

**IN THE SUPREME COURT OF TENNESSEE**  
**AT NASHVILLE**

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

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**RESPONSE TO APPELLANT’S PRINCIPAL BRIEF**

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**ORAL ARGUMENT REQUESTED**

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### III. STATEMENT OF THE ISSUES

1. Is a defendant who successfully defends against a lawsuit that seeks to modify a court-ordered Marital Dissolution Agreement who 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?
2. When "contract language is interpreted according to its plain terms and 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?
3. Whether the Appellant should be awarded her reasonable attorney's fees regarding this appeal under the Parties' MDA, Tenn. Code Ann. §36-5-103 (c), or both provisions?
4. Whether the Appellee should be awarded his reasonable attorney's fees regarding this appeal?

#### IV. STANDARDS OF REVIEW

The issue of whether the Appellant was a “prevailing party” entitled to attorney fees at law is a question of statutory interpretation this Honorable Supreme Court reviews *de novo*. See *Lawson v. Hawkins Cnty.*, No. E2020-01529-SC-R11-CV (Tenn. Feb. 16, 2023).

The standard by which this Supreme Court considers such statutory interpretation is “well-defined” with the “primary objection to carry out legislative intent without broadening or restricting the statute beyond its intended scope.”

When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). *Manor v. Woodroof*, No. M2020-00585-COA-R3-CV, at \*6 (Tenn. Ct. App. Feb. 12, 2021)

The interpretation of a contract is a “matter of law” with “no presumption of correctness” that requires a *de novo* review on appeal. See *NSA DBA Benefit Plan, v. Connecticut Gen. Life Ins. Co.*, 968 S.W.2d 791 (Tenn. Ct. App. 1997).

The standard for this review is to “ascertain the intent of the parties” and “interpret the contract as written according to its plain terms.”

The cardinal rule in the construction of contracts is to ascertain the intent of the parties. *West v. Laminite Plastics Mfg. Co.*, 674 S.W.2d 310 (Tenn. Ct. App. 1984). If the contract is plain and unambiguous, the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written according to its plain terms. *Petty v. Sloan*, 197 Tenn. 630, 277 S.W.2d 355 (Tenn. 1955). The language used in a contract must be taken and understood in its plain, ordinary, and popular sense. *Bob Pearsall Motors, Inc. v. Regal Chrysler — Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975). In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. *Ballard v. North American Life Casualty Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Sutton v. First Nat. Bank of Crossville*, 620 S.W.2d 526 (Tenn. Ct. App. 1981). Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made. *McKee v. Continental Ins. Co.*, 191 Tenn. 413, 234 S.W.2d 830 (Tenn. 1950). *Promus Hotels, Inc. v. Martin, Cole, Dando Robertson, Inc.*, No. W2002-01028-COA-R3-CV, 2003 Tenn. App. LEXIS 95, at \*6-7 (Tenn. Ct. App. February 3, 2003). *Erwin v. Moon Prod.*, No. M2002-00877-COA-R9-CV, at \*1 (Tenn. Ct. App. Aug. 5, 2003)

## V. INTRODUCTION

The definition of “prevailing party” is uniformly defined by both state and federal law. The case law in both state and federal law is that a voluntary nonsuit does not have a “prevailing party” as neither party’s position is altered in any manner; neither party is successful in any significant claim or in obtaining any relief sought; and both parties are left in the same manner in which they were prior to the case being filed.

“The United States Supreme Court has defined “prevailing party” as “one who has succeeded on any significant claim affording it some of the relief sought.” *Texas State Teachers Ass’n. v. Garland Indep. School Dist.*, 489 U.S. 782, 791, 109 S. Ct. 1486, 1493, 103 L.Ed.2d 866 (1989).” *Dairy Gold, Inc. v. Thomas*, No. E2001-02463-COA-R3-CV, at \*1 n.1 (Tenn. Ct. App. July 29, 2002).

Appellee contends that there has been conformity in case law in Tennessee since the Supreme Court decision in *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012). Although the *Himmelfarb* case did not apply the holding that a nonsuit does not result in a prevailing party outside the issue of a malicious prosecution claim, other Tennessee Court of Appeals decisions have consistently applied the *Himmelfarb* in that manner.

“As our Supreme Court has stated, “[w]hen a voluntary nonsuit is taken, the rights of the parties are not adjudicated, and the parties are placed in their original positions prior to the filing of the suit.” *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn.

2012); *see also Cooper v. Glasser*, 419 S.W.3d 924, 930 (Tenn. 2013); *Jasinskis v. Cameron*, No. M2019-01417-COA-R3-CV, 2020 WL 2765845, at \*5 (Tenn. Ct. App. May 27, 2020). A plaintiff's voluntary nonsuit "terminates the action without an adjudication of the merits" and leaves the parties "as if no action had been brought at all." 27 C.J.S. Dismissal and Nonsuit § 11 (2020); *see also Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990) (stating that voluntary dismissal "'carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim.'") (quoting *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949)); 24 AM. JUR. 2D Dismissal § 4 (2020) ("Nonsuit is a procedural step that terminates the pending litigation but leaves the issues of the cause undecided."). *Justice v. Craftique Construction, Inc.*, No. E2019-00884-COA-R3-CV, 2021 WL 142146, at \*3 (Tenn. Ct. App. Jan. 15, 2021). *Colley v. Colley*, No. M2021-00731-COA-R3-CV, at \*9 (Tenn. Ct. App. Nov. 17, 2022)

These case decisions of having no "prevailing party" in a voluntary nonsuit pursuant to Tenn. Rules of Civil Procedure Rule 41.01 are based on the intention and language of the rule itself, sound public policy, and practical legal reasoning.

Many cases explain what happens when a voluntary nonsuit is taken by a plaintiff. Absent a few procedural, statutory, or other case law exceptions, including a pending summary judgment motion, the matter is over and ended with no controversy existing once a voluntary dismissal is filed. Pertinent time frames begin upon the entry of the order of dismissal.

“As this Court concluded in *Rose*, the plaintiff "had functionally and effectively ended this action" by taking a voluntary nonsuit. See 2016 WL 7786449, at \*4. At that point, the present controversy no longer existed. See *Martin*, 1993 WL 241315, at \*2” *Menche v. White Eagle Prop. Grp.*, No. W2018-01336-COA-R3-CV, at \*5 (Tenn. Ct. App. Aug. 26, 2019)

The Tennessee Court of Appeals has been consistent in conformity with federal case law on the issue of ascertaining there *is not* a “prevailing party” in cases where a plaintiff takes a voluntary nonsuit.

"To be a `prevailing party,' a party must `succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ( quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "A plaintiff is benefitted by `monetary damages, injunctive relief, or a voluntary change in a defendant's conduct.'" *Owner-Operator Independent Drivers Ass'n, Inc. v. Bissell*, 210 F.3d 595, 597 (6th Cir. 2000) (quoting *Woolridge v. Marlene Indus.*, 898 F.2d 1169, 1173 (6th Cir. 1990). "In short, a plaintiff `prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). *Kentucky Restaurant Concepts v. City of Louisville*, CIVIL ACTION No. 3:01CV-374-H, at \*1 (W.D. Ky. May 5, 2003)

The Tennessee Rules of Civil Procedure Rule 54.04 specifically allows discretionary costs to be awarded in a situation where a voluntary nonsuit/dismissal is taken. Rule 41.01 excludes the ability to take a nonsuit in certain situations and specifically allows two nonsuits to be taken before the nonsuit is considered taken with prejudice on the merits of the case. Had 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. In fact, as this Supreme Court noted in the case of *Cooper v. Glasser*:

Tennessee appears to be the only jurisdiction with a procedural rule or statute that specifically permits a plaintiff to refile a lawsuit after two voluntary dismissals. See Tenn. R. Civ. P. 41.01(2). Most states have adopted the federal two-dismissal rule in some form. *Cooper v. Glasser*, 419 S.W.3d 924, 926 n.2 (Tenn. 2013)

Thus, the unique, liberal Tennessee rule of voluntary dismissal has been interpreted and decided favorably in support of permitting a voluntary nonsuit in appropriate situations with the specific intention of allowing the lawsuit to be refiled.

To substantively change this rule by determining a “prevailing party” in a nonsuit is to, in fact, revise the effect of the liberally written Rule 41.01. For once a party is determined a “prevailing party,” the case then becomes a case essentially resolved upon the merits in favor of that “prevailing party” such that there is a risk of no longer

maintaining the ability to refile the lawsuit as well as the risk of being required to pay attorney fees.

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 voluntarily 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.

This Supreme Court has already reviewed a variety of jurisdiction's approach to the issue of determining if a voluntary dismissal is a favorable termination within the context of malicious prosecution claims and considered the public policy reason to not determine a "prevailing party" in a voluntary nonsuit of the same.

"We decline to adopt a rule that would deter litigants with potentially valid claims from filing those claims because they are fearful of a subsequent malicious prosecution action. Nor do we wish to deter parties from dismissing their claims when a dismissal is the appropriate course of action." *Himmelfarb v. Allain*, 380 S.W.3d 35, 41 (Tenn. 2012)

The same public policy reasons to not determine a defendant as a “prevailing party” in a voluntary nonsuit also apply to the context of other civil actions.

Appellant contends that the purpose of a defendant’s goal in a civil action is to preserve the status quo by enforcing the earlier decree. *See e.g. Pounders v. Pounders*, No.W2010-01510-COA-R3-CV, 2011 WL 38499493 at \*5 (*Appellant’s Principal brief, p. 13*). Appellant uses this contention to support the determination that a defendant should be a prevailing party when a plaintiff voluntarily dismisses a case.

In this case, the plaintiff’s original pleading was not meant to alter or amend an order from 2012, but to *enforce* the Marital Dissolution Agreement as it was written and maintain the status quo for both parties. The plaintiff had a goal to enforce that contract as Appellant was not abiding by the contract of the parties. The outcome was that the alimony payments and insurance coverage were no longer required based on the enforcement of the Marital Dissolution Agreement provisions. Appellant’s action in marrying right after Appellee filed this petition rendered the petition seeking enforcement of the Marital Dissolution Agreement moot as to the alimony payments and insurance coverage.

## **VI. STATEMENT OF THE FACTS**

John Colley, III (hereinafter “Husband”) and Vanessa Colley (hereinafter “Wife”) were divorced on July 18, 2012. The parties entered into Marital Dissolution Agreement and a Final Decree of Divorce on this date. Under the provisions of this agreement, Husband paid Wife transitional alimony in the amount of \$5,000.00 and also was required to maintain her as a life insurance beneficiary in the amount of, at least, \$500,000.00 until such time as she cohabitated with a third person or was remarried.

On January 9, 2019, Husband filed for a termination of his obligation to pay transitional alimony and maintain her as a life insurance beneficiary based upon her cohabitation with her boyfriend/fiancé. Husband filed for the enforcement of the order regarding Wife’s requirement to reimburse him for interest and penalty from the parties’ 2010 IRS tax return. Husband requested a judgment for the amount owed of \$6000. Husband requested his attorney’s fees, discretionary costs, and any such other relief to which he may be entitled at law.

Wife filed a response to Husband’s petition, but Wife pled no counter-claim in this cause. Wife requested her attorney fees in her response to Husband’s petition.

Nearly immediately after Husband filed the petition, Wife married rendering any alimony payments moving forward and Husband’s

obligation to continue Wife as a beneficiary on his life insurance policy moot. Thus, the only two remaining issues ripe for litigation were the two- and one-half months of alimony from the date of the filing of the petition and the \$6000 judgment for reimbursement from the taxes.

After failed negotiation settlements and a cost analysis of the amount of money sought to be awarded and the amount of the costs of continued litigation, Husband voluntarily nonsuited his petition by filing notice with the Court on November 6, 2020. The Court issued an Order of Nonsuit dismissing Husband's petition on November 13, 2020.

Subsequently, pursuant to Tenn. Code Ann. Section §29-41-101, *et. seq.*, Wife filed a Motion for Abusive Lawsuit against Husband on November 8, 2020. Husband prevailed in this action, yet the Court did not award Husband his attorney's fee for successful defense against this motion. The Court directed Wife to file a Motion for her Attorney Fees, and Wife did so on February 4, 2021. Wife argued in her motion that she was entitled to attorney fees based on Tenn. Code Ann. §36-5-103 (c) and/or the parties' Marital Dissolution Agreement contractual provision regarding attorney fees to a "prevailing party."

The trial Court entered an order on May 11, 2021, finding that the Court *was not* going to make a determination of any prevailing party in this cause based on case law cited by Husband; however, the Court still awarded Wife attorney fees in the amount of \$16, 500.00, based on requesting she be awarded said fees in her response. The Trial Court made no ruling or explanation as to which, if any, of the legal grounds the Court was relying on to grant said fees since the Court did not

determine a prevailing party as is required for either method of recovery of attorney fees relied on by Wife.

Husband appealed Wife’s award of attorney fees. The Court of Appeals reversed the order awarding Wife attorney fees and determined she was not, in fact, a “prevailing party” based on the reasoning this Court outlined in the *Himmelfarb v. Allain* ruling in 2012 and the subsequent Court of Appeals case law interpreting this ruling in other civil cases.

Wife timely filed the application for this appeal, and Husband timely responded with an objection to the application for appeal. The Supreme Court accepted the application for appeal, and Wife filed her principal brief on April 4, 2023. Husband received an extension for providing a response to Wife’s principal brief. Husband timely files this response.

## VII. ARGUMENT

### **THERE IS NO “PREVAILING PARTY” WHEN A LAWSUIT IS VOLUNTARILY DISMISSED TO JUSTIFY AN AWARD OF ATTORNEY FEES TO WIFE UNDER TENN. CODE ANN. §36-5-103 (c).**

Appellee contends the case law in Tennessee has been consistent over the past years in its assertion that there is no “prevailing party” when a case is voluntary nonsuited and dismissed. In order for there to be a “prevailing party” within the meaning of Tenn. Code Ann. §36-5-103, the case must have been heard and decided on the merits and facts of the case and the outcome must have materially altered the legal relationship between the parties.

Appellee contends that the definition of “prevailing party” is consistent under state and federal law.

Tennessee jurisprudence has defined “prevailing party” in various ways. We find the following definitions most instructive in this case. A “prevailing party” is one who has been awarded some relief by the court.” *Fannon*, 329 S.W.3d at 430 (citations omitted). Such relief most often comes in the form of “enforceable judgments on the merits and court-ordered consent decrees.” *Id.* at 431 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)). *Aylor v. Carr*, No. M2018-01836-COA-R3-CV, at \*6 (Tenn. Ct. App. July 1, 2019).

Tennessee courts have defined a “prevailing party” as one who “succeeds on a ‘significant claim’ which affords the [party] a substantial measure of the relief sought.” *Daron v. Dep’t of Corr.*, 44 S.W.3d 478, 481 (Tenn. 2001). Additionally, a “prevailing party” has been defined as a party “who has succeeded ‘on any significant issue in litigation which achieves some of the benefit

the part[y] sought in bringing suit." *Fannon v. City of LaFollette*, 329 S.W.3d 418, 431 (Tenn. 2010) *Jones v. Reda Homebuilders, Inc.*, No. M2020-00597-COA-R3-CV, at \*8 (Tenn. Ct. App. June 10, 2021)

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." Black's Law Dictionary 1188 (6th Ed. 1990). *Dairy Gold, Inc. v. Thomas*, No. E2001-02463-COA-R3-CV, at \*1 (Tenn. Ct. App. July 29, 2002)

The United States Supreme Court has provided a definition of "prevailing party" for statutory interpretation. It said:

"...at a minimum, the plaintiff must be able to point to a resolution of the dispute *which materially alters the parties' legal relationship in a manner which Congress sought to promote in the fee statute.* *Hewitt v. Helms*, 482 U.S. 755, 760. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that it is so insignificant as to be insufficient to support prevailing party status. However, where the parties' relationship has been materially changed, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley, supra*, not to the availability of the fee award" *vel non*. Pp. 791-793. *Texas Teachers Assn. v. Garland School Dist*, 489 U.S. 782, 783 (1989)

Case law in Tennessee over the past few years has consistently maintained that under a Rule 41.04 voluntary nonsuit, there is not a "prevailing party."

As our Supreme Court has stated, "[w]hen a voluntary nonsuit is taken, the rights of the parties are not adjudicated, and the parties are placed in their original positions prior to the filing of the suit." *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012); *see also Cooper v. Glasser*, 419 S.W.3d 924, 930 (Tenn. 2013); *Jasinskis v. Cameron*, No. M2019-01417-COA-R3-CV, 2020 WL 2765845, at \*5 (Tenn. Ct. App. May 27, 2020). A plaintiff's voluntary nonsuit "terminates the action without an adjudication of the merits" and leaves the parties "as if no action had been brought at all." 27 C.J.S. *Dismissal and Nonsuit* § 11 (2020); *see also Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990) (stating that voluntary dismissal "'carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim.'") (quoting *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949)); 24 AM. JUR. 2D *Dismissal* § 4 (2020) ("Nonsuit is a procedural step that terminates the pending litigation but leaves the issues of the cause undecided."). *Justice v. Craftique Constr., Inc.*, No. E2019-00884-COA-R3-CV, at \*5 (Tenn. Ct. App. Jan. 15, 2021)

**THERE IS NO “PREVAILING PARTY” IN A VOLUNTARY NONSUIT FOR THE AWARD OF ATTORNEY FEES TO WIFE UNDER THE PLAIN MEANING OF THE MARITAL DISSOLUTION AGREEMENT PROVISION REQUIRING SUCH AN AWARD TO A “PREVAILING PARTY.”**

The Federal 6<sup>th</sup> Circuit specifically addressed the meaning of “prevailing party” in the context of a contract where the definition of “prevailing party” was not defined in the parties’ agreement.

The term "prevailing party" is not defined by the CNDA, but the Sixth Circuit has addressed how courts are to define "prevailing

party" in the context of a contract dispute when the parties themselves have left the meaning otherwise undefined. "Where, as here, the contractual provision awarding fees is identical to the frequently-used statutory term 'prevailing party,' and there is no effort to define that term differently in the [agreement] providing for the recovery of fees, we hold that the parties intend the term 'prevailing party' to have the meaning given it by the case law under Rule 54(d)(1)." *Clarke v. Mindis Metals, Inc.*, 99 F.3d 1138 (Table), 1996 WL 616677, at \*10 (6th Cir. Oct. 24, 1996). *Epac Techs., Inc. v. Harpercollins Christian Publ'g, Inc.*, 362 F. Supp. 3d 446, 449 (M.D. Tenn. 2019)

Applying the same standard of Federal Court to Tennessee Courts, it would reason the definition of "prevailing party" in a parties' contract would be as the "plain terms" in which it was written and intended it to be or defined as case law has determined it to be.

"A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties." *Crye-Leike, Inc. v. Carver*, 415 S.W.3d 808, 816 (Tenn. Ct. App. 2011) (quoting *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009)). "When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written." *Id.* (quoting *Union Realty Co., Ltd. v. Family Dollar Stores of Tenn., Inc.*, 255 S.W.3d 586, 591 (Tenn. Ct. App. 2007)). "In such a case, the contract is interpreted according to its plain terms as written, and the language used is taken in its 'plain, ordinary, and popular sense.'" *Id.* (quoting *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008)). *Jones v. Reda Homebuilders, Inc.*, No. M2020-00597-COA-R3-CV, at \*7-8 (Tenn. Ct. App. June 10, 2021)

Appellant desires to extend the definition of "prevailing party" beyond its "plain, ordinary, and popular sense" as used in the parties'

Marital Dissolution Agreement. However, case law in Tennessee has uniformly defined the term of “prevailing party” in party contracts.

The term of art "prevailing party," for the purpose of recovering attorney's fees, applies to a party to whom the court has awarded relief on the merits of the party's claim. *Consol. Waste Sys., LLC v. Metropolitan Gov't of Nashville & Davidson County*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at \*46 (Tenn. Ct. App. June 30, 2005)(citing *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 600, 121 S.Ct. 1835, 183-40 (U.S. 2001)). "[P]revailing party status does not turn on the magnitude of the relief obtained." *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 574 (1992)). However, a prevailing party is not "a litigant who left the courthouse emptyhanded." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 614, 121 S.Ct. 1835, 1845 (U.S. 2001)(Scalia, J, concurring)). For the purposes of recovering attorney's fees under contractual provisions like the provision at issue in this case, we have defined "prevailing party" 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.'" *Meredith v. Weller*, No. E2010-02573-COA-R3-CV, 2012 WL 219082, at \*13(Tenn. Ct. App. Jan, 25, 2012) (no perm. app. filed)(quoting *Dairy Gold, Inc. v. Thomas*, No. E2001-02463-COA-R3-CV, 2002 Tenn. App. LEXIS 548, at \*10, 2002 WL 1751193 (Tenn. Ct. App. July 29, 2002) (quoting Black's Law Dictionary 1188 (6th ed.1990))). *Sisco & Close Props. v. C & E P'ship*, No. M2012-00400-COA-R3-CV, at \*10 (Tenn. Ct. App. Dec. 28, 2012)

The Tennessee Court of Appeals even provided case law with statutory interpretation of the term “prevailing party” to define parties’ contract “prevailing party” language when it said:

Although the *Fannon* holding was premised upon a statutory entitlement to recover attorney's fees, this court has adopted a consistent approach in construing the "prevailing party" in the context of contractual attorney's fees clauses. See *Isaac v. Ctr. for Spine, Joint, & Neuromuscular Rehab., P.C.*, No. M2010-01333-COA-R3-CV, 2011 WL 2176578, at \*8 (Tenn. Ct. App. June 1, 2011) (quoting *Dairy Gold, Inc. v. Thomas*, No. E2001-024630-COA-R3-CV, 2002 WL 1751193, at \*4 (Tenn. Ct. App. July 29, 2002)) (defining "prevailing party" 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.") (emphasis in original); see also *RCK Joint Venture*, 2014 WL 1632147, at \*5 (quoting *Fannon*, 329 S.W.2d at 431) (stating "a prevailing party is one who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."). *Williams v. Williams*, No. M2013-01910-COA-R3-CV, at \*18-19 (Tenn. Ct. App. Jan. 30, 2015)

The Tennessee Court of Appeals more recently defined "prevailing party" in the context of contractual obligations by stating:

A "prevailing party" is "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Buckhannon [Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources]*, 532 U.S. [598, ] 603, 121 S.Ct. 1835 [149 L.Ed.2d 855 (2001)]. The Court has also noted that a party need not attain complete success on the merits of a lawsuit in order to prevail. Rather, a prevailing party is one who has succeeded "'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *Fannon v. City of LaFollette*, 329 S.W.3d 418, 431 (Tenn. 2010). *Commercial Painting Co. v. The Weitz Co.*, No. W2019-02089-COA-R3-CV, at \*42-43 (Tenn. Ct. App. Mar. 11, 2022)

**AS THERE IS NO PREVAILING PARTY IN A VOLUNTARY  
NONSUIT, APPELLANT SHOULD NOT BE AWARDED  
ATTORNEY FEES ON APPEAL.**

As there is no legal justification for the Trial Court’s award of Appellant’s attorney fees under either Tenn. Code Ann. §36-5-103 (c) or the parties’ Marital Dissolution Agreement. As such, Appellant should not be awarded attorney fees on appeal.

**APPELLEE SHOULD BE AWARDED HIS ATTORNEY FEES ON  
APPEAL.**

The award of attorney fees on this appeal is clearly within the discretion of this Honorable Court as

“A decision to award attorney fees on appeal, however, is within the discretion of the appellate court. *Paschedag v. Pachedag*, No. M2016-00864-COA-R3-CV, 2017 WL 2365014, at \*5 (Tenn. Ct. App. May 31, 2017).” *Gordon v. Gordon*, No. M2017-01275- COA-R3-CV, at \*16 (Tenn. Ct. App. Oct. 16, 2018)

The Tennessee Court of Appeals Panel’s decision to reverse the award of Wife’s attorney fees is the correct interpretation of the current case law addressing the issue of the determination of a “prevailing party” in a voluntary nonsuit.

After this Honorable Court has had the opportunity to determine the *Himmelfarb* holding should be extended to cases other than just malicious prosecution claims, Appellee should be awarded attorney fees for the appeal based on an affirmation of the Panel's decision in this matter.

## VIII. CONCLUSION

The Trial Court erred in its award of Appellant's attorney fees as no party is a "prevailing party" in a voluntary dismissal of a lawsuit to justify the award of attorney fees in this case under either Tenn. Code Ann. §36-5-103 (c) or the parties' Marital Dissolution Agreement.

Appellee's voluntary nonsuit does not meet the definition of a "prevailing party" as it made no material change to the parties' legal relationship; provided no relief to Appellant and had her leave emptyhanded; did not have either party successful in prosecuting or defending the case; permitted neither party to prevail on any issue; put the parties back into the original positions prior to the filing of the suit; and terminated the case without adjudication on the merits.

For the foregoing reasons, the Tennessee Court of Appeals Panel's judgement should be **AFFIRMED**.

Respectfully submitted by:



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**IX. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE**

Under Tennessee Supreme Court Rule 46, §3.02 and Tennessee rule of Appellate Procedure Rule 11 (d), this brief contains 4,996 words pursuant to §3.02 (a) (1) (b) 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 the page limit provided for a response.

A handwritten signature in blue ink that reads "P. Marlene Boshears". The signature is written in a cursive style with a horizontal line underneath the name.

P. Marlene Boshears, BPR #025280

**X. CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of May, 2023, a copy of the foregoing was served via the Court's electronic signature upon the following individuals:

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