OA 5-850

017

FILED
SID J. WHITE
FEB 2 1990
CLERK, SUPREME COURT
By
Deputy Clerk

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.

/

ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEAL

INITIAL BRIEF OF APPELLANTS

GEORGE E. DAY
TIMOTHY I. MEADE
GEORGE E. DAY, P.A.
32 Beal Parkway SW
Fort Walton Beach, FL 32548
(904) 243-1234

ATTORNEYS FOR APPELLANTS
PATRICIA THORNBER, JOHN
FRANKLIN, and AL GRANT

Copy requested

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

In this brief, Petitioners, Cross-Respondents, will be referred to as Plaintiffs, councilmen or by name. The Respondent, Cross-Petitioners, who was the Defendant in trial court, will be referred to as the City, the Defendant or the Respondent.

Citations to the original record on appeal will be made the letter "R" and the appropriate page number.

STATEMENT OF THE CASE

This is an appeal from an order of the First District Court of Appeal which denied Plaintiff/councilmen an attorney fee for having successfully defended themselves in a recall action. This interpretation conflicts with case law interpretation of other district courts, as well as a 1989 attorney-general opinion. Further, Plaintiffs contest that portion of the 1st DCA's judgment which denied attorney fees based on the "frivolous defense statute", and failed to award appellate attorney fees to the Plaintiffs at the appellate level.

STATEMENT OF THE FACTS

Plaintiffs Thornber and Franklin were elected to the City Council of Fort Walton Beach, Florida in 1981, as was a new mayor Bagley. Plaintiff Grant was a sitting member having been elected in 1979 (R 1072- R 1096). Plaintiffs had run on a "reform" and "clean-up city politics" campaign (R 1129). The mayor put on a

coffee at her home prior to having being sworn and before Plaintiffs were sworn into office. (R 1121). Plaintiff Grant did not attend the coffee (R 1098). At the first meeting of the newly constituted City Council in July, 1981, Plaintiff Grant made a motion at this properly noticed public meeting. He moved that the City Council vote upon discharging the city manager (R 1098) and to appoint the newly elected mayor as city manager pro tem (R 1100). Plaintiffs Thornber, Franklin and Grant voted for this motion at this public meeting following lengthy and vigorous debate, and the record is unrebutted that this vote was in their official legislative capacity (R 1063, 1098, 1273).

Some days later, Mayor Bagley (acting as city manager pro tem) discharged the Chief of Police Thomas B. Ray (R 1128). There is no evidence that this was anything but an official act by the mayor in her official capacity and no evidence that Plaintiffs participated in or influenced this decision (R 1063-1273).

Supporters of Chief Thomas Ray and/or Chief Ray filed a recall action vs. Plaintiffs, a declaratory action to void the City Councils' actions (Wilson V City of Fort Walton Beach 81-1411 Okaloosa County), one administrative action, one circuit court action vs. the City Attorney (Chesser V Ray 425 So2d 92 1DCA 1983) and a Federal 1983 action vs. the City of Fort Walton Beach, Mayor Bagley as mayor and individually, and vs. Plaintiffs Thornber, Franklin and Grant officially and individually (PCA 81-521 ND FL 1981).

Plaintiff/councilmen prevailed in every action filed by Chief Ray or his supporters as follows:

(1) The illegal recall was permanently enjoined in an injunctive action (Thornber v. Evans (81-1532 Circuit Court Okaloosa County 1981).

(2) Plaintiff Wilson voluntarily dismissed. August 27, 1981 (Wilson supra)

(3) The administrative appeal of Ray was denied on July 14, 1981.

(4) Chief Ray's declaratory action Ray v. Chesser (82-91 Circuit Court of Okaloosa County) found for Ray and was reversed in Chesser supra by the 1DCA.

(5) Ray v. Bagley, et al supra (Fed 1983 action)

a. After being fired by Mayor Bagley, Chief Ray sued the City of Fort Walton Beach, Mayor Bagley and the Plaintiffs Thornber, Franklin and Grant as councilmen and individually on or about July 22, 1981.

b. Plaintiff Grant and another sitting city council member were defeated in the 1983 elections and three persons who were active in the recall against the Plaintiffs were elected. In November, 1983, Attorney Michael Chesser (Defendant's Exhibit B, p 196 R 624, 625) advised Federal District Court Judge that he was no longer counsel for the City. The present counsel for the City of Fort Walton Beach came aboard in January, 1984. All of the legal or administrative actions except Ray v. The City of

Fort Walton Beach had been resolved in favor of the Plaintiff councilmen or the City of Fort Walton Beach at this time.

c. The Plaintiff Thomas B. Ray moved for voluntary dismissal of Ray (PCA 81-521) (Defendant's Exhibit B, p 220-221, R 648-649) on May 30, 1984. This motion prayed for dismissal of the cause by Ray v. Mayor Bagley. Attached to the motion was a "STIPULATION AND AGREEMENT" which had no specific date in May, 1984 (but which was dated May 2, 1984 in a later filing).

(1) This stipulation was signed on behalf of the City of Fort Walton Beach by C.S. Ingram (City Manager) and James E. Moore as City Attorney, and by Chief Thomas B. Ray and Mayor Bagley. The stipulation released Mayor Bagley and the City of Fort Walton Beach with prejudice, but specifically noted on p 297, 298 that the agreement would not apply to "any other individual defendant, other than the City and an undersigned defendant . . . sic (The City of Fort Walton Beach and Mayor Bagley). See also Defendant's Exhibit B, p 340 G-M, R 768-774. . . dismiss Bagley.

(2) Plaintiffs Thornber, Franklin and Grant objected to this settlement by the City Attorney Moore and Chief Thomas Ray (R 1114, 1115), since they had only acted in their legislative capacity in voting to appoint Bagley as mayor and insisted all of their acts were not actionable, and disagreed that the City attorney could act against their interest.

d. On June, 1, 1984, Federal District Judge Paul issued a surprise order dismissing not only the City of Fort Walton

Beach and Mayor Bagley, but also Councilmen Thornber, Franklin and Grant in their official capacities, Defendant's Exhibit B, p 327-335. (R 749-758)

e. On August 21, 1984, Federal District Judge Paul further clarified his ORDER granting Thomas B. Ray's motion for voluntary dismissal of the City and dismissed Thornber, Franklin and Grant in their official capacity, Defendant's Exhibit B, p 340. (R 761)

f. That on July 13, 1984, that Chief Thomas B. Ray filed a STIPULATION AND AGREEMENT dismissing Plaintiff councilmen Thornber, Franklin and Grant individually with prejudice . . . (Defendant's Exhibit B, p 340 A-M, R 762-767) and which preserved the councilmen's rights to pursue an attorney fee vs. the City of Fort Walton Beach for "any litigation they have participated in",

g. That Plaintiff Thornber, Franklin and Grant requested an attorney fee from the City of Fort Walton Beach in May, 1984, but the City refused to pay (R 1092). Plaintiff Thornber, Franklin and Grant filed a complaint on June 14, 1984 seeking attorney fees for representation in their official and individual capacities (R 1-6, 14-29) alleging the City failed or refused to represent them in any of these actions since the City attorney declared a conflict (R 1073). On September 17, 1984, Plaintiffs Thornber, Franklin and Grant filed an amended six count complaint seeking attorney fees for all legal actions supra, and an attorney fee for having to sue for a fee.

The Plaintiffs Thornber, et al alleged that the City had refused to represent them because of a "conflict of interest" (R 14-29) based on the allegations of misconduct and violation of the Sunshine Law by the Recall Committee and the other multiple actions filed against them. All councilmen testified (R 1073, R 1097, R 1119) that the City Attorney Chesser had advised they needed private counsel.

In count I, the councilmen requested reimbursement of attorney's fees incurred in defending a declaratory judgment action filed against the City by Joseph Wilson, a taxpayer and resident of the City. The councilmen alleged that they had to give depositions in Wilson, in which they testified that former City Attorney Walter Smith had advised them that their presence at the private meeting would not violate the Sunshine Law. In Count II, the councilmen requested reimbursement of fees and costs in bringing an action to enjoin recall petitions filed by citizens who sought removal of the councilmen from public office on the basis of their alleged misconduct. The councilmen alleged that the attempted recalls had no basis in law or fact; that the petitions accused them of both civil and criminal misconduct which, if successful, would have laid a judicial predicate for money damages against the councilmen and City, thus they were required to file the suit for injunctive relief.

In Count III, the councilmen alleged that it was necessary for them to retain legal counsel to represent them in an administrative hearing on a grievance filed by Ray. In Count Iv,

the councilmen requested reimbursement of attorney's fees incurred in defending a federal civil rights action filed by Ray against the City, Mayor Bagley, and the City Council in their official and individual capacities. In Count V, the councilmen alleged that it was necessary for them to retain legal counsel to monitor a declaratory judgment action filed by Ray in circuit court. The councilmen alleged that if Ray had been successful in his declaratory judgment action, the councilmen would have been subject to the claim of interference with his employment. Finally, in Count VI, the councilmen requested reimbursement of attorney's fees in the present action.

In January, 1985, Judge G. Robert Barron granted the City's motion to dismiss Counts II-VI for failure to state a cause of action upon which relief could be granted. Strictly construing section 111.07, the trial court found that the statute contemplated only reimbursement of attorney's fees for party-defendants, and prohibited the payment of attorney's fees on behalf of public officials who initiated litigation, (Count II). The court also found that the councilmen were not legally required to defend the grievance petition filed by Thomas Ray, (Count 111), and Ray's action in circuit court against the City Attorney (Count V). In dismissing Count IV, the court granted leave to amend the count to allege that the councilmen had requested the City to provide an attorney for their defense in the federal lawsuit, and that the request had been denied. Finally, the court found that section 111.07 did not contemplate

reimbursement of attorney's fees for filing the present lawsuit (Count VI). In a subsequent order, the trial court found that the City had never moved to dismiss Count I of the amended complaint, and that the councilmen had successfully amended Count IV, so that dismissal of that count was void. The councilmen's appeal of the dismissal of Counts II, III and V was dismissed by the 1st DCA as untimely.

In June, **1985,** the City filed its answer to the amended complaint, generally denying the allegations in Count I, and asserting as an affirmative defense that the councilmen were not named as party defendants in Wilson v City of Fort Walton Beach and did not intervene in the lawsuit, so that they were not entitled to an award under section 111.07. As to Count IV, the City admitted that Thomas Ray had filed a civil rights lawsuit in federal court against the City, the Mayor and the City Council, but otherwise denied its liability for reimbursement of attorney's fees under section 111.07, and asserted as an affirmative defense that it had provided an attorney for the councilmen in the federal lawsuit.

In September, **1985,** the trial court entered an order granting the City's motion for summary judgment as to Count I, finding that a genuine issue of material fact did not exist as to the councilmen's request for reimbursement of attorney's fees relating to Wilson v City of Fort Walton Beach, in that the councilmen were never named as individual defendants in that action. However, the trial court denied the motion for summary

judgment as to Count IV, finding that there was a genuine issue of material fact as to representation of the councilmen in both their official and individual capacities in the federal lawsuit. (R 193-195)

In February, 1987, the case proceeded to trial before Judge Erwin Fleet on Count IV of the amended complaint. Councilwoman Thornber testified that after she was elected, but before she was sworn into office, she had attended the meeting at Mayor Bagley's home. The trial judge asked her whether the proposed resolutions were discussed at the meeting. Thornber replied that they had discussed firing Police Chief Ray and City Manager Walker. Thornber also testified that she gave a deposition in Wilson v. City of Fort Walton Beach, and that her attorney, George Day, represented her at that deposition. She stated that City Attorney Chesser had advised her that he could not represent her in the federal lawsuit due to the conflict of interest and that he had told her to retain a private attorney to represent her in both her individual and official capacities. She stated that Day filed an answer and motion to dismiss in the federal case on her behalf in both her capacities. It was her understanding that the City would be ultimately responsible for paying his fees. (R 1073-1074, 1087)

Councilman Grant testified that he had two or three conversations with City Attorney Chesser, who advised him that he should also retain private representation in both capacities in the federal lawsuit. Grant also hired Day, but he never agreed

to pay the attorney any fees because it was his understanding that the City was obligated. To the trial judge's inquiries about the meeting at Bagley's home, Grant replied that he had not attended that meeting and that he never discussed any proposed resolutions with his fellow councilmen before the public meeting. (R 1098)

Councilman Franklin testified that Michael Chesser had represented him at a deposition in the Wilson case before he became City Attorney. Chesser advised Franklin to seek private counsel, suggesting Day. Franklin also testified that he never had an attorney/client relationship with Chesser in the federal lawsuit. To the judge's inquiries about the private meeting at Bagley's home, Franklin responded that it was a social function for coffee at which he, Bagley, Thornber and Bagley's private attorney, a Mr. Chandler from Washington, discussed the general state of the city and whether to retain City Manager Walker, but that no decision was reached. Franklin testified that prior to the public meeting on July 6, 1981, he had met with Chandler and former City Attorney Mead to discuss the chronological order of the proposed resolutions, which were drafted by Mead. Franklin stated that his decision to vote for Walker's dismissal was made 45 minutes before the public meeting. (R 1128) All three Plaintiff councilmen testified that they voted at a scheduled public city council meeting after vigorous debate. (R 1076-1077, 1098, 1119-1120).

City Attorney Chesser testified by deposition that he represented the councilmen in their official capacities and that attorney Day represented them individually in the federal lawsuit. He stated that Mayor Bagley was represented in her individual capacity by a private attorney, and that Councilman Baughman also had an attorney to represent him in his individual capacity in the federal lawsuit. (R 1145)

After the councilmen rested their case on the issue of liability, the City moved for a directed verdict, arguing that it was not liable for the attorney's fees in the federal lawsuit because former City Attorney Chesser had represented the councilmen in their official capacities. The trial court denied the motion, stating that "the record before the court right now shows very emphatically that he (Chesser) never undertook to represent them (the councilmen) in their official or individual capacity". (R 1153-1154). The City was unable to show the trial court that Chesser filed a pleading on behalf of the councilmen in their official capacities. In fact, the pleadings from the civil rights lawsuit shows that Chesser had filed a motion for extension of time to file an answer on behalf of Bagley and the City; that Day had filed an answer and a motion to dismiss on behalf of councilmen Thornber, Franklin and Grant in their individual and official capacities; and, that Chesser had eventually filed an answer on behalf of the City only.

After the City rested its case, the councilmen presented evidence on the amount of a reasonable attorney's fee. George

Day testified to the hours he expended and rates at which he billed his clients. Expert witness, attorney Pat Maney, testified that the hours and rates billed were reasonable, and that applying Rowe, a reasonable fee for the services was $35,000.00, which did not include interest. (R 1268, 1269)

Attorney Stephen S. Poche' testified (R 1248-49) as to the reasonableness of the attorney fee hours and rate would total $25,000.00 and that Plaintiff Thornber's counsel was entitled to enhancement under Rowe to $40,000.00. This testimony (R 1251) was not objected to nor was it challenged by the City.

Attorney George E. Day testified (R 1235) to the reasonableness of the fee and hours.

There was no rebuttal testimony by the City to a lodestar of $24,000.00 - $25,000.00 for Plaintiff's fee or that plaintiffs were due an enhancement under the Rowe standard.

There was no evidence in the record that the City had ever represented the Plaintiff councilmen individually in the Ray v City case, and the court noted that the unrebutted testimony of Plaintiffs Thornber, et al denied an attorney/client relationship with the city attorney in their official capacity. Further, all of the pleadings filed on behalf of Plaintiffs Thornber, et al were done by their private counsel, while the city attorney responded for the City in its capacity. (R 1152-1155) The trial court specifically noted that all of the Ray v City pleadings were filed by Plaintiff's counsel on behalf of the councilmen and that the city attorney responded only for the City.

In October, 1987, the trial court entered final judgment, finding that councilmen Thornber and Franklin had violated the Sunshine Law by participating in the "secret" meeting at Mayor Bagley's house, citing Tolar v School Board of Liberty County, 398 So2d 427 (Fla 1981), and that as a result, they had acted in bad faith under section 111.07 and were therefore not entitled to attorney's fees for their defense of the federal lawsuit. The court awarded reimbursement of fees to Councilman Grant, who was not present at the "secret" meeting. The court also determined that the City had not asserted a frivolous defense in the present case and therefore the councilmen were not entitled to attorney's fees under section 57.105, F.S. (Supp.1986). (R 249)

Councilmen Franklin and Thornber filed a motion for rehearing, alleging that they were surprised by part of the court's ruling. They attached affidavits which alleged that at the time of the "secret" meeting, they were advised by former City Attorney Walter Smith that the meeting was not a Sunshine Law violation. The City responded by filing a motion to strike the motion for rehearing. Councilmen Franklin and Thornber then filed a motion to amend the motion for rehearing, alleging that the Sunshine Law violation was neither pled nor tried by the parties' consent and that, in any event, the trial court had misapplied Tolar. The trial court denied the City's motion to strike and granted the councilmen's motion to amend the motion for rehearing, but subsequently denied the motion for rehearing.

The councilmen then filed a motion to amend the order denying their motion for rehearing, which the trial court also denied.

The City filed a notice of appeal, from that portion of the final judgment awarding fees to Councilman Grant (Case No. 87-1900). Councilmen Thornber, Franklin and Grant filed a two-part notice of appeal (Case No. 88-99). In Part I, all three councilmen appealed the trial court's order dismissing Counts II, III and V of their amended complaint. In Part II, Councilmen Thornber and Franklin appealed the final judgment denying them reimbursement of attorney's fees pursuant to Counts I and IV of their amended complaint. A claim as to Count I is waived by Plaintiff Thornber, et al by the Plaintiffs in this brief.

SUMMARY OF THE ARGUMENT

POINT ONE

The issue on this point of the argument is whether or not the 1st DCA correctly interpreted the case law and F.S. 111.07 which arose from the common law doctrine that allows public officials reasonable attorney's fees at the public's expense for actions arising from the performance of their official duties. The plaintiffs respectfully submit the 1st DCA erred in the aforementioned narrow interpretation which resulted in a denial of the plaintiffs' attorney fees under Count II of their amended complaint in the trial court. Section 111.07 Fla.Stat. (1981) recognizes the subject common law doctrine as does the case law presented in support of the plaintiffs' argument on this point. The 1st DCA erred by placing precedential value on factually distinguishable case law which has little or no relation to the issue of the public officials entitlement to attorney fees for actions arising from the performance of their official duties. Plaintiff argues that Encompass lacks precedential value in this case. Pursuant to the aforementioned common law doctrine, the relevant case law and F.S. 111.07, the plaintiffs are entitled to attorney fees under Count II of their amended complaint in the trial court.

ARGUMENT

POINT ONE

The plaintiffs are entitled to attorney fees under Count II of their amended complaint in Case No. 84-1376 in the Circuit Court in and for Okaloosa County, Florida, whereby Count II involved a claim for the plaintiff's attorney fees incurred as a result of the plaintiffs' requesting and successfully obtaining injunctive relief of an invalid and illegal recall petition addressed to Thornber, Franklin and Grant. See R 14-29, 33 and R 1091-1095. Thornber v Evans, 81-1532 (Circuit Court Okaloosa County, FL).

In Count II, the First District Court of Appeal strictly construed F. S. 111.07 and denied the plaintiffs' attorney fees in the aforementioned Okaloosa County Circuit Court action because the plaintiffs were not "named party defendants". City of Fort Walton Beach v. Grant 544 So2d 230 at 236, 237 (Fla 1DCA 1989). The dissent in City of Fort Walton Beach v Grant, 544 So2d at 238 stated "There seems to be no question that the common law recognizes a right of governmental officers to reimbursement for legal services performed for such officer to establish or defend the officer's legal right to act in that capacity, whether or not the officer is sued directly as a defendant." Lomelo v. City of Sunrise 423 So2d 974 (Fla DCA 1983). The majority in City of Fort Walton Beach states that "the purpose of F.S. 111.07 is to recognize the common law doctrine that a public officer is entitled to an attorney at the expense of the public litigation

"arising from" their performance of his official duties while serving a public purpose. Nuzum v Valdes, 407 So2d 277 (Fla 3d DCA 1981); Ellison v Reid, 397 So2d 352 (Fla 1DCA 1981); Markham v State Dept. of Revenue, 298 So 2d 210 (Fla 1DCA 1974); Duplig v City of South Daytona, 195 So2d 581 (Fla 1DCA 1967); Peck v Spencer, 26 Fla 23, 7 So 642 (1890). The purpose of the rule is to avoid the "chilling effect" that a denial of representation might have on a public official in performing his duties properly and diligently." City of Fort Walton Beach 544 So2d at 236, 239.

It is settled that a municipal corporation has the right and power to retain and pay private counsel to protect the interests of the municipality and that invasion of those interests may take the form of an "attack" on one or more public officers. Lomelo citing City of North Miami Beach v. Estes 214 So2d 644 (Fla 3DCA 1968). In the City of North Miami Beach the court cited Duplig and stated "the common underlying touchstone in Duplig and the case at bar is that there existed a pending legal action which tended to pose a threat to the effective administration of municipal government. Such an action represents, in and of itself, a circumstance sufficiently tinted with public interest as to validate the appropriation of public funds for special legal counsel." City of North Miami Beach 214 So2d at 646. The Supreme Court of Florida in Miller v Carbonelli 80 So2d 909 (Fla 1955) held "where a councilman was elected mayor of village by council as provided by village charter, and another councilman challenged by quo warranto first councilman's right to that

office, council was justified in expending public funds to insure that action they had taken in choice of mayor was properly defended."

The basic premise behind a quo warranto action and a recall action under Section 100.361, F.S. (1981) is similar in the regard that in both actions a taxpayer(s) is affirmatively challenging a public official's entitlement/right to office. Granted, the grounds, procedures and relief of the aforementioned actions are different; however, the common underlying element is that someone other than the public official in question has initiated some action against a public official.

In the present case, the 1st DCA's interpretation of Section 111.07 F.S. (1981) (which encompassed 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, see City of Fort Walton Beach 544 So2d at 236, 239) a public official would not be entitled to reimbursement for reasonable fees for successfully challenging a petition for recall initiated or brought against said public official. Under said interpretation, a city official would either have to sit back and watch the invalid, illegal recall run its course, or successfully challenge said recall and bear the burden of the attorney fees incurred as the result of having performed official duties. Surely, such an interpretation would have precisely the "chilling effect" that was cautioned against in Nuzum v Valdes, 407 So2d 277 (3DCA 1981), and reiterated by the 1st DCA in the

present case. City of Fort Walton Beach 544 So2d at 236. Nevertheless, after recognizing the "chilling effect" that would occur in this case, the 1st DCA failed to properly weigh Nuzum and its progeny. The record is unrebutted that the Plaintiff Thornber, et al voted in their legislative capacity at a public city council meeting after vigorous public participation and debate. They had just been elected (Thornber and Franklin) after campaigning to "clean up" the politics of Fort Walton Beach.

The present majority opinion in the case before the court is, that if a public official votes at a public meeting and an illegal recall is commenced, that the public official must defend at his own expense, or vacate office. Such a ruling violates common sense and violates the intent of the "Recall Statute" (F.S. 100.361). The recall statute specifically prohibited a recall of Thornber and Franklin during their first year in office. The legislature's intent was clear in preventing dissatisfied politicians from upsetting the public mandate, by attempting to do with a recall what they could not do at the ballot box.

Public interest and the effective administration of municipal government was at stake in this case where a citizen filed an illegal and invalid recall petition against three current City of Fort Walton Beach councilmen and the councilmen prevailed by enjoining said recall petition. R 33, R 1091-1095, City of Fort Walton Beach 544 So2d at 237, 238, Duplig 195 So2d 581, City of North Miami Beach 214 So2d 644, Lomelo 423 So2d 974,

Ferrara v Caves 475 So2d 1295 (Fla 4DCA 1985). Duplig, City of North Miami Beach, Lomelo and Ferrara have consistently stood for the proposition that a public official is entitled to a defense at public expense for actions arising out of the performance of his official duties.

The issue of the plaintiffs' entitlement to attorney fees under Count II of their amended complaint and Ferrara involve the same factual situation. Misconduct charges were brought against public officials for performing public duties in the form of recall petitions brought against the public officials. In response to the illegal recall petitions, the public officials instituted legal action. City of Fort Walton Beach, 544 So2d 230, Ferrara 475 So2d 1285. The Ferrara court cited and distinguished Lomelo (where the court action was initiated by the party alleging misconduct through a civil suit) and stated, "nevertheless, their action (town commissioners and mayor) for declaratory and injunctive relief was an effort to defend against charges of misconduct and that in the spirit of Lomelo, the town is required by the common law to pay reasonable attorney's fees the cross appellants incurred". Ferrara 475 So2d at 1300. There is no valid distinction between the facts in Ferrara and this case. City of Fort Walton Beach 544 So2d at 239. In White v Crandon 116 Fla 162, 156 So 303 (1934) some fifty-six years ago, the Supreme Court of Florida held that county commissioners, when acting in the scope of their official duties, it is within their power to initiate an action of "prosecution and defense" of "all

legal causes". In White, the county commissioners sought "the determination and adjudication of the constitutionality of a local law where there existed apparent conflicts between provisions of the general law affecting the duties of county commissioners, and the provisions of a special act relating to the duties of a special statutory county officer, to such an extent that personal obligations or liabilities upon the part of the county commissioners may be incurred in their handling of the county finances". White 156 So at 305.

In Op.Atty. Gen.Fla 89-69 (October 6, 1989), the Florida Attorney General opined that a city council member is entitled to reimbursement for reasonable attorney fees incurred as a result of said council member successfully challenging an illegal recall petition by obtaining injunctive or declaratory relief from said illegal recall petition. (Citing Lomelo and Ferrara).

The 1st DCA majority opinion on the present case relies upon Encompass Incorporated v Alford 444 So2d 1085 (Fla 1DCA 1984) in holding that statutes authorizing the award of attorney's fees are considered in derogation of common law so as to require strict construction. City of Fort Walton Beach 544 So2d at 236. This reliance is misplaced. Encompass involved a statutory provision for attorney's fees in a private dispute involving a mechanic's lien. City of Fort Walton Beach 544 So2d at 239. The Encompass opinion cites Jackson v Hatch 288 So2d 564 (Fla 2DCA 1974) (interpreting Section 713.29) and Kittel v Kittel 210 So2d 1 (Fla 1967) in support for their holding that statutes

authorizing awards of attorney's fees are in derogation of common law "so as to require strict construction". The Jackson case uses the same "so as to require" language in the strict construction issue and cites Kittel as authority on this point. In Kittel, under head note three, it states "Statute authorizing an award of attorney's fees is in derogation of common law, and "should" be construed strictly". Kittel 210 So2d at 1. In Kittel, footnote 7 cites Great American Indemnity Co. v Williams, 85 So2d 619 (Fla 1956) as authority for the "should be construed strictly" terminology. In Great American Indemnity Company, the Supreme Court of Florida stated "We are not unmindful of the rule that the award of attorney fees is in derogation of common law and that acts for that purpose "should" be construed strictly." Great American Indemnity Company 85 So2d at 623.

The Jackson court in relying upon the Supreme Court decision in Kittel misquoted the "should be" language of Kittel and instead used "so as to require". The Encompass court and the court below relied upon and used the same misquote used by the Jackson court in regards to the standard concerning strict construction. The plaintiffs submit that the word "should" as used in the context of the Supreme Court opinions in Kittel and Great American Indemnity Company allows the court to use discretion and judgment, whereas the "so as to require" language as improperly used in Jackson, Encompass and City of Fort Walton Beach, requires a mandatory improper construction. The plaintiffs submit that under the "should be construed" standard,

the Encompass decision is not mandatory and should not be followed on the issue of public officials entitlement to attorney fees at the public's expense.

Regardless of the level of discretion to be applied to the construction in the afore cited cases, the plaintiffs respectfully submit that Encompass is of no precedential value and thus was improperly relied upon by the below majority court in this case. City of Fort Walton Beach 544 So2d at 239.

In the minority opinion below, J. Zehmer states "Moreover, the majority applies a strict construction to the statute upon the stated proposition that the award of attorney's fees is in derogation of the common law, citing Encompass Incorporated v Alford, 444 So2d 1085 (Fla 1DCA 1984), a case that involved a statutory provision for attorney's fees in a private dispute involving a mechanic's lien. But that case has 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 at 236. The fact that the five cases cited by the majority in support of this stated proposition all involved cases in which the officers were named as defendants does not necessarily serve to limit the application of the common law doctrine to named defendants only nor mandate a

strict construction of the statute as so modifying and limiting the common law doctrine.

I do not believe, therefore, that the statute should be strictly construed to require appellants to be named as a defendant in the court action to recover such fees. All that is necessary to recover such fees is that the officer employ the attorney's services for the purpose of establishing, protecting, and defending the officer's legal right to act in his official capacity in the manner alleged; whether the attorney, in the exercise of his professional judgment, elects to initiate a court action to achieve that purpose or simply to wait until others initiate such action is immaterial in my view, for to so construe the statute would significantly deprive the public officer of the full benefit of his attorney's expertise and the protections that can be afforded by a court action." City of Fort Walton Beach 544 So2d at 239.

Encompass and the afore stated cases going back to Great American Indemnity Company involve construction of mechanic's lien, workman's compensation and dissolution of marriage attorney's fees statutes. Those cases are factually distinguishable and therefore inapplicable to the present case, Ferrara, Lomelo, Duplig, et al.

In 1925, the Florida Supreme Court spoke to the issue of strict construction of statutes and said, "The principles of common law are in force, if not in conflict with organic or statute law; rules of both common law and statutes are designed

for application to new conditions and circumstance; principles of common law are intended to be vitalized by practical utility, subject to organic limitations. State ex rel Burr v Jacksonville Terminal Co., 90 Fla 721, 744, 106 So 576, 584 (1925).

The plaintiffs respectfully submit that Section 111.07 F.S. (1981) is not limiting or displacing the subject common law doctrine but is recognizing and encoding the subject common law doctrine. Further, F.S. 111.07 arose at a time following the explosion of Federal civil rights suits under 42 USC 1981-1983 where prisoners commenced suing for packages, and a plethora of other civil rights issues. This history more likely than not accounts for the use of the words "Civil Rights" in F.S. 111.07. The below majority opinion concedes that F.S. 111.07 recognizes the subject common law doctrine. The facts in the present case and Ferrara are of a new nature that require practical utility of F.S. 111.07. The first sentence of F.S. 111.07 states "Any agency of the state, or any county, municipality, or political subdivision of the state, is authorized to provide an attorney to defend any civil action arising from a complaint . . ." In the present case, the enjoining of the illegal civil recall action was an action which arose from the illegal recall complaint based on the plaintiff's official actions made in the public's interest and thus the plaintiff's are entitled to an attorney's fee at the public's expense pursuant to F.S. 111.07 and the common law.

From the Supreme Court case of White v Crandon through Ferrara, it is clear that 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 has been followed and upheld. The majority court below now seeks to deviate from the long line of cases holding that a public officer is entitled representation at the public's expense for actions "arising from" the performance of his public duties by quoting and misapplying one line from a case involving a mechanic's lien attorney's fee statute, as well as by seizing on the vague word defendant in the F.S. 111.07. Plaintiffs respectfully submit the majority court below erred in denying the plaintiffs' attorney's fees under Count II of their amended complaint and request that portion of the ruling be reversed and remanded with instructions to award fees consistent with the standards set forth in Florida Patient's Compensation Fund v Rowe, 472 So2d 1145 (Fla 1985).

SUMMARY OF THE ARGUMENT

POINT TWO

That the lower courts erred in not awarding plaintiffs an attorney's fee for the City's frivolous defense of the issue of liability for an attorney fee. That the City had no factual basis to deny liability, and had no basis in law for denying liability under a common sense reading of the state of the case law through Metropolitan Dade County, 474 So2d 392 (3DCA 1985). That the City defended for political vs. legal reasons, and cannot be permitted to have it's attorney work against the plaintiffs and then claim to have provided representation.

ARGUMENT

POINT TWO

CASE 88-99

The lower courts erred in not awarding plaintiffs a frivolous attorney fee at trial and appeal, as the defense was for political reasons instead of legal reasons in this cause now an appeal. The defense failed to raise justiciable issues of law as liability was clear and failed to raise relevant issues of fact to their claimed defense.

1. Counsel for the Defendant City did not come into the lawsuit until January, 1984. At that time, the "reform council" had been reduced by two supporters and plaintiffs Thornber and Franklin were in the minority. Present counsel for the City had not participated in any of the previous legal actions, recall, administrative actions or declaratory cases in which plaintiffs had been 100% successful. The sole remaining case was the Federal 1983 civil rights action of Ray v City of Fort Walton Beach supra, who was suing the City, Mayor Bagley and plaintiff councilmen in their official and individual capacity.

2. The City and plaintiffs Thornber, Franklin and Grant were polarized in two opposite directions. The City and Mayor Bagley desired to settle with Chief Ray and give him indirect compensation through workman's compensation for an unreported previous injury, and back out of the Federal 1983 civil rights suit by Ray (see settlement agreement) (R 765-768, Defendant's Exhibit B).

a. Plaintiff councilmen were opposed to this settlement and refused to participate because they were convinced Ray could not prevail at trial (R 1114, 1115), so the City and its present counsel prepared a settlement agreement between Ray, the City and Mayor Bagley (who as City Manager pro tem) had fired Chief Ray. Settlement occurred in May, 1984, just on the eve of the Federal Ray v City of Fort Walton Beach, Bagley, et al trial in Panama City. The settlement agreement specifically and intentionally excluded the plaintiffs Thornber, et al so that when trial occurred in Federal court, the City would not be defending. There can be no question in interpreting the settlement agreement that the City attorney acted against the interests of the plaintiffs by noting on (R 772) that the agreement "does not apply to those defendants who would not join in the agreement."

b. Federal Judge Paul granted the City's motion to dismiss. . . but surprisingly dismissed the plaintiffs in their official capacity as well as Mayor Bagley in her official capacity.

3. This dismissal of plaintiff Thornber, et al made them by law prevailing parties in June-August, 1984 when Judge Paul dismissed plaintiffs in their official capacity. Metropolitan Dade County v Evans, supra. This dismissal operated to terminate finally any proceedings against the plaintiffs in their official capacity. See Sacks v Rickles, 155 So2d 400 (3DCA 1963) and State Department of Health, etc, 409 So2d 193-195 (3DCA 1982) which said "a merits determination is not a prerequisite to an

award of attorney's fees where the statute provides they will inure to the party who prevails .."

Further, the long body of common law cases going back to Duplig supra and three Nuzum (1981) and Lomelo (1982) made it clear that where a public official was sued and prevailed, that he was entitled to an attorney fee.

On the date of filing the Federal pre-trial stipulation in the Ray v City case, Ray then dismissed the Thornber, et al with prejudice in their private individual capacities.

4. At this point, the legal position of the City was clear. The City and its counsel were well aware that plaintiffs had:

(1) prevailed in both their official and individual capacities against Chief Ray.

(2) that no evidence existed that the plaintiffs Thornber, Franklin and Grant had acted in anything but their legislative capacity as councilmen, and thus their vote to appoint Mayor Bagley was done in their legislative capacity and thus plaintiffs were "immune" from liability for their vote. See Tenney v Brandhave, 341 US 367,376 (1951), Supreme Court of Virginia v Consumer's Union, 446 US 719 (1980) and Harlow v Fitzgerald, 457 US 800-815 (1982). Further, it was clear that no evidence ever had existed to support either Ray's charges or the Recall's baseless charges. That is why plaintiffs had prevailed in every action and Ray had lost. Ray's dismissal of the plaintiffs in their individual capacity with prejudice clearly settled the issue of the City's liability for fees.

(3) The Federal record was clear that the City never filed any pleadings on behalf of the plaintiffs, but in fact all of the pleadings in Ray v City were filed by plaintiff Thornber's counsel in both their official and individual capacity, and both the trial court and 1st DCA agreed with the record and found that the City had never represented the plaintiffs in the Federal 1983 case. The plaintiffs testified unanimously that the past City Attorney Chesser had declared a conflict, and sent them to private counsel. Further, the City Attorney acted specifically against the plaintiffs by preparing and signing a settlement agreement which the plaintiffs violently opposed, and which was 100% against their interests. It is not difficult to understand how a counsel can represent two opposing parties on opposite sides, and claim to represent both.

(4) Defendant's counsel never took the depositions of the plaintiffs or sought discovery from the plaintiffs before trial in 1987 concerning whether the previous City Attorney had advised plaintiffs that he could not represent them.

(5) Plaintiff filed an 18 page memorandum of law and fact (R 226-243) to appraise the court and the defendants of the total lack of legal basis to claim in their pre-trial stipulation (R 211-224) at pages 212, 213 that Defendants would contest, "whether the fees are attributable to representation of the councilpersons in their individual capacity as opposed to their official capacity".

The City then (R 213) stated their defenses were:

(1) "The City is not liable for private legal fees in absence of an agreement or contract with the City or if the City failed to defend an elected official sued during the conduct of act under color of office.

(2) That the City is not responsible for private legal fees for acts of public officials done prior to their taking office or for acts that were done in their individual capacity".

The parties' pre-trial stipulation (R 216) noted that there were six issues of law and fact:

a. Is Fort Walton Beach a municipality required to pay a fee in this case?

b. Was the defense of Thornber, et al a "civil rights" act or omission covered by F.S. 111.07?

c. Did the City fail to provide an attorney?

d. Are the plaintiffs entitled to a reasonable fee?

e. If so, what amount of fee?

The thrust of the foregoing claimed defenses seemed to be, despite the two memos of law submitted by plaintiffs Thornber (R 90-93) and (R 226-243) that the City had no liability for a fee under F.S. 111.07, and that the City was not responsible because the plaintiff's acts were private acts, or acts done in their private capacity.

The City's defense of the case in trial court never raised any issue of whether the plaintiff's acts were private acts, because there was ZERO evidence in existence that the plaintiffs

had acted privately. The plaintiff's "out of office opponents" in the Recall had made some allegations about the plaintiff's actions, but these allegations had never been reduced to evidence and proof, because it did not exist. The only record evidence deduced was contrived by the trial judge who obviously wanted to try the case on these unpled allegations. The trial judge departed the pleadings, asked some vague questions which were improper, and then improperly found the plaintiffs Thornber and Franklin guilty of Sunshine violations by using the rationale of an overruled minority opinion from the Florida Supreme Court case of Tolar v School Board of Liberty County. The District Court wisely reversed this misconduct, and found the court's action unfounded.

The only relevant evidence that existed in fact, and was merged into the pleadings by the pre-trial stipulation, was that the plaintiffs voted in an open public meeting in July, 1981 to fire the City Manager of Fort Walton Beach and replace him with Mayor Bagley as manager pro tem, and that plaintiffs were entitled to a statutory fee in responding to a civil rights suit, because they were prevailing parties under Metropolitan Dade County v Evans, 474 So2d 392 (3DCA 1985).

The plaintiff's acts were further recognized by F.S. 111.07 as official acts for which the City needed to provide an attorney, or pay for an attorney. The record is crystal clear that the City in fact, through their previous attorney Chesser, had referred the plaintiffs to outside counsel in 1981, and that

plaintiff's counsel had filed all of the pleadings on behalf of the plaintiffs. The trial court noted emphatically on the record "The record before the court right now shows very emphatically that he (City Attorney Chesser) never undertook to represent them in their official or individual capacity". (R 1153 and 1154) This assessment by the trial court was correct, and was affirmed by the 1st DCA in the present case.

What particularly qualifies this cause for a frivolous fee is the progress of the attorney fee law following Lomelo, and using a lawyer and common sense evaluation of the non-existence of any relevant probative evidence that the plaintiffs did any act as councilmen which would disqualify them for an attorney fee under F.S. 111.07. To value whether the City had represented the councilmen in the Federal 1983 action or refused to represent them, the effect of Ferrara and the "on all fours" case of Metropolitan Dade County, supra, which had awarded a Miami police officer attorney fees under F.S. 111.07 when Dade County refused him legal representation in the notorious "Duffie" beating death, and lastly the "on all fours" effect of Chief Ray and the City of Fort Walton Beach counsel settling out Ray in the same fashion as Metropolitan Dade County, supra.

Further, plaintiff Thornber enlightens this court at (R 1092) when she testifies unrebutted:

> "Well, after the election of 1983 and the new council was sitting, Mr. Jerry Miller who was a fellow councilman, told me that I should have submitted my bills prior to the election

> because the councilmen were not going to pay for it and they were going to keep it in court as long as possible until I just got tired and worn out."

Plaintiff Thornber's testimony was taken in February, 1987, when Nuzum, supra, Lomelo, supra and Metropolitan Dade County, supra cases were two years old. Her testimony clearly explains why the City wrongfully and frivolously continued to deny liability in this Federal 1983 attorney fee issue by making the incredible claim (1) that the City had represented plaintiffs, (2) claiming there had to be "an agreement or contract" with the City, or (3) claiming that the City was not liable for "private" acts or "individual" acts, when they knew they could not put on (and did not put on) any such evidence.

The City has used the legal process since filing of plaintiff's action in September, 1984, to "keep it in court as long as possible until I (Thornber) just got tired and worn out".

The act of the City Attorney entering into a settlement agreement diametrically opposed to the legal interests of the plaintiffs in May, 1984, left the plaintiffs to defend from their private funds. In a classic of "double speak", the City then alleges in the pre-trial stipulation that they provided legal representation to the plaintiffs. This claim is a gross misstatement of the factual issue, and was absolutely void of probative support at trial.

F.S. 57.105 (1) provides for a reasonable attorney fee for a complete absence of justiciable issue of either law or fact "raised by the complaint or defense of the losing party".

A principal remedy for award of attorney's fees is F.S. 57.105. Board of Trustees of Internal Emp. Trust Fund v Ray, 444 So2d 1110 (4DCA 1984) and also Wright v Acierno, 437 So2d 242 (5DCA 1983).

Plaintiff submits that a common sense reading of the facts of this cause made it clear that there was one, and only one issue for trial, which was what amount of attorney fees. This issue could have been settled in half a day. Instead, it took from 1984 to 1987, and two full days of trial, because the defendant was "going to wear out plaintiff Thornber in court".

For the foregoing reasons, plaintiff should be entitled to an award of attorney fees for the defendant City having frivolously defended against an attorney's fee for plaintiff both at trial level and on appeal, and the lower court must be reversed.

Plaintiff submits that a common sense reading of the law in this case makes it clear that plaintiffs became prevailing parties under Florida Law in 1984 when the Ray v City case was dismissed with prejudice as to plaintiffs in both their private and official capacities. Metropolitan Dade County, supra, Nuzum and Lomelo.

SUMMARY OF THE ARGUMENT

POINT THREE

CASE 88-99

Plaintiffs Thornber and Franklin were required to appeal to the 1st DCA from a finding of the trial court that Plaintiffs were not entitled to an attorney fee for defense of a Federal 1983 civil rights action against them. Plaintiffs were clearly "prevailing parties" under F.S. 111.07 and the body of case law on attorney's fees and prevailing parties, and entitled to an attorney fee under F.S. 59.46 and Fl.R.App.P. 9.400 for having prevailed on appeal.

ARGUMENT

POINT THREE

CASE 88-99

F.S. 111.07 provides for an attorney fee for the prevailing party who is required to defend against a "civil rights" claim. Chief Thomas Ray sued plaintiffs Thornber, et al claiming that the plaintiffs violated his civil rights. Ray filed a dismissal with prejudice against the City and Mayor Bagley, which Federal Judge Paul extended to the plaintiffs Thornber in his dismissal order.

Ray then dismissed with prejudice against plaintiffs Thornber in their individual capacity. Under the F.S. 111.07 and the case law of Metropolitan Dade County, supra, it is clear that plaintiffs were prevailing parties since the dismissals with prejudice terminated all litigation between Ray and the plaintiffs Thornber, et al.

Because of the trial court's improper and adverse ruling against the plaintiffs, the plaintiff was required to appeal to the 1st DCA. In Thornber, et al v The City of Fort Walton Beach, 544 So2d 230 (1DCA 1989), the 1st DCA reversed and awarded plaintiffs Thornber and Franklin an attorney fee. This case amounted to the majority of plaintiff's lodestar fee of $24,000.00 to $25,000.00

F.S. 59.46 provides that where there are statutory grounds for an attorney fee (such as F.S. 111.07), that the successful party is entitled to attorney fees on appeal.

That plaintiff moved for an attorney fee on appeal, however, although they prevailed and were awarded fees under F.S. 111.07, the 1st DCA denied plaintiffs fees under F.S. 59.46 in its order of April 20, 1989.

WHEREFORE, Plaintiff prays that plaintiff be awarded a reasonable attorney fee for having successfully appealed the denial of an attorney fee under F.S. 111.07 at the appellate level.

CONCLUSION

The judgment of the 1st DCA should be reversed in part and affirmed in part. The portions of the judgment which should be reversed are as follows:

1. The denial of the plaintiffs' attorney fees under Count II of their amended complaint for the successful challenge of the illegal recall petition.

2. The denial of the plaintiffs' frivolous attorney fees under F.S. 57.105 for having to contest the "prevailing party" and "lack of legal representation from the City" issues at the trial level.

3. The denial of the plaintiffs' appellate attorney fees on the issues listed above in number two and on the issue of defending the unpled "sunshine law violation".

The remainder of the 1st DCA's judgment should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by regular U.S. Mail this the 1st day of February, 1990, to Bert Moore, Moore, Kessler & Moore, P.O. Box 746, Niceville, FL 32578.

GEORGE E. DAY
GEORGE E. DAY, P.A.
32 Beal Parkway SW
Fort Walton Beach, FL 32548
(904) 243-1234
Attorney for Appellants
Florida Bar No. 0228818

TIMOTHY I. MEADE
GEORGE E. DAY, P.A.
32 Beal Parkway SW
Fort Walton Beach, FL 32548
(904) 243-1234
Attorney for Appellants
Florida Bar No. 0628379