

IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1195
Third DCA Case No. 3D19-73, 3D19-318
L.T. Case No. 11-31255

SAMUEL SALOMON LEVY,

Petitioner,

vs.

EINATH BACH LEVY

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF

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3 STATEMENT OF THE CASE AND OF THE FACTS

3.1 INTRODUCTION

The history of this case is long and tortured, and the Trial Court Record on Appeal alone is 1,626 pages long.¹ Fortunately for purposes of this appeal, most of that record is irrelevant.

The single issue before this Court involves the interpretation of one paragraph in the parties' Property Settlement Agreement:

13. ENFORCEMENT: In the event that either party should take legal action against the other by reason of the other's failure to abide by this Agreement, the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party's reasonable expenses incurred in the enforcement of this Agreement, said expenses to include, but not be limited to, reasonable attorney's fees, court costs, filing fees, court reporter appearance fees, copying costs, travel costs and transcription fees.

(R. 90).

¹ The Petitioner is referred to as the "Former Husband". The Respondent is referred to as the "Former Wife". "R." refers to the record on appeal from the Trial Court. "R. 3DCA" refers to the record on appeal from the Florida Third District Court of Appeal. Unless otherwise stated, all emphasis is supplied.

The Former Wife prevailed in an enforcement action brought against her by the Former Husband. The General Magistrate nonetheless denied the Former Wife's request for prevailing party fees as they were available only to "the party who prevails in [an] action against the party found in violation of the ... Agreement". (R. 1266).

The Third District Court of Appeal reversed. The District Court found that Florida Statute §57.105(7) "amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action". (R. 3DCA 1959).

This Court accepted jurisdiction on the basis that the Third District's opinion is in express and direct conflict as a matter of law with *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013).

3.2 HISTORY OF THE CASE

The parties were divorced by a Virginia Final Judgment of Dissolution of Marriage dated March 25, 2011. (R. 53 – 56). The Final Judgment adopted two settlement agreements reached by the parties: a "Property Settlement and Support Agreement" (hereinafter

“Property Agreement” or “PSA”) as well as a “Consent Custody and Visitation Agreement” (“Custody Agreement”). (R. 76 – 98; 99 - 114). Both Agreements contain identical prevailing party fees provisions. (R. 90, 94 – 95). The Final Judgment was domesticated in Florida on November 14, 2011 after the parties and their children moved to South Florida. (R. 68 – 69).

The Former Husband filed in 2013 a *Motion to Compel Former Wife to Reimburse the Former Husband for Support Overpayments, Children’s Expenses, and Debt Incurred in the Name of the Former Husband, Motion for Credit Against Future Spousal Support Obligations as a Consequence of Money Advanced to the Former Wife, and Motion for Attorney’s Fees and Costs* (hereinafter “Motion to Compel”). (R. 179-192).

The Motion to Compel contained seven different claims, most of which were explicitly tied to the Former Wife’s alleged violation of the Property Agreement: overpayment of support, in violation of Paragraphs 1 and 7; failure to reimburse for uncovered medical expenses and insurance costs in violation of Paragraph 3; incurring debt in the Former Husband’s name in violation of Paragraph 4; incurring car title expenses in violation of Paragraph 8(c); and finally,

a claim for fees incurred as a result of the Former Wife's alleged violation of other terms of the Property and Custody Agreements, such as failing to share in transportation. *Id.* The Former Husband, in the concluding paragraph of his Motion to Compel, stated:

The Former Husband requests that this Court enter an order that compels the Former Wife to comply with the parties' Property Settlement and Support Agreement and shared parental responsibility and requires the Former Wife to pay the sums delineated herein to the Former Husband, *and awards him attorney fees and costs incurred as a result of the Former Wife's failure to adhere to the parties' agreements.*

(R. 191).

The hearing on the Motion to Compel occurred over three days in 2014; two days in 2017, and three days in 2018. (R. 1265). In her Report of General Magistrate and Notice of Filing dated September 28, 2018 (hereinafter "2018 Report"), the General Magistrate ruled against the Former Husband on all claims in his Motion to Compel. (R. 1265 - 1279).

The 2018 Report states in pertinent part:

17. The Former Husband did not prevail on enforcement of the Parties'

PSA in his Motion to Compel. Since the Former Husband inaccurately claimed that he was owed the sum of \$35,144.91 as of March 26, 2013 (the date of his Motion to Compel certificate of service) and, after extensive litigation, was only entitled to reimbursement of the sum of \$484.64, he cannot be viewed as the prevailing party under paragraph 13 of the parties' PSA. Additionally, the Former Wife was not even apprised prior to the last hearing of the amount being sought for car insurance. A Motion to Compel should reasonably imply that at least a good faith effort was made to communicate the exact debt owed so that repayment could have been made without the need to file enforcement proceedings. Since this is not the case with respect to the Former Husband's Motion to Compel, there is no entitlement to attorney's fees and costs against the Former Wife under Paragraph 13 of the parties' PSA.

(R. 1271-1272).

However, the General Magistrate also denied prevailing party fees to the Former Wife:

18. The Former Wife in her written closing argument claims entitlement to prevailing party fees and costs in defending against the Former Husband's Motion to Compel. This

type of relief is not encompassed in Paragraph 13 of the parties' PSA as entitlement to attorney's fees and costs is only contemplated against "the party who is found to be in violation of this Agreement."

(R. 1272).²

The Former Wife appealed to the Third District Court of Appeal after the Trial Court denied her Exceptions. (R. 1419-1430, 1556).

3.3 THE THIRD DISTRICT OPINION

The Third District Court of Appeal, in an opinion dated July 15, 2020, found the Former Wife had an entitlement to prevailing party fees under Florida Statute §57.105(7) and remanded to the Trial Court to determine a reasonable amount. (R. 3DCA 1956-1960).

Florida Statutes §57.105 states:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when the party prevails in any action, whether as plaintiff or defendant, with respect to the

² The General Magistrate reserved on claims for attorney's fees and costs for both parties under Florida Statutes Section 61.16. (R. 1272).

contract. This subsection applies to any contract entered into on or after October 1, 1988.

The Third District held:

Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action. The statute applies if the contract contains a prevailing party provision, and the litigant seeking fees is a party to the contract. *Azalea Trace, Inc. v. Matos*, 249 So. 3d 699, 702 (Fla. 1st DCA 2018), which is exactly the set of facts before the Court in this case. Thus, we would not be rewriting the parties' contract if the former wife is awarded prevailing party attorney's fees because section 57.105(7) amends the prevailing party attorneys' fee provision by operation of law. The award is mandatory, once the lower court determines a party has prevailed. *Landry v. Countrywide Home Loans, Inc.*, 731 So. 2d 137 (Fla. 1st DCA 1999) (discussing section 57.105(2), which later became section 57.105(7)). Furthermore, the trial courts do not have discretion to decline to award prevailing party fees in a case such as this. *Lashkajani v. Lashkajani*, 911 So. 2d 1154(Fla. 2005) ("Trial courts do not have the discretion to

decline to enforce such provisions, even if the challenging party brings a meritorious claim in good faith. Such provisions exist to ‘protect and indemnify’ the interests of the parties, not to enrich the party.” (internal citations omitted).

(R. 3DCA 1959-1960).

The Third District concluded “section 57.105(7) requires the former wife be awarded attorney’s fees for successfully defending against the former husband’s motion to compel.” (R. 3DCA 1960).

3.4 SUPREME COURT DISCRETIONARY JURISDICTION

The Former Husband filed a Petition requesting that this Court invoke its discretionary jurisdiction to resolve an express and direct conflict on a matter of law between the Third District opinion and *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013). This Court accepted jurisdiction.

All other facts deemed relevant will be stated *infra* in the argument sections to which they apply.

4 **SUMMARY OF THE ARGUMENT**

The Third District Court of Appeal in *Levy v. Levy*, 307 So.3d 71 (Fla. 3d DCA 2020) held that the Former Wife was entitled to prevailing party attorney’s fees and costs after she successfully defended against an action brought by the Former Husband to compel compliance with their Settlement Agreement. An enforcement provision in the Agreement states that if a party takes “legal action against the other by reason of the other’s failure to abide by this Agreement, the party who is found to be in violation of this Agreement” is entitled to prevailing party attorney’s fees and costs. The Third District found this provision was a unilateral prevailing party fees provision. Applying Florida Statutes §57.105(7), the Third District held:

Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action. The statute applies if the contract contains a prevailing party provision, and the litigant seeking fees is a party to the contract . . . which is exactly the set of facts before the Court in this case.

Id. (citation omitted).

This Court exercised its discretionary jurisdiction on the basis that the *Levy* opinion is in express and direct conflict on a matter of law with *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013). This Court has held that Florida Statutes §57.105(7) is unambiguous and a Court should not add “words to the statute that were not placed there by the Legislature”. *Page v. Deutsche Bank Trust Co. Ams.*, 46 Fla. L. Weekly S3 (Fla. Dec. 31, 2020). However, that is precisely what *Sacket* does; it insets a “condition precedent” into §57.105(7) that does not exist in the plain text of the statute.

It is respectfully submitted that the opinion in *Levy* should be approved and the opinion in *Sacket* should be quashed.

5 **ARGUMENT**

5.1 **STANDARD OF REVIEW**

This Court reviews *de novo* the interpretation of a provision of the parties' Property Settlement and Support Agreement. *Levy v. Levy*, 307 So.3d 71 (Fla. 3d DCA 2020), quoting *McIlmoil v. McIlmoil*, 784 So. 2d 557, 561 (Fla. 1st DCA 2001) ("The interpretation of the wording and meaning of [a] marital settlement agreement, as incorporated into [a] final judgment, is subject to de novo review."); see also *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 145 n.2 (Fla. 2019).

5.2 **FORMER WIFE, AS PREVAILING PARTY, IS ENTITLED TO PREVAILING PARTY ATTORNEY'S FEES AND COSTS**

There is no dispute that the Former Wife was the prevailing party in this case. She successfully defended against the Former Husband's motion seeking to enforce terms of the parties' Property Settlement and Support Agreement ("Property Agreement").³ The

³ Florida law recognizes that a marital settlement agreement is a contract that is to be interpreted as are all other contracts.

only question before this Court is whether Florida Statutes §57.105(7) allows the Wife to recover prevailing party fees and costs. The Third District found that she does, holding in its Opinion that the statute “applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action”. *Levy v. Levy*, 307 So.3d 71 (Fla. 3d DCA 2020).

This is consistent with this Court’s 2020 Opinion in *Page v. Deutsche Bank Trust Co. Ams.*, 46 Fla. L. Weekly S3 (Fla. Dec. 31, 2020). In that case, Deutsche Bank made the same argument that the Former Husband does now—that there was a “condition precedent” to an award of prevailing party attorney’s fees and costs under §57.105(7). This Court rejected that argument when made by Deutsche Bank, and it is respectfully submitted this Court should do so again.

The prevailing party fees provision in this case states:

13. ENFORCEMENT: In the event that either party should take legal action against the other by reason of the other’s failure to abide by this Agreement, the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party’s reasonable expenses incurred in the

enforcement of this Agreement, said expenses to include, but not be limited to, reasonable attorney's fees, court costs, filing fees, court reporter appearance fees, copying costs, travel costs and transcription fees.

The General Magistrate found, and the Third District agreed, that, as drafted, the prevailing party fees provision applied "against 'the party who is found to be in violation of this Agreement'". However, the Third District held that the contract's unilateral prevailing party fees provision was made reciprocal by operation of law pursuant to Florida Statutes §57.105(7). That statute states:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when the party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

Id.

This Court held in *Page* that Florida Statutes §57.105(7) is unambiguous and a Court should not add "words to the statute that were not placed there by the Legislature". The statute requires an award of prevailing party fees "when a party prevails in any action,

whether as plaintiff or defendant, with respect to the contract". *Id.* There are no qualifiers, no conditions precedent. "[W]e presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.*

In *Page*, the District Court reversed a Trial Court order that granted prevailing party fees to a homeowner in a mortgage foreclosure case because, *inter alia*, she failed to prove that the contract was unenforceable both on the day the suit was filed as well as at trial. This Court found error and quashed the opinion:

To the extent the Fourth District read section 57.105(7) as requiring contract enforceability by both parties on the day suit is filed, *the Fourth District erroneously added words to the statute "that were not placed there by the Legislature."* *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). Section 57.105(7) does use the word "enforce," but that word is found in the statute's first clause—the clause that looks to whether the contract contains "a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract." §57.105(7), Fla. Stat. There is simply no basis in the statutory text on which to conclude that a contract containing the requisite provision must be shown to be mutually

enforceable on the day suit is filed. The Fourth District's failure to identify any such statutory language is thus not surprising.

Notably, the Former Husband did not cite to *Page* in his Initial Brief.

5.2.1 **Application of §57.105(7) Based on Plain Text**

"To be entitled to attorney's fees under section 57.105(7), the movant has the burden of proving the following: '(1) the contract provides for prevailing party fees; (2) both the movant and opponent are parties to that contract; and (3) the movant prevailed.'..." *Hopson v. Deutsche Bank Nat'l Trust Co.*, 278 So.3d 306 (Fla. 2nd DCA 2019).

As the Third District held:

Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action.

This Court in *Page* analyzed the statute as follows:

The statute contains two clauses, the first of which addresses the existence of a fee provision in the underlying contract, and the second of which addresses the requisite prevailing in

an "action . . . with respect to the contract." The conditions in both statutory clauses must be satisfied before fees may be awarded. . .

The first clause requires the existence of "a contract [that] contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract." §57.105(7), Fla. Stat. This question is about what appears in the contract. . .

The second clause of the statute requires that "the other party" must "prevail[] in any action, whether as plaintiff or defendant, with respect to the contract." § 57.105(7), Fla. Stat.

Id.

The Former Husband concedes that the parties are bound by the terms of the Property Agreement; that he would have been entitled to prevailing party attorney's fees and costs if he had prevailed in the enforcement action; and that he did not recover those fees because the Former Wife was the prevailing party. The Former Husband nonetheless argues that the prevailing party fees provision is not applicable to the Former Wife because a "default" of the Property Agreement is a condition precedent to an award of prevailing

party fees under the contract.

The Property Agreement, as drafted, allows for prevailing party fees only to the party who a) brings the enforcement action and b) proves a default by the other party. As a result, only the party bringing the action—the plaintiff—can receive prevailing party fees. That makes the prevailing party fees provision unilateral. This is the problem that §57.105(7) was designed to fix; the statute awards fees to the successful defendant, not just a successful plaintiff.

Florida courts have applied §57.105(7) on numerous occasions to find that victorious defendants in contract disputes are entitled to prevailing party fees. In *Ham v. Portfolio Recovery Assoc.*, 308 So. 3d 942 (Fla. 2020) this Court found that debtor was entitled to attorney's fees and costs for successfully defending against a credit card collection action, based upon a prevailing party fees provision in the credit card contract. While not technically a breach of contract action, this Court found that the defendant was nonetheless entitled to prevailing party fees; it was enough that the claim could not have been brought but for the existence of the contract. *See also, Holiday Square Owners Ass'n v. Tsetsenis*, 820 So. 2d 450 (Fla. 5th DCA 2002) (association was entitled to an award of attorney fees under

the reciprocity mandate of Fla. Stat. § 57.105(7), because attorney fees were provided for in the declaration, and the defendant association was the prevailing party in suit brought by shopping plaza tenant); *Ajax Paving Indus. v. Hardaway Co.*, 824 So. 2d 1026 (Fla. 2d DCA 2002) (prevailing party fees provision amended by operation of statute where contractually it applied only to appellee but Section 57.105(7) “mandate[ed] that contractual fee provisions must impose reciprocal obligations and benefits on all parties to a given contract.”)

5.2.2 **“Default” Not Condition Precedent to §57.105(7) Fees**

The Former Husband tries to draw a distinction between prevailing party fees provisions that use the word “default” as opposed to those that use the word “prevail”. He argues that in this case an award of prevailing party fees is dependent upon a “default”. Without a default, he argues, the prevailing party fees provision is not triggered.

Essentially, the existence of a unilateral attorney’s fee clause is a condition precedent to the invocation of Florida Statutes Section 57.105(7). This is in stark contrast to the instant case, where the violation by

one party is a condition precedent to invoke the attorney's fee clause in the parties' PSA.

Initial Brief, pg. 17.

As argued *supra*, a fee-shifting provision with language referring to a "default" impermissibly adds a requirement to §57.105(7) that the Legislature did not intend. *Page v. Deutsche Bank Trust Co. Ams.*, 46 Fla. L. Weekly S3 (Fla. Dec. 31, 2020). Further, it is still a unilateral prevailing party fees provision even considering a "default" requirement. To find otherwise would gut §57.105(7), as the non-moving party could never make a claim for prevailing party fees if it was required to a) successfully defend against a breach of contract action while also b) showing that a breach of contract occurred. The Former Husband, in contrast, would have been entitled to prevailing party attorney's fees and costs had he prevailed on his Motion to Compel. The "condition precedent" argument demonstrates the unilateral nature of the prevailing party provision in this case, as it applies only "to a party when he or she is required to take any action to enforce the contract". §57.105(7).

The Former Husband cites to the Fourth District's opinion in *Florida Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So.3d 893 (Fla.

4th DCA 2010). However, it supports the Former Wife’s position rather than his own. In that case, a homeowner filed a suit for breach of contract against a contractor who had performed faulty work. The homeowner sought §57.105(7) fees against based upon a contract that included the provision that “purchaser is responsible for all costs of collection including Attorney’s fees. And 1.5% of contract amount”. *Id.* at 894,

The Fourth District quashed an award of §57.105(7) fees to the homeowner because it was not a collections action. The Court held:

[H]ere the contract provided fees for the contractor in the event of a collection action. Section 57.105(7) requires reciprocity. *Reciprocity would allow for the homeowner to receive fees if she prevailed in a collection action brought by the contractor. That is mutuality; that is reciprocity.*

Id. at 895-896. Under the rationale of the Fourth District, the Former Wife—like a homeowner prevailing in a collection action—is entitled to prevailing party fees as she prevailed in a breach of contract case brought by the Former Husband. “That is mutuality; that is reciprocity”. *Id.* at 896.

The prevailing party fees provision in this case is similar to the

“default” prevailing party fees provision in *Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC*, 197 So.3d 1112 (Fla. 3d DCA 2016). In that case, the contract—a note and mortgage—contained a prevailing party fees provision that “entitles the Bank, as mortgagee, to the recovery of its attorney's fees if the borrower *defaults on the note secured by the mortgage and the Bank successfully brings an action to foreclose on the mortgage*”. *Id.* at 1114. The Third District found that the provision was unilateral and was therefore modified by operation of law:

[S]ection 57.105(7) provides the other party to the mortgage—i.e., the mortgagor—a substantive right to the recovery of its fees in any action where, by virtue of the fee provision in the mortgage, the mortgagee would be entitled to fees. In other words, notwithstanding that the contractual fee provision is one-sided, entitling only one of the contract's parties to prevailing party fees, by operation of law section 57.105(7) bestows on the other party to the contract the same entitlement to prevailing party fees.

Id. at 1115.⁴ (citations omitted).

5.2.3 **The Flawed Reasoning in *Sacket v. Sacket***

The Former Husband premises his argument that there is an implied “condition precedent” on *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013), the opinion which this Court determined was in express and conflict on a matter of law with the Third District’s opinion in this case. *Sacket* is an outlier case that has never once been cited in another opinion in the eight years since it was decided. It is based on *dicta* from another case; is inconsistent with other Fourth District cases; and is in conflict not just with the Third District’s opinion in this case but also with *CalAtlantic Grp., Inc. v. Dau*, 268 So.3d 265 (Fla. 5th DCA 2019).

In *Sacket*, the Former Wife filed a contempt motion against the Former Husband for an alleged violation of their marital settlement agreement. She lost. The Former Husband sought fees under the prevailing party provision of the marital settlement agreement. It stated:

⁴ The Third District ultimately denied §57.105(7) to the Appellee, even though she was prevailing party, because she was not a party to the contract. Here, that is not an issue.

Except as otherwise provided in this Agreement, should either party to this agreement **default** in his or her obligation hereunder, the party in **default** shall be liable to the other party for all reasonable expenses, including attorney's fees, incurred by the other party with regard to the enforcement of the obligations created in this Agreement, whether suit be brought or not.

Id. (Emphasis in original).

The Trial Court granted prevailing party fees to the Former Husband, reasoning:

Because the Former Wife's Motion for Contempt was in the nature of an enforcement of a provision in the Marital Settlement Agreement, and because of the language contained in Florida Statute 57.105(7) making a provision for attorney's fees to enforce a contract provision bilateral, the Former Husband is entitled [to] an award of fees and costs in a successful defense of the Former Wife's Motion for Contempt.

Id. at 1070.

The Fourth District reversed, finding that §57.105(7) was inapplicable because the prevailing party fees provision was reciprocal:

The attorney's fees provision in the marital settlement agreement applied to both parties equally, and was therefore not a unilateral provision necessitating the application of section 57.105(7) for reciprocity purposes, and as such, the trial court also erred in relying on section 57.105(7).

The *Sacket* Opinion hinges on the use of the word “default”, holding that a party must prove a default of the contract before there is an entitlement to prevailing party fees. It appears, although it is far from clear, that the Fourth District found the provision was reciprocal because either party had the ability to file a motion to enforce the settlement agreement. Regardless, the Fourth District added a term to the statute that does not exist in the plain text.

The *Sacket* Court apparently considered only the first clause of §57.105(7), which defines a prevailing party fees provision as one that allows for fees if a party is “required to take any action to enforce the contract”. It ignores the second clause: “whether as plaintiff *or defendant*, with respect to the contract”. The true test of reciprocity is not whether both parties have the ability to collect fees if they bring, and are successful, in an enforcement action. It is only reciprocal if, once an action has been brought by either party,

prevailing party fees will be awarded to whichever side wins. The prevailing party fees provision in *Sacket* was clearly unilateral and the Trial Court's use of §57.105(7) to award fees to the Former Husband in that case was not error.

The *Sacket* Opinion cites as precedent *Zakian v. Zakian*, 837 So. 2d 549 (Fla. 4th DCA 2003), to support the argument that a "default" was required before the prevailing party fees provision is triggered. However, the quoted language from *Zakian* is *dicta*.

In *Zakian*, the Former Wife argued her fee award was too small because the Trial Court had granted fees under §61.16, as opposed to under the prevailing party fees provision in the parties' settlement agreement. That fees provision provided:

Should either party fail to abide by the terms of this Agreement, the defaulting party will indemnify the other for all reasonable expenses and costs including attorney's fees incurred in the enforcement of this Agreement.

Id. at 550.

The *Zakian* Court stated it "did not read this particular provision to base entitlement to fees on whether the party prevailed" as it "tied the contractual obligation to pay fees to whether one of

them ‘defaulted’ on a duty or obligation arising under the settlement agreement”. *Id.* The Fourth District, however, ultimately determined it was not necessary to resolve the “default” issue—and also left open the possibility that the Former Wife should have recovered under the prevailing party fees provision. Instead, the Fourth District reasoned that the Former Wife had received a fee award, albeit not as large as she requested:

In the end, we cannot say that the former wife has shown prejudicial error in the attorney’s fee award. *While the record may support her argument that the fee award should have been based solely on the agreement,* she has failed to show that this legal error as to the source of entitlement to fees resulted in a smaller award than would have resulted if the proper basis had been stated.

Id. at 551.

5.2.4 **Other Opinions in Conflict with Sacket**

The *Sacket* opinion is in express and direct conflict with not just *Levy*, but also with *CalAtlantic Grp., Inc. v. Dau*, 268 So.3d 265 (Fla. 5th DCA 2019). In that case the Fifth District considered, and rejected, the same “default” argument that the Former Husband

makes to this Court. The Fifth District reversed a Trial Court order which denied attorney's fees to the Appellant under §57.105(7), partly on the basis that there was no finding of a violation of the contract in question.

The contract at issue was titled a "Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions of Waterside Pointe" (a planned residential community). The Declaration included the following prevailing party fees provision:

The expense of any litigation to enforce this Declaration shall be borne by the Person against whom enforcement is sought, provided such proceeding results in a finding that such Person was in violation of the Declaration. The prevailing party in any such action shall be entitled to recover its reasonable attorneys' fees, costs and disbursements through the appellate level.

The Appellee argued that an award of §57.105(7) fees is "designed to even the playing field, not expand it beyond the terms of the agreement". The Appellee "...maintain[ed] that awarding CalAtlantic attorney's fees would impermissibly expand the scope of the attorney's fees provisions of the Declaration because a breach is required to trigger the entitlement to fees, and here, a breach did not

occur”. *Id.* at 267.

The Fifth District rejected that argument, finding that the lawsuit fell squarely under the types of actions envisioned by the prevailing party fees provision in the contract. “Had Appellees prevailed, they would have been entitled to recover attorney’s fees”. *Id.* at 268.

In reaching its conclusion, the Fifth District cited to *GEMB Lending, Inc. v. RV Sales of Broward, Inc.*, 2010 WL 5313482 (S.D. Fla. Dec. 20, 2010). In *GEMB*, the plaintiff had unsuccessfully sued to collect delinquent loan payments. The prevailing party fee provision stated: “If you default, you agree to pay out costs for collecting amounts owing, including court costs, reasonable attorneys’ fees”. The plaintiff argued that the defendant, although he had prevailed in the litigation, was not entitled to §57.105(7) fees because the defendant had not sought to enforce the contract, and there was no breach of the contract. Again, that argument was rejected:

Florida Statute § 57.105(7) allows a party to invoke mutuality even if they are a "defendant." *Thus, [the plaintiff] need not have defaulted on anything to trigger the statute and fee*

provision. Rather, it is [the plaintiff's] unsuccessful attempt to sue the [defendants] for default and collection which resulted in the [defendants] incurring attorney's fees. Florida law allows them to recoup these fees from [the plaintiff] under the terms of the parties' agreement.

The *CatAtlantic* Court adopted that reasoning:

As in GEMB, here, we hold that the availability of attorney's fees was determined by the cause of action asserted in Appellees' complaint, not the disposition of the case. Provided that the contract is not found to be unenforceable between the parties, if a claim is within the scope of an attorney's fees provision, the party defending against that claim is entitled to attorney's fees pursuant to section 57.105(7) if the party prevails.

Id.

The *Sacket* Court also ignores Fourth District precedent. The District Court in *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So.3d 348 (Fla. 4th DCA 2011), reversed a Trial Court order denying §57.105(7) fees to a defendant who successfully defeated a breach of contract claim. The case involved a broker who had contracted to sell the Appellant's business. The broker's contract

included the clause: “If a suit is filed to enforce Broker's rights hereunder and the Broker is the prevailing party, the Seller will pay the Broker its full commission, legal fees & costs incurred in any litigation and one (1) percent monthly interest pre and post judgment”.

The Broker subsequently sued the Seller/Appellant, and lost. The Trial Court, however, refused to award prevailing party fees to the Appellant, even though the broker conceded that reciprocity provision in §57.105(7) allowed the Appellant to do so. The Fourth District held this was reversible error. “We agree with the seller that it was entitled to recover its attorney's fees against [broker] pursuant to section 57.105(7)”. *Id.* at 355.

5.2.5 **Public Policy**

Finally, the Former Husband makes a case that because of the “uniqueness of family law cases”, this Court should treat a marital settlement agreement differently than “form contracts prepared by large commercial entities”. Initial Brief, pg. 23. Again, this is not supported by the plain text of §57.105(7). There is no “except in family law cases” exception in the statute. It applies to all cases with

unilateral prevailing party provisions.

6 CONCLUSION

The Former Husband spent eight years litigating an enforcement action he lost, in the process forcing the Former Wife to incur tens of thousands of dollars in fees. Prevailing party fees provisions “exist to protect and indemnify the interests of the parties, not to enrich the prevailing party”. *Lashkajani v. Lashkajani*, 911 So.2d 1154, 1158 (Fla. 2005) (internal citations omitted). The Former Wife simply seeks to make herself whole. An award of prevailing party fees to the Former Wife also is consistent with the principle of §57.105(7), which seeks to level the playing field by making all prevailing party fees provisions reciprocal. *See Jacques-Meraz v. Walker*, 5D20-412 (Fla. 4th DCA July 2, 2020); *Stratton v. Port St. Lucie MGT, LLC*, 149 So.3d 100 (Fla. 4th DCA 2014).

Based upon the arguments made above, the Former Wife respectfully requests that this Court approve *Levy*, and quash *Sacket*.

Respectfully submitted,

By: *Robert Kohlman*
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7 CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via email to: Evan Abramowitz, Esq., Abramowitz and Associates, 3211 Ponce de Leon Blvd., Suite 202, Coral Gables, FL, eserviceabramowitz@gmail.com, this 17th day of March, 2021.

By: *Robert Kohlman*
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8 **CERTIFICATE OF COMPLIANCE**

This certifies that this Respondent's Answer Brief is printed in 14-point, Bookman Old Style.

Respectfully submitted,

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