OA 5-8-90



IN THE SUPREME COURT IN THE STATE OF FLORIDA

PATRICIA THORNBER, et. al.,

Petitioners,
Cross- Respondents,

CASE NO. 74,494

**VS.**

DISTRICT COURT OF APPEAL,
FIRST DISTRICT - 87-1900/88-99

CITY OF FORT WALTON BEACH,

Respondent,
Cross- Petitioner.

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ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEAL

# ANSWER BRIEF AND REPLY BRIEF OF PETITIONER/CROSS-RESPONDENTS

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## INTRODUCTORY STATEMENT

The following abbreviations are sometimes used throughout the Petitioners'/Cross-Respondents' Answer and Reply Brief in lieu of the formal title/name.

Trial Court - the Circuit Court for Okaloosa County, Florida which tried the case, the Honorable Erwin J. Fleet presiding.

City - City of Fort Walton Beach, Florida.

Respondent - Respondent/Cross-Petitioner (City of Fort Walton Beach, Florida).

Day - George E. Day, attorney for Petitioners/Cross-Respondents.

Petitioners - John R. Franklin (Franklin), Al Grant (Grant), and Patricia Thornber (Thornber).

R - Record on Appeal

TR-1 - Transcript of the hearing before the Trial Court on February 20, 1987

TR-2 - Transcript of the hearing before the Trial Court on October 14, 1987

First DCA - First District Court of Appeal

ANSWER BRIEF OF PETITIONERS/CROSS-RESPONDENTS

## SUMMARY OF THE ARGUMENT

### POINT ONE

The First DCA correctly ruled the Petitioners were prevailing parties in their defense of the 1983 civil rights case because dismissal with prejudice operated to terminate any proceeding against the Petitioners. In such a factual situation a merits determination is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the party who prevails. City of Fort Walton Beach v. Grant, 544 So2d 230 at 235 (Fla.App. 1st Dist. 1989) quoting Metropolitan Dade County v. Evans, 474 So2d 392 at 393 (Fla. 3d DCA 1985).

The decision of the First DCA is distinguishable from Simmons v. Schimmel, 476 So2d 1342 (Fla. 3d DCA 1985). In the present case the dismissal was with prejudice and marked an end to the litigation, in Simmons, the dismissal was without prejudice and for strategic reasons. Simmons supra at 1344 quoting Evans.

In the alternative, even if this court feels a quasi-merits determination is necessary under a statute providing for fees; then the Petitioners were still prevailing parties because the party (Ray) suing the Petitioners obtained no relief from them other than an agreement to seek attorney fees under Section 111.07 Fla.Stat. (R 765-767). Ray's 1983 civil rights complaint requested $1,350,000.00 in damages and a permanent injunction (R

438). Ray's claim that he prevailed against the City and therefore the Petitioners' is incredulous. On page three of Ray's agreement with the City, in which he obtained a small fraction of his requested relief from the City and Mayor Bagley, the Petitioners are specifically excluded from the settlement (R 770-774). Any relief Ray obtained from the City is irrelevant because the Petitioners did not participate in said settlement.

POINT TWO

The decision of the First DCA is in compliance with Florida Patient's Compensation Fund v. Rowe, 472 So2d 1145 (Fla. 1985). The testimony of Grant clearly shows he had a contingency arrangement with Day for recovery of attorney fees under Section 111.07 Fla.Stat. for his successful defense of a 42 USC 1983 action.

The decision of the First DCA concerning Thornber and Franklin's attorney fees is also correct and in compliance with Rowe. The record evidence reflects Day's agreement with all three Petitioners was of a contingency nature, in that Day was expected to recover his attorney fees under Section 111.07 Fla.Stat. as the prevailing party.

The expert witness testimony from Pat Maney as to the proper lodestar is unrefuted. The only remaining issue as to Thornber and Franklin's attorney fees is the correct application of the proper contingency multiplier per this court's opinion in Standard Guaranty Insurance Company v. Quanstrom, 15 FLWS 23 (Fla. Jan 11, 1990).

## ARGUMENT POINT ONE

### ANSWER TO INITIAL BRIEF OF RESPONDENT/CROSS-PETITIONER'S POINT ON CROSS-APPEAL NO, I

The Respondent misinterprets the holding and rationale of Simmons v. Schimmel which the Respondent exclusively relies on in its point on cross-appeal number one. Furthermore, the Respondent fails to mention the point in Simmons which is clearly distinguishable from the present case and the other cases cited by Respondent which involves the "prevailing party" issue. Said point is that in Simmons the voluntary dismissal of the wrongful death action brought against a doctor was without prejudice. Simmons, supra at 1342, 1343. The dismissal was "allegedly a strategic move on the part of the Plaintiff in an attempt to reduce the possibility of jury confusion from multiple defendants". Simmons, supra at 1343.

The Simmons court cited and distinguished other Third DCA cases which put an actual end to litigation, as opposed to a voluntary dismissal without prejudice, by stating;

> In rendering this decision, we are mindful of our pronouncement in State Department of HRS v. Hall, 409 So2d 193, 195 (Fla. 3d DCA 1982), that "a merits determination is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the party who prevails." We point out, however, that in Hall and the cases that have quoted this passage and upheld fee awards, there has been an actual end to the litigation on the merits so that it could be determined whether or not the party had "prevailed". See also Metropolitan Dade County v. Evans, 474 So2d 392 (Fla. 3d DCA 1985) (this court upheld an award of fees pursuant to section 111.07, Fla.Stat. (1983), in favor of the appellee, where the case

> against him was dismissed with prejudice pursuant to a settlement effected by Dade County, a codefendant, since "the dismissal operated to terminate finally any proceeding against the (appellee)").

The present case is indistinguishable from Evans. In both cases a component of the State (In Evans a county, in the present case a municipality) settled with the Plaintiff, and a codefendant was dismissed with prejudice. In the present case, Mayor Bagley and the City settled with Plaintiff Ray through a stipulation and agreement which in theory provided for Ray's reinstatement, but which in practicality did not reinstate Ray to active employment because the guts of the agreement was that Ray was "totally and permanently disabled from continuing to perform the duties of Director of Public Safety and Chief of Police...". Interestingly enough, said agreement also stated in paragraph 4 that said settlement "is not intended to affect or diminish any benefits that Ray has in the part nor is currently receiving from Florida Workers' Compensation Benefit". (R 770-774) obviously, the settlement was designed to enhance workers compensation benefits Ray was receiving at the time (R 771).

Ray did not prevail against Mayor Bagley and the City in his federal civil rights action because he dismissed them with prejudice, just as he dismissed Thornber, Franklin and Grant. The Petitioners in this case did not participate in the City/Bagley stipulation and agreement. Page three of that agreement specifically excluded "those other individual defendants who do not join in this agreement" (Thornber, et. al.)

(R 772). That agreement was signed by attorneys for the City of Fort Walton Beach, Thomas Ray and Kathryn Bagley (R 773-774). Petitioner Grant testified he did not even know about the settlement until he read about it in the paper (TR-1 61 R 1114). Pursuant to said settlement, Judge Paul dismissed the federal action as to defendants City of Fort Walton Beach and Kathryn P. Bagley on June 4, 1984 (R 752). On July 13, 1984, Thomas Ray dismissed the Petitioners with prejudice (R 765-769).

After Judge Paul dismissed the City and Kathryn Bagley, Thomas Ray was free to pursue the Petitioners in his federal action, if he chose to do *so.* Mr. Ray did not pursue the Petitioners, but chose to voluntarily dismiss them with prejudice (R 765-767). The only benefit Mr. Ray received from said dismissal was that the Petitioners would seek reimbursement from the City for their attorney fees. Given these facts, clearly supported by the record, it defies logic how the Respondent argues Ray prevailed in the federal civil rights action against the Petitioners.

The Respondent argues that the Simmons opinion "implicitly sets forth a two-part test for determining whether a party has "prevailed". (See Respondent's Initial Brief, page 12). Said implicit two-part test could possibly, though highly inconceivable, be gleaned from the Simmons opinion in a case involving a voluntary dismissal without prejudice. However, it defies logic, the Simmons opinion, and case law therein, to argue that there must be some merits determination as a prerequisite to

an award of statutory provided attorney fees in a case where there has been a voluntary dismissal with prejudice. Simmons, supra at **1344,** Evans, supra.

In the present case, even the case law relied upon by the Respondent clearly holds "that a merits determination is not a prerequisite to an award of attorney fees where the statute provides that they will inure to the party who prevails where there has been a dismissal which operated to terminate finally any proceeding against the party entitled to the statutory attorney fee award". Simmons, supra at **1344,** Grant, supra at **235,** Evans, supra, Stuart Plaza, Ltd. v. Atlantic Coast Development Corporation of Martin County, **493** So2d **1136** (Fla. **4** DCA **1986).**

Even if it was necessary to determine the prevailing party after a voluntary dismissal with prejudice; then clearly, the facts of this case prove that Ray did not prevail over the Petitioners in that the Petitioners did not participate in the agreement which the Respondent relies on as the basis for their contention that Ray prevailed in his **1983** action against the Petitioners. The Respondent's argument that Ray prevailed against the Petitioners in the civil rights action because the city attorney entered into an agreement which specifically excluded the Petitioners and which amounted to a solidification of Ray's existing workers' compensation claim is incredulous.

On page 10 of the Respondent's brief, the Respondent attempts to question the rationale of Fourth, Fifth and First

District Court Appeal's decisions concerning the prevailing party issue. The Respondent points out that "a plaintiff suing for $50,000.00 could voluntarily dismiss his action against the defendant pursuant to a settlement whereby the defendant agreed to pay $45,000.00 to plaintiff and the defendant would be considered the "prevailing" party and entitled to statutory attorney's fees." The Respondent implies that in such a situation, the plaintiff should be the prevailing party. This is a remarkably strained example of logic, and one that none of the cases cited (supra) are in agreement with. Regardless, using the Respondent's logic, Respondent did not prevail against the City of Fort Walton Beach in that he sued for a total of $1,350,000.00 in damages and a permanent injunction and received less than two years salary and a disability stipulation from the City in his agreement with Defendants Bagley the City (See R 438-439, 770-774). A recovery of less than two years of a 1981 Police Chief's salary and a stipulated disability reinstatement does not accomplish the goal of a civil rights claim which prays for $1,350,000.00 in damages and a permanent injunction. Ray may claim to have prevailed vs. the City and the Mayor, but in no way did he prevail against codefendants Thornber, Franklin and Grant, who were all dismissed with prejudice. Metropolitan Dade, supra at 393.

Respondent goes on to allege that the Third DCA has a different view on who is a "prevailing" party than does the Fourth, Fifth and First DCA because of the Simmons opinion. For

reasons previously stated, Simmons is factually distinguishable from the Fourth, Fifth and First DCA prevailing party definitions. In fact, the First DCA in the present case, correctly relied on the Third DCA Evans opinion in finding that the Petitioners were prevailing parties.

Petitioners respectfully submit the First DCA correctly ruled the Petitioners were entitled to an award of statutory attorney fees as prevailing parties under Section 111.07 Fla.Stat. for defending against Ray's 1983 civil rights action and should be affirmed in that regard.

## CONCLUSION

That portion of the First DCA's decision finding that Petitioners were prevailing parties for purposes of recovering their attorney fees under Count IV of their Amended Complaint and Section 111.07 Fla.Stat. is correct and should be affirmed.

## ARGUMENT POINT TWO

### ANSWER TO INITIAL BRIEF OF RESPONDENT/CROSS-PETITIONER'S POINT ON CROSS-APPEAL NO. II

Initially, it should be noted that the Respondent's Point on Cross Appeal Number II was never stated as an issue at the appellate level. In case no. 87-1900, the First DCA stated "The City's second point on appeal is that Grant did not prevail in the federal lawsuit". Grant, supra at page 230. This point is Respondent's Point on Cross Appeal No. I in the present case. Respondent's Point on Cross Appeal No. II was mentioned under a section titled "C. claiming "Grant Failed to Prove Entitlement To A Reasonable Fee Under The Authority of Florida Patient's Compensation Fund v. Rowe" on page 16 of the Respondent's Initial Brief in case no. 87-1900. However, section "C" was a subsection under the prevailing party issue in the Respondent's Initial Brief in case no. 87-1900. Respondent now attempts to untimely raise this Point on Cross Appeal No. II as an issue, an argument which they previously had used in support of their prevailing party argument at the First DCA level.

Appellant respectfully submits this is an improper attempt to raise a new issue at the Supreme Court level from supporting argument of an initial issue at the First DCA level. The Respondent clearly raised two separate distinct issues in their initial brief in case no. 87-1900. Now the Respondent drops one issue and improperly attempts to subdivide the remaining issue. Said attempt by the Respondent is improper, misleading and an oblique effort to raise a new issue at the Supreme court level.

Respondent cites Florida Patients Compensation Fund V. Rowe, 472 So2d 1145 (Fla. 1985) and subsequent case law which follows Rowe to point out to this court that Rowe held (among other things) that, "in no case should the court-awarded fee exceed the fee agrement reached by the attorney and his client". Id. at page 1151. Respondent goes on to state that "the present case involves non-contingent fee agreements between Day and his clients (the Petitioners) and then cites no record evidence in support of this bald assertion. (Respondent's Initial Brief, page 16).

In response to cross-examination from the city attorney James E. Moore, Thornber states;

> Q Have you -- as it deals with that written contract, did you and Mr. Day discuss the responsibility of who would pay for the Tommy Ray case?
>
> A It was my understanding that the City would.

(TR-1 35 R 1087)

Thornber's testimony that she expected the City to pay her attorney fees coupled with the fact that Count IV of the Amended Complaint at the trial level was for fees under Section 111.07 Fla.Stat., demonstrates that Day's recovery of attorney fees was contingent upon him prevailing at the trial level against the City under Section 111.07 Fla.Stat.. The record is clear and unrebutted that the City had refused to pay the Petitioner's attorney fees and therefore the Petitioners were forced to sue the City for said fees (R 1083, 1092).

The Respondent points out that Mr. Grant felt he had no obligation to pay attorney fees to Day and in response to the Court's inquiry, Mr. Grant states it was his understanding that if Mr. Day gets paid anything it would be from the City. Respondent's quote of Grant is taken out of context, and is not a correct summation of his testimony. Respondent fails to mention Mr. Grant stated he had an attorney/client relation with Day. Mr. Grant's testimony demonstrates that he had an understanding that if Day were to be paid it would be contingent upon him recovering his fees from the City (R 1103-1104). Respondent attempts to argue that because Grant felt he had no personal obligation to pay Day's fees (because he understood Day would recover fees from the City) that this means Day was working pro-bono. This argument is baseless and totally devoid of merit. The very basis of a contingency fee adjustment agreement in a 1983 case or a statutory provided fee case is that the attorney will recover from a source other than the client. The whole record testimony of Grant clearly shows he was Day's client and that if Day were to recover a reasonable attorney fees, the recovery was contingent upon Day recovering the fees from the City. Rowe and the contingency risk multiplier as set out in Rowe applies to Grant as it does to Thornber and Franklin.

The Respondent misconstrues exactly what the First DCA acknowledged was Grant's agreement with Day concerning fees. On page 16 of its Initial Brief, the Respondent states "Even the First DCA acknowledged that although Grant had hired Day, he had

never agreed to pay him any fees". The dicta the Respondent refers to is as follows "Grant also hired Day, but he never agreed to pay any fees because it was his understanding that the City was obligated." Grant, supra at 234. When this quote is reviewed in its entirety; it is clear, the First DCA recognized the contingency arrangement for the collection of fees by Day. The Respondent's misleading partial statement of what the First DCA acknowledged or stated is consistent with the Respondent's entire Initial Brief, its defense of the case on the record, and the case law quotes within their brief.

Franklin testified he felt the City was obligated to pay his fee pursuant to Section 111.07 Fla.Stat. (TR-1 77 R 1130). Pursuant to inquiry from the court, Franklin further testified he felt he was entitled to an enhanced fee (R 1133). Franklin testified that he hired Day after the then city attorney (Mike Chesser) declared a conflict. Franklin testified that the City should pay Day's fees and, other than a moral obligation, Franklin's testimony spells out that Day's collection of fees were contingent upon collecting the fees from the City (TR-1 76-80 R 1129-1133).

Thornber, Franklin and Grant's testimony demonstrate that they all felt the City was liable for their fees and that Day would collect from the City (i.e., contingency contract, in that Day had to prevail against the City under Section 111.07 Fla.Stat.). It is undeniable that Thornber, Franklin and Grant felt there was little question about the City's obligation to pay

their fees. The Respondent's claim that Grant had no obligation to pay Day for attorney fees is exactly what makes this case a contingency fee case under Rowe. Day had to prevail against the City to collect his fees. Whether any of the Petitioners felt any moral obligation to pay Day some fee is irrelevant. The claim that Grant agreed to pay Day nothing, (even though Grant agreed to Day's hourly rates and that Day should recover under Section 111.07 Fla.Stat.) is contradicted by the recent decision of Ganson v. State Department of Administration, 554 So2d 522 (Fla.App. 1st Dist. 1989). Ganson indicates that in an attorney/client contingency arrangement situation, such as this one, that application of the Rowe multiplier factor must be considered in determining a reasonable attorney's fee. Also see Standard Guaranty Insurance Company v. Quanstrom, 15 FLW 523 at 525. In Ganson, Quanstrom and the present case, the agreement was that if the attorney prevailed, the attorney would be entitled to a fee as set by the court under the statute which the attorney claimed entitled him to a fee.

The portion of the present case which Respondent refers to in point II on cross-appeal stemmed from the Petitioners' successful defense of the federal 1983 action brought against Petitioners in their official and individual capacities. As stated in Petitioner's reply to Respondent's point I on cross-appeal, the Respondent and then Mayor Bagley settled with Ray on May 2, 1984 in a stipulation and agreement which specifically excluded the Petitioners. In that stipulation and agreement, Ray

received some back pay and a stipulation by the City which was negotiated as a part of a totally separate workman's compensation case (R 770-774). The City and Bagley stipulated Ray was disabled in the workman's compensation case. petitioners disagreed with that claim by Ray and refused to sign that May 2, 1984 agreement. On July 13, 1984, Ray dismissed the Petitioners with prejudice, pursuant to an agreement where Petitioners would seek their 1983 attorney fees from the City under Section 111.07 Fla.Stat.. The Respondent's argument that Ray prevailed against the Petitioners in his 1983 action whereby he sought damages of $1,350,000.00 and a permanent injunction and he received from the Petitioners a stipulation to seek their attorney fees from the City is fatuous and inconsistent with the case law.

In 1983 cases, the contingency fee agreement does not serve as a cap in determining a reasonable fee as claimed by Respondent. See Blanchard v. Bergeron, 109 Sup.Ct. 939 (1939). Blanchard held that the type of contingency fee case "identified as a "contingency adjustment" occurs when a fee authorizing statute is construed to allow an enhancement of the lodestar figure because of the risk of nonpayment". Quanstrom supra at 15 FLW 525. The present case is such a case. This court stated that in such cases, the public "ordinarily has a strong public interest factor involved". In Quanstrom, this court went on to recite the attorney fee factors set out in Johnson v. Georgia Highway Express, 488 F2d 714 (5th Cir. 1974) and that those factors should be considered. Quanstrom at 15 FLW 525. Expert

witness, Attorney Pat Maney, testified the hours and rates billed were reasonable and that applying Rowe, a reasonable fee for the services was $35,000.00. Grant supra at 230. Maney also testified he applied the factors set out in Johnson. (TR-2 35, R 1265-1267). Maney reached said figure partly based upon his lodestar of $24,000.00 and a 1.5 multiplier. Maney's testimony was unrefuted. Respondent submits that a 2.5 multiplier is now the proper multiplier in that the trial court ruled against the Petitioners at the trial level; therefore, success was obviously unlikely at the outset of the case. Quanstrom supra at 15 FLW 526.

In the present case, the Petitioners' testimony and expert Maney's testimony reflects that there was a contingency arrangement between the Petitioners and Day. Pursuant to Rowe, Quanstrom and Johnson when viewed with the present case's facts, the First DCA correctly ruled Thornber, Grant and Franklin were all entitled to attorney fees. The lodestar figure at the trial level testified to by Day and Maney is unrefuted and the only issue remaining is the application of a larger multiplier (2.0-2.5) as set out by this court in Quanstrom.

## CONCLUSION

That portion of the First DCA's decision finding the Petitioners are entitled to attorney fees under Count IV of their Amended Complaint and Section 111.07 Fla.Stat. consistent with the record evidence and Rowe is correct and should be affirmed.

## REPLY ARGUMENT TO APPELLEE'S ANSWER BRIEF

### REPLY POINT ONE

That Respondent has misconstrued the plain meaning of Section 111.07 Fla.Stat. in their answer brief, and the majority opinion in the First DCA erred in it's narrow construction of Section 111.07 Fla.Stat. on attorney fees for a recall. This is remarkable since the First DCA has been a fountainhead of case law on attorney fees from Duplig V. City of South Daytona, 195 So2d 581 (1967) through Ellison v. Reid, 397 So2d 352 (1981). The First DCA precedent setting cases interpreting the common law on eligibility for attorney fees for public officials defending themselves in actions taken in their official capacity have been cited by the Fourth DCA in the 1983 case of Lomelo v. City of Sunrise, 423 So2d 974, and in the Third DCA case of Nazum V, Valdes, 407 So2d 277 (1981) and a multitude of other cases.

The First DCA has been frequently quoted by the Third and Fourth DCA in their interpretation of the common law because of their compelling logic which concurred with Duplig, Markham v. State Department of Revenue, 298 So2d 210 (1DCA 1974) and the Florida Supreme Court in White V. Crandon, 156 So 203 (1934).

None of the judges who have fashioned the common law principles as they did in Duplig or Markham or White had the clairvoyance to anticipate each specific act that public officials would have to defend against as a result of their official conduct,

It is equally obvious that the legislature would be unable to forecast specifically what variation of trails off the main thoroughfare would develop when they enacted Section 111.07 Fla.Stat. (1977). It is these factual uncertainties which require that both legal opinions and statutes are broad enough to cover those many unforeseen circumstances in which public officials are required to act.

Section 111.07 Fla.Stat. is couched in the broadest of terms, relying heavily upon the use of the word "ANY". The statute uses the word "any" to say in the broadest of language that "any agency" of the state, or "any county" is authorized to provide an attorney to defend "any" civil action arising from a complaint or injury, suffered as a result of actions by "any" of its officers, etc.

The use of "any" is synonymous with "all or every". see Glen Alduc Coal Company v. City of Scranton, 127 A. 307, 308.

The key flaw in the reasoning of the trial court and the First DCA in the case at bar Thornber, et. al., v. City of Fort Walton Beach, 544 So2d 230 (1DCA 1989) is that they seized upon the wrong word in the statute, to wit: "defend", and "defendant" in order to find that Councilman Thornber, et. al. had to be named defendants in a recall matter (where the City failed to defend). Petitioners note that to seize upon the narrow interpretation of the statute through the language of Encompass, Inc. v. Alford, 444 So2d 1085 (1DCA 1985) results in a ruling in direct contradiction to the whole series of common law cases

which led up to the enactment of Section 111.07 Fla.Stat.. Even a quick reading of Section 111.07 Fla.Stat. makes it obvious that it is a general, broad statute providing for the defense of any civil action, to even include the newborn multitude of civil rights suits ... largely arising from the Warren Court federal decisions.

Justice Zehmer in the present case of Thornber, et. al. v. City of Fort Walton Beach, correctly interpreted the purpose of Section 111.07 Fla.Stat. when he stated: "I believe this construction of the statute is much too strict, and the decision is not in keeping with the decisional law of this state."

Justice Zehmer correctly compares the Florida Supreme Court precedent of more than 50 years past in White v. Crandon, 156 So 303 (1934) to Encompass, supra and states that Encompass, supra had :

> "no precedential value in respect to the question now before us because, as cited above and conceded by the majority opinion," Section 111.07 recognizes the common law doctrine that a public officer is entitled to an attorney at the expense of the public in litigation arising from the performance of his official duties while serving a public purpose". Supra page 236 Thornber.

Justice Zehmer notes that the majority opinion in Thornber cited five district court cases in which the public officials were named defendants.

There is an equal and more compelling group of Florida cases which hold that a public official does not have to be a named defendant in order to be awarded attorney fees, and in which the

official is Plaintiff or Petitioner. The more binding and more compelling law comes from White, supra in 1934, where the court says in headnote 7, page 303:

> "Bona fide dispute held to constitute "legal cause" which county commissioners were entitled to prosecute or defend...in defense and prosecution of all legal cases."

It does not get any plainer than this!

The White case is not alone in this view, as there are other cases that are persuasive on when an official is entitled to an attorney fee. The Third DCA took on a parallel issue in 1968 in City of North Miami Beach v. Estes, 214 So2d 644 (Fla.App. 3DCA 1968). An unhappy loser Bernard Weithorn, sued four of the successful candidates by claiming election law violations and wanting declaratory and injunction against the winners. After Weithorn filed, the entire city council of North Miami passed an ordinance to authorize legal counsel to defend in Weithorn v. Adelstein, Dade Cty. Cir.Ct. 67-7846. Weithorn's case was dismissed.

A citizen John W. Estes then entered the fray and sued the City of North Miami, a neutral third party to the election squabble to enjoin North Miami from paying counsel for councilman Adelstein, et. al. The Third DCA ruled that the City was required to provide an attorney for Adelstein. They cited Duplig, supra, saying:

> "The common underlying touchstone in Duplig ...is...a legal...threat to effective administration...Such...action...(is) sufficiently tinted with public interest...to

appropriation of public funds for counsel."
Page 646 - City of North Miami Beach, supra.

Clearly, councilman Adelstein was provided an attorney even though he was not named as a defendant by Estes in this action.

The recent Fourth DCA case of Ferrara v. Caves, 475 So2d 1295 (4DCA 1985) best represents how the common law applies to attorney fees for a recall. The fact pattern is on all fours with Thornber, since Caves (a town commissioner) was forced to sue Ferrara, who had commenced an illegal recall of Caves. Caves obtained injunction, as did Petitioners, and sued for an attorney fee. Caves was a plaintiff in an injunction against the city clerk to stop the recall, precisely as were the Petitioners in suing plaintiff against the city clerk of Fort Walton Beach.

Petitioners are unable to find any language in the common law cases from White v. Crandon up to Thornber (now at bar) which ever enunciated the notion that a public official had to be a defendant to recover. obviously, the Florida Supreme court in White said just the opposite, ordering that a public official could be either plaintiff or defendant.

In summary, Thornber turns on whether Section 111.07 Fla.Stat. has replaced the common law, and whether Section 111.07 Fla.Stat. must be interpreted that only "named defendants" can recover attorney fees for defense of official actions. Such a narrow construction is offensive to common sense, and to the case law on construction of statutes. Simmons v. Schimmel, 476 So2d 1342 (3DCA 1985) correctly notes:

> "When statute does not specifically define words of common usage, the words are to be construed in accordance with their plain and ordinary meaning."

The common sense meaning of the word defend is spelled out in Black's 1979 Law Dictionary, 5th Ed., which states:

> "Defend. To prohibit or forbid. To deny. To contest and endeavor to defeat a claim or demand made against one in a court of justice. To oppose, repel, or resist. To protect, to shield, to make a stand for, or uphold by force or argument. To vindicate, to maintain or keep secure, to guaranty, to agree to indemnity. To represent defendant in administrative, civil or criminal proceeding. See also Defense."

This meaning of the verb "to defend" goes far beyond the passive noun "defense", and notes that "defend" permits one to "prohibit", "to deny", to "oppose" or to "resist". As lawyers, we prohibit for our clients with injunction, prohibition and mandamus, usually as plaintiffs.

The words "defend any civil action" in Section 111.07 Fla.Stat. must be read in para materia to obtain its intended meaning. A common maxim is that "the best defense is a good offense". Typical of this is a complaint for injunction, mandamus, quo warranto, and prohibition as extraordinary remedies. These may require a public official to become a plaintiff in order "to defend" against illegal acts. In White, supra, the Florida Supreme Court noted that "county commissioners were entitled to prosecute or (to) defend under statutory authority to represent county in defense or prosecution of all legal causes."

Ellison v. Reid, 397 So2d 352 (1DCA 1981) held that property appraiser Reid was entitled to sue for declaratory judgment as plaintiff to secure attorney fees for having prevailed against a meritless complaint to another agency. City of North Miami Beach, supra also permitted offensive pleading.

Nazum v. Valdes, 407 So2d 277 (3DCA 1981) found that Nazum could properly petition for the extraordinary remedy of certiorari, and be awarded an attorney fee under Section 111.07 Fla.Stat. This court specifically interpreted that Section 111.07 Fla.Stat. to permit an official to sue as a plaintiff in certiorari applying the common sense interpretation of "to defend any civil action" by saying:

> "to deny public official representation for acts purportedly arising from the performance of his official duties would have a chilling effect upon proper performance of his duties and diligent representation of the public interest."

What could be more chilling than to permit an illegal recall to wipe out the newly elected mayor, and four members of the city council. It would have paralyzed local government.

The case law in City of North Miami Beach, Markham, and Ferrara, significantly addresses election contests, and dissatisfied office seekers. As recently as October, 1989, the Florida Attorney General in opinion 89-69 addressed attorney fees for a city council member obtaining fees for "successfully challenging" a recall under Section 100.361 Fla.Stat., (the recall statute) or for obtaining "declaratory relief" from a meritless recall.

This attorney general opinion clearly recognizes that a councilman is permitted to be a plaintiff and be funded for complaints as a plaintiff. The attorney general opinion is clearly consistent with the Supreme Court opinion in White, Ferrara, and Nazum, in that an official can sue or be sued,

For the first time in an illustrious series of cases, the First DCA failed to be faithful to White by placing a far too restrictive interpretation on Section 111.07 Fla.Stat.. Their opinion is inconsistent with White, and relies instead upon Encompass, which is wholely lacking in factual or legal precedent.

Petitioners noted in their brief that to deny a public official attorney fees to enjoin an illegal recall has a "chilling effect" on access to public funds for legal representation. It frustrates the voter's choice of candidates. The plain idea of Section 100.361 Fla.Stat. was to stop the turmoil created by disgruntled voters and office seekers in filing illegal and unfounded recall petitions. The recall petitions filed against Thornber, et. al. were invalid for lack of a legal chairman, for attempting to immediately recall Thornber and Franklin before they had served one year, and other irregularities. Ferrara and attorney general opinion 89-69 remedy this untenable situation and offer public officials the assurance that they too have the "keys to the courthouse", just as a wealthy rival would have.

The Respondent City never responded to this obvious argument except to note that only the councilmen have an interest in their job. The voters have a vested interest in their candidate remaining in office. The City has an interest in stability of the office holder and the orderly administration of government. Sections 111.07 and 100.361 Fla.Stat. clearly compliment each other in the case of an illegal or meritless recall action. It is important to the stability of the politics of Florida that these two important statutes continue to balance each other. It was for this reason that Petitioners and Ferrara were able to get injunctive relief as plaintiffs in the trial courts. Ferrara got the full relief of injunction and attorney fees. Petitioners seek comparable relief in this appeal.

Having fully replied to Defendant, City of Fort Walton Beach's answer, Petitioners move for reversal on the issue of attorney fees for enjoining a recall, and that the court order Petitioners a reasonable attorney fee consistent with the record evidence and Florida Patient's Compensation Fund v. Rowe, 472 So2d 1145 (Fla. 1985).

REPLY POINT TWO

Petitioner claims, and the transcript and record reflect that there was no issue of law or issue of fact on liability for an attorney fee for their vote at a city council meeting in Plaintiff's Count IV of Thornber, et. al. v. City of Fort Walton Beach.

Section 111.07 Fla.Stat. (1979) notes that the party who "prevails" in defense of a civil rights action is entitled to an attorney fee. This statutory declaration is clear. The trial testimony was clear Petitioner's vote was an official legislative act.

Thornber went to trial in February and October, 1987. The following four First DCA cases had been issued in the First DCA and represented the law on a public official obtaining attorney fees for defense or prosecution. See Markham V. State, 298 So2d 210 (1974), Askew V. Green, 348 So2d 1245 (1977), Shuler v. Liberty County, 366 So2d 1184 (1978), Ellison v. Reid, 397 So2d 352 (1981). The following Third DCA cases also represented the law in 1987. See City of Hiahleah V. Bennett, 376 So2d 483 (1979), Nazum V. Valdes, 407 So2d 277 (1981)(interpret Section 111.07 Fla.Stat.), Metropolitan Dade v. Evans, 474 So2d 392 (1985)(interpret Section 111.07 Fla.Stat.). The following Fourth DCA cases were issued. See Lomelo v. City of Sunrise, 423 So2d 974 (1982) and Ferrara V. Caves, 475 So2d 1295 (1985).

State Department of Health V. Hall, 409 So2d 193 (3DCA 1985) had been issued on the matter of prevailing party, as was Sacks v. Rickles, 155 So2d 400 (3DCA 1963), and Stuart Plaza V. Atlantic Coast Development, 493 So2d 1136 (4DCA 1986), and Metropolitan Dade, below.

> Metropolitan Dade, supra was specifically on "fours" in holding:
> "Dismissal of...officer...codefendant with County,...operated to terminate...proceedings ....Police officer "prevailed" under 111.07 when officer was dismissed "with prejudice".

When Federal Judge Paul dismissed all Defendants in their official capacity and individual capacities, Petitioner became prevailing party. This dispatched any liability for their official vote, or any personal acts.

The only avenue left to deny the Petitioners an attorney fee under Section 111.07 Fla.Stat. was to put on evidence that the Petitioner, Thornber acted in "bad faith". Respondent did not put on any evidence of misconduct, as Respondent was aware they were estopped from doing this when Chief Ray dismissed Petitioners with prejudice on the issue of liability for their "private" or "persona1 acts". Prevailing party was fixed by Metropolitan Dade, and the wealth of similar cases. (R 761)

The total issues of any liability on the part of the Petitioner were now settled out factually as well as legally on the 13th day of July, 1984 when Chief Ray dismissed Petitioner Thornber, Franklin and Grant with prejudice.

It is essential that this review and analysis of the law and facts of this case be compared to Metropolitan Dade, Nazum, Lomelo, and Ferrara in 1985 prior to trial.

Such a review and analysis demonstrates that the case law and Section 111.07 Fla.Stat. dictate that the City is liable for a reasonable attorney fee. Only attorney fees are at issue.

Despite the clarity of the Respondent City's liability for attorney fees, the Respondent City dug in their heels for political reasons and forced Petitioners in to a full two day

trial (1) to determine that Petitioner was not entitled to fees because of "private" acts and (2) amount of the fees,

The only legitimate issue for trial was (2) amount of fees. Respondent put on no evidence that Petitioners were not entitled to fees, although they claimed in the Pretrial stipulation (R 213) that they were going to try this issue, and refused to admit liability at trial through a different obtuse claim that the City had represented the Petitioners in Ray v. City of Fort Walton Beach, et. al., Case No. PCA 81-521 (N.D.Fla. 1981) and therefore the city was not liable for a fee, and that the City was prevailing party. The Respondent still continues that frivolous argument, and needs to be sanctioned with a Section 57.105 Fla.Stat. fee,

Petitioner is entitled to a fee under Section 57.105 Fla.Stat. because (1) There was no question of law or fact that the Respondent City was liable for a reasonable attorney fee based on the dismissals of Petitioners with prejudice in their official and personal capacity. Respondent claimed in the Joint Pretrial Stipulation (R 213) that they would try the issues of "private legal fees" and "private acts" in their individual capacity. Ferrara correctly discusses the "complete absence of a justiciable issue of law or fact citing the Florida Supreme Court in Whitten V. Progressive Casualty Insurance, 410 So2d 501, 506 (1982). Ferrara says:

> "It is conduct in connection with the court proceedings. e.g. stonewalling by a Defendant who has no glimmer of a meritorious defense, that can be grounds for an

attorney's fee award under this statute (Section 57.105 Fla.Stat.).

The clarity of the law on prevailing party, those decisions signalling an end to litigation, the conduct of the Respondent City at trial, and the obtuse and incredible claim at trial that the same Respondent City had represented Petitioner as counsel (when city attorney prepared and signed a settlement agreement with Mayor Bagley that left Petitioners potentially liable for judgment) make it patently clear on its face that Respondent City simply stonewalled the liability issue at trial. This turned what should have been a four hour hearing into a full-blown two day trial. The City then frivolously appealed the prevailing party issue which was not in the pre-trial stipulation, was never pled, nor tried by consent. The Respondent City never had a "glimmer of a meritorious defense". Ferrara, supra.

It is undisputed that Respondent City was paying Respondent's attorney to defend against Petitioner's legitimate claim for fees. The Petitioner councilmen's testimony is undisputed that they expected the Respondent to pay their fee. It is this egregious use of the city purse, combined with conduct of the trial, that entitles Petitioner to a fee under Section 57.105 Fla.Stat. as a public sanction for the "stonewalling". Petitioner is alternatively entitled to fees under Section 111.07 Fla.Stat.

Having fully responded to Respondent City's answer brief, and subject to Petitioner Thornber's Motion to Strike the City's brief, the Petitioner Thornber requests:

That the Court reverse the findings of the lower court holding that Petitioner is not entitled to a reasonable attorney fee for the frivolous defense at trial, and absolute lack of a justiciable issue of law or fact by Respondent in their defense at trial of the cause; or to an attorney fee under Section 111.07 Fla.Stat. from trial through all appeal levels. Petitioner is entitled to appellate fees on either statute, 57.105 or 111.07.

REPLY POINT THREE

Petitioner replies: Respondent still claims Petitioners did not prevail for an appellate attorney fee. This remarkable disingenuous argument simply ignores what is out there for case law. The appeals court dispatched this claim relying on Metropolitan Dade v. Evans, supra, and on Stuart Plaza, supra...City of Fort Walton Beach v. Grant, 544 So2d page 235 (1DCA 1989).

Petitioner is unable to phrase it any better than did the First DCA on page 235. This defense and claim is without merit.

Petitioners are entitled to an attorney fee for the successful appeal of Count IV on behalf of Thornber, Franklin, and Grant, as well as attorney fees for this appeal to the Supreme Court. Petitioner relies upon Sections 111.07 and 59.46 Fla.Stat.

WHEREFORE, Petitioner prays for an order affirming appellate fees on all successful issues on appeal.

## CONCLUSION

Petitioners are prevailing parties in both (1) the recall action and (2) for attorney fees for defending Ray's civil rights suit.

The City's frivolous defense both at trial court and the appellate level in Ray v. City merits Section 57.105 Fla.Stat. sanctions as Respondent has failed to show that their defense was not a sham, stonewalling at trial, or that the action was not frivolous or completely lacking justiciable issues of law or fact, both at trial and on appeal in defense and appeal of Petitioner's Count IV at trial and appeal.

The lower courts finding that Thornber is not entitled for appellate attorney under Sections 111.07 and 59.46 Fla.Stat. should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by regular U.S. Mail this the 13th day of March, 1990, to Bert Moore, Moore, Kessler & Moore, P.O. Box 746, Niceville, FL 32578.

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