

**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**

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**RESPONDENT'S BRIEF ON JURISDICTION**

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## STATEMENT OF THE CASE AND OF THE FACTS

The Third District Court of Appeal found that the Former Wife has an entitlement, pursuant to Florida Statutes Section 57.105(7), to prevailing party attorney's fees and costs after successfully defending against the Former Husband's motion to compel enforcement. Levy v Levy, 3D19-73 (Fla. 3d DCA July 15, 2020). It reversed a Trial Court Order which finds the Former Husband did not prevail, but notwithstanding this finding, refuses to award fees to the Former Wife. Id. at 3.

The parties below entered into a Consent Custody and Visitation Agreement as well as a Property Settlement and Support Agreement ("PSA"), which were incorporated into their Final Judgment of Dissolution of Marriage. Id. at 2. Each agreement contained the following identical prevailing party fees provision:

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 limited to, reasonable attorney's fees, court costs, filing fees, court reporter fees, copying costs, travel costs and transcription fees.

(emphasis added).

The Former Husband filed 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 or Attorney’s Fees and Costs” (hereinafter “Motion to Compel”). The General Magistrate, at the conclusion of an eight-day trial, “made recommended factual findings against the Former Husband on all claims in his Motion to Compel”.<sup>1</sup> Id. at 3. The General Magistrate, however, also recommended that the Trial Court deny the Former Wife’s request for prevailing party attorney’s fees and costs, but reserve jurisdiction on the claims from both parties for attorney’s fees and costs under Section 61.16, Florida Statutes (2018). Id. The Former Wife’s exceptions were denied by the Trial Court. Id. The Third District reversed. Id. at 5.

In reaching its conclusion, the district court started with Florida Statutes Section 57.105 and analyzed how the statute applies to the facts. Id. at 4. Section 57.105(7) 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. This subsection applies to any contract entered into on or after October 1, 1988.

The Third District found:

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

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<sup>1</sup> The Former Husband cross-appealed the denial of his Motion to Compel. The Third District affirmed without comment.

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. 1<sup>st</sup> 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. 1<sup>st</sup> 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.") (internal citations omitted).

Id. at 4-5.

The Third District concluded "section 57.105 requires the former wife be awarded attorney's fees for successfully defending against the former husband's motion to compel." Id. at 5.

## **SUMMARY OF THE ARGUMENT**

There is no conflict between the law applied by the district courts in Levy v Levy, 3D19-73 (Fla. 3d DCA July 15, 2020) and Sacket v. Sacket, 115 So.3d 1069 (Fla. 4<sup>th</sup> DCA 2013). Both district courts use the same legal standard for interpreting a prevailing party fees provision in a marital settlement agreement, and both agree as to the scope and effect of Florida Statutes Section 57.105(7).

The results are different only because the facts are different. After a *de novo* review, the Levy court determined that the prevailing party provision was unilateral and so applied Section 57.105(7). After a *de novo* review, the Sacket court determined that the use of the word “default” in the prevailing party fees provision—a word not used in the Levy fees provision—rendered it, under the circumstances of the case, unenforceable either by contract or statute.

The cases are uniform in their application of the law and distinguishable on the facts.

## **ARGUMENT**

This Court has jurisdiction to review an opinion of a district court if it expressly and directly conflicts with the opinion of another district court *on the same question of law*. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) (emphasis added). The opinions in Levy v Levy, 3D19-73 (Fla. 3d DCA July 15, 2020) and Sacket v. Sacket, 115 So.3d 1069 (Fla. 4<sup>th</sup> DCA 2013) are not in conflict in the

application of the relevant Florida law.

For example, the Sacket court reviewed the Trial Court's interpretation of the prevailing party fees provision *de novo*. Sacket at 1071. The Levy court held that "the interpretation of the wording and meaning of a marital settlement agreement, as incorporated into a final judgment, is subject to *de novo* review". Levy at 4 (internal citations omitted).

The Sacket court found that it "is well settled that a marital settlement agreement is to be interpreted like any other contract and is construed as a matter of law". It further held that "the provisions in the marital settlement agreement awarding attorney's fees are generally enforced", citing Vitale v. Vitale, 31 So.3d 970, 973 (Fla. 4<sup>th</sup> DCA 2010). Sacket at 1071. The Levy court treated as established law that a prevailing party provision in a marital settlement agreement is enforceable. Levy at 3 (trial court erred in denying fees pursuant to prevailing party provision of settlement agreement).

The district courts also agree upon the use and effect of Florida Statutes Section 57.105(7). The Sacket court held that Section 57.105(7) amends all contracts by statute and "renders bilateral a unilateral contractual clause for prevailing party attorney's fees". Sacket at 1071. Similarly, the Levy court held that: "Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal". Levy at 4.

Finally, Section 57.105(7) can only be applied if two requirements are met: “First, the party must have prevailed. Second, the party had to be a party to the contract containing the fee provision”. Nationstar Mortg. LLC v. Glass , 219 So.3d 896, 898 (Fla. 4th DCA 2017). Both district court opinions apply this legal standard. Sacket at 1072; Levy at 4.

The results in Sacket and Levy are different only because the facts of each case are different. The Sacket court noted that its decision is based on the “circumstances of this case”, Sacket at 1071, while the Levy court bases its ruling on “the set of facts before the Court in this case”. Levy at 4.

The key difference is the use in the prevailing party fees provision in Sacket of the word “default”, which does not appear in the prevailing party fees provision in Levy. In Sacket, the fees provision states:

Except as otherwise provided in this Agreement, should either party to this agreement **default** in his or her obligation hereunder, the party in **default** should 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.

Sacket at 1070 (emphasis in original). The Fourth District felt the use of the word “default” was important enough to highlight it, in bold, in its opinion.

Contrast this with the fees provision in Levy:

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 limited to, reasonable attorney's fees, court costs, filing fees, court reporter fees, copying costs, travel costs and transcription fees.

Levy at 2 (emphasis added).

It is without question that the Sacket decision rests upon the application of the word "default" to the fees provision:

In the present case ... the clause in the parties' marital settlement agreement tied the former wife's obligation to pay attorney's fees to a "default" in one of the former wife's obligations under the marital settlement agreement.  
...

However, nor did the former wife "default" in an obligation under the agreement simply because the former husband "prevailed" in defending against her emergency motion. Accordingly, since there was no "default," and a "default" was necessary to trigger application of the fees provision in the marital settlement agreement, we find that the attorney's fees provision in the marital settlement agreement was not applicable

Sacket at 1071.

The Sacket opinion cites as precedent Zakian v. Zakian, 837 So. 2d 549 (Fla. 4<sup>th</sup> DCA 2003). In Zakian, the Former Wife argued her fee award was insufficient because the Trial Court granted fees under Florida Statutes Section 61.16, as opposed to under the 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 wrote:

We do not read this particular provision to base entitlement to fees on whether the party prevailed, although the party would have to successfully enforce performance against the defaulting party. Here the parties' agreement tied the contractual obligation to pay fees to whether one of them has "defaulted" on a duty or obligation arising under their settlement agreement.

Id. The Sacket court quotes this passage in full, and then finds that the cases are identical in the use of the word "default" in the fees provision. Sacket at 1071.

However, the quoted language from Zakian is dicta. The Zakian court ultimately did not reach the question of whether or not the Former Wife had an entitlement to prevailing party fees under the agreement. "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 that would have resulted if the proper basis had been stated". Zakian at 551.

The Levy court did not consider the legal effect of the word "default" because it did not have to. There is no disagreement in Levy that a party is entitled to

prevailing party fees if that party both brought an enforcement action, and won. The issue is whether the prevailing party provision is unilateral, so as to trigger the application of Section 57.105(7) to make it reciprocal. The Third District determined it was unilateral; as drafted, only one party has the ability to receive prevailing party fees in a post-judgment action. The district court applied Section 57.105(7) to award the Former Wife prevailing party fees. The Levy court held:

Accordingly, section 57.105(7) requires 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 the former wife.

Levy at 5.

The Former Wife in the case below seeks only to recover what she has spent on attorney's fees in defending against a meritless enforcement action by the Former Husband. This is consistent with the goal of a prevailing party fees provision. As this Court explained in Lashkajani v. Lashkajani, 911 So.2d 1154 (Fla. 2005), prevailing party fees provisions "exist to protect and indemnify the interests of the parties, not to enrich the prevailing party". Id. at 1158 (internal citations omitted). It also is consistent with the principle of Section 57.105(7), which seeks to level the playing field by making reciprocal all prevailing party fees provisions. See Jacques-

Meraz v. Walker, 5D20-412 (Fla. 4<sup>th</sup> DCA July 2, 2020); Stratton v. Port St. Lucie MGT, LLC, 149 So.3d 100 (Fla. 4<sup>th</sup> DCA 2014).

### **CONCLUSION**

As argued above, the Former Husband seeks to create conflict between Sacket and Levy where none exists. The law used by both district courts is the same. The different results are due to different factual circumstances. The Sacket opinion turns on the effect of the word “default” in a fees provision. The Levy opinion turns on whether a prevailing party fees provision is unilateral or bilateral.

It is respectfully submitted that this Court is without jurisdiction as there is no express and direct conflict between Sacket and Levy on a question of law, and that the Petitioner’s request to invoke the jurisdiction of this Court under Florida Rule of Appellate Procedure 9.120 should be denied.

Respectfully submitted,

By: s/Robert F. Kohlman  
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**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](mailto:eserviceabramowitz@gmail.com), this 14th day of September, 2020.

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**CERTIFICATE OF COMPLIANCE**

This certifies that this Respondent's Answer Brief on Jurisdiction is printed  
in 14 point, Times New Roman.

Respectfully submitted,

By: *s/Robert F. Kohlman*  
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