

SUPREME COURT OF FLORIDA

CASE NUMBER: SC20-1195

SAMUEL SALOMON LEVY,

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

Petitioner,

vs.

EINATH BACH LEVY,

Respondent.

\_\_\_\_\_ /

**PETITIONER'S JURISDICTIONAL BRIEF**

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## **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”.

## **STATEMENT OF CASE AND FACTS**

The Former Wife and Former Husband entered into a property settlement and support agreement (“PSA”), and dissolved their marriage in the State of Virginia. The Order of the Court from the State of Virginia which ratified the PSA, was later domesticated in the State of Florida.

The Former Husband filed a “Motion to Compel Former Wife to Reimburse the Former Husband for Support Overpayments, Children 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” (“Motion to Compel”). The parties appeared before the General Magistrate who recommended that the Former Husband’s Motion to Compel be denied in all respects. The General Magistrate

did not award attorney's fees and costs to either party. The Former Wife filed exceptions to the General Magistrate's Report and Recommendations, which were denied by the Trial Court.

The Former Wife proceeded to file an Appeal with the Third District Court of Appeal. The critical issue on appeal related to an attorney's fee provision in the parties' PSA, which states as follows:

“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, traveling costs and transcription fees.” (Emphasis supplied).

The General Magistrate reasoned that paragraph 13 of the parties' PSA only allowed for an award of attorney's fees and costs against the party to be found in violation of the agreement and since neither party was found in violation, it was inappropriate to award attorney's fees and costs to either party based on paragraph 13 of the PSA.

On Appeal, the Former Wife argued that the Trial Court erred in not awarding attorney's fees and costs to her for successfully defending against the Former Husband's Motion to Compel. The Third District Court of Appeal agreed

with the Former Wife and found that section **57.105(7), Florida Statutes (2011)**, amended by statute paragraph 13 of the parties' PSA, and therefore, the Former Wife was entitled to an award of attorney's fees and costs for successfully defending against the Former Husband's Motion to Compel. The Third District Court of Appeal reversed the Order on Appeal and remanded to the Trial Court with directions to determine reasonable attorney's fees and costs to be awarded to the Former Wife.

### **SUMMARY OF THE ARGUMENT**

The decision by the Third District Court of Appeal in **Levy v. Levy, 2020 WL 3980684 (Fla. 3d DCA 2020)** directly conflicts with the decision of the Fourth District Court of Appeal in **Sacket v. Sacket, 115 So. 3d 1069 (Fla. 4<sup>th</sup> DCA 2013)**, as the Court in **Levy** found that a defaulting party's attorney's fee provision is amended by **57.105(7), Florida Statutes (2011)**.

### **JURISDICTIONAL ARGUMENT**

**I. The decision by the Third District Court of Appeal in Levy v. Levy, 2020 WL 3980684 (Fla. 3d DCA 2020) directly conflicts with the decision of the Fourth District Court of Appeal in Sacket v. Sacket, 115 So. 3d 1069 (Fla. 4<sup>th</sup> DCA 2013).**

Pursuant to **Fla.R.App.P., 9.030(a)(2)(A)(iv)**, this Honorable Court has discretionary jurisdiction to resolve direct and express conflicts with decisions of

this Court and other District Courts of Appeal. See also *Ford Motor Co. v. Kikis*, **401 So. 2d 1341 (Fla. 1981)** (discussion of legal principals applied by a district court of appeal supplying sufficient basis for conflict review).

In *Sacket v. Sacket*, **115 So. 3d 1069 (Fla. 4<sup>th</sup> 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 saw in *Levy v. Levy*, **2020 WL 3980684 (Fla. 3d DCA 2020)**. In *Sacket*, the parties' Marital Settlement Agreement had 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**. (Emphasis supplied).

In *Sacket*, the former wife filed a Motion for Contempt against the former husband which was denied by the trial court. Utilizing essentially the same reasoning relied upon by the Third District Court of Appeal in *Levy*, 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 **section 57.105(7), Florida Statutes (2011)** made the provision for attorney's fees to enforce a contract in the parties' Marital Settlement Agreement bilateral.

In relying on its own opinion in the case of *Zakina v. Zakina*, 837 So. 2d 549 (Fla. 4<sup>th</sup> DCA 2003), the Fourth District Court of Appeal 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* 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.

Moreover, the Fourth District Court Appeal found that it was error for the trial court to have applied **section 57.105(7), Florida Statutes (2011)** to the attorney's fee provision contained in the parties' Marital Settlement Agreement in *Sacket*, as the provision was not unilateral necessitating the application of **Section 57.105(7)** for reciprocity purposes. *Id.* at 1072. In finding same, the Fourth

District Court of Appeal quoted *Fla. Hurricane Prot. & Awning, Inc., v. Pastina*, **43 So. 3d 893, 895 (Fla. 4<sup>th</sup> DCA 2010)**, as follows: “The statute is designed to even the playing field, not expand it beyond the terms of the agreement.” The *Sacket* Appellate Court 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*, the Third District Court of Appeal in *Levy* misconstrued and redefined the meaning and application of **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*, **2020 WL 3980684 at \*2**.

The Third District Court of Appeal’s decision in *Levy* directly conflicts with the Fourth District Court of appeal’s decision in *Sacket*. Although the attorney’s fee provisions in *Levy* and *Sacket* do not contain the exact same language, the operative language in *Sacket* (“default”) and in *Levy* (“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* at 1070.** Although the PSA in ***Levy*** did not use the word “default”, it said that the attorney’s fees provision is triggered if legal action is taken against the other party by reasons of the other’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<sup>1</sup>.”

The attorney’s fee provision in ***Levy*** is the same as the attorney’s fee provision in ***Sacket***. Yet, in ***Levy***, the Third District Court of Appeal found that the attorney’s fee provision in the PSA was a unilateral prevailing party fee provision and that accordingly, **section 57.105(7), Florida Statutes (2011)** required that the Former Wife be awarded prevailing party attorney’s fees for successfully defending against the Former Husband’s Motion to Compel. 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 shows 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

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<sup>1</sup>As found in the Merriam-Webster’s online dictionary at page <https://www.merriam-webster.com/dictionary/default>. See also ***Powell v. State*, 508 So. 2d 1307, 1310 (Fla. 1<sup>st</sup> DCA 1987)** (holding that dictionary definitions may be used as sources where a statute does not define a term in question).

“prevailing party” was just an identifier used to reference the non-defaulting party. Same resulted in the Third District Court of Appeal misapplying and redefining **section 57.105(7), Florida Statutes (2011)** to convert defaulting attorney’s fee clauses into prevailing party fees clauses.

The decisions in Levy and Sacket are not just in conflict, but it is respectfully asserted that the opinion 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, however, the Third District Court of Appeal’s decision in Levy essentially rewrites all defaulting party attorney’s fee provisions.

**CONCLUSION**

Based upon the above, it is respectfully submitted that the Third District Court of Appeal’s opinion in Levy is in conflict with the Fourth District Court of Appeal’s opinion in Sacket and is subject to review by this Honorable Court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via E- Mail to: ROBERT F. KOHLMAN, Esquire, 100 S.E. 2nd Street, Suite 3500, Miami, Fl 33131, [robert.kohlman@kohlmanlaw.com](mailto:robert.kohlman@kohlmanlaw.com); this 9<sup>th</sup> day of September, 2020.

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

Undersigned counsel for the Former Husband hereby certifies that the provisions of ***Fla.R.App.P. 9.210(a)(2)*** have been complied with and that the appropriate font has been used above.

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