IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

VANESSA COLLEY,	§	
	§	
Respondent-Appellant,	§	Case No.: M2021-00731-SC-R11-CV
	§	
v.	§	Case No.: M2021-00731-COA-R3-CV
	§	
JOHN S. COLLEY, III,	§	Davidson County Circuit Court
	§	Case No.: 12D-314
Petitioner-Appellee.	§	

REPLY BRIEF OF APPELLANT VANESSA COLLEY (TURNER)

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A. MS. TURNER HAD ALREADY SECURED PREVAILING PARTY STATUS BY OBTAINING COURT-ORDERED MERITS RELIEF AND A JUDICIALLY SANCTIONED CHANGE IN THE PARTIES' LEGAL RELATIONSHIP DURING THEIR ORIGINAL LITIGATION.

1. The favorable merits judgment, court-ordered alimony award, and consent decree that Ms. Turner won in the Parties' original litigation made her a prevailing party.

Tenn. Code Ann. § 36-5-103(c) permits prevailing parties to recover fees in a proceeding "to enforce, alter, change, or modify any decree of alimony[.]" *Id.* In this respect, it is narrowly concerned with *post*-judgment proceedings that follow *earlier* litigation in which a judicially sanctioned change in the legal relationship between the parties has *already* been secured. Thus, by the time a proceeding affected by this provision of Tenn. Code Ann. § 36-5-103(c) is initiated, one party will already have won a judicial "decree of alimony" from the other. *Id.*

Here, as Ms. Turner emphasized in her Principal Brief, this post-judgment litigation arises from an earlier "consent decree[.]" *See* Appellant's Principal Br. at 35; *id.* at 40 ("This is not original litigation. Instead, it is post-judgment litigation over an earlier consent decree."). In particular, Mr. Colley launched this post-judgment litigation to try to terminate his consent-decree-produced "alimony obligation prematurely based on a claim that Ms. Turner 'was living with her fiancé two months immediately preceding her remarriage.'" *Id.* at 41 (citation omitted). Ms. Turner then defended the earlier consent decree "for nearly two years against [Mr. Colley's] unsuccessful efforts to modify it. . . ." *Id.* at 35.

Given this chronology, Ms. Turner has asserted that Mr. Colley's

unsuccessful post-judgment litigation "should be treated the same way" as federal law treats similar post-judgment efforts to modify earlier-secured consent decrees. *Id.* at 34–35. Under federal law's approach, after securing prevailing party status through a consent decree, parties "are not again required to establish prevailing party status in the conventional sense of requiring a judicially-sanctioned material change in the legal relationship of the parties[,]" given that "an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis of a plaintiff's prevailing party status . . . ." *See Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 625 (6th Cir. 2013); *see also* Appellant's Principal Br. at 34–35 (collecting cases). Thus, Ms. Turner has argued that "when the Plaintiff dismissed his own claims on the eve of trial, this case concluded with Ms. Turner successfully maintaining her previously secured prevailing-party status under the Parties' consent decree, which she was not required to establish again." *Id.* at 41; *see also id.* at 40 ("In the preceding litigation, Ms. Turner also successfully obtained both an 'adjudication of the merits of the case' . . . and a 'material alteration of the legal relationship of the parties[.]'").

2. <u>Mr. Colley has waived opposition to Ms. Turner's earlier-secured and later-maintained prevailing party status by failing to contest it.</u>

Mr. Colley does not contest Ms. Turner's arguments about her preexisting and later-maintained prevailing party status. More specifically, Mr. Colley does not contest that Ms. Turner's original lawsuit against him resulted in both a merits judgment sustaining Ms. Turner's cause of action and a consent decree requiring Mr. Colley to pay

Ms. Turner alimony. *See generally* Br. of Appellee. Nor does he contest that Ms. Turner was the prevailing party in the Parties' original litigation. *Id.* He does not contest that, by resisting dismissal of Mr. Colley's effort to terminate his alimony obligation prematurely, Ms. Turner maintained her earlier-secured prevailing party status, either. *Id.*

Nor *could* Mr. Colley reasonably contest these points. To begin, the judgment that Ms. Turner secured in the Parties' original litigation "sustained" her cause of action on the merits and awarded her an absolute divorce.[1] The Parties' accompanying Marital Dissolution Agreement was also definitionally a consent decree, because it was "'a contract made final and binding upon the parties by approval of the court.'" *See Lovlace v. Copley*, 418 S.W.3d 1, 30 (Tenn. 2013) (cleaned up). Ms. Turner's consent decree changed the Parties' legal relationship by obligating Mr. Colley to pay her alimony and insure the obligation, too.[2]

Thus, Ms. Turner was *necessarily* the prevailing party in the Parties' original litigation even under the cases that Mr. Colley and *amicus curiae* cite, because plaintiffs who are awarded merits relief or obtain consent decrees are prevailing parties as a categorical matter. *See Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 (2001) ("a 'prevailing party' is one who has been awarded some relief by the court"); *id.* ("court-ordered consent decrees create the 'material alteration of the legal relationship of the

[1] Supp. R. at 27.

[2] Supp. R. at 31–32.

parties' necessary to permit an award of attorney's fees."). Certainly, plaintiffs who win merits relief *and* obtain a consent decree that requires a defendant to pay alimony are prevailing parties. *Id.*

After Ms. Turner's original prevailing party status was secured, Mr. Colley then sought to terminate his alimony obligation prematurely. All agree that he did not succeed. Thus, following Mr. Colley's post-judgment litigation, no one disputes that Ms. Turner's previously-secured prevailing party status remained in place.

There is also a reason why Mr. Colley has not responded to these claims. The reason is that Mr. Colley has asked this Court to extend *Himmelfarb*'s malicious prosecution-based requirement that a party must secure a favorable judgment "on the merits" to *all* prevailing determinations—including post-judgment litigation implicated by Tenn. Code Ann. § 36-5-103(c). *See* Br. of Appellee at 24. *Himmelfarb*'s standard is incompatible with federal prevailing party law, though. *Compare Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) ("a judgment that terminates a lawsuit in favor of one of the parties must address the merits of the suit . . ."), *with CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 431 (2016) ("The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."). Thus, Mr. Colley has not asked this Court to adopt the federal standard.

To be sure, it is Mr. Colley's right to advocate that *Himmelfarb*'s malicious prosecution standard be extended to a materially different area of law where it does not belong. Given that Mr. Colley has not even

attempted to respond to Ms. Turner's arguments about her preexisting and later-maintained prevailing party status, though, Mr. Colley has not only *forfeited* any arguments: (1) that the Parties' original litigation did not result in a merits judgment sustaining Ms. Turner's claims and an accompanying consent decree; (2) that Ms. Turner was not the prevailing party in the Parties' original litigation; or (3) that Ms. Turner did not maintain her prevailing party status afterward. Instead, he has *waived* them. *See, e.g., Knight v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 67 F.4th 816, 836 (6th Cir. 2023) ("Nashville did not even try to respond, opting to rely exclusively on its claim that *Penn Central*'s test applied. [] In prior cases, we have treated this type of omission as a waiver, not just a forfeiture.") (citing *United States v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014)); *see also Dominy v. Davidson Cnty. Election Comm'n*, No. M2022-00427-COA-R3-CV, 2023 WL 3729863, at *1 (Tenn. Ct. App. May 31, 2023) ("Because the Election Commission presented a well-developed and well-supported argument in favor of mootness and because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission's mootness argument has been waived. Accordingly, we dismiss this appeal."); *id.* at *4 (collecting cases supporting waiver under circumstances when a party does not respond to a properly supported argument). *Cf. Donovan v. Hastings*, 652 S.W.3d 1, 9 (Tenn. 2022) ("As Mr. Hastings neither raised an issue in his brief regarding Ms. Donovan's compliance with section 20-12-119(c)(5)(B) nor included a sufficient argument on this point, the issue is deemed waived.").

Thus, for purposes of this appeal, this Court should assume Ms. Turner's preexisting and later-maintained prevailing party status. Ms. Turner also notes that if her preexisting prevailing party status is assumed, then she wins even under the federal law standard that the Government urges this Court to embrace. *See Pottinger v. City of Miami*, 805 F.3d 1293, 1299 (11th Cir. 2015) ("attorneys' fees can be awarded **for defending**, enforcing, **opposing the modification of**, or monitoring compliance with an existing consent decree.") (emphases added).

3. ***Amicus curiae* may not raise a fact-specific claim that Mr. Colley himself has chosen to waive.**

As *amicus curiae*, the Government concedes both that an earlier-secured prevailing party determination need not be reestablished in post-judgment litigation and that such a scenario would justify a fee award under federal law. *See* Government's Br. at 21. Unlike Mr. Colley, though, the Government also tries to contest Ms. Turner's preexisting prevailing party status in the Parties' original litigation. *See id.* For several reasons, this Court should not permit the Government to do so.

First, the Government's claim that Ms. Turner's earlier-secured merits judgment and consent-decree-produced alimony award did not make her an original prevailing party under federal law is almost comically wrong. *See CRST*, 578 U.S. at 422 ("The Court has explained that, when a plaintiff secures an 'enforceable judgmen[t] on the merits' or a 'court-ordered consent decre[e],' that plaintiff is the prevailing party because he has received a 'judicially sanctioned change in the legal relationship of the parties.'") (cleaned up); *Buckhannon*, 532 U.S. at 604. The Government also offers no record citation, case citation, or reasoning

to support its contrary claim on the matter, *see* Government's Br. at 21—a defect that would result in waiver even if the Government could raise the claim. *See Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

Second, the argument is not the Government's to make. Whether—under the specific facts here, *see Fannon v. City of LaFollette*, 329 S.W.3d 418, 432 (Tenn. 2010) ("The 'prevailing party' determination is necessarily fact-intensive.")—Ms. Turner's earlier-secured merits judgment sustaining her cause of action and her consent-decree-produced alimony award conferred preexisting prevailing party status does not affect the question of statutory interpretation that underlies the Government's asserted interest in this matter. *See* Government's Br. at 8–9 (identifying its purported interest). The Government cannot rightfully assert an interest in that case-specific and fact-intensive question unique to the Parties, either.

Third, the limited circumstances that might otherwise enable this Court to consider an argument raised only by *amicus curiae*—which Mr. Colley himself had good reason not to make—are not present here. *See Adkisson v. Jacobs Eng'g Grp., Inc.*, 36 F.4th 686, 697 (6th Cir. 2022) (noting "the general rule that a court ought not consider an argument raised solely in an amicus brief"); *PPL Corp. v. Comm'r of Internal Revenue*, 133 S.Ct. 1897, 1907 n.6 (2013) (declining to consider argument raised by *amici* that a party admitted it had not preserved for review).

As then-Judge Gorsuch explained under similar circumstances:

> We see two difficulties here. In the first place, Dr. Genova hasn't pursued the argument for himself. Though we have the discretion to address an argument developed only by an amicus rather than a party, we will typically exercise that discretion only when (1) a party has done something to incorporate the argument "by reference" in its own brief, or (2) "the issue involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir.1997); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1422 (10th Cir.1990). Neither of these conditions is met here.
>
> Beyond that, there quickly appears a good reason why Dr. Genova didn't attempt the argument.

See Genova v. Banner Health, 734 F.3d 1095, 1103 (10th Cir. 2013).

Here, for the same reasons, the Government should not be permitted to raise a fact-specific claim unique to the Parties that Mr. Colley waived and had "a good reason" not to raise himself. *Id.; Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997) ("Despite the fact that Tyler did not raise the issue, amicus curiae, the United States, argues that Tyler is entitled to seek compensatory damages for violations of Title II of the ADA without alleging intentional discrimination. We choose not to address this argument because it was not raised by a party to this appeal. It is instead an attempt by amicus to frame the issues on appeal, a prerogative more appropriately restricted to the litigants.").

In summary: Ms. Turner had already secured prevailing party status by obtaining court-ordered merits relief and a judicially sanctioned change in the Parties' legal relationship during their original

litigation—a status that she maintained when Mr. Colley nonsuited. Mr. Colley has also waived opposition to that claim, having intentionally advocated for a non-federal standard under which a party's preexisting prevailing party status is irrelevant. The Government cannot raise a waived argument in Mr. Colley's place, either.

B. THIS COURT SHOULD RULE THAT, TO RECOVER UNDER TENN. CODE ANN. § 36-5-103(C), A PARTY WHO PREVIOUSLY SECURED PREVAILING PARTY STATUS BY OBTAINING AN ALIMONY AWARD NEED NOT REESTABLISH PREVAILING PARTY STATUS IN POST-JUDGMENT LITIGATION DEFENDING THAT AWARD.

There are also good reasons for this Court to hold—as federal law does—that under Tenn. Code Ann. § 36-5-103(c), a party who previously secured prevailing party status by obtaining an alimony award need not reestablish prevailing party status in post-judgment litigation to recover. Four reasons support embracing this approach.

First, given that Tenn. Code Ann. § 36-5-103(c) almost uniformly addresses circumstances involving an attempt to modify a previously-awarded judicial decree, *see id.*, both Tenn. Code Ann. § 36-5-103(c)'s text and its purpose contemplate this approach, and each is relevant to Tenn. Code Ann. § 36-5-103(c)'s proper interpretation. *See In re Markus E.*, No. M2019-01079-SC-R11-PT, 2023 WL 3557708, at *16 (Tenn. May 19, 2023) ("We consider 'the language of the statute, . . . the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.' . . . Our construction must be reasonable in light of the statute's purposes and objectives.") (cleaned up).

Second, even though the pre-2018 version of Tenn. Code Ann. § 36-5-103(c) referred only to a "plaintiff spouse" (and, thus, did not expressly

allow *defending* spouses to recover), *see Friesen v. Friesen*, No. E2017-00775-COA-R3-CV, 2018 WL 5791954, at *5 n.1 (Tenn. Ct. App. Nov. 5, 2018) (McBrayer, J., concurring), the Court of Appeals had repeatedly interpreted Tenn. Code Ann. § 36-5-103(c) "as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order." *See Hansen v. Hansen*, No. M2008-02378-COA-R3-CV, 2009 WL 3230984, at *3 (Tenn. Ct. App. Oct. 7, 2009) (citing *Shofner v. Shofner*, 232 S.W.3d 36, 40 (Tenn. Ct. App. 2007); *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *8 (Tenn. Ct. App. Feb. 28, 2007)); *Pounders v. Pounders*, No. W2010-01510-COA-R3CV, 2011 WL 3849493, at *5 (Tenn. Ct. App. Aug. 31, 2011). Thus, the function of the 2018 amendment was to codify a line of Court of Appeals authority that had allowed successful defendants—*including those who had prevailed due to voluntary dismissals, see Pounders*, 2011 WL 3849493, at *4–5; *Hansen*, 2009 WL 3230984, at *3—to recover attorney's fees notwithstanding Tenn. Code Ann. § 36-5-103(c)'s then-existing reference to a "plaintiff spouse" alone

"[T]he General Assembly is presumed to know the 'state of the law' when enacting legislation, including 'the manner in which the courts have construed the statutes it has enacted.'" *See In re Bonding*, 599 S.W.3d 17, 22 (Tenn. 2020) (quotation omitted); *see also Doe v. Sundquist*, 2 S.W.3d 919, 925, n.5 (Tenn. 1999) (relying on "statutory history"). Thus, the General Assembly is presumed to know about this line of Court of Appeals authority at the time of the 2018 amendment. It is presumed

to know about the Court of Appeals' separate line of authority that a defendant "is a prevailing party when a plaintiff voluntarily dismisses [its] suit" as well. *See Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 180 (Tenn. Ct. App. 2010) ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to."); *see also JPMorgan Chase Bank v. Franklin Nat. Bank*, No. M2005-02088-COA-R3-CV, 2007 WL 2316450, at *8 (Tenn. Ct. App. Aug. 13, 2007); *Est. of Burkes ex rel. C.T.A. v. St. Peter Villa, Inc.*, No. W2006-02497-COA-R3-CV, 2007 WL 2634851, at *7 (Tenn. Ct. App. Sept. 12, 2007). Both lines of authority may fairly be said to be integrated into Tenn. Code Ann. § 36-5-103(c) as a result.

Third, although the federal rule that earlier prevailing parties need not reestablish their prevailing status to recover fees in post-judgment litigation seeking to modify a consent decree has not yet been explicitly embraced by this Court, this Court's reasoning in a related context supports it. *See Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125, 161 (Tenn. 2021) ("A party that properly recovers fees in the trial court need not show that an appeal is independently meritless: the rationale supporting fees in the trial court carries over and supports the defense of the award on appeal.").

Fourth, the rule is a good one. As the Court of Appeals has observed—and as Ms. Turner has argued without contest, *see* Principal Br. of Appellant at 33–36—the judiciary has an interest in robust enforcement of its decrees, and that interest has been emphasized

repeatedly as a reason to award fees under Tenn. Code Ann. § 36-5-103(c) to successful defenders of earlier court orders. *See, e.g., Hansen*, 2009 WL 3230984, at *3 ("[Tenn. Code Ann. § 36-5-103(c)] has been interpreted as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order."). This Court also emphasized that interest in *Wilson v. Wilson*, 984 S.W.2d 898, 904 (Tenn. 1998), where it held that it warranted an exception to traditional conflict principles in contempt cases. *Id.* ("Contempt of court is intended to vindicate a court's authority *and to maintain the integrity of court orders*. . . . In a contempt proceeding alleging a violation of a court order, therefore, the interest of the private litigant coincides with the interest of the court.") (internal citation omitted).

Without the assurance of fee-shifting, though, Tennessee's poorest and most vulnerable litigants—including a large number of single parents who rely on alimony and child support to make ends meet—will be exposed. Thus, many meritorious family law orders will be chronically underdefended, because poor litigants cannot afford to defend them without certainty that defending against meritless post-judgment litigation will result in fee-shifting. There is deterrence-related value in "discourag[ing] vexatious litigation" in the family law space, too. *See Fraser v. ETA Ass'n, Inc.*, 41 Conn. Supp. 417, 420 (1990).

For all these reasons, this Court should rule that, to "prevail[]" in post-judgment litigation implicated by Tenn. Code Ann. § 36-5-103(c), an earlier-secured prevailing party determination need not be established

anew.

C. MR. COLLEY MISAPPREHENDS THE LAW HE CITES.

Mr. Colley also misapprehends the law that he cites to support his position. For example, he cites cases relying on the federal standard *for plaintiffs* as support for his argument that *Himmelfarb*'s "on the merits" standard should be extended to prevailing party determinations. *See* Br. of Appellee at 17, 24, at 28. Because the U.S. Supreme Court has concluded that "Plaintiffs and defendants come to court with different objectives[,]" though, *see CRST*, 578 U.S. at 431, federal law flatly rejects this standard. In particular, while federal law holds that a "defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason[,]" *see id.*, Mr. Colley insists that a claim "must have been heard and decided on the merits and facts of the case" to produce a prevailing party under Tenn. Code Ann. § 36-5-103(c). *See* Br. of Appellee at 24.

Mr. Colley is also wrong that "[t]he definition of 'prevailing party' is uniformly defined by both state and federal law." *See* Br. of Appellee at 15. It is not. Tennessee law does not track federal law on material components of prevailing party jurisprudence. *See, e.g., Williams v. Williams*, No. M2013-01910-COA-R3-CV, 2015 WL 412985, at *10–13 (Tenn. Ct. App. Jan. 30, 2015) (holding, in moot contempt case, that a litigant was a prevailing party because her lawsuit catalyzed relief). Federal law also is not settled as to whether or when voluntary dismissals produce a prevailing party, *see* Br. of Appellant in Resp. to Gov't. (forthcoming); *see also Matter of Herrera*, 912 N.W.2d 454, 471–72

(Iowa 2018), and even if it were, Tennessee law has its own view of the matter. *See Freeman*, 359 S.W.3d at 180 ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to.").

Nor does Mr. Colley's Rule 41 argument make sense. He asserts that "[h]ad the rule makers wanted to include a provision allowing the Court to award attorney fees in a voluntary dismissal case or distinguishing a 'prevailing party' when a case is nonsuited, they certainly could have done so." *See* Br. of Appellee at 18. But Rule 41 is not the source of Ms. Turner's claim for fees. Instead, Tenn. Code Ann. § 36-5-103(c) and the Parties' MDA provide that authority. So Rule 41 is irrelevant to the issue presented here.

Mr. Colley's policy arguments fail, too. He insists that:

> The public policy reason to liberally permit the taking of a voluntary nonsuit is to encourage the voluntary dismissal of a case when appropriate. There exist a multitude of circumstances and situations where a nonsuit is appropriate and assists to free up the Court's already over-packed dockets.
>
> If the law were that any time a party voluntary took a nonsuit, the other side would be a "prevailing party," then no party would ever dismiss a case voluntarily and cases would linger on Court dockets for fear of voluntarily dismissing the case and the risk of having to pay attorney fees.

Br. of Appellee at 19.

This is wrong. For one thing, nobody seeks to interfere with the right to "liberally permit the taking of a voluntary nonsuit," which has not been challenged. *Id.* For another, a litigant's incentive to voluntarily

dismiss a non-meritorious claim as quickly as possible persists when provisions that permit post-nonsuit fee-shifting apply. The reason is simple: The longer a baseless claim is maintained, the more expensive the fee award will be at the end of litigation, so there are strong monetary reasons not to engage in time-consuming discovery or to take a baseless claim to trial.

By contrast, what is lost under Mr. Colley's approach is the surpassing value of a fee-shifting regime that deters litigants from bringing baseless claims in the first place. *That* is what will really prevent cases from clogging "over-packed dockets." *See id. Cf. Fraser*, 41 Conn. Supp. at 419–20 ("There are decided benefits to interpreting the statute so that defendants in cases withdrawn by plaintiffs can recover their legal expenses. Not only will this discourage frivolous suits, but it will place the burden where it belongs—on the party with the poorly thought out complaint or the hastily conceived writ. It will also discourage vexatious litigation and the use of pretrial discovery and depositions to harass defendants."). With this consideration in mind, Mr. Colley's maintenance of a bogus claim for nearly two years—only to nonsuit it on the eve of trial in an effort to evade consequences—is not a success story. Instead, as this litigation itself evidences in spades, Mr. Colley requires additional deterrence to prevent him from initiating vexatious claims to begin with.

D. MR. COLLEY UNPERSUASIVELY RESPONDS TO MS. TURNER'S CONTRACT-BASED CLAIM FOR FEES.

The Parties appear to agree that the law "at the time" of contracting forms a part of the Parties' contracting. Principal Br. of Appellant at 27–

28; Br. of Appellee at 27. That consideration is also dispositive here, because—as Ms. Turner has noted—Tennessee law at the time of contracting (on July 18, 2012[3]) provided that "a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit, . . . regardless of whether the plaintiff has re-filed her suit, or intends to." *See Freeman*, 359 S.W.3d at 180 (collecting cases). Tennessee law observed a specific distinction between obtaining a "favorable termination" and "prevail[ing]," too. *See Foshee v. S. Fin. & Thrift Corp.*, 967 S.W.2d 817, 820 (Tenn. Ct. App. 1997) (favorably citing authority that "[i]t is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action.").

By contrast, *none* of the cases identified by either Mr. Colley or the Government could have interfered with this reasonable expectation. *Himmelfarb*—which is irrelevant anyway—had not been decided. *Himmelfarb*, 380 S.W.3d 35 ("Aug. 28, 2012"). Both *Jasinskis v. Cameron*, No. M2019-01417-COA-R3-CV, 2020 WL 2765845 (Tenn. Ct. App. May 27, 2020), and *Justice v. Craftique Constr.*, Inc., No. E2019-00884-COA-R3-CV, 2021 WL 142146 (Tenn. Ct. App. Jan. 15, 2021)—which concerned *original* (rather than post-judgment) litigation and are materially distinguishable, *see* Principal Br. of Appellant at 38–42—were not decided until nearly a decade later. None of the fractured post-*CRST* federal jurisprudence discussed by *amicus curiae*—only one line of which the Government has identified—had been decided, either, given that *CRST* was not decided until 2016. *CRST*, 578 U.S. 419.

[3] Supp. R. at 52.

Thus, even if this Court disagrees with Ms. Turner's view of Tenn. Code Ann. § 36-5-103(c), the Parties' MDA would still merit awarding fees here. That holding is necessary based on the state of the law at the time of contracting. It is also necessary because "contract language is interpreted according to its plain terms and ordinary meaning[,]" *see BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93 (Tenn. 2012), and neither the favorable-termination-on-the-merits element of a post-*Himmelfarb* Tennessee common law malicious prosecution test nor the (unsettled scope of the) federal "judicial imprimatur" test is plain or ordinary. Instead, the "common sense," lay understanding of the term "prevailing party" asks simply whether a suing plaintiff got what he sought. *See, e.g., Acorn Olympia LLC v. Helstrom*, 18 Wash. App. 2d 1009 (2021) ("'based on the 'common sense meaning' of 'prevail' recognized in *Walji*, the Helstroms would be considered the prevailing party following Acorn Olympia's voluntary nonsuit.'"); *Santisas v. Goodin*, 17 Cal. 4th 599, 609 (1998) ("Giving the term 'prevailing party' its ordinary or popular sense, the seller defendants are the prevailing parties in this litigation. Plaintiffs' objective in bringing this litigation was to obtain the relief requested in the complaint. . . . [P]laintiffs failed in their litigation objective and the seller defendants succeeded in theirs.").

This Court should construe Tenn. Code Ann. § 36-5-103(c) and the Parties' MDA the same way, however. Both Tenn. Code Ann. § 36-5-103(c) and the Parties' MDA operate from the same critical point of reference: a preexisting, judicially enforced status quo. Both also provide that an effort by one party to modify that status quo through post-judgment litigation will trigger fee-shifting. That framework creates

strong incentives for would-be defendants to stipulate to valid claims for modification before they are brought and for would-be plaintiffs not to initiate baseless claims that lack merit. This Court should not disrupt that considered approach, which—not for nothing—has also served as a vital component of Tennessee family law for many years. *See Pounders*, 2011 WL 3849493, at *5; *Hansen*, 2009 WL 3230984, at *3.

E. MR. COLLEY HAS NO PLAUSIBLE ENTITLEMENT TO FEES.

Mr. Colley concludes his Brief by demanding appellate fees of his own. *See* Br. of Appellant at 30–31. If fees are available in this post-judgment litigation, though, then Ms. Turner has already won.

At any rate, Mr. Colley does not qualify for a fee award, because he does not come within the terms of either provision implicated by this appeal. Ms. Turner is entitled to fees under Tenn. Code Ann. § 36-5-103(c) because she was the prevailing party in a proceeding to "alter, change, or modify any decree of alimony." *Id.* By contrast, Mr. Colley cannot claim to have prevailed in his failed alimony-modification effort, and he is not seeking "to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order" through this appeal. *Id.* Further, unlike Ms. Turner—who is entitled to fees by contract because she successfully "defend[ed] legal proceedings related to the enforcement of [the alimony] provision of" the Parties' MDA[4]—Mr. Colley uncontestedly failed with respect to the alimony modification proceedings he instituted.

Thus, Mr. Colley is not entitled to fees on appeal, because he has no

[4] Supp. R. at 35.

plausible claim to fees arising from the underlying litigation. By contrast, Ms. Turner—who was correctly awarded fees by the trial court—is entitled to fees on appeal because "[a] party that properly recovers fees in the trial court need not show that an appeal is independently meritless: the rationale supporting fees in the trial court carries over and supports the defense of the award on appeal." *Milan Supply Chain Sols., Inc.*, 627 S.W.3d at 161.

IV. CONCLUSION

The trial court's judgment awarding the Appellant her reasonable attorney's fees should be reinstated, and the Appellant should be awarded her attorney's fees on appeal.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-IV) contains 5,000 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of June, 2023, a copy of the foregoing was served via the Court's electronic filing system upon:

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