OA 5-8-90

IN THE SUPREME COURT OF FLORIDA

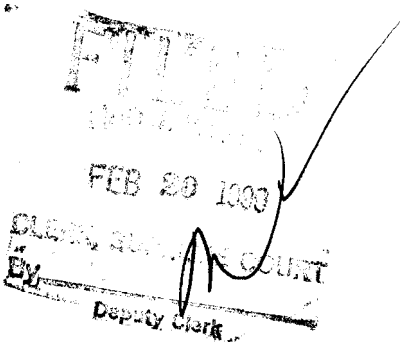
PATRICIA THORNBER, et al.

Petitioners/
Cross-Respondents,

v. Case No. 74,494

CITY OF FORT WALTON BEACH,

Respondent/
Cross-Petitioner,



RESPONDENT/CROSS-PETITIONER'S INITIAL BRIEF AND ANSWER BRIEF TO INITIAL BRIEF OF PETITIONERS/CROSS-RESPONDENTS

On Review from the District Court of Appeal,
First District, State of Florida

James E. Moore
Florida Bar #056540
Bert Moore
Florida Bar #0336378
Alice H. Murray
Florida Bar #0794325
MOORE, KESSLER & MOORE
P.O. Box 746
Niceville, Florida 32578
(904) 678-1121
Attorneys for Respondent/
Cross-Petitioner

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INTRODUCTORY STATEMENT

As used within the text of Respondent/Cross-Petitioner's Brief, the abbreviations below shall mean the following:

"Circuit Court" - the Circuit Court in and for Okaloosa County, Florida, the trial court

"City" - the City of Fort Walton Beach, Florida, **Respondent/Cross-Petitioner**

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

"DCA" - District Court of Appeal

"Franklin" - John R. Franklin, Petitioner/Cross-Respondent

"Grant" - Al Grant, Petitioner/Cross-Respondent

"Petitioners" - John R. Franklin, Al Grant, Patricia Thornber

"Ray" - Thomas B. Ray, former City Police Chief and Director of Public Safety, Plaintiff in federal civil rights action Ray v. Bagley, Case No. PCA 81-521 (N.D. Fla. 1981)

"R" - Record on Appeal

"Thornber" - Patricia Thornber, Petitioner/Cross-Respondent

"Tr" - Transcript of the hearing before the Honorable Erwin Fleet, Circuit Judge, in and for the First Judicial Circuit of Florida on February 20, 1987

STATEMENT OF THE FACTS AND CASE

In May of 1981, Thornber and Franklin were elected to the City Council; Grant was already serving as a Councilman at that time. City of Fort Walton Beach v. Grant, 544 So.2d 230, 231 (Fla. 1st DCA 1989). In June of that year, the newly elected City Council members and mayor met privately at the mayor's home and discussed certain actions to be taken by the City Council. Id. As a result of these discussions, a special City Council meeting was called for July 6, 1981; at that meeting a number of actions were taken including the appointment of Mayor Bagley as Acting City Manager. Id. In this capacity, Mayor Bagley fired Ray as the City's Chief of Police. Id.

The actions taken by the City Council led to the initiation of a number of legal and administrative proceedings. Id. One of these actions was a federal civil rights suit brought by Ray which named the City, its mayor and four of the seven Council members (both in their individual and official capacities) as Defendants. Id. at p. 232. Various relief was sought in this federal case including Ray's reinstatement to employment and the award of compensatory and punitive damages. Id. at fn. 7; Ray v. Bagley, Case No. PCA 81-521 (N.D. Fla. 1981). Day participated in the defense for Franklin, Grant and Thornber. The federal action was ultimately voluntarily dismissed by Ray pursuant to settlement agreements reached among the parties. Grant, supra at p. 232 fn. 7. The action was dismissed as to Defendants City and as to Defendants Thornber, Franklin and Grant in their official capacities based on a Stipulation and Agreement executed in May, 1984. Id. This Agreement provided for the retroactive reinstatement of Ray, Ray's entitlement to disability retirement, his recovery of salary, sick leave and vacation time, and the waiver of any claim by Defendants for attorney's fees and court costs against Ray as a result of the action. (R. at pp. 770-772.) Thornber, Franklin and Grant

were dismissed in their individual capacities in July of 1984. Grant, supra at p. 232 fn. 7.

A six-count Amended Complaint was thereafter filed by Franklin, Thornber and Grant against the City in the Circuit Court in and for Okaloosa County, Florida. (R. at pp. 14-29.) The action was brought pursuant to Section 111.07, Fla. Stat. (1983) for reimbursement of attorney's fees for representation in the several legal and administrative proceedings resulting from Ray's dismissal. Id. Count IV specifically sought reimbursement for the defense of the federal civil rights action. (R. at pp. 21-24.)

The trial court dismissed Counts 11, 111, V and VI and later entered summary final judgment for the City on Count I. Grant. supra at pp. 232-233. The case proceeded to trial on Count IV; at trial, expert testimony was presented by the Councilmen as to the amount of reasonable attorney's fees applying the standards of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Id. at p. 234. A final judgment was entered in October 1987 awarding $7,500.00 in attorney's fees to Grant but denying such fees to Franklin and Thornber because they were found to have violated the Sunshine Law. (R. at pp. 246-250.)

Two separate appeals to the First District Court of Appeal followed the decision of the trial court. Grant. supra at p. 235. In Case 87-1900, the City appealed from the award of attorney's fees to Grant on Count IV; in Case 88-99, Thornber, Franklin and Grant appealed the dismissal of Counts 11, 111, and V of their Amended Complaint and Thornber and Franklin appealed from the judgment in favor of the City on Count IV. Id. These two cases were consolidated on appeal for record purposes only. Id. at p. 231.

In an Opinion filed April 14, 1989, the First DCA affirmed the judgment in favor of Grant in Case 87-1900 finding that Grant was a "prevailing" party pursuant to Section 111.07 simply by reason of his

voluntary dismissal upon settlement. Id. at p. 235. The judgment in Case 87-1900 was affirmed in part and reversed in part. Specifically, the dismissal of Counts II, III and V was affirmed but the denial of reimbursement to Thornber and Franklin on Count IV was reversed and the case remanded for entry of judgment consistent with the award of attorney's fees to Grant. Id. at pp. 235, 237, and 238.

Franklin, Grant and Thornber filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court on July 28, 1989. (DCA - R. at p. 51.) Following a denial of its Motion For Rehearing by Order dated July 3, 1989, the City filed a Cross-Notice to Invoke Discretionary Jurisdiction on August 2, 1989. Id. at p. 52. Despite the pendency of the appeal, the First DCA entered an order on September 14, 1989, reversing its order awarding fees and remanded the case to the trial court for determination of appropriate fees in accordance with the provisions of Florida Patient's Comuensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). (DCA - R. at p. 70.) Pursuant to an order dated January 12, 1990, this Court accepted jurisdiction of this case and stayed further proceedings in the First DCA and the Circuit Court.

SUMMARY OF ARGUMENT

A. INITIAL BRIEF OF RESPONDENT/CROSS-PETITIONER

POINT ON CROSS-APPEAL NO. I

The decision of the First DCA is in conflict with that of the Third DCA in Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985), with regard to who is a prevailing party for an award of statutory attorney's fees. According to the First DCA, a party such as Grant prevails when litigation against that party is dismissed with prejudice because this signals the end to the litigation against him. Such a position defies common sense and logic because it would allow a party to be considered "prevailing" merely because of the party's dismissal regardless of the circumstances leading to the dismissal.

In contrast, the Third DCA requires not only that there be an end to the litigation, but also that the party making the claim have successfully maintained it. Simmons, supra. Such an analysis is not only in accord with common sense but also with the plain and ordinary meaning of the term "prevail." Franklin, Grant and Thornber would not be a prevailing parties under this approach because the party suing them obtained the very relief sought, reinstatement to employment, albeit through settlement rather than a formal merits determination.

POINT ON CROSS-APPEAL NO. II

The decision of the First DCA is in conflict with this Court's directive in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), with regard to the maximum amount of attorney's fees which can be awarded by a court. Rowe placed a cap on such award - it cannot exceed the fee agreement reached by the attorney and his client.

Grant was awarded $7,500.00 in attorney's fees by the trial court, which award was affirmed on appeal. This award is erroneous in that it exceeds the fee agreement between Grant and Day. It was established at

trial and acknowledged by the First DCA that Grant was to pay Day nothing for his representation. Thus, if Grant is a prevailing party, he is entitled to no attorney's fees per the express language of Rowe. Should this Court determine that Franklin and Thornber are prevailing parties entitled to attorney's fees, their award likewise, must not exceed their fee agreement with Day.

B. ANSWER BRIEF OF RESPONDENT

POINT ON APPEAL NO. I

The affirmance of the dismissal of Count II of Franklin, Grant and Thornber's Amended Complaint, wherein they sought reimbursement of attorney's fees pursuant to Section 111.07 for bringing an action to enjoin their recall, was the proper ruling by the First DCA. The language of Section 111.07 only authorizes reimbursement to prevailing defendants; however, Franklin, Grant and Thornber were prevailing plaintiffs. To accept Franklin, Grant and Thornber's position that they were defending against the recall action by instituting an action for injunctive relief and thus come within the preview of Section 111.07 is to construe an unambiguous statute in a tortured fashion. Case law relied on by Franklin, Grant and Thornber for their alleged entitlement to attorney's fees is misplaced as none of those cases involved entitlement sought under Section 111.07. Furthermore, the acts of Franklin, Grant and Thornber leading to the litigation against them were outside the course and scope of their official public function, thus precluding an award under Section 111.07. In any event, reimbursement in the circumstances of a recall would be an improper use of public funds.

POINT ON APPEAL NO. II

Franklin, Grant and Thornber's request for an award of attorney's fees pursuant to Section 57.105 was appropriately denied. Both the trial and appellate courts found that the City did in fact raise justiciable issues

and that its defense of Count IV was therefore not frivolous. Because of the conflict in the case law and the language of Section 111.07, the City's defense that Franklin, Grant and Thornber had not "prevailed" in the federal lawsuit cannot be said to be completely lacking in merit - a prerequisite to an award under Section 57.105.

POINT ON APPEAL NO. III

There is no justification for an award of appellate attorney's fees pursuant to Section 59.46 with regard to the appeal of the trial court's decision on Count IV. To be entitled to an award under this statute, Franklin, Grant and Thornber first must show their entitlement to attorney's fees under Section 111.07. Since Franklin, Grant and Thornber were not the "prevailing" parties in the federal lawsuit against them, they are not entitled to attorney's fees under Section 111.07 much less Section 59.46.

ARGUMENT

A. INITIAL BRIEF OF RESPONDENT/CROSS-PETITIONER

POINT ON CROSS-APPEAL NO. I

THE DECISION OF THE FIRST DCA IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DCA IN SIMMONS v. SCHIMMEL, 476 So.2d 1342 (Fla. DCA 1985), WITH REGARD TO WHEN A PARTY IS A "PREVAILING PARTY" FOR PURPOSES OF AN AWARD OF STATUTORY ATTORNEY'S FEES.

Following Ray's voluntary dismissal of his federal civil rights action, Franklin, Grant and Thornber instituted a multi-count lawsuit against the City in the Circuit Court. (R. at pp. 14-29.) Plaintiffs relied on Section 111.07, Fla. Stat. (1983) for reimbursement of attorney's fees for representation in the several legal and administrative proceedings resulting from Ray's dismissal. Id. Count IV of the Amended Complaint sought reimbursement for the defense provided in the federal civil rights action. (R. at pp. 21-24.) The trial court awarded Grant $7,500.00 on Count IV, but denied recovery to Franklin and Thornber because of their violation of the Sunshine Law. (R. at pp. 246-250.) On appeal the award to Grant was affirmed, but the denial of recovery to Franklin and Thornber was reversed. Grant. supra at p. 238.

Both Section 111.07, Fla. Stat. (1983) and the current version of Section 111.07 are entitled "Defense of civil actions against public officers, employees, or agents." These statutes authorize any political subdivision of the state, such as the City, to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers arising out of the scope of his employment or function. If such political subdivision fails to provide any attorney, the political subdivision:

> ...shall reimburse any such Defendant who prevails in the action for court costs and reasonable attorney's fees. [Emphasis added.]

Unfortunately, neither the current or former Section 111.07 provides an explicit definition of a "prevailing" defendant. Similarly, other Florida statutes granting attorney's fees to the "prevailing party" such as Sections 57.105, Fla. Stat. (Supp. 1989), Section 713.29 Fla. Stat. (1988), and 718.303, Fla. Stat. (1988), omit any such definition. The deceptively simple phrase "prevailing party" has been a fertile source of litigation. Ferrell v. Ashmore, 507 So.2d 691 (Fla. 1st DCA 1987). Because of the lack of a statutory definition, the issue of whether a party has "prevailed" for purposes of an award of attorney's fees has become a bone of contention in numerous cases, including the present one.

The "prevailing" party issue was addressed by the First DCA in its opinion filed April 14, 1989. In affirming the award of attorney's fees to Grant on Count IV, the appellate court reasoned that:

> Grant prevailed because the dismissal with prejudice in the federal lawsuit signalled an end to the litigation against him and under these circumstances a merits determination was not necessary. Grant, supra, at p. 235.

Although the "prevailing" party issue was not explicitly addressed in regard to Franklin and Thornber, the appellate court implicitly utilized this same rationale in reversing the denial of attorney's fees to them; it remanded the case to the trial court for entry of judgment for Franklin and Thornber "consistent with Grant's award." **Id**. at p. 238.

From the First DCA's opinion below it would appear that the mere fact of the dismissal of a defendant, regardless of the circumstances under which such dismissal occurs, elevates that defendant to a "prevailing" party. That such a position lacks any logic whatsoever is amply illustrated by the very facts of the present case.

The federal civil rights action instituted by Ray against Franklin, Grant and Thornber, both individually and in their official capacities, sought various relief for Ray including reinstatement to employment and the award of compensatory and punitive damages. Id at p. 232 fn. 7. Admittedly, Ray voluntarily dismissed these Defendants; however, they

cannot truthfully be said to have "prevailed" against Ray given the circumstances under which this dismissal was obtained.

The dismissal was predicated on a Stipulation and Agreement by which Ray was to have been retroactively reinstated, to recover back salary, sick leave, and vacation time and was to be entitled to disability retirement. (R. at pp. 770-772.) Clearly the thrust of Ray's action was that he had wrongly been dismissed and that this injustice should be rectified. The settlement undeniably vindicated Ray's claim making him, and not Franklin, Grant and Thornber, the "prevailing" party. Under these circumstances, common sense dictates that Franklin, Grant and Thornber are not entitled to attorney's fees under Section 111.07. Ferrell. supra, and other courts have taken a common sense, rather than a mechanical approach to determining who is a prevailing party for purposes of an award of attorney's fees.

The conclusion that Ray was the "prevailing" party in the federal civil rights action is bolstered by the opinion in 51 Island Wav Condominium Assn.. Inc. v Williams, 458 So.2d 364 (Fla. 2d DCA 1984). In Williams, the appellee unit owners sold a one-third interest in their condominium to the appellee purchasers. The condominium association sought declaratory and injunctive relief plus attorney's fees alleging that the sale was violative of the declaration of condominium. The court ultimately dismissed the case for mootness as the appellee purchasers had reconveyed the one-third interest back to the appellee unit owners by quitclaim deed. The denial of attorney's fees to the association was appealed.

In remanding the case for an award of attorney's fees to the association, the Williams court found that the association had indeed been the prevailing party in the litigation, It noted that a merits determination was not necessary for purposes of a statutory fee award; therefore, the dismissal for mootness did not preclude the recovery of attorney's fees. The association was viewed as the "prevailing" party in the litigation on the following rationale:

> in essence, the association had prevailed because the effect of appellee's reconveyance was to accede to the association's request for relief. Id. at p. 366. [Emphasis added.]

Similarly, Ray was the "prevailing" party in the federal civil rights case at issue in the present case since the essence of the settlement agreement was for Franklin, Grant and Thornber to accede to Ray's request for relief, i.e., reinstatement.

Federal case law also compels the conclusion that Ray was the prevailing party in the federal civil rights case. With regard to 42 U.S.C. Section 1988 (Proceedings in vindication of civil rights and attorney's fees), the U.S. Supreme Court has defined a prevailing party as one who succeeds:

> on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed 2d *40* (1983).

Ray's obtaining reinstatement was certainly success on a significant issue in his lawsuit and part of the benefit sought in bringing that suit.

Given the lack of a statutory definition for "prevail" or "prevailing", it is unsurprising that the Florida District Courts of Appeal have taken inconsistent and conflicting views of when a party has prevailed for purposes of an award of statutory attorney's fees. The Fourth DCA, the Fifth DCA and the First DCA (as evidenced by the opinion below) apparently agree that a plaintiff's voluntary dismissal of an action against a defendant alone makes that defendant a "prevailing" party. Vidibor v. Adams, 509 So.2d 973 (Fla. 5th DCA 1987); Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp. of Martin County, 493 So.2d 1136, 1137 (Fla. 4th DCA 1986.) Under this logic 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. Surely this is not what the Legislature intended when it passed

statutes such as Section 111.07 which award attorney's fees to "prevailing" parties.

Such a logic-defying position expressly and directly conflicts with the position of the Third DCA as set forth in Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985), review denied 486 So.2d 597 (Fla. 1986). In Simmons, the plaintiff voluntarily dismissed his wrongful death action prior to the empanelling of the jury; this move allegedly was a strategic one in an attempt to reduce the possibility of jury confusion from multiple defendants. Thereafter, the defendant filed a motion seeking attorney's fees pursuant to Section 57.105, Fla. Stat. (1981) and Section 768.56, Fla. Stat. (1981). [Each of these statutes, as does Section 111.07, authorized the court to award attorney's fees to the "prevailing" party; Section 768.56 was repealed in 1985.1 Based on the plaintiff's dismissal of the lawsuit, the trial court awarded defendant attorney's fees. An appeal followed.

The sole issue on appeal in Simmons was whether the defendant was a "prevailing party" within the meaning of the statutes. Since the term "prevailing party" was not statutorily defined, the court construed the words in accordance with their plain and ordinary meaning pursuant to well established rules of statutory construction. In particular, the meaning ascribed by Black's Law Dictionary was considered:

> The party ultimately prevailing when the matter is finally set at rest... To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully made it. Simmons, supra, at p. 1344.

In light of this definition, the Simmons court stated that there must be some end or finality to litigation on the merits so that a determination could be made if the party making the claim had been successful. A formal merits determination was not found to be necessary as long as there was some end to the litigation so the court could determine whether the party requesting fees had "prevailed." In Simmons, there was no basis to

conclude that the defendant was a "prevailing party" as the plaintiff's voluntary dismissal was not related to the merits of the case but was merely strategic.

The Simmons opinion implicitly sets forth a two-part test for determining whether a party has "prevailed":

1. Whether there was some end or finality to the litigation on the merits; and

2. Whether the party making the claim had successfully maintained it.

According to Simmons, both of these questions must be answered in the affirmative in order for a party to be considered as "prevailing." In Simmons, part one of the test could not be answered affirmatively since the dismissal was unrelated to the merits of the case and was without prejudice to the suit's being reinstituted.

The position of the First DCA as enunciated in its April 14, *1989* opinion concurs with Simmons only to the extent of the first part of the Simmons test. The First DCA requires only that there be finality to the litigation; it disregards the second part of the Simmons test. Thus, the defendant Council members were characterized as "prevailing" parties simply because they were dismissed with prejudice. Grant, supra, at p. 235. No consideration was given to whether Plaintiff Ray had successfully maintained his claim.

Part two of the Simmons test, completely ignored by the First DCA below, is an essential element of a correct "prevailing" party analysis - one which does not defy logic. As detailed above, Ray clearly successfully maintained his claim in the federal civil rights action because he obtained the very relief sought therein, i.e., reinstatement; he prevailed in "essence" even though not through a formal merits determination. Williams, supra, at p. 366.

That the party making the claim has "prevailed" where that party obtains the relief sought even though not through a formal merits

determination was also the view expressed by the Third DCA in a somewhat similar factual situation in State, Dept. of HRS v. Hall, 409 So.2d 193 (Fla. 3d DCA 1982). Hall involved the appeal from an award of attorney's fees by the Career Service Commission pursuant to a Commission rule awarding attorney's fees to an employee that "prevails." Hall, who had been suspended from employment, challenged this disciplinary action. Prior to the scheduled hearing date, HRS unilaterally voided the suspension and reinstated Hall with full back pay; the Commission granted Hall attorney's fees nevertheless and HRS appealed. The Third DCA agreed that Hall was a "prevailing" party entitled to attorney's fees since her rights were vindicated in that HRS granted her the relief she could have obtained from the Commission. Likewise, Ray was a "prevailing" party since his rights were vindicated through the settlement in that he obtained the relief (i.e., reinstatement) sought in the federal court.

That Ray's rights were vindicated through a settlement agreement rather than a formal merits determination does not make him any less a "prevailing" party. The following cases are persuasive authority for the proposition that a "prevailing" party includes those parties who have successfully maintained their claims through settlements:

1. Maher v. Gagne, 448 U.S. 122 (Conn. 1980) - prevailing through settlement rather than through litigation does not preclude a party's claiming attorney's fees as the prevailing party;

2. McManama v. Lukhard, 464 F. Supp. 38 (W.D. Va. 1978), aff'd and remanded on other grounds 616 F.2d 727 (4th Cir. 1980) - where settlement clearly accomplished goals of civil rights suit, plaintiffs could properly be deemed prevailing parties;

3. Goodwin v. D'Elia, 504 N.Y.S.2d 389 (1986) - fact that litigation was settled did not preclude claim for attorney's fees as prevailing party where the settlement accomplished the goal of the civil rights claim; and

4. Indiana Bureau of Motor Vehicles v. Zimmerman, 476 N.E.2d 114 (Ind. 1985) - lack of formal judicial relief did not, of itself, deprive one of prevailing party status - attorney fee award may be appropriate even though plaintiffs vindicated their rights by settlement.

As in Goodwin, supra, Ray undeniably accomplished the goals of his federal civil rights action - he obtained reinstatement through the settlement.

The differing views on who is a "prevailing" party has led to inconsistent determinations among the District Courts of Appeal as to the award of statutory attorney's fees. In the First DCA, the Councilmen are prevailing parties but would not be under the Third DCA's Simmons two-part test. In order that a logical and just result be reached herein, the two-part Simmons test should be embraced. Accordingly, Ray would be the "prevailing" party in the federal civil rights action making the award of any statutory attorney's fees to Franklin, Grant and Thornber erroneous.

POINT ON CROSS-APPEAL NO. II:

THE DECISION OF THE FIRST DCA IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985) WITH REGARD TO THE EFFECT OF A FEE AGREEMENT BETWEEN THE ATTORNEY AND CLIENT ON THE AMOUNT OF ATTORNEY'S FEES WHICH MAY BE AWARDED BY THE COURT.

In 1985, this Court considered the computation of a reasonable attorney's fee under Section 768.56, a now repealed Florida statute authorizing the courts to award attorney's fees to the prevailing party in a medical malpractice action, in the case of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In Rowe, the Court noted a perceived lack of objectivity and uniformity in court-determined reasonable attorney's fees. Id. at p. 1149. In order to rectify that situation, the Rowe Court set forth a detailed analysis of the criteria courts of this state should utilize in determining reasonable attorney's fees.

The Rowe opinion placed a cap on the amount of attorney's fees which a court could award. Specifically, the opinion stated that:

> ... in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client. Id. at p. 1151.

That Rowe sets a cap in this way on the amount of attorney's fees which can be awarded was confirmed in a decision just recently released by this Court. Standard Guaranty Ins. Co. v. Quanstrom, 15 F.L.W. 23, 24 (Fla. Jan. 1, 1990).

Although Rowe discussed the cap on fees imposed by the attorney-client fee agreement in the context of contingency fee cases, that cap is not applicable in contingent fee cases only. For example in Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989), this Court answered the certified question of whether the trial court is limited by a non-contingent fee agreement between attorney and client in the affirmative. Id. at p. 1023. In so holding, the Brea opinion rejected the defense counsel's argument that the Rowe cap applied only to contingent fee cases. Id.

The present case involves noncontingent fee agreements between Day, and his clients, Franklin, Grant and Thornber. Pursuant to Rowe, attorney's fees cannot be awarded to Franklin, Grant and Thornber and against the City in excess of the fee agreement between Day and his clients, i.e., the amount to be awarded is capped by such agreements.

In its Opinion filed April 14, 1989, the First DCA affirmed the Circuit Court's award of attorney's fees to Grant in the sum of $7,500.00. Such an award expressly and directly conflicts with Rowe in that it ignores the cap imposed by the Supreme Court of the fee agreement reached by the attorney and his client.

Grant's testimony at trial clearly established that he was to pay Day nothing for his representation:

> COURT: What did you agree to pay him?
>
> A.: I didn't agree to pay anything
>
> COURT: What is your understanding of your financial obligation to Mr. Day for his fees in the event this Court does not award you any?
>
> A: As far as I'm, concerned, I had no obligation.
> (Tr. page 50, lines 1-6)
>
> * * * *
>
> COURT: Mr. Grant, does the Court understand your testimony to be that your understanding of your arrangement with Mr. Day is if he gets paid anything it comes from the City and nothing from you? Is that your understanding?
>
> A: That's my understanding, yes, sir.
>
> Q: Mr. Grant, will you tell the Court whether or not you had an attorney/client position with me during the course of this litigation?
>
> A. Yes --...
> (Tr. p. 51, lines 4-12)

Even the First DCA acknowledged that although Grant had hired Day, he had never agreed to pay him any fees. Grant, supra, at p. 234. Nevertheless, it proceeded to affirm an award of attorney's fees to Grant in the sum of $7,500.00. Id. at p. 238. Since the client agreed to pay Day nothing for his representation, the court's award of $7,500.00 in attorney's fees to

Grant undeniably exceeded the fee agreement between Day and Grant in direct contravention of the Florida Supreme Court's directive as to a cap in Rowe.

The Circuit Court, finding violations of the Sunshine Law by Franklin and Thornber, held that those two City council members were not entitled to attorney's fees. Grant, supra, at p. 234. On appeal, the denial of recovery of attorney's fees to Franklin and Thornber was reversed and the matter remanded to the trial court for entry of judgment for such an award. Id. at p. 238. Because of the stay of proceedings granted by this Court's order accepting jurisdiction dated January 12, 1990, no such judgment has been entered.

While the exact amount of attorney's fees to be awarded Franklin and Thornber has not yet been set by the court, Rowe makes clear that the court's award can be no more than the fee agreement reached between those two and Day. Thornber testified at trial that an agreement was reached with Day as to the hourly amount to be charged her:

> Q. Okay. Can you tell the Court what fee that you agreed to pay initially in 1981, if you remember an hourly rate?
>
> A. Oh, uh, I believe it was $75 and then in succeeding years it went up to -- I think in 1982 it went up to $85 and I believe in "83 it went up to, I believe, $90.
>
> Q. Did you agree to that?
>
> A. Yes.
> (Tr. p. 29 lines 9 - 16.)

Under Rowe then, the attorney's fees which can be awarded Thornber cannot be determined utilizing higher hourly rates than those to which Thornber testified she had agreed.

At trial Franklin also testified as to his agreement with Day:

> Q. Okay, sir, did you come and visit with me about representing you?
>
> A. Yes, sir, I did.
>
> Q. All right. Did you understand that I was going to represent you in an attorney/client relationship?
>
> A. Yes, sir.
> (Tr. p. 76, lines 15-20.)

* * * *

Q. Do you remember what I quoted you for an hourly rate at that time, 1981?

A. If you'll give me a second I'll look it up, sir.

Q. All right

A. $75 an your [sic], sir.

Q. All right, sir. Did you agree to pay that fee?

A. No, sir.
(Tr. p. 77, lines 6 - 12.)

* * * *

Q. All right. Can you tell the Court whether or not you expected that the Council -- I beg your pardon, that the City would be paying your attorney fees if you prevailed in the action, in this action today?

A. Not only did I expect it, but I was advised legally and in reading the Florida Statute, that's what it says.
(Tr. p. 77, lines 17 - 22.)

As with Grant, Franklin never agreed to pay Day anything for his representation. Instead both Grant and Franklin expected the City to pay the attorney's fees incurred. Admittedly, Franklin testified he felt a moral obligation to Day for the job he did, but no agreement for Franklin to compensate Day was ever reached. (Id.; Tr. p. 78 lines 6 - 7.) Therefore, under Rowe, no attorney's fees can be awarded because Franklin effectively agreed to pay Day nothing.

In summary, Rowe places a cap on the amount of attorney's fees which the court can award, i.e., the attorney/client fee agreement. The award of $7,500.00 to Grant was erroneous in that it exceeded the cap set by Rowe; Grant never agreed to pay Day anything - he expected the City to pick up the tab. While no attorney's fees have yet been set by the court for Franklin and Thornber, if they are determined to be entitled thereto by this Court, the Rowe cap must be respected. Franklin, like Grant, should receive $0.00, the amount he agreed to pay Day for his representation. The award to Thornber, who testified she agreed to be charged a specified

hourly rate, must be determined by utilizing hourly rates which do not exceed the hourly rate to which she agreed.

B. ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER

POINT ON APPEAL NO. I

Count II of the Amended Complaint filed in the Circuit Court by Franklin, Grant and Thornber sought reimbursement of attorney's fees pursuant to Section 111.07 for bringing an action to enjoin the recall petition filed by citizens seeking the Council members' removal on the basis of alleged misconduct. (R. at pp. 16-19.) This count was dismissed by the trial court, and the dismissal was affirmed upon appeal, on the ground that said statute did not encompass such situations. Grant, supra at pp. 233 and 238. Specifically, both courts found Section 111.07 authorized reimbursement of attorney's fees only to party-defendants; Franklin, Grant and Thornber were party plaintiffs in the action for which reimbursement of attorney's fees was sought.

The initial brief of Franklin, Grant and Thornber in urging the reversal of the denial of reimbursement of attorney's fees relies to a great extent on the case law; however, it neglects to directly address the statutory language of Section 111.07. In pertinent part, this statute provides:

> Any...municipality...of the state is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers...for an act or omission arising out of and in the scope of his employment or function...Defense of such civil action shall include, but not be limited to, any civil rights lawsuit seeking relief personally against the officer...If any...Municipality is authorized pursuant to this section to provide any attorney to defend a civil action arising from a complaint for damages or injuries suffered as a result of any of its officers...and fails to provide such attorney, then said...municipality...shall reimburse any such defendant who prevails in the action for court costs and reasonable attorney's fees. (Emphasis added)

The thrust of Section 111.07 is clearly to reimburse the public officer for his costs and attorney's fees incurred in defending a civil action instituted against him. Franklin, Grant and Thornber, as plaintiffs in the action for injunctive relief from recall petition, simply do not come within the statutory directive of reimbursement of prevailing defendants.

Error is asserted on the part of the appellate court in strictly construing Section 111.07 and its use of the "vague" word "defendant." (Initial Brief of Appellants at pages 19 and 29.) On the contrary, the word "defendant" is extremely clear and precise. Even a lay person would have no difficulty in identifying the defendant in a legal action. Black's Law Dictionary defines a defendant as:

> the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case. Black's Law Dictionary 377 (5th ed. 1979).

Undeniably, Franklin, Grant and Thornber were the prevailing parties in the action for injunctive relief, but they were the parties seeking relief therein, rather than the defendants.

Since the term "defendant" is in no way ambiguous, the trial and appellate courts had no reason to construe it, strictly or otherwise. It is a fundamental rule of statutory construction that where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. In that situation, the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984); Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918). A court is bound by the unambiguous terms of a statute. Cassady v. Consolidated Naval Stores Co., 119 So.2d 35 (Fla. 1960).

The rules of statutory construction are to be used only in cases of doubt and should never be used to create doubt, only to remove it. Englewood Water Dist. v. Tate, 334 So.2d 626 (Fla. 2d DCA 1976). Franklin, Grant and Thornber are attempting to cast doubt on who the legislature has explicitly directed be reimbursed, i.e. prevailing defendants. Since the language of Section 111.07 is clear and limiting reimbursement to prevailing defendants is not unreasonable, the courts have no power to go outside the statute and give a different meaning to the word defendant used therein. Its plain and ordinary meaning, i.e., the party against whom

relief is sought, must be utilized. Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

Despite the explicit requirements for reimbursement set forth in Section 111.07, Franklin, Grant and Thornber assert that because of 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, they are entitled to attorney's fees as sought in Count II of their amended complaint. Reliance is placed on Lomelo v. City of Sunrise, 423 So.2d 974 (Fla. 4th DCA 1982), for this proposition; however, that case is easily distinguishable.

In Lomelo, attorney's fees were sought from the city by its mayor who had been successful in defending a felony indictment against him. Neither Section 111.07 nor any other statute or city ordinance, authorized or required reimbursement; apparently Section 111.07, which is addressed to civil actions, did not apply as the mayor was the target of a criminal, as opposed to a civil action. Moreover, while the mayor was successful in obtaining attorney's fees, this success was in the context of his defense of an action against him. The present case involves attorney's fees sought for the successful prosecution of an action brought by a public official.

Reliance for entitlement to reimbursement is also placed on Ferrara v. Caves, 475 So.2d 1295 (Fla 4th DCA 1985). Facially, the Ferrara case may appear to support the position of Franklin, Grant and Thornber because of factual similarities. Both involve an attempt by public officials to have a political subdivision pay for attorney's fees incurred in successfully challenging a recall attempt through the obtaining of injunctive relief. In Ferrara, the Fourth DCA held that the Town of Pembroke Park was indeed required to pay reasonable attorney's fees incurred by the mayor and town commissioners.

Nevertheless, Ferrara is distinguishable from the present case in that the court therein was not addressing a request for attorney's fees under

Section 111.07. Instead, the award of attorneys fees was predicated on the "spirit" of the common law principles set forth in Lomelo. Franklin, Grant and Thornber specifically requested attorney's fees pursuant to Section 111.07. Therefore, in order to prevail, they must meet the conditions of that statute. However, it is impossible for them to do so since they were plaintiffs rather than defendants in the action for which the attorney's fees were sought.

Likewise, the recent Florida Attorney General's opinion cited in the Initial Brief of Appellants is not dispositive on this issue. The question to which the Attorney General responded in 1989 Op. Att'y Gen. Fla. 89-69 (October 6, 1989), was whether:

> A city council member (is) entitled to be reimbursed by the municipality for reasonable attorney fees incurred by the council member in successfully challenging a petition for recall pursuant to Section 100.361, F.S., or for obtaining declaratory relief, where the sole grounds for recall were based on the actions of the council member performed in the course of his legislative duties while serving a municipal purpose. Id.

While this question was answered affirmatively, the key point is that neither the question posed nor the answer given addressed entitlement pursuant to Section 111.07 - the issue presently before this court. In fact, in reaching his conclusion, the Attorney General relied on Ferrara and Lomelo, which, as noted above, are also distinguishable for not considering attorney's fees in the context of Section 111.07.

Franklin, Grant and Thornber attempted to get around the clear statutory language of Section 111.07 by arguing that their actions in instituting an action for injunctive relief were an effort to "defend" against illegal recall petitions. This argument is simply another attempt to stretch the plain meaning of the statutory language which utilizes the words "defense" and "defendant" once and the word "defend" twice. A defense is :

> that which is offered and alleged by the party proceeded against in an action or suit.... (Emphasis added.) Blacks Law Dictionary, supra.

By seeking injunctive relief, Franklin, Grant and Thornber were undeniably not the parties proceeded against.

To accept the arguments of Franklin, Grant and Thornber, this Court would be second-guessing the intent of the Legislature in enacting Section 111.07, which intent is expressed in the plain and unambiguous terms used therein. Had the intent been for public officials to be reimbursed for attorney's fees whether acting offensively (i.e. instituting an action for injunctive relief) or defensively (opposing a complaint filed against the official), it would have been a simple matter for the statute to *so* state or at least for it to not limit reimbursement to a prevailing "defendant."

Certainly it makes sense that the Legislature wanted to limit the responsibility of a political subdivision for the payment of attorney's fees, the bills for which could be quite high. A line had to be drawn somewhere. What better bright-line limit to impose than only paying attorney's fees for the prevailing defendants. This arrangement allows the protection of officials from attack but does not authorize officials to institute litigation on their own. If the consequences of the present statute are unpalatable, the recourse is to work to change the statute, not for a court to reach a tortured construction of its wording.

The entitlement of Franklin, Grant and Thornber to attorney's fees from the City is doubtful even putting aside the statutory requirement of Section 111.07 that they be prevailing defendants. First, Section 111.07 authorizes reimbursement where the action arose from acts or omissions of a public office in the course and scope of his function. The recall petition was based on allegations that these City Council members acted illegally in meeting privately to discuss official business in violation of Florida's Sunshine Law. (See Appendix Document A.) Such actions are clearly outside the scope and course of said officials' function.

Secondly, the reimbursement of attorney's fees to Franklin, Grant and Thornber is an improper use of public funds. It is a fundamental

proposition that public funds may be expended only for a public purpose. A municipality has no interest in the outcome of a recall election and should pay no costs associated therewith. Williams v. City of Miami, 42 So.2d 582 (Fla. 1949); 1980 Op. Att'y Gen. Fla. 80-075 (August 19, 1980). The rationale is that a recall election is a personal matter between the electors and the officer whose recall is being sought; thus, no public purpose exists for which public funds may be expended. Id. at p. 188. On the other hand, the municipal officer himself has a sufficient property right in his office to permit him individually to challenge in a separate action the sufficiency of a recall petition. If Franklin, Grant and Thornber wanted to protect their property rights in a municipal office, they could indeed do *so* offensively by seeking injunctive relief and footing their own legal bills.

POINT ON APPEAL NO. II

Point Two on appeal raises an issue not set forth in Petitioner's Jurisdictional Brief. A Motion to Strike the argument as to this point is now pending. Not knowing how this Court will rule on said motion, the City briefly responds to this argument. Franklin, Grant and Thornber assert the error of a denial of an award of attorney's fees pursuant to Section 57.105, Fla. Stat. (Supp. 1989). This statute directs the court to award a reasonable amount of attorney's fees to be paid to the "prevailing party" where the court finds that there was a complete absence of a justiciable issue of either fact or law raised by the complaint or defense of the losing party.

The only count of Franklin, Grant and Thornber's six count Amended Complaint on which they could possibly be deemed to have prevailed *so* as to authorize an award under Section 57.105 is Count IV; Counts 11, 111, V and VI were dismissed by the trial court and final summary judgment was entered for the City on Count I. Grant supra, at pp. 232-233. Count IV sought the award of attorney's fees pursuant to Section 111.07, Fla. Stat. (1983),

with regard to the federal civil rights suit instituted by Ray. (R. at pp. 21-24). The City defended against the award of attorney's fees against it based on the very language of Section 111.07 which requires a municipality to reimburse a public official who is a "prevailing Defendant." (Tr. at p. 16.) [See detailed discussion of Section 111.07 in the argument as to Point I on Cross-Appeal, supra.] It was Ray, and not the City or Franklin, Grant and Thornber, who prevailed in the federal lawsuit as Ray obtained the very relief sought therein, i.e. reinstatement to employment.

Undeniably, there is a conflict in the case law as to when a party "prevails" for purposes of an award under Section 111.07. Given this uncertainty in the law and the case authority on which the City has relied in asserting that Franklin, Grant & Thornber did not prevail, it cannot reasonably be determined that the City was asserting a defense which was completely lacking in merit and frivolous. In fact, the opposite conclusion is compelled; Franklin, Grant and Thornber are not entitled to the recovery of attorneys fees under either Section 111.07 or Section 57.105.

It should be of some consequence that two separate courts have denied attorney's fees pursuant to Section 57.105. The appellate court specifically found that the City presented justiciable issues of both law and fact in its defense. Grant, supra, at p. 238. The trial court, which personally heard all evidence at the trial of this matter, likewise found the City to have raised justiciable issues in its defense. (R. at page 249.)

Franklin, Grant and Thornber's arguments on this particular point on appeal are to a great extent irrelevant and an attempt to muddy the waters. Pages in their brief are devoted to the procedural history of the federal case. Further, the City's alleged bad motives for not acceding to Franklin, Grant and Thornber's request for payment of attorney's fees are stressed. The details of the federal suit are only pertinent in so far as

the final result therein, i.e. did Franklin, Grant and Thornber "prevail" so as to provide a predicate for the suit based on Section 111.07 brought in the circuit court.

Likewise, the motives of the City in not paying the attorney's fees requested by Franklin, Grant and Thornber are of no consequence to the determination of entitlement to attorney's fees pursuant to Section 57.105; instead, the focus is upon whether or not the City raised a justiciable issue of law or fact in defending against the circuit court action. As discussed above, the issue of whether Franklin, Grant and Thornber "prevailed" in the federal suit was strongly grounded on the statutory language of Section 111.07 and the case law and thus was not so lacking in merit as to justify an award of attorney's fees under Section 57.105. It is for the assertion of a frivolous defense and not bad motives that Section 57.105 authorizes the award of attorney's fees.

Not only are portions of Franklin, Grant and Thornber's argument irrelevant, some statements therein are in fact highly improper as well. At page 36 of Petitioners' Brief, comments are made about the "misconduct" of the trial judge; the accusation is made that the trial judge "contrived" certain record evidence. The Florida Supreme Court has admonished attorneys that:

> statements [in briefs] are not to contain undecorous statements relating to opposing counsel, the judge, or parties to the lawsuit. Jones v. Griffin, 138 So. 38, 40 (Fla. 1931)

Despite this directive from the Court, opposing counsel has unleashed a personal attack upon a member of the judiciary. Such tactics are apparently a continuing pattern of Day's as his Amended Initial Brief was stricken by order of the First DCA below on July 7, 1988, as containing racist and sexist remarks. Moreover, Day was publicly reprimanded for his "flagrant" violation of the Florida Rules of Appellate Procedure by order of the First DCA filed November 15, 1988. These actions cannot and should not be tolerated.

POINT ON APPEAL NO. III

A motion to strike the portion of Franklin, Grant and Thornber's brief as regards this point on appeal is currently pending. As with the previous point on appeal, the City will nonetheless respond briefly thereto as the ultimate'dispositionof that motion is unknown.

Point Three on appeal asserts that the First DCA erred for denying attorney's fees pursuant to Section 59.46, Fla. Stat. (Supp. 1989) for successfully appealing the circuit court's denial of attorney's fees under Section 111.07 to Franklin, Grant and Thornber. Section 59.46 provides in pertinent part that

> ...any provision of a statute...providing for the payment of attorney fees to the prevailing party shall be constituted to include the payment of attorney's fees to the prevailing party on appeal.

Franklin, Grant and Thornber urge that this statute requires Section 111.07 to be construed to authorize the payment of their attorney's fees in the appeal which reversed the trial court's denial of attorney's fees to Franklin and Thornber.

In order for an award of attorney's fees to be appropriate under Section 59.46, the party seeking those fees must first be entitled to attorney's fees under the provision of another statute. In this case, that statute is Section 111.07 on which Franklin, Grant and Thornber relied in bringing their multi-count action in the circuit court. Section 111.07 authorizes the payment of attorney's fees to prevailing defendants.

As has been thoroughly detailed in Point I on Cross-Appeal, Ray, not Franklin, Grant and Thornber, prevailed in the federal civil rights action; therefore, Franklin, Grant and Thornber are not entitled to attorney's fees under Section 111.07 as Section 59.46 is predicated on recovery under Section 111.07, the lack of entitlement of Franklin, Grant and Thornber to recover under Section 111.07 precludes their recovery under Section 59.46.

CONCLUSION

As has been fully set forth herein, Franklin, Grant and Thornber were not prevailing parties within the meaning of Section 111.07 authorizing their entitlement to attorney's fees. Therefore, the First DCA's affirmance of the award of attorney's fees to Grant should be reversed and the First DCA's reversal of the denial of attorney's fees to Franklin and Thornber should be reversed. If this Court should determine that Franklin, Grant and Thornber are indeed entitled to attorney's fees under Section 111.07 as prevailing parties, the First DCA's award of attorney's fees should be modified to recognized the cap imposed by Rowe, supra. In no event can Franklin, Grant and Thornber be awarded more than their fee agreement with Day.

None of Franklin, Grant and Thornber's Points on Appeal are well taken. The First DCA's affirmance of the dismissal of Count II must be affirmed as Section 111.07, which authorizes the award of attorney's fees to prevailing defendants, would not by its very terms encompass situations where a public official is a prevailing plaintiff. Because the City raised a justiciable issue of law as to the "prevailing" defendant, the City's defense against Count IV was not frivolous; accordingly, the First DCA's denial of attorney's fees pursuant to Section 57.105 must be affirmed. Since Franklin, Grant and Thornber are not entitled to recover under Section 111.07, a prerequisite to recovery under Section 59.46, the First DCA's denial of appellate attorney's fees must be affirmed.

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that a true and accurate copy of the foregoing Initial Brief and Answer Brief of Respondent/Cross-Petitioner was furnished to George E. Day, Esq., 32 Beal Parkway, S.W., Fort Walton Beach, Florida 32548 by regular U.S. Mail, postage prepaid, this 20th day of February, 1990.

Bert Moore
Florida Bar #0336378
MOORE, KESSLER & MOORE
P.O. Box 746
Niceville, Florida 32578
(904) 678-1121
Attorney for Respondent/
Cross-Petitioner

OF COUNSEL:

James E. Moore
Florida Bar #056540
MOORE, KESSLER & MOORE
P.O. Box 746
Niceville, Florida 32578
(904) 678-1121

Alice Hale Murray
Florida Bar #0794325
MOORE, KESSLER & MOORE
P.O. Box 746
Niceville, Florida 32578
(904) 678-1121