No. M2021-00731-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

VANESSA COLLEY,

Respondent-Appellant,

v.

JOHN S. COLLEY, III,

Petitioner-Appellee.

On Appeal from the Judgment of the Davidson County Circuit Court

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BRIEF FOR THE STATE OF TENNESSEE AS *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

This case presents an interpretive question implicating the scope of fee-shifting provisions in Tennessee. Under Tennessee Code § 36-5-103(c), a "prevailing party" may collect attorney fees spent to enforce an alimony or child-support order. But the statute does not define what it means to be a prevailing party.

The State of Tennessee appears as an *amicus curiae* because it has a substantial interest in the correct interpretation of the term "prevailing party."[1] The "prevailing party" language found in § 36-5-103 appears in dozens of fee-shifting provisions throughout the Tennessee Code. *See*, *e.g.*, Tenn. Code § 14-6-105(f)(4) (COVID-19 regulations); *id.* § 24-9-207 (Uniform Interstate Depositions and Discovery Act); *id.* § 29-37-104(a) (Equal Access to Justice Act of 1984); *id.* § 36-6-236 (Uniform Child Custody Jurisdiction and Enforcement Act); *id.* § 37-4-101(XI)(C) (Interstate Compact for Juveniles); *id.* § 42-8-104 (heliport regulations); *id.* § 47-5-111(e) (Uniform Commercial Code—Letters of Credit); *id.* § 47-18-406(c) (True Origin of Goods Act); *id.* § 47-18-1510(b) (Consumer Telemarketing Protection Act of 1990); *id.* § 47-18-1807(f) (Foreign Foods Disclosure Act of 1997); *id.* § 47-18-2304(b)(2) (Tennessee Consumer Protection Act of 1977); *id.* § 47-25-704 (Tennessee Motion Picture Fair Competition Act); *id.* § 49-12-301(XIII)(B)(7), (D)(2) (Interstate Compact on Educational Opportunity for Military Children); *id.* § 55-28-111(a) (Tennessee Recreation Vehicle Franchise Act of 2016); *id.* § 56-32-126(b)(3)(D) (Health

[1] Vanessa Colley (now Vanessa Turner) also challenges the proper interpretation of the Marital Dissolution Agreement. The State of Tennessee takes no position on that issue.

Maintenance Organization Act of 1986); *id.* § 62-13-504 (Tennessee Real Estate Broker License Act of 1973); *id.* § 63-6-402(17)(b), (18)(h) (Interstate Medical Licensure Compact); *id.* § 66-19-213(f) (maritime lien regulations); *id.* § 66-27-415(g) (Tennessee Condominium Act of 2008); *id.* § 66-32-306(b) (Membership Camping Act); *id.* § 68-11-231 (healthcare facility regulations); *id.* § 68-140-602(13)(B)(6), (D)(2) (Emergency Medical Services Personnel Licensure Interstate Compact). Thus, the Court's resolution of the first question presented may influence the interpretation of those provisions, which will affect litigants throughout the State and directly impact how much the Tennessee taxpayers will be required to underwrite when it comes to attorney fee awards.

SUMMARY OF ARGUMENT

This Court has been asked to decide whether a defendant qualifies as a prevailing party under § 36-5-103(c) when the plaintiff voluntarily dismisses his action without prejudice under Tennessee Rule of Civil Procedure 41.01.

The answer is "no."

I. The state and federal fee-shifting regimes are based on the same bedrock principle—that litigants must pay their own fees unless a statute or contract provides otherwise. Accordingly, this Court and the Tennessee Court of Appeals have turned to U.S. Supreme Court precedent when interpreting whether a litigant qualifies as a "prevailing party" for purposes of fee-shifting provisions. The Court should continue that practice here by looking to federal law when interpreting § 36-5-103(c)'s prevailing-party provision.

II. Under federal law, a defendant seeking attorney fees—like the defendant in this case—does not qualify as a prevailing party unless that defendant obtains a judicial decision that rejects the plaintiff's claims and provides enduring relief. It is not enough for the other party to voluntarily change its conduct—as the plaintiff did in this case; there must be some *judicial* imprimatur on an order that permanently changes the parties' legal relationship.

III. Under those principles, a voluntary nonsuit does not confer prevailing-party status. Like a voluntary dismissal under Federal Rule of Civil Procedure 41(a), a nonsuit under Tennessee Rule of Civil Procedure 41.01 is accomplished by the parties without any judicial stamp of approval on the defendant's arguments. Moreover, a voluntary nonsuit accomplishes no enduring change in the legal relationship between the parties because the plaintiff remains free to refile his suit. For those reasons, a voluntary dismissal under Rule 41.01 does not create a prevailing party for purposes of § 36-5-103(c).

ARGUMENT

I. This Court Relies on U.S. Supreme Court Precedent When Interpreting the Term "Prevailing Party."

"Under the bedrock principle known as the American Rule, each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 382 (2013) (cleaned up). The American Rule traces back through centuries of common law, *see*, *e.g.*, *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796), and rests in part on the principle that parties "should not be penalized for merely defending or prosecuting a lawsuit," *Fleischmann*

Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (reciting justifications for the American Rule). The Rule applies in federal court unless "explicit statutory authority" or contractual language provides otherwise. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602 (2001)).

The State of Tennessee's fee-shifting rules parallel the federal regime. "Tennessee, like most jurisdictions, adheres to the 'American [R]ule' for award of attorney fees." *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009); *see*, *e.g.*, *Carter v. Va. Sur. Co.*, 216 S.W.2d 324, 328 (Tenn. 1948) (applying that rule). The American Rule "reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case." *House v. Estate of Edmondson*, 245 S.W.3d 372, 377 (Tenn. 2008). Thus, as is true in federal court, Tennessee litigants "must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005).

To displace the American Rule's presumption against fee shifting, the Tennessee General Assembly has enacted statutes that empower a "prevailing party" to collect fees. Although some of those statutes expressly define "prevailing party," *see*, *e.g.*, Tenn. Code § 29-20-113(a), (b) (fee-shifting provision in the Tennessee Governmental Tort Liability Act),[2] most do not—including the provision at issue here, *see*, *e.g.*, *id.*

[2] The State expresses no position on the correct interpretation of "prevailing party" when that term is statutorily defined.

§ 36-5-103(c) (fee-shifting provision for alimony and child-support disputes); *id.* § 47-18-2304(b)(2) (fee-shifting provision in Tennessee Consumer Protection Act of 1977). Accordingly, Tennessee courts are frequently tasked with deciding who qualifies as a prevailing party for purposes of recovering attorney fees.

Given the similarities between the state and federal fee-shifting regimes, it comes as no surprise that "Tennessee courts have turned to [the] United States Supreme Court['s] interpretations of 'prevailing party'" for guidance. *Williams v. Williams*, 2015 WL 412985, at *15 (Tenn. Ct. App. January 30, 2015) (McBrayer, J., dissenting). In *Fannon v. City of LaFollette*, 329 S.W.3d 418 (Tenn. 2010), for example, this Court rested its interpretation of "prevailing party" on the U.S. Supreme Court's decisions in *Buckhannon*, *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Other Tennessee state-court decisions likewise borrow from federal jurisprudence when interpreting "prevailing party" or similar fee-shifting terms. *See*, *e.g.*, *Daron v. Dep't of Corr.*, 44 S.W.3d 478, 480–81 (Tenn. 2001) (defining "successfully appealing employee" in part by reference to the U.S. Supreme Court's prevailing-party precedent); *Dairy Gold, Inc. v. Thomas*, 2002 WL 1751193, at *4 & n.1 (Tenn. Ct. App. July 29, 2002) (same when defining "prevailing party"); *see also Aylor v. Carr*, 2019 WL 2745625, at *3–4 (Tenn. Ct. App. July 1, 2019) (similar).

Looking to federal precedent when defining "prevailing party" accords with this Court's settled interpretive conventions. Although the fee-shifting authority in § 36-5-103(c) traces back to 1957, Act of Jan. 31,

1957, ch. 21, § 1, 1957 Tenn. Pub. Acts 70, 70 (codified at Tenn. Code § 36-822), the General Assembly did not add the "prevailing party" language until 2018, Act of July 1, 2018, ch. 905, § 1 (codified at Tenn. Code § 36-5-103(c)). That means the General Assembly added "prevailing party" *after* this Court and others interpreted that term based on U.S. Supreme Court precedent. Of course, "the 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.'" *In re Bonding*, 599 S.W.3d 17, 22 (Tenn. 2020) (quotation omitted). And by adding "prevailing party" after that term had been defined based on federal jurisprudence, the General Assembly incorporated those federal principles into § 36-5-103(c). *See Lawson v. Hawkins County*, 661 S.W.3d 54, 59 (Tenn. 2023) ("When a statute uses a common-law term without defining it, we assume the enacting legislature adopted the term's common-law meaning 'unless a different sense is apparent from the context, or from the general purpose of the statute.'" (quotation omitted)).

The bottom line: The state and federal fee-shifting regimes rest on the same foundation—both presume that the parties will pay their own fees, and that presumption cannot be overcome without explicit statutory or contractual language. Because of the similarities between the two regimes, this Court often looks to federal law to interpret "prevailing party" when that term is not otherwise statutorily defined. The Court should follow that approach here given the statutory history of § 36-5-103(c). *See Doe v. Sundquist*, 2 S.W.3d 919, 925 n.5 (Tenn. 1999) (relying on "statutory history").

II. To Prevail Under Federal Law, a Party Must Obtain a Judicial Decision That Rejects the Plaintiff's Claims and Provides Enduring Relief.

"'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes." *Buckhannon*, 532 U.S. at 610 (Scalia, J., concurring). To the contrary, it is a "legal term of art" with rich historical meaning. *Id.* at 603 (majority opinion). Consistent with that meaning, a defendant seeking fees—like the defendant in this case—must achieve two objectives. First, the defendant must obtain a judicial decision that rejects the plaintiff's claims. And second, that decision must provide the defendant with enduring relief. Only then does a defendant "prevail."

"[T]he 'touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.'" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016) (quotation omitted); *see Tex. State Teachers Ass'n*, 489 U.S. at 792–93 (same); *Fannon*, 329 S.W.3d at 430 (same)*; Daron*, 44 S.W.3d at 480 (same). For a plaintiff, that standard is generally met when he "establish[es] his entitlement to some relief on the merits of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam).

But for a defendant, the rules differ because defendants come to court with a different objective than plaintiffs: The defendant seeks to *prevent* the plaintiff from altering the parties' legal relationship. *CRST*, 578 U.S. at 431. So a defendant prevails when the court rejects the plaintiff's claims, either for a merits or non-merits reason. *Id.* What matters for the defendant is that *the court* "rejec[t] [ ] the plaintiff's attempt to

alter the parties' legal relationship" in a decision "marked by 'judicial *imprimatur*.'" *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1298 (11th Cir. 2021) (quoting *CRST*, 578 U.S. at 422); *see O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 955 F.3d 990, 993 (Fed. Cir. 2020) (defendants must obtain a "final court decision" to prevail).

The presence of "judicial imprimatur" remains indispensable. It is not enough that a party achieve relief through the other party's voluntary change in conduct. "[A] 'prevailing party' is one who has been awarded some relief *by the court*." *Buckhannon*, 532 U.S. at 603 (emphasis added). The U.S. Supreme Court made that point abundantly clear in *Buckhannon* when it repudiated a broad interpretation—known as the "catalyst theory"—of "prevailing party" that had been adopted by various federal courts. *Id.* at 601–02. Under the catalyst theory, courts awarded prevailing-party status even if a litigant only "achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. The Court rejected the catalyst theory, though, precisely because it would "allo[w] an award where there is no judicially sanctioned change in the legal relationship of the parties," *id.* at 605, a hallmark of what it means to prevail. Thus, a party's "voluntary change in conduct," although perhaps accomplishing a practical achievement, "lacks the necessary judicial *imprimatur* on the change." *Id.*

Securing judicial relief is only the first obstacle for would-be prevailing parties. That court-ordered relief must also accomplish an enduring change in the legal relationship between the parties. In *Sole v. Wyner*, 551 U.S. 74 (2007), the U.S. Supreme Court held that a plaintiff that secures a preliminary injunction that is later "reversed, dissolved,

or otherwise undone by the final decision" does not qualify as a prevailing party. *Id.* at 83. After all, a party "who achieves a transient victory at the threshold of an action" does not truly prevail "if, at the end of the litigation, her initial success is undone." *Id.* at 78. In other words, if the party obtains only a "temporary" and "fleeting success," then there is "no enduring 'chang[e] [in] the legal relationship'" between the parties. *Id.* at 83, 85, 86 (quotation omitted).

In sum, a defendant has prevailed for purposes of collecting attorney fees only once she secures a judicial decision that rejects the plaintiff's claims and provides enduring relief.

III. A Voluntary Nonsuit Generally Does Not Confer Prevailing-Party Status.

Under those principles, a voluntary dismissal generally does not create a prevailing party. Because the parties, rather than the court, initiate the dismissal, the defendant never secures the judicial stamp of approval that accompanies prevailing-party status. Moreover, a voluntary dismissal does not provide the defendant enduring relief—a plaintiff who dismisses his suit is free to refile. For those reasons, under both federal and state rules, a voluntarily dismissal rarely confers prevailing-party status.

Under Federal Rule of Civil Procedure 41—the "federal counterpart" to the Tennessee nonsuit provision invoked in this case, *Ewan v. Hardison Law Firm*, 465 S.W.3d 124, 134 (Tenn. Ct. App. 2014) (quotation omitted)—a plaintiff has the right to voluntarily dismiss his action. Rule 41(a)(1) allows the plaintiff to dismiss an action "without a court order" by filing a "notice of dismissal before the opposing party serves

either an answer or a motion for summary judgment" *or* a "stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A). In all other circumstances, the plaintiff must obtain a court order to voluntarily dismiss the action. Fed. R. Civ. P. 41(a)(2).

Either way, the dismissal is generally without prejudice, which "render[s] the proceedings a nullity and leave[s] the parties as if the action had never been brought." *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996); *accord* 24 Am. Jur. 2d Dismissal § 91 (2023) ("The effect of a voluntary dismissal of an action is to render the proceeding a nullity."). That is, a voluntary dismissal does not change the legal relationship between the parties; it simply maintains the status quo ante the filing of the complaint.

These dismissals under Federal Rule 41(a) thus do not confer prevailing-party status because the litigation ends by the *parties'* voluntary actions rather than a decision rendered with the *court's* imprimatur. Although the district court may enter an order terminating the case, that order does not change the legal relationship between the parties because voluntary dismissals take effect as soon as they are filed. *See O.F. Mossberg & Sons*, 955 F.3d at 993. For that reason, "a plaintiff's voluntary decision to withdraw a claim" presents "the mirror image" of the "defendant's voluntary change in conduct" that *Buckhannon* found insufficient to confer prevailing-party status. *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293, 1303 (11th Cir. 2019) (describing the holding in *Buckhannon*). No judicial stamp of approval exists. And absent such approval, "there is no 'prevailing party.'" *See, e.g.*, *SnugglyCat, Inc. v. Opfer Commc'ns, Inc.*, 953 F.3d 522, 527 (8th Cir. 2020); *Xlear, Inc. v.*

Focus Nutrition, LLC, 893 F.3d 1227, 1237 (10th Cir. 2018) ("[A] clerk of court terminating a case following a stipulation of dismissal [under Rule 41(a)] does not constitute judicial action or judicial *imprimatur* for purposes of the prevailing party analysis.").

That remains true even when a voluntary dismissal requires a court order to take effect. The Eleventh Circuit's decision in *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293 (11th Cir. 2019), explains why. There, the federal government filed a complaint seeking forfeiture of certain funds allegedly used in criminal activity. But when a state-court judgment disposing of those funds mooted the action, the government moved to dismiss its complaint voluntarily without prejudice under Federal Rule of Civil Procedure 41(a)(2). Because that Rule requires court approval, the district court considered the motion and ultimately entered an order dismissing the action. *See id.* at 1296. Judge William Pryor, writing for the Eleventh Circuit, held that the parties seeking to prevent the government from obtaining the funds could not collect attorney fees because "a dismissal without prejudice places no 'judicial *imprimatur*' on 'the legal relationship of the parties,' which is 'the touchstone of the prevailing party inquiry.'" *Id.* at 1303 (quoting *CRST*, 578 U.S. at 422). And without a "'final judgment reject[ing] the [government's] claim' to the defendant funds," the defendant had not prevailed. *Id.* (quoting *CRST*, 578 U.S. at 431).

This Court should follow the federal approach and interpret "prevailing party" as used in § 36-5-103(c) to require more than a nonsuit to prevail. Like the Federal Rules, a voluntary nonsuit under Rule 41.01 is accomplished by the plaintiff's own volition. Setting aside some narrow

exceptions that are not relevant here, a plaintiff's right to voluntary dismissal is "free and unrestricted," *Lacy v. Cox*, 152 S.W.3d 480, 484 (Tenn. 2004), and securing such a dismissal "does not require the permission of, or an adjudication by, the trial court," *Flade v. City of Shelbyville*, 2023 WL 2200729, at *9 (Tenn. Ct. App. Feb. 24, 2023); *see Ewan*, 465 S.W.3d at 133 ("the act of 'taking' a nonsuit is not dependent on any action of the trial court"). As this Court has explained time and again, when it comes to voluntary nonsuits under Rule 41.01, the "lawyer for the plaintiff is the sole judge of the matter and the trial judge has no control over it." *Green v. Moore*, 101 S.W.3d 415, 418 (Tenn. 2003) (quotation omitted).

Tennessee's nonsuit provision differs from the federal regime in that Rule 41.01 always requires the trial court to enter an order dismissing the action. *See* Tenn. R. Civ. P. 41.01(3). But that distinction should not make a difference because the dismissal order is "pro forma" and serves "ministerial and procedural purposes." *Lacy*, 152 S.W.3d at 484. In fact, as is true in the federal system, the "nonsuit actually occurs prior to the entry of the order." *Ewan*, 465 S.W.3d at 133. Just like the order required for voluntary dismissals under Rule 41(a)(2), *see $70,670.00 in U.S. Currency*, 929 F.3d at 1303, the state court's dismissal order for voluntary nonsuits merely rubberstamps the plaintiff's decision.

Simply put, a voluntary nonsuit under Rule 41.01 does not involve any court decision that puts the judicial seal of approval on the discontinuation of the litigation. And for that reason, there is no prevailing party in cases involving a nonsuit under Rule 41.01.

Nor does a voluntary nonsuit satisfy the enduring-relief requirement. "When a voluntary nonsuit is taken" under Rule 41.01, "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). Even after the first two voluntary dismissals, the same case "may be refiled *at any time* subject to the statute of limitations and Rule 41 of the Tennessee Rules of Civil Procedure." *Mynatt v. Nat'l Treasury Emps. Union, Chapter 39*, --- S.W.3d ----, 2023 WL 3243237, at *8 (Tenn. May 4, 2023) (emphasis added); *see Himmelfarb*, 380 S.W.3d at 40 (explaining that a case that has been nonsuited "may be refiled subject to the applicable statutes of limitations").[3] Any "success" that Ms. Turner achieved through the voluntary dismissal is at best "fleeting" and "temporary." *Sole*, 551 U.S. at 83, 85. Mr. Colley may refile his suit—and if he did, the dismissal of the first action would pose no legal barrier. In other words, the voluntary nonsuit did not permanently change the parties' legal relationship.

The federal consent-decree cases that Ms. Turner relies on are not to the contrary. It is true that courts have awarded attorneys' fees "for defending, enforcing, opposing the modification of, or monitoring compliance with an existing consent decree." Turner Br. 34 (quoting *Pottinger v. City of Miami*, 805 F.3d 1293, 1299 (11th Cir. 2015)). But before

[3] Ms. Turner has not and cannot persuasively distinguish *Himmelfarb*. Turner Br. 26. Although Ms. Turner labels *Himmelfarb* an "irrelevant" "malicious prosecution case," *id.*, that decision describes the legal effect of a nonsuit under Rule 41.01, *see* 380 S.W.3d at 40—the precise rule used by Mr. Colley to dismiss his action to modify the Marital Dissolution Agreement. Hence, *Himmelfarb* proves useful here because it makes clear that a nonsuit (1) is not an adjudication on the merits and (2) poses no barrier to a suit being refiled.

collecting those fees, the party must demonstrate that it has in fact *prevailed*. While "an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis" for prevailing-party status moving forward, *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 625 (6th Cir. 2013), that is only true when the pre-existing consent decree creates a prevailing party, *see id.* at 620. Here, unlike in *Binta*, the Marital Dissolution Agreement does no such thing, so Ms. Turner has no prior prevailing-party status on which to rely.

For these reasons, the Court should reject the argument that a nonsuit under Rule 41.01 suffices to make a defendant a prevailing party.

CONCLUSION

The State of Tennessee takes no position about how the Court should interpret the fee-shifting provision in the Marital Dissolution Agreement. But if the Court reaches the statutory question, then the State respectfully requests that the Court affirm the judgment of the court of appeals because the plaintiff's voluntary nonsuit under Rule 41.01 did not create any prevailing parties for purposes of § 36-5-103(c).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the requirements set forth in Supreme Court Rule 46, Section 3, Rule 3.02. Based on the word count of the word processing document used to prepare the brief, the word count is 3,713, excluding parts of the brief exempted by Tennessee Rule of Appellate Procedure 30(e) and Supreme Court Rule 46, Section 3, Rule 3.02.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion has been served on counsel for the Petitioner and Respondent through the Supreme Court's e-filing system and by e-mail to:

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