.04, and 60.02 for setting aside a default judgment. The circuit court determined

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<sup>1</sup> Mr. Weiss was served with the second amended complaint on January 29, 2021. Fifteen days from that date was Saturday, February 13, 2021. Because February 14 was a Sunday and February 15 was President's Day, the operative deadline for Mr. Weiss to file a response was Tuesday, February 16, 2021.

that, because a default judgment had not been entered, the appropriate analysis was whether an enlargement of time to file a response should be granted under Tenn. R. Civ. P. 6.02, which also considers whether excusable neglect exists.<sup>2</sup> The court concluded that Mr. Weiss demonstrated excusable neglect and found that any prejudice to Mr. Burgess was “minimal” because, although a “delay of a matter of weeks” may be inconvenient for Mr. Burgess, granting an extension of time would not affect Mr. Burgess’s ability to prosecute the case. Thus, the court denied the motion for default judgment and extended the deadline for Mr. Weiss to file a response to “no later than Monday, March 22, 2021.”

Within the extension of time allowed by the court, Mr. Weiss responded to the second amended complaint by filing a motion to dismiss for failure to state a claim. The circuit court denied the motion to dismiss on April 21, 2021, finding that Mr. Weiss failed to state with particularity the grounds for dismissal. Mr. Weiss then filed an answer to the second amended complaint on May 3, 2021. While the motion to dismiss was still pending, Mr. Burgess filed a motion requesting permission to amend his complaint a third time to add the trial judge as a defendant and “to add the Constitutional Claim for a fair trial.” The court denied the motion.

On May 21, 2021, Mr. Weiss filed a motion for judgment on the pleadings. The court granted the motion because, after considering all of the relevant caselaw pertaining to negligent misrepresentation, the court concluded that the second amended complaint failed to allege facts satisfying all of the required elements for establishing such a claim.

Mr. Burgess timely appealed and presents several issues for our review which we consolidate and restate as follows: (1) whether the circuit court erred in granting the HOA’s and Ms. Burka’s motion to dismiss, (2) whether the circuit court abused its discretion in denying the motion for Rule 11 sanctions against Mr. Fowler, and (3) whether the circuit court erred in granting Mr. Weiss’s motion for judgment on the pleadings.

#### STANDARD OF REVIEW

The issues raised by Mr. Burgess require us to consider both a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings. Motions to dismiss filed pursuant to Tenn. R. Civ. P. 12.02(6) challenge “only the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence.” *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). If a defendant files a motion for judgment on the pleadings pursuant to Tenn. R. Civ. P. 12.03, the motion “is in effect a motion to dismiss for failure to state a claim upon which relief can be granted.”

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<sup>2</sup> Pursuant to Tenn. R. Civ. P. 6.02, if a party misses a deadline to respond and then requests an enlargement of time to respond, “the party requesting the enlargement must demonstrate that its failure to meet the deadline was due to excusable neglect and that the opposing party has not been prejudiced by the delay.” *Kenyon v. Handal*, 122 S.W.3d 743, 756 (Tenn. Ct. App. 2003).

*Sakaan v. Fedex Corp., Inc.*, No. W2016-00648-COA-R3-CV, 2016 WL 7396050, at \*6 (Tenn. Ct. App. Dec. 21, 2016) (quoting *Timmins v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009)). Therefore, a motion for judgment on the pleadings also challenges the legal sufficiency of the complaint. *Id.* A defendant filing a motion either to dismiss or for judgment on the pleadings ““admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.”” *Webb*, 346 S.W.3d at 426 (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010)); *see also Sakaan*, 2016 WL 7396050, at \*6 (citing *Timmins*, 310 S.W.3d at 838). A court resolves motions filed pursuant to either Rule 12.02(6) or Rule 12.03 “by examining the pleadings alone.” *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824 (Tenn. 2015); *Sakaan*, 2016 WL 7396050, at \*5.

When determining whether a complaint should be dismissed for failure to state a claim under either Rule 12.02(6) or Rule 12.03, the court ““must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.”” *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (quoting *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)); *Chill v. Tenn. Farmers Mut. Ins. Co.*, No. E2012-01675-COA-R3-CV, 2013 WL 3964272, at \*1-2 (Tenn. Ct. App. July 31, 2013) (quoting *Frankenberg v. River City Resort, Inc.*, No. E2012-01106-COA-R3-CV, 2013 WL 1952980, at \*2 (Tenn. Ct. App. Apr. 11, 2013)). The court should grant a motion to dismiss or a motion for judgment on the pleadings if it appears that the plaintiff cannot prove any set of facts in support of the claim entitling him or her to relief. *Webb*, 346 S.W.3d at 426; *Frankenberg*, 2013 WL 1952980, at \*2. A trial court’s decision regarding the adequacy of a complaint involves a question of law which we review de novo with no presumption of correctness. *Myers v. AMISUB(SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012); *Stewart v. Schofield*, 368 S.W.3d 457, 462-63 (Tenn. 2012).

#### ANALYSIS

As a preliminary matter, we note that Mr. Burgess is a pro se litigant. This Court has stated the following principles about pro se litigants:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant’s adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

*Young v. Barrow*, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (citations omitted); *see also Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct App. 2003). Additionally, we allow

pro se litigants some latitude in preparing their briefs and endeavor to “give effect to the substance, rather than the form or terminology,” of their court filings. *Young*, 130 S.W.3d at 63.

## I. Motion to Dismiss

Mr. Burgess’s argument that the circuit court erred in granting the HOA’s and Ms. Burka’s motion to dismiss the amended complaint can be divided into three theories: (1) that the circuit court lacked subject matter jurisdiction over his claim due to the improper removal of the case from the general sessions court, (2) that the circuit court should have granted his motions for default judgment, and (3) that the circuit court erred in concluding that his claim was for a derivative action. We address each in turn.

### A. Subject Matter Jurisdiction

The Tennessee Supreme Court has previously explained subject matter jurisdiction as follows:

The concept of subject matter jurisdiction involves a court’s lawful authority to adjudicate a controversy brought before it. *See Meighan v. U.S. Sprint Commc’ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Standard Sur. & Cas. Co. v. Sloan*, 173 S.W.2d 436, 440 (Tenn. 1943). Subject matter jurisdiction involves the nature of the cause of action and the relief sought, *see Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994), and can only be conferred on a court by constitutional or legislative act. *See Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989). Since a determination of whether subject matter jurisdiction exists is a question of law, our standard of review is de novo, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

*Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *see also Johnson v. Memphis Guitar Spa, LLC*, 600 S.W.3d 348, 350 (Tenn. Ct. App. 2019).

Mr. Burgess adamantly contends that the circuit court did not have subject matter jurisdiction over the case because the HOA and Ms. Burka lacked any legal justification for removing the case from the general sessions court. The Tennessee General Assembly has provided defendants with the following procedure for the removal of actions filed in general sessions courts:

(a) At any time at least three (3) or more business days prior to the scheduled trial date of a civil action commenced in general sessions court, any defendant in the action may apply to have the action and all the papers of the

action removed to a court having jurisdiction of appeals from courts of general sessions. A case properly removed pursuant to this section shall be tried by the appellate court in the same manner as appeals from general sessions court civil actions are currently tried, except there shall be no default or other judgment entered at the general sessions level, and except that a case removed pursuant to this section shall not be subject to any monetary jurisdictional limit that would have applied in the general sessions court if the case had not been removed.

(b) Any defendant seeking to remove an action pursuant to subsection (a) shall file with the application an affidavit stating that the defendant has a substantial defense to the action and/or that the defendant's defense will be of such a complex or expensive nature that the interests of justice require that the defendant not be required to present the defense at the general sessions level. The affidavit shall state the grounds of the defense and why the affiant believes it to be sufficiently substantial, complex or expensive to merit the removal of the case. The affidavit and application shall also be accompanied by a cost bond sufficient to defray all costs that have accrued prior to the time the application for removal is made.

Tenn. Code Ann. § 16-15-732.

In the present case, the HOA complied with these statutory requirements. It filed a motion for removal with the affidavit of Mr. Fowler stating that the HOA sought removal because:

5. [The] HOA has a substantial defense to this action, which will be of such a complex and expensive nature (and amount) that the interests of justice require that the HOA not be required to present the defense at the general sessions court level. The grounds of the defense and the reasons why I believe it to be sufficiently substantial, complex, and expensive to merit the removal of the care are set forth below:

6. In addition, [the] HOA has compulsory counterclaims which include causes of action for (1) injunctive relief, and (2) declaratory judgment to determine the rights, status, and legal relations of the parties.

The HOA also executed a cost bond sufficient to defray all costs that had accrued prior to the filing of the removal motion.

Although Mr. Fowler's affidavit does not go into great detail about the HOA's defenses, it provides sufficient information to support removal of the case to the circuit court. Specifically, Mr. Fowler stated that the HOA has a compulsory counterclaim for declaratory judgment. Tennessee's Declaratory Judgment Act expressly provides "[c]ourts of record within their respective jurisdictions have the power to declare rights, status, and



other legal relations whether or not further relief is or could be claimed.” Tenn. Code Ann. § 29-14-102(a). We have held that, because the statutes establishing the general sessions court, Tenn. Code Ann. §§ 16-15-101 to -103, “do[] not provide for the keeping of records for proceedings, . . . it has become well-accepted in Tennessee that general sessions courts are not courts of record.” *Baxter Bailey Invs. LLC v. APL Ltd. Inc.*, No. W2015-00067-COA-R3-CV, 2015 WL 5560563, at \*7 (Tenn. Ct. App. Sept. 21, 2015); *see also Weaver v. Cromer*, 392 S.W.2d 835, 836-37 (Tenn. 1965); *Spencer v. Dixie Fin. Co.*, 327 S.W.2d 301, 302-03 (Tenn. 1959). In other words, this case needed to be removed to the circuit court because the general sessions court lacked authority to adjudicate a declaratory judgment claim because it was not a court of record. Therefore, contrary to Mr. Burgess’s assertions, the HOA provided a legal basis for removing the case to the circuit court.

We discern that Mr. Burgess’s argument on this issue stems from the fact that the HOA and Ms. Burka never expressly set forth a claim for declaratory judgment in an answer to the amended complaint. The HOA and Ms. Burka chose, however, to file a motion to dismiss the amended complaint before filing an answer, and the court granted the motion to dismiss. As a result, the HOA and Ms. Burka were not required to file an answer setting forth their claim for a declaratory judgment. *See* TENN. R. CIV. P. 12.01 (stating that service of a motion to dismiss alters the 30-day period of time for filing an answer as follows, “unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition . . . , the responsive pleading shall be served within 15 days after notice of the court’s action”).

In light of the foregoing principles, we conclude that the circuit court had subject matter jurisdiction to hear the matter.

## B. Default Judgment

Mr. Burgess next contends that he was entitled to a default judgment against the HOA and Ms. Burka because they failed to file their motion to dismiss within fifteen days of being served with the amended complaint. On August 31, 2020, after the case was removed to the circuit court, Mr. Burgess filed a motion requesting the court’s permission to file an amended complaint, and he attached to his motion a copy of the proposed amended complaint. The parties do not dispute that the HOA and Ms. Burka were served the motion and proposed amended complaint that day, nor do they dispute that the HOA and Ms. Burka had fifteen days to file a responsive pleading once the amended complaint became operative. *See* TENN. R. CIV. P. 15.01 (“A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 15 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.”). Their dispute pertains to the date the amended complaint became operative triggering the fifteen-day time period to respond.

Because no responsive pleading had been filed when Mr. Burgess filed his motion to amend, he points out that Tenn. R. Civ. P. 15.01 allowed him to amend his complaint “once as a matter of course at any time before a responsive pleading is served.” Thus, he argues, the amended complaint became operative when the HOA and Ms. Burka were served with it on August 31. However, Mr. Burgess did not simply file his amended complaint. He filed a motion requesting the court’s permission to file an amended complaint and, therefore, made it an issue for the court to rule upon. Therefore, as the HOA and Ms. Burka assert, the amended complaint was not operative on August 31 because the court had not yet issued a ruling on Mr. Burgess’s motion.

Seeming to acknowledge the foregoing, Mr. Burgess presents the alternative argument that the amended complaint became operative when the circuit court entered an order granting his motion to amend the complaint on September 18, 2020. The HOA and Ms. Burka contend that the amended complaint did not become operative at that point either, but rather, it became operative when Mr. Burgess filed the amended complaint as a standalone document on September 29. Therefore, they argue, the deadline for filing a responsive pleading was October 14—the date they filed their motion to dismiss. The circuit court agreed with the HOA and Ms. Burka and denied Mr. Burgess’s motion for default judgment.

Mr. Burgess argues that the circuit court should not have considered September 29 as the operative date because there is no state or local rule requiring that the amended complaint be filed as a standalone document. At oral argument, we asked Mr. Fowler if there was a state or local rule requiring that the amended complaint be filed as a standalone document. He responded that he did not believe there was but that it was the circuit court’s customary practice. Indeed, this Court found three applicable rules and none of them require that the amended complaint be filed as a standalone document. For instance, if a party moves for permission to amend a pleading, Tenn. 20th J. Dist. R. § 26.04(c) requires that the party “attach a copy of the proposed amended pleading to the motion so that it becomes part of the record.” After filing the motion and proposed amendment, Tenn. R. Civ. P. 5.01 requires service of “every pleading subsequent to the complaint.” After being served, Tenn. R. Civ. P. 15.01 provides that a responsive pleading must be filed within fifteen days. Despite lacking the assistance of counsel, Mr. Burgess complied with each of these state and local rules in filing his motion to amend the complaint and the proposed amended complaint.<sup>3</sup> The HOA’s and Ms. Burka’s, as well as the circuit court’s, insistence

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<sup>3</sup> Tennessee Rule of Civil Procedure 5.01 provides:

Unless the Court otherwise orders, every order required by its terms to be served; every pleading subsequent to the original complaint; every paper relating to discovery required to be served on a party; every amendment; every written motion other than one which may be heard *ex parte*; and, every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each of the parties, but no service need be made on parties adjudged in default for failure to appear, except that

that the amended complaint was not operative until he completed the basically ministerial task of refileing the amended complaint as a standalone document on September 29 is not well taken. We conclude that the amended complaint became operative when the circuit court granted Mr. Burgess's motion to amend on September 18.

Although the HOA and Ms. Burka failed to file their motion to dismiss within fifteen days of the amended complaint becoming operative, Mr. Burgess goes a little too far in arguing that he was entitled to a default judgment. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default *may* be entered[.]" TENN. R. CIV. P. 55.01 (emphasis added). We have interpreted Rule 55.01 to mean "that entry of default is permissive rather than mandatory." *Parks v. Mid-Atlantic Fin. Co., Inc.*, 343 S.W.3d 792, 798 (Tenn. Ct. App. 2011). Thus, we review a court's decision to grant or deny a motion for default judgment for an abuse of discretion. *Id.* (citing *Patterson v. SunTrust Bank*, 328 S.W.3d 505, 509-10 (Tenn. Ct. App. 2010); *Pasche Indus. v. Wallace Hardware Co.*, No. E2003-01483-COA-R3-CV, 2003 WL 22668854, at \*2 (Tenn. Ct. App. Nov. 12, 2003)). As we have previously explained,

Implicit in this standard of review is the underlying proposition that the trial court has discretion to excuse an insignificant delay beyond the normal 30 days specified in Tenn. R. Civ. P. 12.01 for filing an answer. It is also clear that a trial court should exercise its discretion in favor of allowing a case to be heard on its merits.

*Id.* (citing *Patterson*, 328 S.W.3d at 509-10).

In making its decision not to grant default judgment to Mr. Burgess, the circuit court referred to the above-discussed principles and found that, even if the motion to dismiss was deemed untimely, default judgment was not appropriate because the case should be heard on its merits. Unquestionably, the circuit court acted within its discretion in denying Mr. Burgess's motion for default judgment.

### C. Derivative Action

Mr. Burgess also contends that the circuit court erred in granting the HOA's and Ms. Burka's motion to dismiss because it incorrectly concluded that the gravamen of the amended complaint challenged the authority of the HOA to enforce the CCRs against residents of the subdivision. The circuit court concluded that Mr. Burgess's amended complaint challenged the HOA's authority to enforce the CCRs against him because,

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pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons, or for constructive service, in Rules 4, 4A, or 4B.

throughout the amended complaint, he claimed that the HOA “illegally” assessed fines against him and, as a nonprofit corporation, the HOA’s authority could be challenged only by bringing a derivative action, which Mr. Burgess failed to do. Thus, the court determined that the amended complaint should be dismissed pursuant to Tenn. R. Civ. P. 12.02(6).

The circuit court based its decision on this Court’s holding in *Royalton Woods Homeowner Association v. Soholt*, No. M2018-00596-COA-R3-CV, 2019 WL 366525, at \*7 (Tenn. Ct. App. Jan. 29, 2019). Like the case at bar, *Royalton Woods* involved a dispute between the Royalton Woods HOA and the Sohols, owners of property in the subdivision. *Royalton Woods Homeowner Ass’n*, 2019 WL 366525, at \*1. In 2015, the board of directors for the Royalton Woods HOA informed the Sohols that they owed assessments to the HOA. *Id.* at \*2. The Sohols claimed they owed no assessments to the HOA because they were not members of the HOA and because their property was not subject to the Royalton Woods CCRs. *Id.* The HOA then filed a complaint against the Sohols that sought enforcement of the CCRs and alleged that the Sohols had committed several violations of the CCRs, including altering the exterior of their property without approval from the HOA and failing to pay assessments to the HOA. *Id.* The Sohols responded by reasserting their claim that their property was not encumbered by the CCRs. *Id.* The trial court granted summary judgment to the HOA after finding that the Sohols’ deed specifically stated that their property was bound by the CCRs and that the Sohols violated the CCRs. *Id.* at \*3.

On appeal, the *Royalton Woods* court affirmed the trial court’s decision to grant summary judgment but relied on different grounds for reaching its decision. *Id.* at \*7. Because the HOA was a non-profit corporation, the court began its analysis of the issue by consulting the Tennessee Nonprofit Corporation Act located in Tenn. Code Ann. § 48-51-101 to § 48-68-211. The court stated:

Relevant here, Tennessee Code Annotated § 48-53-104 states:

- (a) Except as provided in subsection (b), the validity of corporate action *may not be challenged on the ground that the corporation lacks or lacked the power to act.*
- (b) A corporation’s power to act may be challenged in a proceeding against the corporation to enjoin an act . . . . The proceedings may be brought by the attorney general and reporter, a director, *or by a member or members in a derivative proceeding.*

(Emphasis added).

As this court previously held, when the “argument goes directly to the incorporated Association’s authority to act through its board of directors,” the Non-profit Corporation Act “provides only one means of recourse—a derivative proceeding brought in the right of the corporation.” *Germantown Manor Homeowners Ass’n, Inc. v. GGAT Dev. Corp.*, No. W2016-01461-COA-R3-CV, 2017 WL 3668926, at \*5 (Tenn. Ct. App. Aug. 24, 2017).

*Id.* The Sohols failed to file a derivative action, so we concluded they could not challenge the HOA’s power to enforce the CCRs against them. *Id.*

We believe the circuit court’s reliance on *Royalton Woods* is misplaced. Unlike the Sohols in *Royalton Woods*, nowhere in the amended complaint does Mr. Burgess claim that the HOA lacks authority to enforce the CCRs against him. Indeed, he acknowledges that his property is encumbered by the CCRs.<sup>4</sup> For instance, he cites to various provisions of the CCRs throughout the amended complaint to demonstrate how he believes his property is, in fact, in compliance. We agree with the circuit court that Mr. Burgess claimed that the HOA “illegally” assessed fines against him, but we do not discern from his use of that word that was challenging the HOA’s authority. We emphasize that he is a pro se litigant. A court should “give effect to the substance, rather than the form or terminology” of pro se litigants’ court filings. *Young*, 130 S.W.3d at 63 (emphasis added). A thorough review of the amended complaint shows that the substance of Mr. Burgess’s claim against the HOA and Ms. Burka is that he should not be fined for the various conditions on his property because he has not violated the CCRs. In other words, the amended complaint sought a declaratory judgment construing the CCRs and “declar[ing] the rights, status, and other legal relations” of the parties under the CCRs to determine whether Mr. Burgess violated the CCRs. Tenn. Code Ann. § 29-14-102; *see also Royalton Woods*, 2019 WL 366525, at \*5 (“[L]and owners may voluntarily enter into agreements with other land owners to restrict the use of their property in a way that is mutually beneficial. Such agreements are commonly referred to as restrictive covenants, and they are, in essence, contractual obligations between property owners . . . .”) (citations omitted). The HOA and Ms. Burka cite to no provision in the Non-profit Corporation Act requiring that a case be filed as a derivative action if the HOA’s authority is not challenged, and this Court is aware of none. Therefore, because the amended complaint did not challenge the authority of the HOA to enforce the CCRs, neither the holding in *Royalton Woods* nor the derivative action requirement in the Nonprofit Corporation Act apply to this set of facts. We, therefore, conclude that the circuit court erred in granting the HOA’s and Ms. Burka’s motion to dismiss as to Mr. Burgess’s claim for a declaratory judgment. That portion of the court’s order granting the motion to dismiss is vacated and remanded for further proceedings to determine whether the conditions on Mr. Burgess’s property violate the CCRs.<sup>5</sup> We note that, on remand, it may be necessary for the court to hear more evidence concerning the noise-making devices and strobe lights on Mr. Burgess’s property to determine whether they violate the CCRs because the parties presented very different descriptions of them during oral argument before this court.

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<sup>4</sup> In light of our determination of the derivative action issue, Mr. Burgess’s motion for this Court to take judicial notice of the Non-profit Corporation Act and his membership in the HOA is pretermitted.

<sup>5</sup> We do not discern from Mr. Burgess’s appellate brief that he challenges the circuit court’s decision to dismiss his remaining claims against the HOA and Ms. Burka. Thus, we decline to address those decisions, and the circuit court’s dismissal of those claims remains in effect.

## II. Motion for Rule 11 Sanctions

Mr. Burgess next asserts that the circuit court improperly denied his motion for Tenn. R. Civ. P. 11.03 sanctions against Mr. Fowler. Rule 11.03 allows a court to “impose an appropriate sanction upon the attorneys, law firms, or parties” if, “after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02<sup>[6]</sup> has been violated.” TENN. R. CIV. P. 11.03. We review a trial court’s decision to deny or grant an award of sanctions under this rule for an abuse of discretion. *Lindsey v. Lambert*, No. W2010-00213-COA-R3-CV, 2011 WL 497248, at \*1 (Tenn. Ct. App. Feb. 11, 2011) (citing *Brown v. Shappley*, 290 S.W.3d 197, 200 (Tenn. Ct. App. 2008)). An abuse of discretion occurs when a court “(1) applies an incorrect legal standard, (2) reaches an illogical or unreasonable decision, or (3) bases its decision on a clearly erroneous evaluation of the evidence.” *Id.* (citing *Elliott v. Cobb*, 320 S.W.3d 246, 249-50 (Tenn. 2010)).

In the order denying the motion for sanctions, the circuit court gave two reasons for its decision: because Mr. Fowler’s motion to remove the case to the circuit court did not violate Rule 11.02 and because the motion for sanctions did not comply with the requirements of Rule 11.03. Regarding the first reason relied upon by the court, Mr. Burgess reasserts his argument that Mr. Fowler had no legal basis for filing the motion to remove the case to the circuit court because he never filed an answer to the amended petition on behalf of the HOA and Ms. Burka. As discussed in detail above, a legal basis existed for removing the case to the circuit court, and Mr. Fowler completed all of the necessary steps for having the case removed. Furthermore, because the court granted the HOA’s and Ms. Burka’s motion to dismiss, they were not required to file an answer setting forth their declaratory judgment claim. This argument is unavailing.

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<sup>6</sup> Tennessee Rule of Civil Procedure 11.02 provides:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, - -

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

As for the court's second reason for denying an award of sanctions, Mr. Burgess asserts that, contrary to the court's finding, he complied with the requirements of Rule 11.03. Tennessee Rule of Civil Procedure 11.03(1)(a) sets forth explicit instructions for requesting an award of sanctions:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. *It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.*

(Emphasis added). “The italicized portion of the above rule is known as the 21-day ‘safe harbor’ provision.” *Mitrano v. Houser*, 240 S.W.3d 854, 862 (Tenn. Ct. App. 2007). As we have explained:

“It serves the important dual role of providing attorneys notice and fair warning that an adversary is proposing seeking sanctions, and acting as a deterrent to frivolous, unsupported, or otherwise improper pleadings being filed with the court in the first place.” *Mitrano*, 240 S.W.3d at 862. Compliance with the safe harbor provision is mandatory. *Id.* A trial court's discretion to determine whether sanctionable conduct exists or how best to sanction that conduct does obviate compliance with the plain language of Rule 11.03. *See Shappley*, 290 S.W.3d at 202. “Attorneys and litigants should be able to place their expectation and reliance upon the fact that Rule 11 means what it says, and that party will not be sanctioned unless his or her opponent has followed the procedure for requesting sanctions as set forth in the rule.” *Mitrano*, 240 S.W.3d at 862 (citations omitted). An award of sanctions absent demonstrated compliance with the safe harbor provision cannot stand. *Shappley*, 290 S.W.3d at 202 (citing *Mitrano*, 240 S.W.3d at 862).

*Lindsey*, 2011 WL 497248, at \*2.

Here, Mr. Burgess served Mr. Fowler with a document titled “Plaintiff's Notice to Defendant of Rule 11.02 Infractions” on August 31, 2020. That same day, Mr. Burgess filed his motion to amend the complaint with a copy of the amended complaint attached. In the amended complaint, Mr. Burgess claimed “that by filing the Motion [to Remove] without a legal basis Mr. Fowler's actions can be considered for Rule 11 sanctions.” Because Mr. Burgess presented his request for Rule 11 sanctions to the court less than twenty-one days after serving Mr. Fowler with notice of his intent to seek sanctions, we

agree with the circuit court's finding that Mr. Burgess's request for sanctions must be denied because he violated the safe harbor provision in Rule 11.03.

Based on the foregoing, we affirm the circuit court's decision to deny an award of sanctions.<sup>7</sup>

### III. Motion for Judgment on the Pleadings

#### A. Default Judgment

Mr. Burgess next argues that the circuit court erred in granting Mr. Weiss's motion for judgment on the pleadings. As with the HOA's and Ms. Burka's motion to dismiss, Mr. Burgess argues that the court should have denied the motion for judgment on the pleadings because it was not timely filed, meaning he was entitled to a default judgment. Once again, we must respectfully disagree.

The original deadline for filing a responsive pleading to the second amended complaint was February 16, 2021. Approximately nine hours after Mr. Weiss missed that deadline, Mr. Burgess filed a motion for default judgment. The circuit court denied the motion and granted Mr. Weiss an enlargement of time under Tenn. R. Civ. P. 6.02 because the court determined that the failure to file a timely response to the second amended complaint was due to excusable neglect.

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<sup>7</sup> On appeal, Mr. Burgess seeks an award of sanctions against Mr. Fowler and Brad W. Craig in the amount of \$100,000 each. According to Mr. Burgess, he is entitled to an award of sanctions because Mr. Fowler and Mr. Craig "misrepresented facts" in the appellate brief they filed in this Court on behalf of the HOA and Ms. Burka. These "misrepresented facts" pertain to facts that are disputed by the parties, i.e., whether or not Mr. Burgess was assessed fines for the conditions on his property. Mr. Fowler and Mr. Craig merely crafted an argument in defense of their clients that demonstrated this dispute. Thus, this argument is without merit.

Mr. Burgess further argues that he is entitled to an award of sanctions because at oral argument Mr. Fowler "fabricated" how many of the "guard dog" signs the HOA was willing to allow. In response, Mr. Fowler acknowledges that he misspoke at oral arguments when he indicated the HOA would have allowed Mr. Burgess one sign. However, he contends that it was merely a mistake and not an intentional attempt at misleading the court. We do not believe that the statement at issue here rises to the level of sanctionable conduct. Thus, Mr. Burgess's motion for appellate sanctions against Mr. Fowler and Mr. Craig is denied.

We note that Mr. Burgess also requests that this Court take judicial notice of the disputed fact that he was fined \$100 for the conditions on his property. However, a court may take judicial notice of only facts that are "not subject to reasonable dispute, in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." TENN. R. EVID. 201(b). Mr. Burgess attempts to show that this fact cannot be reasonably questioned by submitting a screenshot of a page titled "Account History" that lists several fines. Neither Mr. Burgess's name nor his address appear anywhere on this document. Moreover, nothing on the document indicates the source of or the authenticity of the document. We, therefore, cannot conclude that this document's accuracy "cannot be reasonably questioned." *Id.* Mr. Burgess's motion for this Court to take judicial notice is denied.



Tennessee Rule of Civil Procedure 6.02 draws a distinction between a motion for an enlargement of time made prior to the expiration of the original time period and one made after the original time period has expired. If, like in this case, “the request is made after the original time has elapsed, the party requesting the enlargement must demonstrate that its failure to meet the deadline was due to excusable neglect and that the opposing party has not been prejudiced by the delay.” *Kenyon*, 122 S.W.3d at 756 (citing *Douglas v. Estate of Robertson*, 876 S.W.2d 95, 97 (Tenn. 1994); *Wagner v. Frazier*, 712 S.W.2d 109, 113 (Tenn. Ct. App. 1986)). We have explained excusable neglect as follows:

The concept of excusable neglect is broad enough to apply to “simple, faultless omissions to act and, more commonly, [to] omissions caused by carelessness.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993). Accordingly, the concept of excusable neglect can be used to excuse a failure to comply with a filing deadline that is attributable to a filer’s negligence. *Pioneer*, 507 U.S. at 394; *Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir. 1996). However, not all negligent acts should be considered excusable.

*Kenyon*, 122 S.W.3d at 756.

When determining whether a failure to meet a deadline was due to excusable neglect, courts consider all of the relevant circumstances surrounding the failure to timely respond, including

“(1) the danger of prejudice to the party opposing the late filing, (2) the length of the delay and its potential impact on proceedings, (3) the reason why the filing was late and whether that reason or reasons were within the filer’s reasonable control, and (4) the filer’s good or bad faith.”

*Id.* (quoting *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Grp.*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001)). A party’s reason for missing a filing deadline

may be the single most important of the four factors and . . . the trial court should examine the proffered reason to determine “(1) whether the circumstances involved were under a party’s own control . . . and (2) whether the party was paying appropriate attention to the matter in light of the surrounding circumstances.”

*Id.* at 756-57 (quoting *Sizemore*, 56 S.W.3d at 569-70). Granting relief from a missed deadline pursuant to Rule 6.02 has been described as “repair work when lawyers have good reasons.” *Id.* at 757 (quoting *Day v. Northern Ind. Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir. 1999)).

Here, the circuit court considered all of the above in making its decision to grant Mr. Weiss an enlargement of time. The court found that the danger of prejudice to Mr. Burgess if an enlargement was granted was “minimal” because the delay would be but a “few weeks” and “[a] delay of a matter of weeks is likely inconvenient . . . but does not risk affecting his ability to prosecute the case moving forward.” As for the reason for the delay in filing a response, Mr. Weiss stated that his counsel suffered the loss of a family member<sup>8</sup> which caused him to “lose track of some deadlines.” The court found that this reason in conjunction with the attorney’s co-counsel departing from the law firm evinced that the delay was inadvertent and not simply an attempt “to slow the pace of this case or prejudice” Mr. Burgess. The court then found that there was no evidence of bad faith. The record supports the circuit courts’ findings. In light of the foregoing, we conclude that the court did not abuse its discretion in granting Mr. Weiss an enlargement of time to file a responsive pleading.<sup>9</sup>

## B. Negligent Misrepresentation

Mr. Burgess next argues that the circuit court erred in determining that Mr. Weiss was entitled to judgment on the pleadings based on the court’s conclusion that the second amended complaint failed to state a claim for negligent misrepresentation because it did not satisfy all of the elements for such a claim. The Tennessee Supreme Court has adopted the Restatement of Torts (Second) section 552 “as the guiding principle in negligent misrepresentation actions against other professionals and business persons.” *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997) (quoting *Bethlehem Steel Corp. v. Ernst &*

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<sup>8</sup> In addition to requesting that this Court sanction Mr. Fowler and Mr. Craig, Mr. Burgess requests that we award him sanctions against Dayne Geyer, the attorney for Mr. Weiss. Mr. Burgess contends that Mr. Geyer should be sanctioned because his claim that he suffered the loss of a family member is false. Specifically, Mr. Burgess claims that it was Mr. Geyer’s fiancé who, in fact, lost a family member. Mr. Burgess failed to raise this argument in the circuit court. Therefore, he waived this issue. *See Dog House Invs., LLC v. Teal Props., Inc.*, 448 S.W.3d 905, 915 (Tenn. Ct. App. 2014) (“It is well settled that issues and arguments not raised or asserted in the trial court may not be raised for the first time on appeal.”). The motion for sanctions against Mr. Geyer is denied.

<sup>9</sup> Within the extension of time permitted by the court, Mr. Weiss filed a motion to dismiss the second amended complaint. The court denied that motion, and Mr. Weiss filed an answer to the second amended complaint on May 3, 2021. We discern that, in his appellate brief, Mr. Burgess argues that he is also entitled to a default judgment because Mr. Weiss failed to file his answer within the original extension of time allowed by the circuit court. Under Tenn. R. Civ. P. 12.01, however, Mr. Weiss had a fifteen-day time period to file his answer after the court denied his motion to dismiss. As the circuit court found, “the fifteenth day of the Rule 12.01 Period fell on Saturday, May 1. However, under Rule 6.01, Saturdays and Sundays are not counted in the computation of the Rule 12.01 Period. Accordingly, the last day of the Rule 12.01 Period fell on Monday, May 3.” Mr. Weiss filed his answer on May 3. This argument is without merit.

*Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991)). Relying on Section 552, the *Robinson* Court described negligent misrepresentation thusly:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information for the guidance of others in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability state in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

*Id.* (quoting RESTATEMENT (SECOND) OF TORTS, § 552 (1977)) (emphasis added). The Court then explained that

liability in tort will result, despite the lack of contractual privity between the plaintiff and defendant, when,

(1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and

(2) the defendant supplies faulty information *meant to guide others in their business transactions*; and

(3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and

(4) the plaintiff justifiably relies upon the information.

*Id.* (quoting *John Martin Co., Inc. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991)) (emphasis added). Courts have limited claims for negligent misrepresentation “to statements made in a business or commercial setting.” *Hodge v. Craig*, 382 S.W.3d 325, 345 (Tenn. 2012). In fact, the requirement that a misrepresentation “be made to guide others ‘in their business transactions’” is considered an “essential element” for establishing a claim for negligent misrepresentation. *Id.* (quoting *Robinson*, 952 S.W.2d at 428).

In the present case, the circuit court concluded that the second amended complaint failed to state a claim for negligent misrepresentation because the facts alleged, taken as

true, did not demonstrate that the second and fourth elements were satisfied. We agree. The second amended complaint contains no allegation demonstrating that, in the letter titled “Violation Notice (4th)”, Mr. Weiss supplied information meant to guide Mr. Burgess in a business transaction.<sup>10</sup> “Business” means a “commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” BLACK’S LAW DICTIONARY (11th ed. 2019). Mr. Weiss made no attempt to induce Mr. Burgess into any type of business transaction or to advise him about any type of business transaction. Mr. Weiss merely informed Mr. Burgess that the HOA considered the conditions on his property to be in violation of the CCRs and that the HOA would take action to enforce the CCRs if Mr. Burgess failed to bring his property into compliance. Because there was no attempt to guide Mr. Burgess in a business transaction, there was no justifiable reliance.

Based on the second amended complaint’s failure to allege facts satisfying all of the required elements of a negligent misrepresentation claim, we affirm the circuit court’s decision to grant Mr. Weiss’s motion for judgment on the pleadings.<sup>11</sup>

#### CONCLUSION

The circuit court’s decision to grant the HOA’s and Ms. Burka’s motion to dismiss the amended complaint as to Mr. Burgess’s claim for declaratory judgment is vacated and the matter is remanded for further proceedings on that claim. The circuit court’s judgment is affirmed in all other respects. Costs of this appeal are assessed equally against the

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<sup>10</sup> In the second amended complaint, Mr. Burgess alleged that, by enforcing the CCRs, the HOA engaged in a business transaction. This allegation is nothing more than a “legal conclusion[] couched as [a] fact[],” which we are not required to accept as true. *Webb*, 346 S.W.3d at 427.

<sup>11</sup> Mr. Burgess also argues that the circuit court erred in granting Mr. Weiss’s motion for judgment on the pleadings because the court should have granted Mr. Burgess’s motion to file a third amended complaint. Tennessee Rule of Civil Procedure 15.01 allows a court to grant a motion to amend “when justice so requires.” The motion to file a third amended complaint states in its entirety:

Comes now the Plaintiff acting on his own behalf requesting leave to Amend his Amended Complaint (3<sup>rd</sup>) pursuant to TRCP 15.01 and the Judge’s Order at the 4/16/21 Hearing. Pursuant to Local Rule 26.04c, the 3<sup>rd</sup> Amended Complaint is included.

This motion fails to state any reason “justice so requires” and, therefore, falls short of the requirement in Tenn. R. Civ. P. 7.02(1) that a motion must “state with particularity the grounds therefor.” *Willis v. Tenn. Dep’t of Corr.*, 113 S.W.3d 706, 709 n.2 (Tenn. 2003) (quoting TENN. R. CIV. P. 7.02(1)). Thus, we find no error in the circuit court’s decision denying Mr. Burgess’s request to file a third amended complaint.

Additionally, Mr. Burgess filed a motion requesting that we “reconsider and correct” the ruling made in his Rule 10B appeal, *Burgess v. Bradford Hills HOA, et al.*, No. M2020-01371-COA-T10B-CV, 2020 WL 6317005 (Tenn. Ct. App. Oct. 28, 2020). Because the motion relates to a different appeal, we decline to address it.

appellant, Monsieur Shawnellias Burgess, and the appellees, Bradford Hills HOA and Lynn Hills Burka, for which execution may issue if necessary.

/s/ Andy D. Bennett  
ANDY D. BENNETT, JUDGE