VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 10th *day of* April, 2015.

Ronald DeCesare, Jr., Appellant,

against Record No. 141089
Circuit Court No. CL-2013-6829

Pilar Godoy, as Trustee
of the DeCesare GST, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and arguments of counsel, the Court is of opinion that the Circuit Court of Fairfax County did not err in awarding attorney's fees and costs pursuant to the terms of a shareholder agreement.

Ronald DeCesare, Jr. (DeCesare) and Pilar Godoy (Godoy) were parties to a shareholder agreement (agreement) concerning the sale of PHR Holdings, Inc. (PHR). The agreement required them to sell if they received a "Qualifying Offer" and forbade the shareholders from frustrating the purposes of the agreement. The agreement provided the criteria for what constituted a Qualifying Offer and stated that any offer made by or on behalf of any party to the agreement shall not be deemed a Qualifying Offer.

DeCesare filed a complaint alleging that Godoy had breached, or alternatively, anticipatorily breached, the agreement by engaging in behavior that frustrated the purpose of the agreement and prevented the sale of PHR. The complaint refers to a proposal to purchase PHR by an entity called Liberating Healthcare, Inc. (Liberating) for the minimum qualifying amount as evidence of the

alleged breach of contract. DeCesare requested, inter alia, not less than $13,000,000 in monetary damages, and he presented evidence regarding the profit he would have received if the Liberating offer had been accepted.

Godoy argued that she had not breached the agreement because she did not engage in activity to frustrate the purposes of the agreement. In support of that position, Godoy presented evidence that the offer from Liberating was the only offer not accepted and that considering the Liberating offer as a Qualifying Offer would have been a breach of the agreement because Liberating was making an offer on behalf of DeCesare for the floor amount required by the agreement.

A jury found that Godoy had not breached or anticipatorily breached the agreement. Godoy filed a post-trial motion asking for an award of "her attorney's fees, costs, and expenses necessarily and reasonably incurred in her successful defense of the claims made against her under the Shareholders Agreement." The circuit court granted Godoy's motion and ordered DeCesare to pay her attorneys' fees and costs. DeCesare appeals the circuit court's decision granting Godoy attorneys' fees and costs.

The award of attorneys' fees and costs is based upon language in the agreement. The agreement states:

> In the event a party to this Agreement engages an attorney to enforce the provisions hereof or to secure performance by a defaulting party under the terms herein stated, the prevailing party in litigation arising therefrom shall be entitled to an award of its reasonable attorney's fees both on trial and the appellate level incurred in enforcing this Agreement and/or securing performance of the terms herein stated.

We review a trial court's interpretation of a contract de novo. PMA Capital Ins. Co. v. US Airways, Inc., 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006).

There is no doubt that DeCesare, a party to the agreement, engaged an attorney to enforce the provisions of the agreement. It is also clear that Godoy was the prevailing party in the litigation arising therefrom. The agreement includes the idiosyncratic requirement that the prevailing party is entitled to the award of its reasonable attorney's fees incurred in enforcing the agreement and/or securing performance of its terms.

We acknowledge that defense of a claim concerning alleged breach of an agreement may not, in many contexts, amount in substance to "enforcing" the agreement. However, under the facts of this case in which Godoy asserted separate terms of the agreement as a defense to DeCesare's allegations, we hold that Godoy incurred attorneys' fees and costs while "enforcing" the agreement. See Webster's Third New International Dictionary 751 (1993) (defining "enforce" as "to put in force: cause to take effect: give effect to esp. with vigor"). Therefore, we affirm the judgment of the circuit court. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

JUSTICE KELSEY, with whom JUSTICE McCLANAHAN and JUSTICE POWELL join, dissenting.

The contract in this case does not include the standard prevailing-party provision awarding attorney fees to any party that

prevails in litigation arising out of the contract. See, e.g., Dewberry & Davis, Inc. v. C3NS, Inc., 284 Va. 485, 490, 732 S.E.2d 239, 240 (2012)("The losing party shall pay the winning party's reasonable attorneys' fees and expenses for the prosecution or defense of any cause of action . . . ."). If it did, I would be in full agreement with the majority.

Instead, broken down, the contested attorney-fees provision in this case provides:

- "In the event a party to this Agreement engages an attorney

  to enforce the provisions hereof or

  to secure performance by a defaulting party under the terms herein stated,

- the prevailing party in litigation arising therefrom shall be entitled to an award of its reasonable attorney's fees both on trial and the appellate level

- incurred in enforcing this Agreement and/or securing performance of the terms herein stated."

Shareholders Agreement ¶ 9, at 2 (bullets and clause separation added).

The syntax of the provision implies that the prevailing party entitled to fees is the party that (as the prefatory clause states) hires counsel to "enforce" or to "secure performance of" the

agreement.[1] The last clause confirms this meaning by making clear that the only attorney fees the "prevailing party" can recover are those "incurred in enforcing and/or securing performance" of the agreement.

The ordinary reading of this limitation necessarily excludes an award of fees solely incurred in defending against another party's effort to enforce, or to secure performance of, the agreement. Dodging a blow, after all, is not the same thing as delivering one. The conventional understanding of these terms has been applied by many courts in many different contexts.[2]

---

[1] If that were not so, the prevailing party would not be entitled to fees if sued by a pro se party. It would be hard to imagine a more baffling contractual intent. It would be the same as saying, "A defendant may recover fees if he wins, but not if the losing party was a pro se plaintiff." Perhaps the parties meant to do just that, but that seems highly unlikely.

[2] See, e.g., Meltzer/Austin Rest. Corp. v. Benihana Nat'l Corp., 2014 U.S. Dist. LEXIS 172665, at *11-12 (W.D. Tex. Dec. 15, 2014); Gadsby v. American Golf Corp. of Cal., 2014 U.S. Dist. LEXIS 152870, at *11-12, *20-21 (M.D. Fla. Oct. 8, 2014); Southern Walk at Broadlands Homeowner's Ass'n v. Openband at Broadlands, LLC, 2012 U.S. Dist. LEXIS 116474, at *7 (E.D. Va. Aug. 17, 2012), aff'd on other grounds, 713 F.3d 175 (4th Cir. 2013); BKCAP, LLC v. Captec Franchise Trust 2000-1, 701 F. Supp. 2d 1030, 1037-38 (N.D. Ind. 2010), aff'd on other grounds, 688 F.3d 810 (7th Cir. 2012); Ocean Reef Developers II, LLC v. Maddox, 96 So. 3d 870, 874 (Ala. Civ. App. 2012); Housing Auth. of Champaign Cnty. v. Lyles, 918 N.E.2d 1276, 1279 (Ill. App. Ct. 2009); Carr v. Enoch Smith Co., 781 P.2d 1292, 1296 (Utah Ct. App. 1989); cf. Cangiano v. LSH Bldg. Co., 271 Va. 171, 175, 183-84, 623 S.E.2d 889, 891-92, 896-97 (2006); Chawla v. BurgerBusters, Inc., 255 Va. 616, 620-21, 499 S.E.2d 829, 831-32 (1998); O'Hara v. O'Hara, 45 Va. App. 788, 799, 613 S.E.2d 859, 865 (2005).

Godoy's argument to the contrary is both strained and result oriented. Underlying it is the assumption that a literal reading of the fee-shifting provision results in an inequity in this particular case. I do not deny the possibility, but I fail to see its relevance. While our historic chancery powers are considerable, they do not permit us to rewrite one-sided contractual provisions or to make a post hoc agreement for the parties that they failed to make for themselves. The overarching principle is far simpler: If a contract is lawful, it should be enforced as written. Doing so ensures that the predictable trajectory of contract law will not be altered because of the perceived inequities of a single case.

I respectfully dissent.

A Copy,

Teste:

Patricia L Harrington

Clerk