IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

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III. INTRODUCTION

This Application seeks review of the following question: Is a defendant who successfully defends against a lawsuit and secures a judgment of dismissal—albeit without prejudice—following an opposing party's voluntary nonsuit a "prevailing party" under Tennessee law?

In the discretionary cost context, several panels of the Court of Appeals have held that the answer is yes. *See, e.g., 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."); *JPMorgan Chase Bank v. Franklin Nat. Bank*, No. M2005-02088-COA-R3CV, 2007 WL 2316450, at *8 (Tenn. Ct. App. Aug. 13, 2007) ("For the purpose of Tenn. R. Civ. P. 54.02(2), FNB was the prevailing party because Chase voluntarily dismissed its suit."); *Est. of Burkes ex rel. C.T.A. v. St. Peter Villa, Inc.*, No. W2006-02497-COA-R3CV, 2007 WL 2634851, at *7 (Tenn. Ct. App. Sept. 12, 2007) ("It makes more sense to simply hold, as did the Court in *JP Morgan*, that a defendant in a case that is voluntarily dismissed is necessarily the 'prevailing party' simply because the plaintiff 'voluntarily dismissed its suit.'") (quoting *JP Morgan*, 2007 WL 2316450, at *8). *Cf. Bardon Trimount, Inc. v. Guyott*, 49 Mass. App. Ct. 764, 779 (2000) ("Similarly, under the Federal rule providing for costs, Fed.R.Civ.P. 54(d), it is said that 'a dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party.'") (quoting 10 Wright, Miller, & Kane, Federal Practice & Procedure § 2667, at 209–210 & n. 14

(3d ed.1998)).

Tennessee statutes similarly indicate that the answer is yes. *See, e.g.,* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, . . . the defendant is the successful party, within the meaning of § 20-12-101."). They have also done so since the 19th century. *See Hagerty v. Hughes,* 63 Tenn. 222, 226 (1874) ("By sec. 3201 of the Code, in cases of discontinuance, the defendant is the successful party, and entitled to full costs.").

Black's Law Dictionary explains that the answer is yes as well. *See* PARTY, Black's Law Dictionary (11th ed. 2019) ("**prevailing party**. A party in whose favor a judgment is rendered, regardless of the amount of damages awarded: — Also termed *successful party*."). *See also Dairy Gold, Inc. v. Thomas*, No. E2001-02463-COA-R3-CV, 2002 WL 1751193, at *4 (Tenn. Ct. App. July 29, 2002) ("The term 'prevailing party' has commonly been defined as 'the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.'" (quoting BLACK'S LAW DICTIONARY 1188 (6th Ed.1990)).

Myriad other jurisdictions to address the question have concluded that the answer is yes, too. *See, e.g., Hatch v. Dance*, 464 So. 2d 713, 714 (Fla. Dist. Ct. App. 1985) ("The trial court refused to award attorney's fees on the grounds that the voluntary dismissal precluded the possibility of there being any successful party. However, it is well-established that statutory or contractual provisions providing for an award of attorney's fees to the prevailing party in a litigation encompass defendants in suits

which have been voluntarily dismissed."); *In re Marriage of Roerig*, 503 N.W.2d 620, 622 (Iowa Ct. App. 1993) ("When plaintiff voluntarily dismissed her action to modify Richard's child support obligation, Richard became the prevailing party for purposes of the statutory provision regarding an award of reasonable attorney fees."); *Dean Vincent, Inc. v. Krishell Lab'ys, Inc.*, 271 Or. 356, 358–59, 532 P.2d 237, 238 (1975) ("defendant was the prevailing party because a voluntary nonsuit terminates the case in a defendant's favor. Even though the termination was without prejudice and plaintiff could file another case upon the same cause of action, these facts did not prevent defendant from being the party in whose favor the judgment was rendered in that particular case."); *Blair v. Ing*, 96 Haw. 327, 331, 31 P.3d 184, 188 (2001) ("we affirm the rule stated in Wong and hold that a defendant who succeeds in obtaining a judgment of dismissal is a prevailing party for the purpose of fees under HRS § 607–14"); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 887 (9th Cir.2000); *Fraser v. ETA Ass'n, Inc.*, 41 Conn. Supp. 417, 419, 580 A.2d 94, 95–96 (Super. Ct. 1990) ("Absent statutory provisions that preclude recovery of attorney's fees where the "prevailing party" prevailed by withdrawal or by other voluntary act of the plaintiff, courts have seen fit to award the fees. . . . It is therefore the conclusion of the court that prevailing party . . . includes defendants in cases that are withdrawn."); *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. Accordingly, the trial

court did not err by concluding that the Helstroms were entitled to an award of attorney fees under the attorney fees provision of the REPSA.'").

Courts have also held that the answer is yes after interpreting the meaning of "prevailing party" in its "ordinary or popular sense" when it has been used as a contract term. *See, e.g., Santisas v. Goodin*, 17 Cal. 4th 599, 609, 951 P.2d 399, 405–06 (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. The objective of the seller defendants in this litigation was to prevent plaintiffs from obtaining that relief. Because the litigation terminated in voluntary dismissal with prejudice, plaintiffs did not obtain by judgment any of the relief they requested, nor does it appear that plaintiffs obtained this relief by another means, such as a settlement. Therefore, plaintiffs failed in their litigation objective and the seller defendants succeeded in theirs. Giving the term 'prevailing party' its ordinary or popular meaning, the seller defendants are the 'prevailing part[ies]' under their agreement with plaintiffs, and, if we consider only the rules of contract law, they are entitled to recover the amounts they incurred as attorney fees in defending all claims asserted in this action."); *Bardon Trimount, Inc.*, 49 Mass. App. Ct. at 778–79 (collecting cases and holding that "[o]ur commonsense reading also accords with case law suggesting that the usage of 'prevailing party' in a contractual fees payment clause should be consistent with the usage of the same words governing liability for court costs in ordinary civil actions."); *Anderson v. Melwani,* 179 F.3d 763, 766 (9th Cir. 1999) ("a voluntary dismissal may be a temporary

reprieve rather than an outright victory. The award of contractual attorney's fees under these circumstances does not necessarily implicate the merits of the underlying lawsuit. Rather, it reflects the fact that the plaintiff has dragged the defendant through a costly and ultimately fruitless exercise.").

Within the meaning of Tenn. Code Ann. § 36-5-103(c)—which provides that "[a] prevailing party may recover reasonable attorney's fees"—multiple panels of the Court of Appeals have held that the answer is yes, too. *See Pounders v. Pounders*, No. W2010-01510-COA-R3CV, 2011 WL 3849493, at *4–5 (Tenn. Ct. App. Aug. 31, 2011) ("Father also argues that the aforementioned statute does not authorize an award of attorney's fees in this case because he voluntarily dismissed his petition prior to a final adjudication by the trial court. . . . [W]e find no abuse of the trial court's discretion in its decision to award Mother her attorney's fees, as such an award was authorized by Tennessee Code Annotated section 36–5–103(c)."); *Hayes v. Scoggin*, No. W2019-00057-COA-R3-CV, 2019 WL 3337219, at *5 (Tenn. Ct. App. July 25, 2019) ("Despite mother's decision to voluntarily dismiss her petition without prejudice, father was still permitted to recover the attorney's fees he incurred in defending against her petition; *Pounders v. Pounders* stands for the proposition that mother cannot voluntarily dismiss her petition in order to avoid paying the statutorily permitted attorney's fees."); *Hansen v. Hansen*, No. M2008–02378–COA–R3–CV, 2009 WL 3230984, at *3 (Tenn. Ct. App. Oct. 7, 2009) (upholding award of attorney's fees under section 36-5-103(c) following litigant's nonsuit).

By contrast, the Panel below held that the answer is no. *See Colley*

v. Colley, No. M2021-00731-COA-R3-CV, 2022 WL 17009222, at *6 (Tenn. Ct. App. Nov. 17, 2022) (holding that because Husband nonsuited, "neither party is a 'prevailing party' for purposes of triggering a right to recover attorney's fees under either the MDA or Tennessee Code Annotated Section 36-5-103(c)."). In so holding, the Panel borrowed from Tennessee's malicious prosecution jurisprudence and held that to be a "prevailing party," a defendant must secure not only a favorable *judgment*, but also a favorable termination on the *merits*. *See id.*

As any defendant who has ever secured a dismissal based on Tenn. R. Civ. P. 12.02(1), (2), (3), (4), (5), (7), a res judicata claim, or any other procedural ground can attest, though—and as other Court of Appeals Panels, Tennessee's statutes, legal dictionaries, and other jurisdictions' courts have instructed—one need *not* secure a merits judgment to be a prevailing party. That conclusion is also especially obvious where—as here—a litigant successfully defends a consent decree against an opposing party's effort to modify it, thereby keeping a previous merits order in place. *Cf. Pounders*, 2011 WL 3849493, at *5 ("By opposing Father's petition, Mother was attempting to enforce the court's previous child support order"). Thus, given the substantial divergence of lower court authority generated by the Panel's opinion below—and given the importance of the question to every case, numbering in the tens of thousands annually, that results in a nonsuit or other non-merits dismissal—the Appellant respectfully applies to this Court for permission to appeal and resolve the split of authority regarding whether defendants who successfully defend against a lawsuit and secure a non-merits dismissal are prevailing parties under Tennessee law.

IV. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(1) FILING STATEMENT

Under Tennessee Rule of Appellate Procedure 11(b), the Appellant states that the judgment of the Tennessee Court of Appeals regarding which this Application is filed—which is attached as **Ex. 1**—was entered on November 17, 2022. *See Colley*, 2022 WL 17009222. No petition to rehear was filed thereafter. Thus, this Application having been filed within 60 days of the Tennessee Court of Appeals' judgment, the Appellant's Rule 11 Application is timely filed.

V. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(2) STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant who defends against a lawsuit that seeks to modify a court-ordered Marital Dissolution Agreement and secures a judgment of dismissal, without prejudice, following the plaintiff's voluntary nonsuit a "prevailing party" within the meaning of Tenn. Code Ann. § 36-5-103(c)?

2. When "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), is a defendant who secures a judgment of dismissal, without prejudice, following a plaintiff's voluntary nonsuit a "prevailing party" within the meaning of a contractual fee-shifting provision when the term "prevailing party" is not otherwise defined?

VI. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(3) STATEMENT OF THE FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

John Shackelford Colley, III ("Husband") and Vanessa Young Colley ("Wife") were divorced on July 18, 2012.[1] The Parties' divorce was finalized pursuant to a Final Decree that incorporated a court-approved Marital Dissolution Agreement ("MDA").[2] As relevant to this appeal, a mandatory fee-shifting provision of the Parties' MDA provided that:

> In the event it becomes reasonably necessary for either party to institute or defend legal proceedings related to the enforcement of any provision of this Agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.[3]

On January 9, 2019, Husband filed a "Petition to Terminate Transitional Alimony, Modify MDA and Enter Judgment for IRS Reimbursement."[4] Husband's Petition sought the following relief:

a) Termination of his obligation to pay transitional alimony pursuant to TCA §36-5-121(2)(C), retroactive to the date of the filing of the instant petition;

b) Terminate his obligation to make Ex-wife a beneficiary of his life insurance policy;

c) Enter a judgment against Ex-wife in the amount of $6000 for reimbursement of interest and penalty on the parties' 2010 IRS return (with statutory interest since January 12, 2015, date of the first written demand to Ex-wife's counsel for reimbursement);

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[1] R. at 1, ¶ 1.
[2] R. (1st Supp.) at 27–40.
[3] *Id.* at 35–36.
[4] *See generally* R. at 1–5.

d) Award his attorney's fees and discretionary should he prevail on any of these grounds; and

e) Such other relief as to which he may be entitled.[5]

Because it was "reasonably necessary" for Wife to defend against Husband's claims, Wife defended against them and filed an Answer.[6] As relief, Wife asked that Husband's Petition "be dismissed, with the costs assessed against Petitioner, for which execution may issue, and that she be awarded a judgment for the reasonable attorney fees she incurred in being forced to defend this unnecessary action."[7]

For the next two years, Wife vigorously defended against Husband's claims, and the Parties engaged in extensive discovery, motion practice, and an unsuccessful pretrial mediation and judicial settlement conference. Wife also repeatedly demanded a trial. Eventually, on July 27, 2020, the Trial Court granted Wife's Renewed Motion to Set for Trial.[8] Thereafter, on August 17, 2020, the Trial Court entered an order setting the final hearing on Husband's claims "for November 18, 2020 at 9:00 a.m."[9]

Twelve days before trial—but after 22 months of litigation—Husband filed a Notice of Nonsuit under Tenn. R. Civ. P. 41.01 dismissing "all causes of action from the instant litigation . . . without prejudice."[10] An Order of Nonsuit dismissing Husband's claims without

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[5] *Id.* at 3.
[6] *See generally id.* at 12–19.
[7] *Id.* at 18.
[8] *Id.* at 88–90.
[9] *Id.* at 91.
[10] *Id.* at 93.

prejudice was entered on November 13, 2020.[11]

Following entry of Husband's nonsuit, Wife filed a Motion for Attorney Fees.[12] As justification for a fee award, Wife relied on two provisions: (1) the "specific contractual provision in the MDA executed by both parties and incorporated in the 2014 Final Decree of Divorce that provides for attorney fees when a party must defend herself in regard to enforcing the MDA[,]" and (2) "the terms of T.C.A.§36-5-103(c)."[13]

On June 2, 2021, the Trial Court entered an order awarding Wife $16,500.00 in reasonable attorney's fees based on both the "specific provision in the parties' MDA that provides for mandatory attorney fees to the prevailing party after a post-divorce proceeding has been initiated or defended" and "T.C.A §36-5-103(c)[.]"[14] Following entry of that order, Husband timely appealed.[15]

On appeal, Husband presented a host of issues on which he did not prevail, several of which he conceded during oral argument. *See Colley*, 2022 WL 17009222, at *3 ("[T]he discovery issue surrounding telephone and email records is moot. At oral argument before this Court, Husband's attorney conceded the foregoing points. When asked the effect of the nonsuit on Husband's issues, Husband's attorney stated that 'based on the nonsuit, there was no longer any controversy' concerning the enforceability of the settlement agreement. As to the discovery issue,

[11] *Id.* at 99–101.
[12] *Id.* at 117–123.
[13] *See id.* at 118; *see also* R. at 119.
[14] *Id.* at 234–36.
[15] *Id.* at 295–96.

Husband's attorney also conceded that this issue would be rendered moot if the nonsuit precluded our review of other issues arising from Husband's substantive lawsuit. We agree.").

As to Wife's attorney's fee award, though, the Court of Appeals reversed. *Id.* at *6. As grounds, the Panel noted that this Court's malicious prosecution jurisprudence requires a favorable termination "'on the merits for the purposes of a malicious prosecution claim.'" *Id.* at *5 (quoting *Himmelfarb v. Allain*, 380 S.W.3d 35, 38–41 (Tenn. 2012)). The Panel added that "this Court has applied the *Himmelfarb* holding in contexts other than malicious prosecution." *Id.* at *6. Based on this reasoning, the Panel determined that:

> Husband's nonsuit "terminate[d] the action without an adjudication of the merits" and left the parties "as if no action had been brought at all." *Id.* As such, neither party is a "prevailing party" for purposes of triggering a right to recover attorney's fees under either the MDA or Tennessee Code Annotated Section 36-5-103(c). Accordingly, we conclude that the trial court erred in awarding Wife her attorney's fees.

Id.

In reversing Wife's fee award, the Panel did not attempt to determine the plain and ordinary meaning of the term "prevailing party" when used by parties in a contract. *See id. But see BSG, LLC*, 395 S.W.3d at 93 ("If the contract language is found to be clear and unambiguous, the contract language is interpreted according to its plain terms and ordinary meaning."); *Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013) ("We initially determine the parties' intent by examining the plain and ordinary meaning of the written words that

are 'contained within the four corners of the contract.'") (cleaned up).

Nor did the Panel try to reconcile its interpretation of "prevailing party" with any of:

1. Three previous Panel opinions holding that a voluntary dismissal without prejudice *does* confer prevailing party status under Tennessee Code Annotated Section 36-5-103(c), *see Pounders*, 2011 WL 3849493, at *4–5 ("Father also argues that [Tennessee Code Annotated section 36–5–103(c)] does not authorize an award of attorney's fees in this case because he voluntarily dismissed his petition prior to a final adjudication by the trial court. . . . we find no support for Father's narrow interpretation of the statute."); *Hayes*, 2019 WL 3337219, at *5 ("Despite mother's decision to voluntarily dismiss her petition without prejudice, father was still permitted to recover the attorney's fees he incurred in defending against her petition; *Pounders v. Pounders* stands for the proposition that mother cannot voluntarily dismiss her petition in order to avoid paying the statutorily permitted attorney's fees."); *Hansen*, 2009 WL 3230984, at *3 (upholding award of attorney's fees under section 36-5-103(c) following litigant's nonsuit); or

2. Several previous Panel opinions holding that a defendant who secures a dismissal following a plaintiff's nonsuit is a prevailing party under Tenn. R. Civ. P. 54.02(2). *See, e.g., 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."); *JPMorgan Chase Bank*, 2007 WL 2316450, at *8 ("For the purpose of Tenn. R. Civ. P. 54.02(2),

FNB was the prevailing party because Chase voluntarily dismissed its suit."); *Est. of Burkes ex rel. C.T.A.*, 2007 WL 2634851, at *7 ("It makes more sense to simply hold, as did the Court in *JP Morgan*, that a defendant in a case that is voluntarily dismissed is necessarily the 'prevailing party' simply because the plaintiff 'voluntarily dismissed its suit.'") (quoting *JP Morgan*, 2007 WL 2316450, at *8).

Thus, because the Panel's ruling below: (1) creates a divergence of Court of Appeals authority as to the meaning of "prevailing party" under Tenn. Code Ann. § 36–5–103(c); (2) creates a divergence of Court of Appeals authority as to the meaning of "prevailing party" generally; (3) is out of step with Tennessee statutory law, common legal dictionaries, and other jurisdictions' approach to the same question; and (4) presents an important question of law that will affect thousands of cases every year, including all cases in which a voluntary nonsuit is taken and all cases in which a non-merits dismissal is obtained, the Appellant has filed this timely Application for Permission to Appeal.

VII. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(4) STATEMENT OF THE REASONS SUPPORTING REVIEW

This Court should grant review under Tennessee Rule of Appellate Procedure 11(a). All four Rule 11 factors are met. Thus, review is warranted given the need:

1. To secure uniformity of decision;
2. To secure settlement of important questions of law;
3. To secure settlement of questions of public interest; and
4. For the exercise of the Supreme Court's supervisory authority.

1. THE NEED TO SECURE UNIFORMITY OF DECISION.

A. Panels of the Court of Appeals are split on whether a defendant is a prevailing party under Tenn. Code Ann. § 36-5-103(c) when a plaintiff takes a voluntary nonsuit.

Drawing from this Court's malicious prosecution jurisprudence, the Panel's opinion holds that a defendant is not a prevailing party under Tenn. Code Ann. § 36-5-103(c) when a plaintiff takes a voluntary nonsuit. *Colley*, 2022 WL 17009222, at *5–6. In particular, the Panel held that:

> Husband's nonsuit "terminate[d] the action without an adjudication of the merits" and left the parties "as if no action had been brought at all." *Id.* As such, neither party is a "prevailing party" for purposes of triggering a right to recover attorney's fees under either the MDA or Tennessee Code Annotated Section 36-5-103(c). Accordingly, we conclude that the trial court erred in awarding Wife her attorney's fees.

Id. at *6.

In so holding, the Panel's ruling conflicts directly with at least three previous Panel opinions on precisely the same point.[16] Most recently, in *Hayes*, 2019 WL 3337219, at *5, the Court of Appeals held that:

> Despite mother's decision to voluntarily dismiss her petition without prejudice, father was still permitted to recover the attorney's fees he incurred in defending against her petition; *Pounders v. Pounders* stands for the proposition that mother cannot voluntarily dismiss her petition in order to avoid paying the statutorily permitted attorney's fees.

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[16] Curiously, Judge Stafford—a member of the Panel below—was also a member of the conflicting Panel decision in *Pounders*. *Compare Colley*, 2022 WL 17009222 ("Kenny Armstrong, J., delivered the opinion of the court, in which J. Steven Stafford, P.J., W.S., and Arnold B. Goldin, J., joined."); *with Pounders*, 2011 WL 3849493 ("ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.").

Id. (citing *Pounders*, 2011 WL 3849493, at *5).

Before that, in *Pounders*, 2011 WL 3849493, at *5, the Court of Appeals held:

> Father also argues that [Tennessee Code Annotated section 36–5–103(c)] does not authorize an award of attorney's fees in this case because he voluntarily dismissed his petition prior to a final adjudication by the trial court. Father claims that there must be a "change or award of child custody" before attorney's fees can be awarded. Again, we find no support for Father's narrow interpretation of the statute. "The custodial spouse in a divorce case 'may recover from the other spouse reasonable attorney's fees incurred' in any proceeding involving the establishment or enforcement of that obligation." *Melvin*, 2006 WL 1132042, at *9 (citing Tenn. Code Ann. § 36–5–103). The relevant statutory language provides that "the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or *in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child*, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing[.]" Tenn. Code Ann. § 36–5–103(c) (emphasis added). Here, Father's petition and proposed parenting plan sought to have his child support decreased and his parenting time increased. By opposing Father's petition, Mother was attempting to enforce the court's previous child support order, in a suit or action that also concerned the adjudication of custody.
>
> The parties have not cited any cases in which a court has considered whether it is appropriate to award attorney's fees pursuant to section 36–5–103(c) when a petition for custody or visitation is voluntarily dismissed prior to a hearing, and we have not encountered any in our research. However, in *Hansen v. Hansen*, No. M2008–02378–COA–R3–CV, 2009 WL 3230984, at *3 (Tenn.Ct.App. Oct. 7, 2009), a father

> voluntarily dismissed his petition to modify child support at the beginning of the hearing on the matter, and this Court held that it was appropriate for the trial court to award the mother her attorney's fees "[i]n light of the fact that Mother's counsel had to prepare for the hearing as if the issue of support would be litigated." Similarly, in the case before us, we find no abuse of discretion in the trial court's decision to award Mother her attorney's fees that were incurred in preparation of litigating the issues raised in Father's petition. One of the benefits of section 36–5–103(c) is that awarding attorney's fees to the custodial parent "discourages vexatious petitions by the noncustodial parent." Janet Leach Richards, Richards on Tennessee Family Law, § 14–3(a)(3) (2d ed.2004). That purpose would not be served if the other spouse could simply dismiss his or her petition prior to the hearing in order to avoid payment of the custodial spouse's attorney's fees.
>
> In sum, we find no abuse of the trial court's discretion in its decision to award Mother her attorney's fees, as such an award was authorized by Tennessee Code Annotated section 36–5–103(c).

Id.

As the *Pounders* Court observed, a previous Court of Appeals decision—*Hansen v. Hansen*, 2009 WL 3230984, at *3—had similarly upheld an award of attorney's fees to a defendant under Tenn. Code Ann. § 36-5-103(c) under circumstances when a litigant "waited until the hearing to voluntarily dismiss his petition to modify his child support obligation." *See id.* As justification for this ruling, the *Hansen* Court reasoned that "[t]his statute 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[,]" and it concluded that "[i]n light of the fact that Mother's counsel had to prepare for the hearing as if the issue of support would be litigated,

we find no abuse of discretion in the trial court's decision to award attorney's fees for that preparation." *See id.*

Because these previous Court of Appeals rulings conflict directly with the Panel's ruling below, this Court should grant review "to secure uniformity of decision[.]" *See* Tenn. R. App. P. 11(a)(1).

B. Panels of the Court of Appeals are split on the broader issue of whether a defendant is a prevailing party, generally, when a plaintiff takes a voluntary nonsuit.

The Panel's ruling that a defendant is not a prevailing party when a plaintiff takes a nonsuit did not purport to depend on any unique interpretation of Section 36-5-103(c). *See Colley*, 2022 WL 17009222, at *5–6. Instead, based on this Court's malicious prosecution jurisprudence requiring a favorable termination on the merits, the Panel's holding applies broadly to *all* prevailing party determinations—whether in the discretionary cost context, the contract context, or otherwise. *See id.*

Several other Court of Appeals Panels have reached a contrary conclusion, though. *See, e.g., 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."); *JPMorgan Chase Bank*, 2007 WL 2316450, at *8 ("For the purpose of Tenn. R. Civ. P. 54.02(2), FNB was the prevailing party because Chase voluntarily dismissed its suit."); *Est. of Burkes ex rel. C.T.A.*, 2007 WL 2634851, at *7 ("It makes more sense to simply hold, as did the Court in *JP Morgan*, that a defendant in a case that is voluntarily dismissed is necessarily the 'prevailing party' simply because the plaintiff 'voluntarily dismissed its suit.'") (quoting *JP*

Morgan, 2007 WL 2316450, at *8). The Panel below also did not attempt to reconcile this conflict or distinguish the many previous Panel decisions that adjudicated the same question in the discretionary cost context. *See Colley*, 2022 WL 17009222, at *5–6. Nor does it make sense that the term "prevailing party" would mean one thing under Section 36-5-103 and another thing under Tenn. R. Civ. P. 54.02(2). Accordingly, this Court should grant review to secure uniformity of decision regarding whether a defendant is a prevailing party, generally, when a plaintiff takes a voluntary nonsuit. *See* Tenn. R. App. P. 11(a)(1).

2–3. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND PUBLIC INTEREST.

Nonsuits that yield a non-merits dismissal are common in litigation, and they occur in thousands—probably tens of thousands—of Tennessee cases each year. Any number of other non-merits dismissals are commonplace, too. *See, e.g.,* Tenn. R. Civ. P. 12.02(1) ("lack of jurisdiction over the subject matter"), (2) ("lack of jurisdiction over the person"), (3) ("improper venue"), (4) ("insufficiency of process"), (5) ("insufficiency of service of process"), (7) ("failure to join a party under Rule 19"). By holding that a defendant who successfully secures a favorable judgment including complete dismissal of all claims—but who does not secure a favorable *merits* judgment—is not a prevailing party, though, the Panel's opinion calls into doubt whether any such defendant may obtain either their discretionary costs or their attorney's fees under circumstances when fees are permitted.

The Panel's failure to construe the MDA's "prevailing party" terminology according to the extensive, pre-existing Court of Appeals

precedent interpreting that term—both in the context of Tenn. Code Ann. § 36-5-103(c) and in general—is also especially problematic under the circumstances presented here. In particular, this Court has long promised contracting parties that:

> Laws affecting either the construction, enforcement, or discharge of a contract, which "subsist at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as fully as if they had been expressly referred to or incorporated in its terms."

See Robbins v. Life Ins. Co. of Virginia, 169 Tenn. 507, 89 S.W.2d 340, 341 (1936) (quoting *Farmers' & Merchants' Bank of Monroe, N.C. v. Fed. Rsrv. Bank of Richmond, Va.*, 262 U.S. 649, 660, 43 S.Ct. 651, 67 L. Ed. 1157, 30 A.L.R. 635 (1923). *See also Cary v. Cary*, 675 S.W.2d 491, 493 (Tenn. Ct. App. 1984) ("laws affecting construction or enforcement of a contract existing at the time of its making form a part of the contract."). That promise notwithstanding, contracting parties that reasonably relied on the Court of Appeals' many consistent and preexisting interpretations of "prevailing party"—in multiple contexts—when drafting a contractual fee-shifting provision can no longer be sure that this Court's promise will be kept.

Given how often the question of "prevailing party" status resulting from voluntary nonsuits arise, it is hardly surprising that Tennessee statutory law, legal dictionaries, and other jurisdictions have determined how the term "prevailing party" should be construed. That guidance is substantially one-directional,[17] and it conflicts with the Panel's decision

[17] Indeed, jurisdictions that have held otherwise have emphasized state-specific statutory language compelling a contrary result. For instance, as

below. *See, e.g.,* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, . . . the defendant is the successful party, within the meaning of § 20-12-101."); PARTY, Black's Law Dictionary (11th ed. 2019) ("**prevailing party**. A party in whose favor a judgment is rendered, regardless of the amount of damages awarded: — Also termed *successful party*."); *Hatch*, 464 So. 2d at 714 ("The trial court refused to award attorney's fees on the

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a Virginia court explained in *Castle v. Sheets*, No. CH00-38, 2001 WL 168258, at *1 (Va. Cir. Ct. February 2, 2001):

> The Defendants point to decisions in other jurisdictions as persuasive authority where the courts have ruled that defendants are "prevailing parties" for purposes of awarding attorney's fees and costs following a non-suit. *See e.g.'s Fraser v. ETA Assoc. Inc.*, 41 Conn.Supp. 417 (1990), *Dean Vincent Inc., v. Krishell Laboratories, Inc.*, 271 Or. 356, (1975), *Hatch v. Dance*, 464 So.2d 713, (1985). In each of these cases the Courts held that the defendants were the "prevailing party" following a non-suit.
>
> However, it is clear that an opposing party cannot be granted attorney's fees and costs against a first-time non-suiting claimant, under Va.Code § 8.01-380 (in the absence of a contract awarding attorney's fees and costs), simply because a party exercised their statutory right of non-suit. Under Va.Code § 8.01-380:
>
> > Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a *matter of right*, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits. The court, in the event *additional* nonsuits are allowed, *may* assess costs and reasonable attorney's fees against the nonsuiting party. Va.Code § 8.01-380(B) (emphasis added).

Id.

grounds that the voluntary dismissal precluded the possibility of there being any successful party. However, it is well-established that statutory or contractual provisions providing for an award of attorney's fees to the prevailing party in a litigation encompass defendants in suits which have been voluntarily dismissed."); *In re Marriage of Roerig*, 503 N.W.2d at 622 ("When plaintiff voluntarily dismissed her action to modify Richard's child support obligation, Richard became the prevailing party for purposes of the statutory provision regarding an award of reasonable attorney fees."); *Dean Vincent, Inc.*, 532 P.2d at 238 ("defendant was the prevailing party because a voluntary nonsuit terminates the case in a defendant's favor. Even though the termination was without prejudice and plaintiff could file another case upon the same cause of action, these facts did not prevent defendant from being the party in whose favor the judgment was rendered in that particular case."); *Blair*, 31 P.3d at 188 ("we affirm the rule stated in *Wong* and hold that a defendant who succeeds in obtaining a judgment of dismissal is a prevailing party for the purpose of fees under HRS § 607–14"); *Kona Enters., Inc.*, 229 F.3d at 887 (stating that, "[u]nder Hawai'i law, a party may be deemed the 'prevailing party' entitled to an award of statutory attorneys' fees under [HRS] § 607–14 without successfully litigating the merits of the party's claim"); *Fraser*, 580 A.2d at 95–96 ("Absent statutory provisions that preclude recovery of attorney's fees where the "prevailing party" prevailed by withdrawal or by other voluntary act of the plaintiff, courts have seen fit to award the fees. . . . It is therefore the conclusion of the court that prevailing party, as used in the lease in question and in § 42–

150bb, includes defendants in cases that are withdrawn."); *Acorn Olympia LLC*, 2021 WL 2673894, at *3 ("'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. Accordingly, the trial court did not err by concluding that the Helstroms were entitled to an award of attorney fees under the attorney fees provision of the REPSA.'").

To be fair to the Panel, though, "Tennessee jurisprudence has defined 'prevailing party' in various ways[,]" resulting in some degree of confusion. *See Aylor v. Carr*, No. M2018-01836-COA-R3-CV, 2019 WL 2745625, at *4 (Tenn. Ct. App. July 1, 2019). This Court has also recognized the different definitions of "prevailing party" that other jurisdictions have adopted, even though it has yet to resolve the matter under Tennessee law. *See Allen v. Jones*, No. 02S01-9512-CV-00127, 1996 WL 631355, at *4 (Tenn. Nov. 1, 1996) ("Some courts in other jurisdictions have held that a prevailing party is one that receives a favorable judgment on the merits. Other courts have held that if a defendant is put through the burden of defending a charge until it is abandoned, it becomes the prevailing party as to that charge.") (internal citations omitted). Since this Court's observation in *Allen*, some courts have even adopted an intermediate approach that considers whether a nonsuit was taken to avoid an unfavorable merits ruling. *See, e.g., Kontoh v. Safo*, No. 05-17-00448-CV, 2018 WL 3215881, at *2 (Tex. App. July 2, 2018) ("a defendant may be a prevailing party when a plaintiff nonsuits without prejudice, if, on the defendant's motion, the trial court

determines the nonsuit was taken to avoid an unfavorable ruling on the merits.") (citing *Epps v. Fowler*, 351 S.W.3d 862, 869 (Tex. 2011); *Cardiovascular Provider Res. Inc. v. Gottlich*, No. 05-13-01763-CV, 2015 WL 4914725, at *5 (Tex. App. Aug. 18, 2015); *BBP Sub I LP v. Di Tucci*, No. 05-12-01523-CV, 2014 WL 3743669, at *3 (Tex. App. July 29, 2014).

Here, the sheer volume of cases that the Panel's anomalous, malicious-prosecution-based definition of "prevailing party" will affect merits this Court's review. The importance of the issue to litigants is confirmed by the fact that so many other jurisdictions have adjudicated the same question presented here alone. These considerations also come in addition to the fact that individuals who relied on previous, then-undisturbed Court of Appeals precedent while incorporating prevailing party-based fee-shifting provisions into their contracts can no longer trust that their expectations will be respected. For all of these reasons, this Court should grant review due to "the need to secure settlement of important questions of law" and "the need to secure settlement of questions of public interest[.]" *See* Tenn. R. App. P. 11(a)(2).

4. THE NEED FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY AUTHORITY.

The Panel's refusal to accord Wife prevailing party status after she spent nearly two full years successfully defending the Trial Court's MDA—a judicially-approved consent decree—will meaningfully deter litigants from defending and enforcing such orders in the future. Because courts must adhere to the "'principle of party presentation[,]'" *see generally State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022), courts must also rely on litigants to defend the propriety of their decrees. As a result,

the judiciary's interest in such enforcement has been identified by multiple different Panels as a reason to accord prevailing party status to successful defenders of earlier court orders. *See, e.g., Hansen*, 2009 WL 3230984, at *3 ("This statute 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."); *Pounders*, 2011 WL 3849493, at *5 ("By opposing Father's petition, Mother was attempting to enforce the court's previous child support order[.]").

That is not the only issue that merits exercise of this Court's supervisory authority, though. Regrettably, on multiple recent occasions, the Court of Appeals has undermined the effectiveness of fee-shifting provisions in a manner that this Court ultimately concluded—unanimously and without difficulty—was erroneous. *See, e.g., Donovan v. Hastings*, No. M2019-01396-COA-R3-CV, 2020 WL 6390134, at *1 (Tenn. Ct. App. Oct. 30, 2020), *appeal granted* (Apr. 7, 2021), *rev'd*, 652 S.W.3d 1 (Tenn. 2022); *Eberbach v. Eberbach*, No. M2014-01811-COA-R3-CV, 2015 WL 6445480 (Tenn. Ct. App. Oct. 23, 2015), *rev'd*, 535 S.W.3d 467 (Tenn. 2017). The Court of Appeals has also been particularly ardent when it comes to undermining the effectiveness of *mandatory* fee-shifting provisions. *See, e.g., Eberbach v. Eberbach*, 535 S.W.3d 467, 478 (Tenn. 2017) (in which this Court reminded a Court of Appeals Panel that had erroneously denied a party a fee award that litigants are "contractually *entitled* to recover their reasonable attorney's fees when they have an agreement that provides the prevailing party in a litigation

is entitled to such fees."); *Donovan*, 2020 WL 6390134, at *1 *rev'd*, 652 S.W.3d 1 (Tenn. 2022) (erroneous denial of complete fees incurred); *Pagliara v. Moses*, No. M2020-00990-COA-R3-CV, 2022 WL 4229930, at *1 (Tenn. Ct. App. Sept. 14, 2022) (finding waiver of any claim to otherwise mandatory fee award if a prevailing defendant does not prematurely seek fees before the statute even permits fees to be awarded); *First Cmty. Mortg., Inc. v. Appraisal Servs. Grp., Inc.*, 644 S.W.3d 354, 368 (Tenn. Ct. App. 2021) (holding that "Tennessee law does not provide that attorney's fees for appellate work are authorized under section 20-12-119(c)" even when the work relates to the dismissed claim); *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *27 (Tenn. Ct. App. Dec. 12, 2019) (finding waiver of appellate attorney's fee claim in 42 U.S.C. § 1983 case in which civil rights litigant prevailed on the merits of all constitutional claims, where the trial court had awarded fees under 42 U.S.C. § 1988(b), and where opposing litigant had conceded the propriety of trial court's consideration of appellate fee award in post-remand litigation). Thus, this case—in which Wife was entitled to an award of attorney's fees on both statutory *and* contractual grounds—presents the latest iteration of the Court of Appeals' efforts to undermine attorney's fee-shifting provisions. This Court should exercise its supervisory authority and grant review as a result.

VIII. CONCLUSION

For all of these reasons, the Appellant's Rule 11 Application for permission to appeal should be **GRANTED**.

Respectfully submitted,

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IX. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02 and Tennessee Rule of Appellate Procedure 11(a), this brief contains 6,867 words pursuant to § 3.02(a)(1)(a) excluding excepted sections, as calculated by Microsoft Word; it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3); and the argument in this Application does not exceed 50 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2023, a copy of the foregoing was served via the Court's electronic filing system upon:

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