IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

PRINCIPAL BRIEF OF APPELLANT VANESSA COLLEY (TURNER)

DANIEL A. HORWITZ, BPR #032176
LINDSAY SMITH, BPR #035937
MELISSA K. DIX, BPR #038535
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
melissa@horwitz.law
(615) 739-2888

Counsel for Appellant

Date: April 4, 2023

ORAL ARGUMENT REQUESTED

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes and Rules

Additional Authorities

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is a defendant who successfully defends against a lawsuit that seeks to modify a court-ordered Marital Dissolution Agreement and 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(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?

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.

IV. STANDARDS OF REVIEW

1. Whether a litigant is a "prevailing party" under Tenn. Code Ann. § 36-5-103(c) is a question of statutory interpretation that this Court reviews de novo. *Lawson v. Hawkins Cnty.*, No. E2020-01529-SC-R11-CV, 2023 WL 2033336, at *2 (Tenn. Feb. 16, 2023) ("We also review de novo questions of statutory interpretation like the one presented here.") (citing *State v. Marshall*, 319 S.W.3d 558, 561 (Tenn. 2010)).

2. "A decision to award attorney fees to the prevailing party under Tenn. Code Ann. § 36-5-103(c) is within the discretion of the trial court, and [appellate courts] will not overturn the trial court's decision absent an abuse of discretion." *See Strickland v. Strickland*, 644 S.W.3d 620, 635 (Tenn. Ct. App. 2021), *appeal denied* (Mar. 23, 2022) (citing *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017)).

3. "The interpretation of a contract is a matter of law that requires a *de novo* review on appeal." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999).

4. Whether a prevailing party should be awarded attorney's fees on appeal is a "discretion[ary]" matter under Tenn. Code Ann. § 36-5-103(c), but under the Parties' MDA, an award of attorney's fees is mandatory. *See* Supp. R. at 35–36 (providing that a prevailing party "shall" be entitled to attorney's fees); *Eberbach*, 535 S.W.3d at 474 ("parties who have prevailed in litigation to enforce their contractual rights are entitled to recover their reasonable attorney's fees once they demonstrate that the contract upon which their claims are based contains a provision entitling the prevailing party to its attorney's fees.").

V. INTRODUCTION

A defendant's goal in litigation is not to alter the status quo. Instead, it is to "prevent plaintiffs from obtaining th[e] relief" they are seeking. *See Santisas v. Goodin*, 17 Cal. 4th 599, 609, 951 P.2d 399 (1998). *Cf. Hedley & Bennett, Inc. v. Mejico*, No. EDCV22816JGBKKX, 2022 WL 2309891, at *2 (C.D. Cal. June 24, 2022) ("a 'defendant's goal is to make the plaintiff go away,' and a voluntary dismissal achieves this objective.") (cleaned up). Further, when a defendant has secured a favorable judgment that a plaintiff later seeks to modify, a defendant's goal—including and especially in family law settings—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 3849493, at *5 (Tenn. Ct. App. Aug. 31, 2011) ("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.").

Given this context, defendants prevail when plaintiffs voluntarily dismiss their claims. They do so within the ordinary and commonly understood meaning of the term "prevailing party," which is the standard that guides contract interpretation. *See* PARTY, Black's Law Dictionary (11th ed. 2019) (a prevailing party is the party "in whose favor judgment is rendered, regardless of the amount of damages awarded[.]"). *See also Santisas*, 17 Cal. 4th at 609 (holding, in case of voluntary dismissal, that "giving the term 'prevailing party' its ordinary or popular sense, the seller defendants are the prevailing parties in this litigation"). That a defendant has prevailed because a plaintiff nonsuited also does not alter

this conclusion. *See* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, dismissal, . . . or discontinuance, the defendant is the successful party, within the meaning of § 20-12-101."). *See also 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-R3-CV, 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-R3-CV, 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).

The contrary approach adopted by the Panel below—which requires a defendant to secure "'an adjudication of the merits'" in order to be a prevailing party—is unpersuasive. *See Colley v. Colley*, No. M2021-00731-COA-R3-CV, 2022 WL 17009222, at *6 (Tenn. Ct. App. Nov. 17, 2022), *appeal granted*, No. M2021-00731-SC-R11-CV, 2023 WL 2471006 (Tenn. Mar. 9, 2023) (cleaned up). That approach wrongly treats whether a defendant has *prevailed* in litigation and whether a defendant has been *maliciously prosecuted* as if they are the same questions, though they are not the same or even similar. *See id.*

Because "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy[,]" *see Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992), the Panel's approach also undermines Tenn. Code Ann. § 36-5-103(c)'s worthwhile policy goals. As one court has explained under similar circumstances, for instance:

> There are decided benefits to interpreting the statute so that defendants in cases withdrawn by plaintiffs can recover their legal expenses. Not only will this discourage frivolous suits, but it will place the burden where it belongs—on the party with the poorly thought out complaint or the hastily conceived writ. It will also discourage vexatious litigation and the use of pretrial discovery and depositions to harass defendants.

See Fraser v. ETA Ass'n, Inc., 41 Conn. Supp. 417, 419–20, 580 A.2d 94, 96 (Super. Ct. 1990).

Further, courts are neutral adjudicators and must rely on litigants to enforce their decrees. As a result, Tenn. Code Ann. § 36-5-103(c) is properly 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." *See Hansen v. Hansen*, No. M2008-02378-COA-R3-CV, 2009 WL 3230984, at *3 (Tenn. Ct. App. Oct. 7, 2009). If that were not the rule, then meritorious orders would be chronically underdefended, particularly by poor litigants who cannot afford to defend them without the assurance of fee-shifting.

For all of these reasons, the Trial Court was right to award the Appellant her reasonable attorney's fees, and the Panel was wrong to vacate her award. As a result, the Panel's judgment should be reversed, and the Trial Court's fee award reinstated.

VI. STATEMENT OF THE FACTS AND OF THE CASE

This case arises out of a Marital Dissolution Agreement ("MDA") entered into by Plaintiff John Colley and Defendant Vanessa Colley (now Turner).[1] The Parties' MDA was finalized by decree of the Davidson County Circuit Court on July 18, 2012.[2] As relevant to this appeal, a mandatory fee-shifting provision of the Parties' MDA provides 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, Mr. Colley filed a "Petition to Terminate Transitional Alimony, Modify MDA and Enter Judgment for IRS Reimbursement" that sought to alter the Parties' MDA in several respects.[4] Mr. Colley's Petition asked the Court to award him 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

[1] Supp. R. at 27–53.
[2] *Id.* at 52.
[3] *Id.* at 35–36.
[4] R. at 1–10.

Ex-wife's counsel for reimbursement);

d) Award his attorney's fees and discretionary costs 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 Ms. Turner to defend against the Plaintiff's claims, Ms. Turner defended the Parties' MDA against the Plaintiff's efforts to modify it.[6] As relief, Ms. Turner prayed that the Plaintiff's claims against her "be dismissed[,]" and she asked "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, Ms. Turner vigorously defended against the Plaintiff's claims. During this time, the Parties engaged in discovery, motion practice, and an unsuccessful pretrial mediation and judicial settlement conference.[8] Ms. Turner also repeatedly demanded a trial.[9]

On July 27, 2020, the Trial Court granted Ms. Turner's Renewed Motion to Set for Trial.[10] A few weeks later, on August 17, 2020, the Trial Court entered an order setting the final hearing on the Plaintiff's claims "for November 18, 2020 at 9:00 a.m."[11]

Twelve days before trial—but after 22 months of litigation—the Plaintiff filed a Notice of Nonsuit under Tenn. R. Civ. P. 41.01 dismissing

---

[5] *Id.* at 3.
[6] *Id.* at 12–19.
[7] *Id.* at 18.
[8] *Id.* at 62–63; *id.* at 91–92.
[9] *Id.* at 64–65; *id.* at 81–82.
[10] *Id.* at 88–90.
[11] *Id.* at 91.

"all causes of action from the instant litigation . . . without prejudice."[12] A final order dismissing, without prejudice, the Plaintiff's claims against Ms. Turner was then entered on November 13, 2020.[13] The order also provided that "[c]ourt costs and litigation fees" would be "taxed to Petitioner, John Colley, for which execution may issue."[14]

After the Trial Court entered judgment dismissing the Plaintiff's claims against her, Ms. Turner filed a Motion for Attorney Fees.[15] As justification for a fee award, Ms. Turner 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)."[16]

On June 2, 2021, the Trial Court entered an order awarding Ms. Turner $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)[.]"[17] Thereafter, the Plaintiff appealed.[18]

On appeal, the Plaintiff presented a host of issues on which he again did not prevail, several of which he conceded during oral argument. *See*

---

[12] *Id.* at 93.
[13] *Id.* at 99–101.
[14] *Id.* at 99.
[15] *Id.* at 117–123.
[16] *Id.* at 118; *see also id.* at 119.
[17] *Id.* at 234–36.
[18] *Id.* at 295–96.

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, 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 Ms. Turner's fee award, though, the Court of Appeals reversed. *Id.* at *6. As grounds, the Panel observed 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 also added that the Court of Appeals "has applied the *Himmelfarb* holding in contexts other than malicious prosecution." *Id.* at *6. Based on that 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.

Ms. Turner timely applied to this Court for permission to appeal the Panel's ruling. As grounds, Ms. Turner's Rule 11 Application noted, among other things, that the Panel's decision:

(1) "did not attempt to determine the plain and ordinary meaning of the term 'prevailing party' when used by parties in a contract" as Tennessee law requires;[19]

(2) conflicted with "[t]hree previous Panel opinions holding that a voluntary dismissal without prejudice does confer prevailing party status under Tennessee Code Annotated Section 36-5-103(c)"[20]; and

(3) contravened "[s]everal 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)[.]"[21]

The Plaintiff responded in opposition to Ms. Turner's Rule 11 Application. More specifically, the Plaintiff opposed the Application as "unwarranted frivolity" and demanded an "award of his attorney fees pursuant to Tennessee Code Ann. §27-1-122 based on the filing of [a] frivolous appeal application."[22] Upon review, this Court granted Ms. Turner's application.[23] This appeal followed.

VII. ARGUMENT

A. MS. TURNER WAS THE PREVAILING PARTY WITHIN THE MEANING OF THE PARTIES' CONTRACT.

1. The Parties' MDA is a contract that is subject to familiar rules of interpretation.

"Because a marital dissolution agreement is 'a contract entered into by a husband and wife in contemplation of divorce,' an MDA 'may include

[19] Appellant's Rule 11 App. at 19–20.
[20] *Id*. at 20.
[21] *Id*. at 20–21.
[22] Appellee's Response in Opp'n to Rule 11 App. at 10.
[23] March 9, 2023 Order on Rule 11 App.

enforceable contractual provisions regarding an award of attorney's fees in post-divorce legal proceedings.'" *Lugo v. Lugo*, No. W2020-00312-COA-R3-CV, 2021 WL 507889, at *3 (Tenn. Ct. App. Feb. 10, 2021) (quoting *Eberbach*, 535 S.W.3d at 474). Thus, traditional methods of contract interpretation determine whether—within the meaning of the Parties' MDA[24]—Ms. Turner was the "prevailing party" when she obtained a final judgment dismissing all of the Plaintiff's claims against her that taxed costs against the Plaintiff and afforded him no relief.

This Court has also explained that it is appropriate to construe the meaning of "prevailing party" under the Parties' contract before addressing the availability of attorney's fees under Tenn. Code Ann. § 36-5-103(c). *See Eberbach*, 535 S.W.3d at 478 ("Because fee provisions in marital dissolution agreements are binding on the parties, when confronted with a request for fees under both contractual and statutory authority, our courts should look to the parties' contract first before moving on to any discretionary analysis under statutes such as section 36–5–103(c)[.]"). Thus, this Court's first task is to interpret the terms of the Parties' MDA.

Here, the relevant provision of the Parties' 2012 MDA states 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.[25]

[24] Supp. R. at 35–36.
[25] *Id*.

Based on this language, the Trial Court ruled that Ms. Turner was the prevailing party after the Plaintiff dismissed his claims. As detailed below, that ruling was correct. In particular, a defendant who obtains a judgment of dismissal—whether with or without prejudice—is the "prevailing party" within the plain and ordinary meaning of that term. Ms. Turner also had a right to rely on the Court of Appeals' consistent interpretation of "prevailing party"— an interpretation that comports with abundant persuasive authority from other jurisdictions—when she contracted with the Plaintiff and submitted a consent decree for judicial approval. Thus, the Trial Court's judgment should be reinstated.

2. Applying the usual, natural, and ordinary meaning of "prevailing party," defendants are prevailing parties when a plaintiff dismisses his claims.

Tennessee law instructs that contract terms are interpreted "based upon the usual, natural, and ordinary meaning of the contractual language." *See Guiliano*, 995 S.W.2d at 95. Thus, a contract's "plain terms and ordinary meaning" guide the inquiry. *See BSG, LLC*, 395 S.W.3d at 93.

It goes without saying that, in common parlance, a "prevailing party" is not a litigant who can satisfy the favorable-termination-on-the-merits element of a post-*Himmelfarb* Tennessee common law malicious prosecution claim. Instead, a prevailing party is commonly understood as being the party "in whose favor judgment is rendered, regardless of the amount of damages awarded[.]" *See* PARTY, Black's Law Dictionary (11th ed. 2019). *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)).

Here, Ms. Turner was the party "in whose favor" judgment was rendered. *See id.* It is also easy to tell, because the Trial Court ordered that the Plaintiff's claims against her "be dismissed" and taxed "costs and litigation fees" to the Plaintiff.[26] The order thus afforded the Plaintiff none of the relief that his petition sought.[27] By contrast, the order granted Ms. Turner the exact relief that she sought: that this action "be dismissed, with the costs assessed against Petitioner[.]"[28]

Tennessee statutes support this common-sense interpretation of the term "prevailing party." *See, e.g.,* Tenn. Code Ann. § 20-12-110 ("In cases of nonsuit, dismissal, abatement by death of plaintiff or discontinuance, 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.").

In the discretionary cost context, the Court of Appeals has reliably adhered to this interpretation of the term "prevailing party," too. *See,*

[26] R. at 99.
[27] *Id.* at 3.
[28] *Id.* at 18.

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). *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)).

Interpreting "prevailing party" in its "ordinary or popular sense" when used as a contract term, persuasive authority holds that a defendant who wins a judgment of dismissal due to a plaintiff's nonsuit is a "prevailing party" as well. *See, e.g., 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."). As one court has explained, for instance:

> 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.

Santisas, 951 P.2d at 405–06

Common sense also supports this view. Simply put: When a plaintiff initiates litigation, his goal is to win affirmative relief. By contrast, a defendant's objective is to secure dismissal of a plaintiff's claims. Thus, when litigation ends with a judgment that dismisses a plaintiff's claims and affords him no relief, it makes little sense to conclude that the defendant did not "prevail."

Importantly, although the way that *contracting parties* would

reasonably understand the term "prevailing party" controls the relevant inquiry, the Panel's opinion below did not seek to determine what the Parties themselves meant when they agreed that—in the event of litigation over their MDA—"the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings."[29] This was error.

The Panel's reliance on *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012)—a malicious prosecution case that serves as the basis for its ruling—was error, too. In particular, beyond being irrelevant to the question of who qualifies as a prevailing party, this Court's August 28, 2012 decision in *Himmelfarb* came *after* the Parties executed their June 11, 2012 MDA.[30] Thus, it is impossible for the Parties to have been relying on *Himmelfarb* when they used the term, both for want of a time machine and because the terms "prevail" and "prevailing party" do not appear in the opinion even a single time. *See generally Himmelfarb*, 380 S.W.3d 35. As such, the Panel erred by relying on *Himmelfarb* to inform the meaning of "prevailing party" under the Parties' MDA.

3. Ms. Turner had a right to rely on the Court of Appeals' consistent interpretation of "prevailing party" when submitting to a consent decree.

Tenn. R. Civ. P. 54.04(1)—governing discretionary costs—provides that "[c]osts included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs[.]" *Id.* Interpreting this language—in a series of decisions that *pre*dated the

[29] Supp. R. at 35–36.
[30] Supp. R. at 29–40.

Parties' 2012 MDA here—the Court of Appeals repeatedly held that "a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit." *See Freeman*, 359 S.W.3d at 180 ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to."); *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).

Of note, the Plaintiff does not contest this longstanding and consistent Court of Appeals authority, all of which: (1) actually considered the definition of prevailing party under Tennessee law; and (2) predated the Parties' MDA. To the contrary, the Plaintiff "*agrees* that the case law in Tennessee may support the award of discretionary costs to the adverse party to the non-suit."[31]

For two reasons, the Parties' agreement on the matter should be dispositive of this appeal.

First, 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

[31] *See* Appellee's Resp. in Opp'n to Rule 11 App. at 8 (emphases added and omitted).

> 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."). Here, the Parties agree that the law that existed at the time the Parties contracted provided that "a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit." *See Freeman*, 359 S.W.3d at 180 (collecting cases). Ms. Turner thus had a right to rely on that pre-existing law—which "enter[s] into and form[s] a part of" the Parties' contract, *see Robbins*, 89 S.W.2d at 341—when she agreed to be bound by a consent decree that used the same "prevailing party" language the Court of Appeals had reliably interpreted one way.

Second, "prevailing party" cannot sensibly be defined differently based on whether the party is seeking discretionary costs versus attorney's fees under a contract term. *Cf. Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."). Whether a defendant seeks costs or fees after a plaintiff has nonsuited, the result secured—dismissal—is the same. Thus, in either case, the term "prevailing party" should be construed the same way as well. *See id. Cf. Bardon Trimount, Inc.*, 49 Mass. App. Ct. at

778–79 ("[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.").

4. Abundant persuasive authority instructs that a defendant is the "prevailing party" when a plaintiff voluntarily dismisses his claims.

Given how often defendants nonsuit, this Court is not the first to consider whether a defendant is a "prevailing party" when a plaintiff voluntarily dismisses his claims. Thus, this Court can look to persuasive authority from other jurisdictions for guidance. *See Lane v. State*, 316 S.W.3d 555, 567 (Tenn. 2010) ("this Court finds 'merit in uniformity' and considers extra-jurisdictional case law for guidance.").

Fortunately, a helpful phalanx of authority from other jurisdictions provides a clear answer. *See, e.g., Hatch v. Dance*, 464 So. 2d 713, 714 (Fla. Dist. Ct. App. 1985) ("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) ("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,* 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 . . . 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.'").

As noted above, courts from other jurisdictions have also explained that treating defendants as prevailing parties when a plaintiff nonsuits is especially appropriate when "prevailing party" is used as a contract term. *See supra* at 24–25. (citing *Bardon Trimount, Inc.*, 49 Mass. App. Ct. at 778–79; *Anderson,* 179 F.3d at 766; *Santisas*, 17 Cal. 4th at 609. Jurisdictions that have held otherwise have also emphasized that state-specific statutory language required a different outcome only "in the

absence of a contract awarding attorney's fees and costs." *See Castle v. Sheets*, No. CH00-38, 2001 WL 168258, at *1 (Va. Cir. Ct. February 2, 2001).

This Court should swim with the current. It should also be especially inclined to do so under circumstances like those presented here, where the Parties' MDA's expressly contemplates that it may be necessary for a party to "defend legal proceedings related to the enforcement of any provision of this Agreement[.]"[32]

Notably, even under minority approaches to the question presented here, Ms. Turner would *still* be a prevailing party. Under Texas law, for example, when evaluating prevailing party status after a plaintiff has nonsuited, courts look beyond the four corners of the judgment to determine whether the nonsuit "was taken to avoid an unfavorable ruling on the merits." *See Kontoh v. Safo*, No. 05-17-00448-CV, 2018 WL 3215881, at *2 (Tex. App. July 2, 2018). If this Court adopted and applied that rule here (which is a great deal more unwieldy and requires much more of courts than the rule applied in *Freeman*, 359 S.W.3d at 180), Ms. Turner would still be a prevailing party. In particular, Ms. Turner would prevail under this rule because the Plaintiff's nonsuit—which he filed in the face of an imminent trial that Ms. Turner had repeatedly demanded after refusing to settle—"was taken to avoid an unfavorable ruling on the merits." *Kontoh*, 2018 WL 3215881, at *2.

* * *

For all of these reasons, the Panel's judgment should be reversed.

[32] Supp. R. at 35–36.

Thereafter, this Court should remand with instructions to reinstate the Trial Court's order awarding Ms. Turner her reasonable attorney's fees based on the fee-shifting provision of the Parties' MDA.

B. MS. TURNER WAS THE PREVAILING PARTY UNDER TENN. CODE ANN. § 36-5-103(C).

Tenn. Code Ann. § 36-5-103(c) provides that:

> A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

Id.

Construing this statute, at least three panels of the Court of Appeals have held that a defendant may recover attorney's fees when a plaintiff voluntarily dismisses his claims. *See Pounders,* 2011 WL 3849493, at *4–5 ("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*, 2009 WL 3230984, at *3 (upholding award of attorney's fees under section 36-5-103(c) following litigant's nonsuit).

These Panels got the answer right. Important policy considerations also require that their reasoning be adopted. Several reasons support this conclusion.

To begin, Tennessee's courts must adhere to the "'principle of party presentation[,]'" which "is a defining feature of our adversarial justice system." *See State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022). Thus, when a party seeks to modify a consent decree, courts must rely on litigants to defend their order. The judiciary's interest in such enforcement has also been emphasized repeatedly as a reason to accord prevailing party status to successful defenders of earlier court orders under Tenn. Code Ann. § 36-5-103(c). *See, e.g., Hansen*, 2009 WL 3230984, at *3 ("[Tenn. Code Ann. § 36-5-103(c)] has been interpreted as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order.") (citing *Shofner v. Shofner*, 232 S.W.3d 36, 40 (Tenn. Ct. App. 2007) ("By successfully enforcing the earlier custody decree, Father is entitled to recover reasonable attorney fees pursuant to Tenn. Code Ann. § 36-5-103(c)."); *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *8 (Tenn. Ct. App. Feb.28, 2007) ("We, therefore, find no error in the trial court's decision to award Mother her attorney's fees

for successfully defending the petition.")); *Pounders*, 2011 WL 3849493, at *5 ("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.").

This approach is consistent with the way that consent decrees are treated generally. For instance, in civil rights and other contexts, federal law instructs that "an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis of a [party's] prevailing party status[,]" such that "[a]fter that initial determination, [parties] are not again required to establish prevailing party status in the conventional sense of requiring a judicially-sanctioned material change in the legal relationship of the parties." *See Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 625 (6th Cir 2013). *See also Pottinger v. City of Miami*, 805 F.3d 1293, 1299 (11th Cir. 2015) ("attorneys' fees can be awarded for defending, enforcing, opposing the modification of, or monitoring compliance with an existing consent decree."); *San Francisco N.A.A.C.P. v. San Francisco Unified Sch. Dist.*, 284 F.3d 1163, 1166 (9th Cir. 2002) ("It is settled law in this circuit that a district court has discretion to award fees to a prevailing party in consent decree litigation for work reasonably spent to monitor and enforce compliance with the decree, even as to matters in which it did not prevail."); *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 716 (8th Cir. 1997) ("Reimbursement for post-judgment litigation fees can be as important as reimbursement for pre-judgment fees in accomplishing the purpose of section 1988."); *Pennsylvania v. Delaware Valley Citizens' Council for*

Clean Air, 478 U.S. 546, 559 (1986), *supplemented*, 483 U.S. 711 (1987) ("Several courts have held that, in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee."). The Parties' consent decree here[33]—which Ms. Turner successfully defended for nearly two years against the Plaintiff's unsuccessful efforts to modify it—should be treated the same way. *Cf. Hedrick v. Grant*, No. 2:76-CV-00162-GEB-EF, 2014 WL 4425816, at *3-4 (E.D. Cal. Sept. 8, 2014) ("Since Plaintiffs have defended against Defendants' motion to terminate the consent decree, Plaintiffs are prevailing parties entitled to an attorney's fees award.").

Without robust private enforcement of trial courts' earlier decrees, Tenn. Code Ann. § 36-5-103(c)'s important policy goals would also be diminished. Most troublingly, the Panel's ruling below will result in underenforcement of family law decrees—especially by poor litigants who cannot afford to defend meritorious orders concerning alimony, child support, and custody without the assurance of fee-shifting.[34] Worse: the Panel's ruling below will incentivize plaintiffs with unwarranted claims

---

[33] "'A consent decree is a contract made final and binding upon the parties by the approval of the court.'" *Lovlace v. Copley*, 418 S.W.3d 1, 30 (Tenn. 2013) (quoting *City of Shelbyville v. State ex rel. Bedford Cnty.*, 220 Tenn. 197, 415 S.W.2d 139, 144 (1967)). Marital dissolution agreements—which are privately negotiated agreements that the parties submit for judicial approval—satisfy this definition.

[34] This Court has "noted in the context of section 36–5–103(c) that '[a]lthough there is no absolute right to such fees, ... their award in custody and support proceedings is familiar and almost commonplace.'" *Eberbach*, 535 S.W.3d at 475–76 (cleaned up).

to pursue them—whether to harass or otherwise—because if defendants opt to defend in response, plaintiffs may safely parachute out of the litigation and nonsuit without consequence on the eve of trial.

"[R]equiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy[,]" though, which the Panel's opinion below undermines. *See Sherrod*, 849 S.W.2d at 785. Further, there are

> decided benefits to interpreting the statute so that defendants in cases withdrawn by plaintiffs can recover their legal expenses. Not only will this discourage frivolous suits, but it will place the burden where it belongs—on the party with the poorly thought out complaint or the hastily conceived writ. It will also discourage vexatious litigation and the use of pretrial discovery and depositions to harass defendants.

See Fraser, 41 Conn. Supp. at 419–20.

Put another way: Tennessee's trial courts should enjoy discretion under Tenn. Code Ann. § 36-5-103(c) to assess attorney's fees against plaintiffs who have "dragged [a] defendant through a costly and ultimately fruitless exercise." *Cf. Anderson,* 179 F.3d at 766. Without basis, the Panel's judgment below strips trial courts of that discretion. Thus, its judgment should be reversed, and this Court should hold that Ms. Turner prevailed under Tenn. Code Ann. § 36-5-103(c) when she successfully defended a consent decree against the Plaintiff's attempt to modify it.

C. THE PLAINTIFF'S CONTRARY ARGUMENTS ARE UNPERSUASIVE.

Seeking affirmance, the Plaintiff makes several contrary arguments. Each is unpersuasive.

First, the Plaintiff claims that, although he "agrees that the case law in Tennessee may support the award of *discretionary costs* to the adverse party to the non-suit," a different definition of prevailing party should apply when a defendant seeks attorney's fees.[35] Interpreting an identical term—"prevailing party"—differently depending on whether a defendant is seeking discretionary costs or attorney's fees makes little sense, though, and it introduces unnecessary inconsistency regarding an identical term without any compelling reason to do so. *See Cochise Consultancy, Inc.*, 139 S. Ct. at 1512 ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."). *See also Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006) ("'we can find no compelling reason whatsoever to interpret essentially identical language . . . differently'").

Second, the Plaintiff insists that, in the time since this Court's ruling in *Himmelfarb*, "the Court of Appeals has been on a distinctive, uniform, and consistent interpretation of the law in Tennessee applying this Honorable Supreme Court's ruling that there is no prevailing party in the case of a voluntary non-suit order of dismissal issued without prejudice."[36] Most of the cases cited by the Plaintiff do not support that proposition, though. For instance, this Court's decision in *Cooper v. Glasser*, 419 S.W.3d 924, 930 (Tenn. 2013), did not touch the question, having been concerned instead with whether Tennessee law gives claim-preclusive effect to a second voluntary dismissal taken in federal court.

[35] Appellee's Resp. in Opp'n to Rule 11 App. at 8–9.
[36] Appellee's Resp. in Opp'n to Rule 11 App. at 9–10.

Similarly, the Court of Appeals' opinion in *Rose v. Bushon*, No. E2015-00644-COA-R3-CV, 2016 WL 7786449 (Tenn. Ct. App. Mar. 28, 2016), concerned a litigant's right to continue pursuing a motion to disqualify—a motion that the trial court adjudicated in the plaintiff's absence and which apparently resulted in a default attorney's fee award—after a plaintiff's nonsuit, which the Court of Appeals reversed because the plaintiff "had functionally and effectively ended th[e] action by exercising her right to take a voluntary nonsuit." *See id.* at *4. Further, *Colley v. Colley*, No. M2021-00731-COA-R3-CV (Tenn. Ct. App. Nov. 17, 2022), is the Panel decision presently under review, and it is not authority for itself.

That leaves just two cited cases that actually do bear on the question presented here: *Jasinskis v. Cameron*, No. M2019-01417-COA-R3-CV, 2020 WL 2765845, at *5 (Tenn. Ct. App. May 27, 2020), plus *Justice v. Craftique Constr., Inc.*, No. E2019-00884-COA-R3-CV, 2021 WL 142146, at *3 (Tenn. Ct. App. Jan. 15, 2021), which relies on *Jasinskis* without adding further analysis. The cases are materially distinguishable, though, and more importantly, they are wrong.

Beginning with *Jasinskis*, 2020 WL 2765845, at *5, the case involved two potential fee-shifting provisions: (1) a contractual fee-shifting provision, and (2) a statutory claim available under the TCPA. *See id.* The defendant's contract-based claim for fees had not been raised at the time the *Jasinskis* plaintiffs nonsuited, though. *See id.* Instead, the plaintiffs nonsuited *before* the defendants' motion to amend "to add a claim for attorney's fees based on a provision of the parties' purchase and

sale agreement" could be heard, meaning that the defendants' contractual claim for fees was not pending at the time of the plaintiff's nonsuit. The trial court thus denied the defendants leave to amend on futility grounds, because the case had by that point concluded. Upon review of this chronology, the Court of Appeals ruled that "the trial court did not abuse its discretion when it denied [the defendants'] motion to amend its counterclaim because such amendment would have been futile in light of the [plaintiffs'] voluntary nonsuit[.]" *See id.*

In dicta irrelevant to that holding, though, *Jasinskis* also made the same error that the Panel made below. In particular, the *Jasinskis* court concluded that this Court's decision in *Himmelfarb*—a malicious prosecution case that had nothing to do with the definition of "prevailing party" under Tennessee law and never mentions the term—instructs that: "Once the [defendants] nonsuited their claims against Clark, neither party was a prevailing party." *Id.* The *Jasinskis* Court even purported to quote "prevailing party" language from *Himmelfarb*. *See Id.* at *5 ("As a result, the *Himmelfarb* plaintiff's voluntary dismissal of his claims against the defendant was not a dismissal on the merits, and neither party ended up as the 'prevailing party.'") (quoting *Himmelfarb*, 380 S.W.3d at 41). The quoted text does not actually appear in *Himmelfarb*, though, which did not use the word "prevail" or the term "prevailing party" even a single time. *See generally Himmelfarb*, 380 S.W.3d at 36.

Jasinskis also addressed a post-nonsuit claim for fees under the TCPA. As the Panel recognized, though, "[t]he language of the statute is

clear that before a court may award a defendant damages, including reasonable attorney's fees, the court must first find that the TCPA action is frivolous, without legal or factual merit, or brought for the purpose of harassment[,]" which had not happened when the plaintiffs' nonsuit was taken. *Jasinskis*, 2020 WL 2765845, at *5. The TCPA's restrictive standard is much different from both the MDA fee-shifting provision at issue here and the standard set forth in Tenn. Code Ann. § 36-5-103(c), though, which provides broadly that: "A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion[.]" *Id.*

The context of *Jasinskis*—an original lawsuit between feuding parties—is also materially distinct from the context presented here. This is not original litigation. Instead, it is post-judgment litigation over an earlier consent decree. In the preceding litigation, Ms. Turner also successfully obtained both an "adjudication of the merits of the case," *see Himmelfarb*, 380 S.W.3d at 39, and a "material alteration of the legal relationship of the parties[.]" *See Texas State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties"). *See also Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 (2001) ("court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees") (cleaned up).

By way of example, among other material alterations, Ms. Turner

won a judgment that "Husband shall pay transitional alimony in the amount of $5,000 a month for a period of eight (8) years[.]"[37] Through his post-judgment action here, Mr. Colley then sought—unsuccessfully—to terminate that alimony obligation prematurely based on a claim that Ms. Turner "was living with her fiancé two months immediately preceding her remarriage." *See Colley*, No. M2021-00731-COA-R3-CV, 2022 WL 17009222, at *1. That claim being false, Ms. Turner defended against it and demanded a trial. Thus, when the Plaintiff dismissed his own claims on the eve of trial, this case concluded with Ms. Turner successfully maintaining her previously secured prevailing-party status under the Parties' consent decree, which she was not required to establish again. As the Sixth Circuit has explained under similar circumstances:

> [W]e conclude that an earlier judicially sanctioned change in the parties' legal relationship through a consent decree can be the basis of a plaintiff's prevailing party status for purposes of § 1988. *Hadix*, 143 F.3d at 256. After that initial determination, plaintiffs are not again required to establish prevailing party status in the conventional sense of requiring a judicially-sanctioned material change in the legal relationship of the parties.

Binta B. ex rel. S.A. v. Gordon, 710 F.3d 608, 625 (6th Cir. 2013).

The Court of Appeals' later decision in *Justice v. Craftique Constr., Inc.*, 2021 WL 142146, at *3, does not provide any persuasive reason to rule differently. That case involved a *plaintiff* who wanted to be considered a prevailing party after nonsuiting, which does not even resemble the question presented here. *See id.* Further, the Court's

[37] Supp. R. at 31.

prevailing party analysis is limited to a single sentence: "We have held that when a plaintiff nonsuits his or her claims against a defendant, neither party is a 'prevailing party.'") (quoting *Jasinskis*, 2020 WL 2765845, at *5). Because, as detailed above, *Jasinskis* is materially distinguishable in several respects and erroneously cites *Himmelfarb* for a proposition that it does not support, this analysis may be rejected in favor of the better-reasoned view that "a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to." *See Freeman*, 359 S.W.3d at 180. *See also 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).

Third, the Plaintiff insists that all "case law and rulings issued prior to the Supreme Court *Himmelfarb* decision in 2012" are now out of date, and that *Himmelfarb* controls the outcome here.[38] The Plaintiff is wrong, though, and the Panel's judgment adopting his faulty analysis of *Himmelfarb* is wrong for the same reasons.

As the Plaintiff acknowledges, "the *Hammelfarb* [sic] decision was in the context of a malicious prosecution claim,"[39] which this case is not. Even so, borrowing from Tennessee's malicious prosecution

[38] *See* Answer to Rule 11 Application at 18. *See also id.* at 22 ("the Supreme Court already exercised its supervisory authority in the *Himmelfarb* case in 2012.").
[39] *See id.* at 19.

jurisprudence, both the Court of Appeals and the Plaintiff relied on *Himmelfarb* for the proposition that a voluntary nonsuit does not amount to a favorable termination on the merits. *Colley*, 2022 WL 17009222, at *5–6. In doing so, the Panel 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.*

Whether a defendant has been *maliciously prosecuted* and whether a defendant has *prevailed* are fundamentally different questions, though. Malicious prosecution is an intentional tort claim. As such, it is concerned with liability for wrongdoing—and malicious wrongdoing, in particular. *See Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992). The tort is thus justified, in part, based on the need to punish "those bent upon harassment or revenge" who institute litigation "in bad faith[.]" *See Johnston v. Zale Corp.*, 484 S.W.2d 531, 534 (Tenn. 1972). *See also Hardin v. Caldwell*, 695 S.W.2d 189, 192 (Tenn. Ct. App. 1985) ("Punitive damages are recoverable in actions based on malicious prosecutions."). Even so, malicious prosecution claims are narrowly circumscribed—and a host of defenses preclude them[40]—in deference to countervailing public policy considerations designed to encourage reports to law enforcement

[40] *See generally* Daniel A. Horwitz, *Defending Against Malicious Prosecution Claims in Tennessee,* TENN. FREE SPEECH BLOG (June 15, 2020), https://tnfreespeech.com/defending-against-malicious-prosecution-claims-in-tennessee/ (detailing many obstacles to malicious prosecution liability in Tennessee, and noting that "defendants who are sued for malicious prosecution have several powerful defenses available to them that often make defending against malicious prosecution claims a simple matter.").

and access to courts.

In stark contrast to the intentional difficulty and corresponding rarity of malicious prosecution claims, contractual fee-shifting provisions are a "common exception[] to the American Rule" against fee-shifting. *Eberbach*, 535 S.W.3d at 474. "In general, the purpose of contractual fee-shifting provisions is to 'encourage compliance with contracts and discourage unfounded lawsuits.'" *U.S. Foodservice, Inc. v. Shamrock Foods Co.*, 246 F. App'x 570, 577 n.8 (10th Cir. 2007) (quoting *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 337 (Colo. 1994) (Rovira, J., dissenting)). Such provisions "enable small claims to be litigated" when a breach is material but the "the claim is a small one[.]" *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys., LLC*, No. 02 C 5403, 2005 WL 948790, at *6 (N.D. Ill. Apr. 19, 2005). Privately negotiated fee-shifting agreements also further the interests of contracting parties in preventing litigation abuse, allowing litigants to oppose baseless claims with confidence that their expenses will ultimately be repaid after they prevail. *Contra* Plaintiff's Answer to Rule 11 App. at 15 (claiming that Plaintiff nonsuited after nearly two full years of litigation—and just days before a trial that Ms. Turner had repeatedly demanded—because the Plaintiff conducted "a cost analysis of the amount of money sought to be awarded and the amount of the costs of continued litigation").

By the same token—and also unlike malicious prosecution claims—statutory fee-shifting awards in family law proceedings are "familiar and almost commonplace." *Eberbach*, 535 S.W.3d at 476. Such awards—available to prevailing parties in a trial court's discretion under Tenn.

Code Ann. § 36-5-103(c)—serve important public policy goals. *Cf. Ochse v. Henry*, 216 Md. App. 439, 456, 88 A.3d 773, 783 (2014) ("statutory fee-shifting provisions are designed to encourage attorneys to take on cases that might otherwise be financially undesirable but which serve some greater, legislatively-established, social purpose."). Chief among them: "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *See Sherrod*, 849 S.W.2d at 785. An additional "purpose of attorney fee awards under Tenn. Code Ann. § 36–5–103(c) is 'to protect the children's, not the custodial parent's, legal remedies.'" *Stancil v. Stancil*, No. M201701485COAR3CV, 2018 WL 1733452, at *2 (Tenn. Ct. App. Apr. 10, 2018) (cleaned up). Perhaps most importantly, though, Tenn. Code Ann. § 36-5-103(c) allows "for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order." *See Hansen*, 2009 WL 3230984, at *3.

With this context in mind, privately negotiated fee-shifting provisions and Tenn. Code Ann. § 36-5-103(c), on the one hand, and malicious prosecution claims, on the other, ought not be treated as if they are the same as one another. They are not the same, or even similar.[41]

[41] As one more example: for a host of reasons, even defendants who prevail on the merits and win a favorable merits judgment as to every issue presented may rarely maintain a subsequent malicious prosecution claims under Tennessee law. By contrast, every litigant who has contracted for a fee-shifting provision and wins a merits judgment is entitled to a fee award. *See Eberbach*, 535 S.W.3d at 478 ("parties are contractually *entitled* to recover their reasonable attorney's fees when

Presumably, that also explains why *Himmelfarb* itself—a decision that dealt exclusively with malicious prosecution claims—had nothing to say about how "prevailing party" should be defined under Tennessee law. No litigant involved in the case expressed any position on the matter, either, because the issue was not involved in the case, much less adjudicated. *See* Defendant/Appellant, Tracy Allain's, Supreme Court Brief, Himmelfarb v. Allain, No. M2010-02401-SC-S10-CV (Tenn. Oct. 17, 2011), 2011 WL 5118579; Plaintiff/Appellee's Brief, Himmelfarb v. Allain, No. M2010-02401-SC-S10-CV (Tenn. Nov. 16, 2011), 2011 WL 6112180; Defendant/Appellant, Tracy Allain's, Reply to Appellee's Brief, Himmelfarb v. Allain, No. M2010-02401-SC-S10-CV (Tenn. Nov. 29, 2011), 2011 WL 6286749.

Given these circumstances, *Himmelfarb* not only did not but *could not* settle the distinct questions presented here. This Court has explained that "stare decisis only applies with reference to decisions directly upon the point in controversy." *State v. Nashville Baseball Club*, 154 S.W. 1151, 1155 (Tenn. 1913). *See also Denny v. Wilson Cnty.*, 281 S.W.2d 671, 674 n.4 (Tenn. 1955); *Burns v. Duncan*, 133 S.W.2d 1000, 1008 (Tenn. 1939). In *Himmerlfarb*, the way the term "prevailing party" should be construed a matter of Tennessee law was not part of the controversy. Thus, *Himmelfarb* cannot control, and the opinion said nothing about prevailing party status for purposes of fee-shifting claims regardless.

---

they have an agreement that provides the prevailing party in a litigation is entitled to such fees.") (collecting cases).

The requirement that a defendant materially alter the parties' legal relationship to be considered a prevailing party—whether under an MDA or for purposes of Tenn. Code Ann. § 36-5-103(c)—also overlooks the practical reality of a defendant's goals. Where, as here, a valid and enforceable MDA has already materially altered the parties' legal relationship, parties who oppose post-judgment modification of an existing decree *definitionally do not wish to change anything about it*. If they did, then they would have been the party to initiate modification proceedings.[42] Instead, under such circumstances, a defendant's goal is to "prevent plaintiffs from obtaining th[e] relief" they are seeking, *Santisas*, 17 Cal. 4th at 609, and "to make the plaintiff go away." *Hedley & Bennett, Inc.*, 2022 WL 2309891, at *2 (cleaned up).

"[A] voluntary dismissal achieves this objective." *See id.* It also does so without the stress, expense, risk, and delay of trial, rendering it an arguably *more* favorable outcome.

These defense-oriented considerations are not limited to petitions to modify or alter MDAs, either. Common sense and practical experience instruct that the goal of any defendant is to secure a dismissal, whether on the merits or otherwise. Any defendant who has ever sought and obtained 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 to that fact. There is also a reason why Tennessee law makes those tools—all of

[42] By way of example, Ms. Turner is the first named party to this action because she initiated the original proceeding. But she is the Defendant here, because after securing a favorable MDA, she wished to—and did—defend it against Mr. Colley's attempts to modify it.

which result in non-merits dismissals—available to defendants, and there is a reason why defendants use them.

With these considerations in mind, defendants who successfully defend lawsuits through their conclusion and win a judgment of dismissal—whether on the merits or otherwise—when the dust settles are prevailing parties. They are prevailing parties for purposes of discretionary costs. *See Freeman*, 359 S.W.3d at 180 ("Tennessee courts have held that a defendant is a prevailing party when a plaintiff voluntarily dismisses her suit . . . regardless of whether the plaintiff has re-filed her suit, or intends to."). They are prevailing parties for purposes of contractual fee-shifting in the "plain" and "ordinary" sense of that term. *See BSG, LLC*, 395 S.W.3d at 93. And they are prevailing parties for purposes of Tenn. Code Ann. § 36-5-103(c), which affords trial courts needed discretion to award attorney's fees to parties who successfully defend consent decrees. For all of these reasons, Ms. Turner prevailed in this litigation, and the Trial Court's judgment awarding her attorney's fees should be reinstated.

D. MS. TURNER SHOULD BE AWARDED HER ATTORNEY'S FEES ON APPEAL.

"A party that properly recovers fees in the trial court need not show that an appeal is independently meritless: the rationale supporting fees in the trial court carries over and supports the defense of the award on appeal." *Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125, 161 (Tenn. 2021). Here, the Trial Court awarded Ms. Turner her attorney's fees, and for the reasons detailed above, that award was proper on two independent grounds. Accordingly, this Court should award Ms.

Turner her appellate attorney's fees and "remand[] to the trial court for a determination of reasonable fees on appeal," *see id.*, given that:

1. Ms. Turner has expressly raised her entitlement to appellate attorney's fees in her Statement of the Issues, *see Killingsworth*, 205 S.W.3d at 412 ("In order to be awarded such fees, a plaintiff must initially request them in his or her appellate pleadings in a timely manner."); and

2. Prevailing in this appeal is necessary to secure her entitlement to relief. *See Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988) ("To paraphrase the acute observation of baseball great Yogi Berra, a case ain't over till it's over. This means that . . . counsel are entitled to compensation until all benefits obtained by the litigation are in hand.").

VIII. CONCLUSION

For the foregoing reasons, the Panel's judgment should be **REVERSED**; the Trial Court's judgment awarding the Appellant her reasonable attorney's fees should be **REINSTATED**; and as the prevailing party under both the Parties' MDA and Tenn. Code Ann. § 36-5-103(c), the Appellant should be awarded her attorney's fees on appeal.

Respectfully submitted,

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ, BPR #032176
LINDSAY SMITH, BPR #035937
MELISSA K. DIX, BPR #038535
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
lindsay@horwitz.law
melissa@horwitz.law
(615) 739-2888

Counsel for Appellant

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02 and Tennessee Rule of Appellate Procedure 11(a), this brief contains 10,230 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.

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of April, 2023, a copy of the foregoing was served via the Court's electronic filing system upon:

Jennifer L. Honeycutt, BPR 025464
P. Marlene Boshears, BPR 025280
Counsel for Appellant
Tenn. BPR #025464
3326 Aspen Grove Drive
Suite 304
Franklin, Tennessee 37067
(615) 807-2395
jennifer@jenniferhoneycutt.com
marlene@boshearslaw.com

Counsel for Appellee

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz