

SUPREME COURT OF FLORIDA

SAMUEL SALOMON LEVY,

Petitioner/Former Husband,

CASE NUMBER: SC20-1195

L. T. CASE NO. 3D19-73; 3D19-318;
11-31255

vs.

EINATH BACH LEVY,

Respondent/Former Wife.

_____ /

PETITIONER'S INITIAL BRIEF ON THE MERITS

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RECEIVED, 03/10/2021 06:17:32 PM, Clerk, Supreme Court

INTRODUCTION

The Petitioner, SAMUEL SALOMON LEVY, the Appellee/Cross-Appellant in the District Court of Appeal, Third District, shall hereinafter be referred to as the "PETITIONER" or "FORMER HUSBAND".

The Respondent, EINATH BACH LEVY, the Appellant/Cross-Appellee, in the District Court of Appeal, Third District, shall hereinafter be referred to as the "RESPONDENT" or "FORMER WIFE".

The Honorable Deborah Magid, Presiding General Magistrate of the Lower Tribunal, in and for the Eleventh Judicial Circuit in and for Miami Dade County, Florida, shall hereinafter be referred to as the "GENERAL MAGISTRATE".

The Honorable George A. Sarduy, Presiding Judge of the Lower Tribunal, in and for the Eleventh Judicial Circuit in and for Miami Dade County, Florida, shall hereinafter be referred to as the "TRIAL COURT JUDGE" or "TRIAL COURT".

Any documents referred to below that are part of the record on Appeal transmitted by the Third District Court of Appeal to the Florida Supreme Court shall be referred to as (R.).

References to the Petitioner's Appendix, shall be referred to as

(App.). References to the numbering of the Appendix shall follow the numbering set forth at the bottom of each page.

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STATEMENT OF THE CASE AND FACTS

This matter stems from a post-judgment dissolution of marriage proceeding. The case originated in the commonwealth of Virginia where the marriage of the parties was dissolved. On August 10, 2010, the parties entered into a “Property Settlement and Support Agreement” (hereinafter “PSA”). (App. 4-26). Of most importance to this matter, paragraph 13 of the PSA states as follows:

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, traveling costs and transcription fees.¹

(App. 18).

Thereafter, the parties and their minor children moved to Florida and on November 9, 2011, the Trial Court entered an “Agreed Order Domesticating Foreign Final Judgment”, which domesticated the commonwealth of Virginia

¹ The parties also entered into a “Consent and Custody Visitation Agreement” and paragraph 26 of that agreement contains the exact same language as paragraph 13 of the PSA. (App. 29-44).

dissolution of marriage Orders in the state of Florida. (App. 27-28). As a result, the PSA became fully enforceable in Florida.

On March 26, 2013, the Former Husband filed his “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 “Former Husband’s Motion to Compel”). (App. 45-58). Therein, the Former Husband argued that the Former Wife had violated the parties’ agreements in various different ways and asked that the Former Wife be compelled to comply with the PSA. The Former Husband also requested that he be awarded attorney’s fees and costs incurred as a result of the Former Wife’s failure to adhere to the parties’ agreements.

The parties appeared before the General Magistrate for a hearing on the Former Husband’s Motion to Compel on July 25, 2018 and July 26, 2018. (App. 67-81). After conducting the hearing, the General Magistrate issued a Report of the General Magistrate and Notice of Filing on December 27, 2018, denying the Former Husband’s motion to compel in all respects. (App. 67-

81). The General Magistrate also denied the Former Wife's request for attorney's fees and costs related to the defense of the Former Husband's Motion to Compel, finding that the attorney's fee provision in the agreement of the parties was "not a blanket prevailing party provision, but rather a provision where reasonable expenses are only payable to the party who prevails in action against the party found *in violation*..." and that "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'". (App. 68); (App. 74). (Emphasis supplied).

The General Magistrate reserved ruling on whether an award of attorney's fees and costs are appropriate with respect to the Former Husband's Motion to Compel under Florida Statutes Section 61.16. (App. 74). In the same Report, the General Magistrate did award attorney's fees and costs to the Former Wife related to a reservation of jurisdiction from a prior Report of the General Magistrate dated September 8, 2016, where the Former Wife was successful in litigating enforcement of the parties' "Consent

Custody and Visitation Agreement”.² (App. 80).

Both parties filed exceptions to various aspects of the Report of the General Magistrate. (App. 82-125). Relevant to the matter before this Honorable Court, in her exceptions, the Former Wife argued that as the prevailing party she was entitled to payment of her reasonable attorney’s fees and costs incurred in the defense of Former Husband’s Motion to Compel, as Florida Statutes Section 57.105(7) provides that prevailing party fees provisions in contracts are reciprocal. **§ 57.105(7), Fla. Stat.** (App. 86-88). The Trial Court Judge denied the Former Wife’s exceptions and the Former Wife filed her appeal with the Third District Court of Appeal. (App. 126).

The Former Wife made similar arguments in her appeal, stating as follows:

The Trial Court erred as a matter of law in failing to award the Former Wife prevailing party attorney’s fees and costs pursuant to the parties’ Property Agreement after she successfully defended against the Former Husband’s allegations she was in breach of that agreement” and that “either pursuant to the express language of the prevailing party provision, or based upon the reciprocity of prevailing party provisions imposed on contracts by Florida Statutes Section 57.105(7), the Trial Court was

² In the prior Report of the General Magistrate, where the determination of the amount of fees to be awarded to the Former Wife was reserved, the Former Husband was found to have violated Orders of the Court. (App. 63).

without discretion to deny fees to the Former Wife.

(R. 10).

In his answer brief, the Former Husband argued that:

The Trial Court was correct as a matter of law in refusing to award the Former Wife prevailing party attorney's fees and costs pursuant to the parties' Property Agreement. The party's legal agreements clearly state that entitlement to attorney's fees and costs is only contemplated against 'the party who is found to be in violation of this Agreement.' The General Magistrate and Judge both agreed and rejected Counsel for the Appellant's arguments. The language above is explicit, unambiguous and represents the parties' respective intent and meeting of the minds.³

(R. 42).

On July 15, 2020, the Third District Court of Appeal issued its opinion in **Levy v. Levy**, 307 So.3d 71 (Fla. 3d DCA 2020), holding, as follows:

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

³ The Former Husband, who proceeded *pro se*, had filed a cross-appeal setting forth many other arguments; however, same are not relevant to this matter and are, therefore, not addressed herein.

prevailing party attorneys' 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, 1158 (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.").

Accordingly, section 57.105(7) requires that the former wife be awarded attorney's fees for successfully defending against the former husband's motion to compel. Therefore, concluding that the trial court erred in declining to award the former wife's motion for attorney's fees pursuant to the prevailing party fee provision as modified by section 57.105(7), we reverse the order on appeal and remand to the trial court with directions to determine the reasonable attorneys' fees and costs to be awarded to the former wife."⁴

(R. 1956-1960).

The Former Husband filed a motion for rehearing, which the Third District Court of Appeal denied without further comment. (R. 1972).

The Former Husband proceeded to file his jurisdictional brief with this

⁴ The Third District Court of Appeal affirmed with respect to the issues raised by the Former Husband in his cross-appeal.

Honorable Court. Therein, the Former Husband argued that the Third District Court of Appeal's decision directly conflicts with the Fourth District Court of Appeal's decision in **Sacket v. Sacket**, 115 So.3d 1069 (Fla. 4th DCA 2013).

On February 3, 2021, this Honorable Court issued an Order accepting jurisdiction of this case.

STANDARD OF REVIEW

This case involves the matter of interpretation of a provision in an agreement and a matter of statutory interpretation. Decisions regarding the interpretation of an agreement are reviewed *de novo*. **Kipp v. Kipp**, 844 So.2d 691, 693 (Fla. 4th DCA 2001) citing **Mcllmoil v. Mcllmoil**, 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."). Furthermore, review of questions of statutory interpretation are also reviewed *de novo*. **Lopez v. Hall**, 233 So.3d 451, 453 (Fla. 2018) citing **Borden v. East-European Insurance Company**, 921 So.2d 587, 591 (Fla. 2006).

SUMMARY OF THE ARGUMENT

There is direct conflict between the Third District Court of Appeal's decision in **Levy v. Levy**, 307 So.3d 71 (Fla. 3d DCA 2020) and the Fourth District Court of Appeal's decision in **Sacket v. Sacket**, 115 So.3d 1069 (Fla. 4th DCA 2013).

The attorney's fee provision in this case is a bilateral defaulting party provision and is therefore not amended by Florida Statutes Section 57.105(7). There is a clear distinction between a "defaulting" attorney's fees clause and a "prevailing party" fees clause in a contract.

The parties in this case made the decision to enter into a defaulting attorney's fee clause and this decision should not be disturbed, as both parties have the equal ability to utilize this provision.

Therefore, the Third District Court of Appeal's decision in **Levy** should be quashed and the Fourth District Court of Appeal's decision in **Sacket** should be approved.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN *Levy v. Levy*, 307 So.3d 71 (Fla. 3d DCA 2020) SHOULD BE QUASHED AND THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013) SHOULD BE ACCEPTED, AS THE ATTORNEY'S FEE PROVISION IN THE PSA WAS A DEFAULTING PARTY PROVISION, NOT A PREVAILING PARTY PROVISION, AND THEREFORE WAS NOT AMENDED TO BE RECIPROCAL BY FLORIDA STATUTES SECTION 57.105(7)

Florida follows the "American Rule" that attorney's fees may only be awarded by a Court when authorized by statute or agreement of the parties. *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 832 (Fla. 1993). Florida Statutes Section 57.105(7) provides that contractual prevailing party fees provisions are reciprocal, stating as follows:

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 that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

Id.

In *Port-A-Weld, Inc., v. Padula & Wadsworth Construction, Inc.*, 984 So.2d 564 (Fla. 4th DCA 2008), the Fourth District Court of Appeal explained

the theory behind Florida Statutes Section 57.105(7), such that “[t]he public policy consideration underlying this statute ‘is to provide mutuality of attorney’s fee remedy in contract cases.’ *Walls v. Quick & Reilly, Inc.*, 824 So.2d 1016, 1019 (Fla. 5th DCA 2002). Such statutes serve to level the playing field between parties of unequal bargaining power and sophistication. *Precision Tune Auto Care, Inc. v. Radcliffe*, 815 So.2d 708, 710–11 (Fla. 4th DCA 2002).” *Id.* at 570.

In his dissenting opinion in *MediPlex Construction of Florida, Inc. v. Schaub*, 856 So.2d 13 (Fla. 4th DCA 2003), Judge Farmer explained “the heart, the very purpose, of this ‘mutuality statute’”, as follows:

The answer is that some bad bargains pervade frequently occurring transactions and have adverse consequences for society. Unilateral fee provisions are usually seen in form contracts prepared by commercial entities. Many of these forms govern consumer transactions. The unilateral fee provision tucked away in the legal text of a form contract effectually deprives many consumers of access to the courts to redress contractual breaches. But typically consumers lack sufficient bargaining power to coax business entities into recasting such fee provisions. And commercial parties need no leveling in negotiating contract terms. Thus the purpose behind section 57.105(7) is obviously that the Legislature found bilateral provisions necessary to enable consumers to have representation and, thereby, meaningful access to the machinery of justice in contractual disputes affecting important consumer and family interests.

Id. at 16.

This issue was further addressed by the First District Court of Appeal in ***Azalea Trace, Inc. v. Matos***, 249 So.3d 699 (Fla. 1st DCA 2018):

Under section 57.105(7), when a contract provides prevailing-party fees for one party, the court may allow prevailing-party fees for the opposing party, even if the contract does not explicitly provide for them. In other words, the statute serves ‘to statutorily transform a unilateral attorney’s fees contract provision into a reciprocal provision.’ *Bank of New York Mellon Tr. Co., N.A. v. Fitzgerald*, 215 So. 3d 116, 119 (Fla. 3d DCA 2017); accord *Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC*, 197 So. 3d 1112, 1115 (Fla. 3d DCA 2016) (“[N]otwithstanding 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 701.

It is also well settled that competent parties have the ability to enter into contracts and if those contracts are entered into voluntarily and fairly, they will be upheld by the Court. ***Pierce v. Isaac***, 134 Fla. 666, 674 (Fla. 1938). Further, as this Honorable Court set forth in ***Hahamovitch v. Hahamovitch***, 174 So.3d 983 (Fla. 2015), “[w]here a contract is clear and unambiguous, it must be enforced pursuant to its plain language. See *Crawford v. Barker*, 64 So.3d 1246, 1255 (Fla. 2011). ‘In such a situation, ‘the language itself is the

best evidence of the parties' intent, and its plain meaning controls.' ' *Id.* (quoting *Richter v. Richter*, 666 So.2d 559, 561 (Fla. 4th DCA 1995))." *Hahamovitch*, 174 So.3d at 986.

In *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013), the Fourth District Court of Appeal was faced with almost the exact same set of facts that the Third District Court of Appeal was presented with in the instant case. In *Sacket*, the parties' marital settlement agreement contained a provision regarding attorney's fees and costs, which read as follows:

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. at 1070.

In *Sacket*, the former wife filed a motion for contempt against the former husband that was denied by the trial court. Utilizing, essentially, the same reasoning relied upon by the Third District Court of Appeal in this case, the *Sacket* trial court awarded attorney's fees to the former husband for successfully defending against the former wife's motion for contempt, finding that Florida Statutes Section 57.105(7) made the provision for attorney's

fees to enforce a contract in the parties' marital settlement agreement bilateral.

In **Sacket**, the Fourth District Court of Appeal, relying on its own opinion in **Zakian v. Zakian**, 837 So.2d 549 (Fla. 4th DCA 2003), reversed the decision of the trial court, finding that the clause in the parties' marital settlement agreement, required the parties *default* in their obligations under the marital settlement agreement for there to be an award of attorney's fees and costs pursuant to the attorney's fee provision. **Sacket**, 115 So.3d at 1071.

The Fourth District Court of Appeal found that as neither party had defaulted in their obligations under the marital settlement agreement, the attorney's fee provision in the marital settlement agreement was not applicable, and the former wife did not default in an obligation under the agreement, simply due to the fact that the former husband prevailed in defending against her motion for contempt. **Id.** Essentially, the Fourth District Court of Appeal made it clear that there is a distinction between a "defaulting" attorney's fees clause and a "prevailing party" fees clause in a contract. **Id.** at 1071-72.

Moreover, in **Sacket**, the Fourth District Court Appeal found that it was

error for the trial court to have applied Florida Statutes Section 57.105(7) to the attorney's fee provision contained in the parties' marital settlement agreement, as the provision was not unilateral necessitating the application of Florida Statutes Section 57.105(7) for reciprocity purposes. *Id.* at 1072. In finding same, the Fourth District Court of Appeal, quoting its opinion in ***Florida Hurricane Protection and Awning, Inc., v. Pastina***, 43 So.3d 893 (Fla. 4th DCA 2010), set forth that "[t]he statute is designed to even the playing field, not expand it beyond the terms of the agreement." *Id.* at 895.

The reciprocity provision of Florida Statutes Section 57.105(7) is not triggered unless a contract has a unilateral attorney's fee provision. *Id.* at 897, 900-901; see also ***CC-Adventura, Inc. v. Weitz Co, LLC***, 2007 WL 2176027, at *3 (S.D. Fla. July 25, 2007) (stating Florida Statutes Section 57.105 is triggered when contract provides only one party the right to attorney's fees in an action to enforce a contract).

In ***Florida Hurricane Protection and Awning, Inc.***, a homeowner had hired a contractor to install shutters on a home. *Id.* at 894. The shutter installation contract included an attorney's fee provision that stated the homeowner was responsible for all of the contractor's costs of collection,

including attorney's fees. *Id.* Notably, there was no provision in the contract that provided for the homeowner to recover attorney's fees if she needed to enforce the contract. *Id.* at 897. After the contractor failed to complete installation of the shutters, the homeowner hired a replacement contractor. *Id.* at 894. Later, the homeowner sued for damages, which included a request for attorney's fees. *Id.* The homeowner prevailed on her breach of contract claim and then moved for attorney's fees in county court. *Id.* The homeowner asserted in her attorney's fees motion that she was reciprocally entitled to attorney's fees pursuant to Florida Statutes Section 57.105(7) because the contractor would receive fees if there was a collection lawsuit. *Id.* The trial court agreed with the homeowner and awarded her \$6,000.00 for her attorney's fees. *Id.* The contractor appealed to the circuit court, which affirmed the trial court's decision. *Id.* The contractor then filed a writ of certiorari to the Fourth District Court of Appeal. *Id.*

As a result of the fact that the contract only permitted the recovery of fees in the event of a collection action, the majority opinion of the en-banc court in ***Florida Hurricane Protection and Awning, Inc.***, granted the petition for certiorari and remanded the case to the trial court with instructions

to vacate the attorney's fee award judgment. *Id.* at 896. Although, the majority's opinion decided that the homeowner could not recover attorney's fees because the contract only provided for fees in the event of a collection action and not a breach of contract action like the homeowner had filed, the two dissenting opinions in the case are especially instructive as to the meaning and application of Florida Statutes Section 57.105(7). *Id.* at 896-04.

The dissenting opinions written by Judge Taylor and Judge Farmer in ***Florida Hurricane Protection and Awning, Inc.*** explain how the unilateral nature of the attorney's fee provision in a contract “[triggers] the reciprocity provisions of section 57.105(7).” *Id.* at 897. In short, Judge Taylor and Judge Farmer determined that the attorney's fee provision in ***Florida Hurricane Protection and Awning, Inc.*** was "one-sided" or unilateral. *Id.*

Judge Farmer's dissent in ***Florida Hurricane Protection and Awning, Inc.*** also explains how the plain text of the statutory predicate of Florida Statutes Section 57.105(7) requires "an explicit, one-sided, contractual provision allowing only the named party to recover attorneys fees from the adverse party..." to trigger application of the independent clause of the provision. *Id.* at 901.

A more elementary summary of Judge Farmer's dissent in ***Florida***

Hurricane Protection and Awning, Inc. is that Florida Statutes Section 57.105(7) is not triggered, unless a contract only allows one party, and not both parties, to seek attorney's fees enforcing a contract. ***Id.*** at 900-04. Simply put, the attorney's fees provision must be unilateral for Florida Statutes Section 57.105(7) to apply. **§ 57.105(7), Fla. Stat.**

The purpose of Florida Statutes Section 57.105(7) is to provide a mutuality of remedy to parties when there is a unilateral attorney's fee clause; not to create a different type of remedy. 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.

The District Court of Appeal Fourth District in ***Sacket*** concluded that "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." ***Id.***

In contrast to ***Sacket***, in this case, the Third District Court of Appeal misconstrued and redefined the meaning and application of Florida Statutes

Section 57.105(7) by finding that by operation of law, said statute converts any contract with a “defaulting” fee provision into a “prevailing party” fee provision. **Levy**, 307 So.3d at 74.

Although the attorney’s fee provision in this case and **Sacket** do not contain the exact same language, the operative language in **Sacket** (“default”) and here (“failure to abide”) are synonymous and have the same functional meaning. In **Sacket**, the marital settlement agreement of the parties required that one party default in their obligation thereunder, in order for an award of attorney’s fees to be triggered. **Sacket**, 115 So.3d at 1070.

Although, the PSA in this case does not utilize the word “default”, it sets forth that the attorney’s fees provision is triggered if legal action is taken against the other party by reason of the other party’s “failure to abide by this agreement” and that attorney’s fees should be paid by the party who is found to be in “violation” of the PSA. Merriam-Webster’s dictionary defines “default”, as a “failure to do something required by duty or law” and “violate”, as to “break, disregard”. The definitions of the terms are extremely similar and in a legal context, there is no discernable difference between the effect of the two terms.⁵ Moreover,

⁵ As found in the Merriam-Webster’s online dictionary at page <https://www.merriam-webster.com/dictionary/default> and

the term “found to be” in violation should not be overlooked as it creates the condition precedent, that one party must be “found to be” in violation of the agreement, in order for the other party to have the right to collect attorney’s fees.

On the other hand, Merriam-Webster’s dictionary defines “prevail”, as “to gain ascendancy through strength or superiority.”⁶ The term “prevail” has a completely different meaning than “default” or “violate”. Furthermore, the operation of the term “prevail” in a contract is wholly disparate from the operation of “default” or “violate”.⁶

The attorney’s fee provision in the PSA in this case, is the same as the attorney’s fee provision in **Sacket. Sacket**, 115 So.3d at 1071-72. Yet, the Third District Court of Appeal found in **Levy** that the attorney’s fee provision in the PSA was a unilateral prevailing party fee provision and that accordingly, Florida Statutes Section 57.105(7), required that the Former Wife be awarded prevailing party attorney’s fees for successfully defending against the Former Husband’s Motion to Compel. **Levy**, 307 So.3d at 74.

<https://www.merriam-webster.com/dictionary/violate>. See also **Powell v. State**, 508 So.2d 1307, 1310 (Fla.1st DCA 1987)(holding that dictionary definitions may be used as sources where a statute does not define a term in question).

⁶ As found in Merriam-Webster’s online dictionary at page <https://www.merriam-webster.com/dictionary/prevail>.

It appears that the Third District Court of Appeal may have been led astray by the Appellant's focus on the words "prevailing party" in paragraph 13 of the PSA; however, as stated above, a close reading of paragraph 13 of the PSA evidences that it is not a prevailing party's attorney's fee provision, but a *defaulting* party's attorney's fee provision, just like the provision in **Sacket**, and the reference to the "prevailing party" was just an identifier used to reference the non-defaulting party. **Sacket**, 115 So.3d at 1071-72. The same resulted in the Third District Court of Appeal misapplying and redefining Florida Statutes Section 57.105(7) to convert defaulting attorney's fee clauses into prevailing party fees clauses. **Levy**, 307 So.3d at 74.

Here, the attorney's fee provision in the PSA is clearly reciprocal, as it allows either party to collect fees against the other, if the other party is found in violation of the agreement. In fact, in the very same Report of the General Magistrate in which the Former Wife was denied attorney fees for successfully defending the Former Husband's Motion to Compel, she was awarded fees for demonstrating that the Former Husband had violated an agreement of the parties. (App. 80). Thus, the playing field is, completely, even.

This also brings into focus the uniqueness of family law cases and the

enforcement of agreements therein. Whether it be a credit card agreement or an agreement to purchase a vehicle, contracts are often limited in their scope and intent. As Judge Farmer explained in *MediPlex Construction of Florida, Inc.*, “[u]nilateral fee provisions are usually seen in form contracts prepared by commercial entities.” *MediPlex Construction of Florida, Inc.*, 856 So.2d at 15.

In the recent decision of *Ham v. Portfolio Recovery Associates*, 308 So.3d 942 (Fla. 2020), this Honorable Court extended the protection to consumers in these types of contracts, finding that a unilateral attorney’s fee provision in a credit card contract was made reciprocal to a debtor when the debtor prevailed in an account stated action brought to collect unpaid credit card debt, even though the action brought by the collector was not technically a breach of contract claim.

In *Ham*, this Honorable Court articulated a two-step analysis, which governs whether Florida Statutes Section 57.105(7) makes unilateral prevailing party fee clauses reciprocal, with the first step of the analysis being, “whether the contract includes a provision allowing attorney’s fees to a party when he or she is required to take any action to enforce the contract” and the second step being whether, “the other party prevails in any action, whether as plaintiff or defendant, with respect to the contract. *Id.* at 946-48.

This Honorable Court focused primarily on the second step of the analysis and in particular the “with respect to the contract” language and found that the consumer was entitled to collect fees associated with the successful defense of the account stated action. *Id.* at 946-951.

This case involves a look at the first step of the analysis articulated in *Ham*, 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.” *Id.* at 947-948. As this Honorable Court explained, this question can be answered by a simple review of the provision in the contract. *Id.* The contract in this case does not satisfy step one of the test as the PSA requires that a party be “found to be in violation” for the attorney’s fees clause to be triggered. (App. 18).

As the PSA does not contain a provision as articulated in *Ham* and the attorney’s fee provision in the PSA is reciprocal, Florida Statutes Section 57.105(7) does not apply. *Id.*; § 57.105(7), *Fla. Stat.* The provision in this case is a “defaulting party” provision, whereas the provision in *Ham* is a “prevailing party” provision.

Contrasting against the type of consumer agreements like the one in *Ham*, as in this case, most agreements arising out of a family law cause of action have parties of equal footing agreeing to various issues, whether it be

alimony, child support, distribution of property or many different aspects of how they will parent their child. These are not form contracts prepared by large commercial entities where consumers lack bargaining power. Same is, likely, the reason that the issue of defaulting language, as opposed to prevailing party language, is arising in the context of appeals related to family law matters, as is the situation with both the **Sacket** and **Levy** cases. **Sacket** 115 So.3d at 1069-72; **Levy**, 307 So.3d at 71-74.

In recognition of the uniqueness of family law cases, the legislature enacted Florida Statutes Section 61.16, which allows the Court, after considering the financial resources of the parties, to order a party to pay attorney's fees to the other party for "maintaining or defending" any proceeding under chapter 61, "including enforcement and modification proceedings." § **61.16, Fla. Stat.**

An exception to the standard for determining entitlement to attorney's fees under Florida Statutes Section 61.16 arises when a marital settlement agreement addresses future attorney's fee awards. **Dean v. Dean**, 655 So.2d 243, 244 (Fla. 4th DCA 2010). Contractual provisions addressing attorney's fees in a marital settlement agreement must be followed when applicable. **Id.** However, entitlement to attorney's fees in chapter 61 proceedings shall be decided under Florida

Statutes Section 61.16, Florida Statutes if the contractual fee provision is not triggered by the circumstances of the case. **Vitale v. Vitale**, 31 So.3d 970, 973-974 (Fla. 4th DCA 2010).

Therefore, even if the Former Wife were to argue that she is not on an even playing field, financially, with the Former Husband, she has an avenue by which she may seek attorney's fees and costs from him, and in fact, as noted above, the General Magistrate reserved jurisdiction to allow her to attempt to do so. Any potential financial advantage one party may have is a completely different issue than whether the attorney's fee provision in an agreement is not reciprocal. Here, the provision is reciprocal, as both parties have the ability to avail themselves of it and have, in fact, done so. In this case, the parties had a meeting of the minds and agreed to the clear and unambiguous language in the PSA and it, therefore, would be erroneous for the Court or Legislature to re-write the parties' PSA.

There is a direct conflict between the Third District Court of Appeal's decision in **Levy** and the Fourth District Court of Appeal's decision in **Sacket. Sacket** 115 So.3d at 1069-72; **Levy**, 307 So.3d at 71-74. The philosophy behind Florida Statutes Section 57.105(7) is more than understandable in the context of unilateral prevailing party attorney's fee provisions, which are, typically, written by large corporations to gain an advantage over much less

powerful consumers. It is in those scenarios that the attorney's fee provisions should be extended by statute and made reciprocal, so as to put all parties on equal footing and level the power inequities. The decision in **Levy**, however, goes too far and re-writes a very clear and unambiguous defaulting party provision. *Id.* The plain meaning of a contract must control as it is the best evidence of the parties' intent. **Richter**, 666 So.2d at 561.

There is a clear distinction between a "defaulting" attorney's fees clause and a "prevailing party" fees clause in a contract. The parties in **Levy** made the decision to enter into a defaulting attorney's fee clause and this decision should not be disturbed, as both parties have the equal ability to utilize this provision. The decision in **Levy** sets a faulty precedent that will have wide sweeping implications for contracts entered into in the State of Florida. Parties should be able to have confidence that their contracts will be interpreted based on the plain language contained therein. The Third District Court of Appeal's decision in **Levy** usurps that confidence and, essentially, rewrites and, drastically, alters the legal effect of all defaulting party attorney's fee provisions. It is, therefore, imperative that the Third District Court of Appeal's opinion in **Levy** not stand and that when two, equally, situated parties enter into a valid contract, Florida continue to respect and honor the plain meaning

of same.

CONCLUSION

Based upon the above, it is, respectfully, submitted that the Third District Court of Appeal's opinion in **Levy** should be disapproved and quashed and the Fourth District Court of Appeal's opinion in **Sacket** should be approved. **Sacket** 115 So.3d at 1069-72; **Levy**, 307 So.3d at 71-74.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent E-Mail to: ROBERT F. KOHLMAN, Esquire, 100 S.E. 2nd Street, Suite 3500, Miami, Fl. 33131, robert.kohlman@kohlmanlaw.com; this 10th day of March, 2021.

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CERTIFICATE OF COMPLIANCE WITH *FLA.R.APP.P. 9.210(a)(2)*

The undersigned hereby certifies that the Respondent's Response has been submitted to this Honorable Court via E-Service transmission and in Arial 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as to the applicable word count limit requirements.

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