IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A	)	Supreme Court
JUDGE, NO. 02-487	)	Case No. SC03-1171

JUDICIAL QUALIFICATIONS COMMISSION'S
ANSWER BRIEF

Thomas C. MacDonald, Jr.
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
813/254-9871
813/258-6265 Facsimile

General Counsel for the Florida Judicial Qualifications Commission

Charles P. Pillans, III
Florida Bar No. 0100066
BEDELL, DITTMAR, DeVAULT, PILLANS & COXE, P.A.
101 East Adams Street
Jacksonville, Florida 32202
904/353-0211
904/353-9307 Facsimile

Special Counsel to the Florida Judicial Qualifications Commission

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT.. 6

I. The Respondent Waived The Claim for Attorneys' Fees 6

II. The Respondent is Not Entitled to Attorneys' Fees Under the Common Law of Florida..................... 7

A. The Charges Did Not Arise Out Of or In Connection With the Respondent's Official Duties 10

B. The Charges Involved Conduct That Did Not Serve a Public Purpose....................... 20

III. Is Respondent's Claim Barred by Sovereign Immunity? 22

IV. No Additional Parties Are Proper or Necessary For a Full Determination of the Issues Presented 28

CONCLUSION... 28

<u>TABLE OF AUTHORITIES</u>

<u>Cases</u> <u>Page</u>

<u>American Home Assurance Company v. National Railroad Passenger Corporation</u>, 908 So.2d 459,(Fla. 2005) 26

<u>Chavez v. City of Tampa</u>, 560 So.2d 1214 (Fla. 2d DCA) 21, 25, 26,27

<u>Concrete & Lumber Enterprises Corp. v. Guaranty Business Credit Corp.</u>, 829 So.2d 247 (Fla. 3d DCA 2002)......................... 7

<u>Dade County v. Carter</u>, 231 So.2d 241(Fla. 3d DCA 1970) 27

<u>Ellison v. Reid</u>, 397 So.2d 352 (Fla. 1st DCA 1981).................. 7, 8, 20, 23, 24 ,27

<u>Estes v. City of North Miami Beach</u>, 227 So.2d 33 (Fla. 1969) 23

<u>Green v. Sun Harbor Homeowners' Association, Inc.</u>, 730 So.2d 1261 (Fla. 1998) 7

<u>In re Gloeckner</u>, 626 So.2d 188 (Fla. 1993) 18

<u>In re Lee</u>, 336 So.2d 1175 (Fla. 1976)....................... 18

<u>In re Rodriguez</u>, 829 So.2d 857 (Fla. 2002) 18

<u>Inquiry Concerning Esquiroz</u>, 654 So.2d 558 (Fla. 1995) 18

<u>Inquiry Concerning Fowler</u>, 602 So.2d 510 (Fla. 1992) 18

<u>Kluger v. White</u>, 281 So.2d 1 (Fla. 1973)............... 26, 27

<u>Lomelo v. City of Sunrise</u>, 423 So.2d 974 (Fla. 4th DCA 1982) 22, 23, 24, 27

<u>Markham v. State</u>, 298 So.2d 210 (Fla. 1st DCA 1974).......... 24

<u>Miller v. Carbonelli</u>,80 So.2d 909 (Fla. 1955) 22, 23

TABLE OF AUTHORITIES (cont'd)

Cases Page

Nuzum v. Valdes, 407 So.2d 277 (Fla. 3d DCA 1981) 20

Peck v. Spencer, 26 Fla. 23, 7 So. 649 (1890) 22, 23

Precision Tune Auto Care, Inc. v. Radcliffe, 815 So.2d 708 (Fla. 4th DCA 2002) 7

State v. Egan, 287 So.2d 1 (Fla. 1973)....................... 26

State v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991)................ 26

Stockman v. Downs, 573 So.2d 835 (Fla. 1991).................. 7

Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990) 5, 6, 7, 8, 19, 20, 21, 22, 23, 24, 25, 26,27

Williams v. City of Miami, 42 So.2d 582 (Fla. 1949) 22, 23

Constitutional Provisions

Article X, Section 13, Florida Constitution 25

Article XII, Section 6(a), 1968 Florida Constitution 26

Statutes

Section 57.111(2), Florida Statutes 7

Section 111.07, Florida Statutes........................6, 24, 27

Chapter 72-36, Laws of Florida, 1972......................... 24

Chapter 79-139, Laws of Florida, 1979........................ 25

TABLE OF AUTHORITIES (cont'd)

Other Authorities

Attorney General's Opinion 93-21,
1993 WL 361721 (Fla. A.G.) 9, 20

Canon 1, Code of Judicial Conduct 2

Canon 2, Code of Judicial Conduct 2

Canon 3D(1), Code of Judicial Conduct 10, 18

Canon 5, Code of Judicial Conduct 2

Canon 5A(1), Code of Judicial Conduct 19

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A	)	Supreme Court
JUDGE, NO. 02-487	)	Case No. SC03-1171

STATEMENT OF THE CASE AND FACTS

On July 16, 2003, the Judicial Qualifications Commission filed a Notice of Formal Charges against Judge Gregory P. Holder, Circuit Judge of the Thirteenth Judicial Circuit of Florida.

The first charge alleged that on or about January 1998, Judge Holder, who at the time held the rank of Lieutenant Colonel, United States Air Force Reserve, plagiarized a research report for an Air War College course he was taking at MacDill Air Force Base, which research report was submitted in fulfillment of a writing requirement of the course and generally considered a prerequisite for a promotion to Colonel.[1] The second charge was that in submitting the plagiarized research report, Judge Holder certified that he had not used another student's research report and that the creative process of

[1] The paper was marked as Exhibit 2 at the hearing. A copy with the plagiarized parts highlighted is in the Commission's Appendix at Tab 1.

researching, organizing and writing his report represented only his own work, and that this certification was false and constituted a federal criminal violation of Section 18, United States Code § 1001 for knowingly and willfully making a materially false statement in a matter that was within the jurisdiction of the executive branch of the Government of the United States. The Notice of Formal Charges alleged that, if the acts occurred, they were in violation of Canon 1 of the Code of Judicial Conduct which requires a judge to uphold the integrity of the judiciary, Canon 2 which requires judges to avoid impropriety and the appearance of impropriety in all of the judge's activities, and Canon 5, which requires that a judge conduct all of the judge's extra-judicial activities so that they do not demean the judicial office. A copy of the Notice of Formal Charges is included in Respondent's Appendix at Tab 1.

An Order to Show Cause why the Hearing Panel should not recommend to the Court that the Respondent be suspended while the charges were pending was also filed, but the matter was never heard.

The Respondent filed an Answer which was a general denial and did not plead a claim for attorneys' fees. (Commission's Appendix, Tab 2). The Respondent during the pre-hearing

proceedings filed three Pre-Hearing Statements, as required by orders of the Hearing Panel, none of which raised a claim for attorneys' fees.[2] (Commission's Appendix, Tabs 3, 4, 5).

The case was tried before a Hearing Panel of the Commission from June 6 to June 14, 2005[3]. On June 23, 2005, the Hearing Panel entered an Order of Dismissal. In the Order, the Hearing Panel stated that "the charges concerned alleged plagiarism by Judge Holder of an Air War College research paper which Judge Holder wrote while a Lieutenant Colonel in the Air Force Reserve". The Panel found that "the evidence was extremely conflicting and the implications disturbing", and that while "the evidence was troublesome [it] did not rise to the level of clear and convincing evidence of guilt." A copy of the Order of Dismissal is included in Respondent's Appendix at Tab 4.

The Hearing Panel at the same time recommended that this Court award costs in favor of Judge Holder in an appropriate amount to be considered by the Hearing Panel upon the filing of

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[2] Although the Respondent's last pre-hearing statement is entitled "Fourth Amended Pre-Hearing Statement", there were actually three complete statements filed by the Respondent with two supplements or amendments relating only to the identification of witnesses.

[3] The delay in holding the hearing was due in large part to the 2004 hurricanes that struck Florida.

a motion and detailed schedules. (Commission's Appendix, Tab 6). The Hearing Panel did not either in the order on costs or otherwise make any reference to an entitlement to attorneys' fees.

On July 25, 2005, Respondent filed his Motion to Tax Costs and a Motion for Award of Attorneys' Fees, raising for the first time a claim for such fees. (Commission's Appendix, Tab 7). In the Motion, which the Respondent did not include in his Appendix, he asked for an award of $1,779,692.00 in fees. (Commission's Appendix, Tab 7).

On December 2, 2005, the Court granted the Respondent's Request for Oral Argument on his Motion for Attorneys' Fees and directed that the parties file supplemental briefs with the Court, including, but not limited, to the following issues:

1. The specific basis and authority for an award of attorneys' fees in this case;
2. Any prohibitions or limitations with regard to a monetary award in this case including, but not limited to, issues of sovereign immunity or otherwise; and

3. The joinder of any additional parties, if any, necessary for proper or a full determination of the issues presented.

SUMMARY OF THE ARGUMENT

The Respondent waived the claim for attorneys' fees because it was raised for the first time in a post-dismissal motion.

The Respondent cannot prevail on his claim for attorneys' fees based upon the common law of Florida as established in Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990).

The Respondent cannot satisfy the first prong of Thornber because the charges brought by the Judicial Qualifications Commission did not arise out of and were not in connection with the Respondent's official duties, but involved the Respondent's personal activities to advance his career as an Air Force Reserve officer. The Respondent's participation as an undercover agent in a federal corruption investigation is not a part of his judicial duties. In addition, Respondent's argument that there was a connection between the Respondent's participation as an undercover agent in a federal corruption investigation and an attempt by unidentified conspirators to derail his participation

by fabricating the paper at issue was not the subject of a finding by the Hearing Panel or supported by the evidence.

The Respondent's conduct does not satisfy the second prong of Thornber because the conduct with which he was charged, plagiarizing a research paper for an Air Force Air War College course, was not done while serving a public purpose.

Respondent's claim may be barred by sovereign immunity if the Court determines that Section 111.07, Florida Statutes, has supplanted the common law adopted in Thornber because the statute is not applicable to the facts of this case.

Finally, the Commission is not aware of any additional parties that are necessary for a proper and full determination of the issues presented by the Motion for An Award of Attorneys' Fees.

ARGUMENT

I.

The Respondent Waived The Claim for Attorneys' Fees

Respondent did not plead an entitlement to attorneys' fees in his Answer, nor did he raise it in the three pre-trial statements he filed pursuant to orders of the Hearing Panel. The claim for fees was raised for the first time following the Order of Dismissal and for this reason, the claim should be

treated as having been waived. Stockman v. Downs, 573 So.2d 835 (Fla. 1991); Green v. Sun Harbor Homeowners' Association, Inc., 730 So.2d 1261, 1263 (Fla. 1998) ("Stockman is to be read to hold that the failure to set forth a claim for attorney fees in a complaint, answer, or counterclaim, if filed, constitutes a waiver."); Concrete & Lumber Enterprises Corp. v. Guaranty Business Credit Corp., 829 So.2d 247, 249 (Fla. 3d DCA 2002) (parties cannot raise claims for attorney fees for the first time in a post-dismissal motion); Precision Tune Auto Care, Inc. v. Radcliffe, 815 So.2d 708, 712 (Fla. 4th DCA 2002) (no waiver of the pleading requirement where entitlement to fees is raised for the first time in a post-trial motion).

II.
The Respondent is Not Entitled to Attorneys' Fees Under the Common Law of Florida

The Respondent bases his claim for attorneys' fees solely upon the common law of Florida citing as authority Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990) and Ellison v. Reid, 397 So.2d 352 (Fla. 1st DCA 1981)[4]. In Thornber, three Fort Walton Beach city council members sought reimbursement of their legal fees incurred in defending against a recall petition

[4] The Respondent's Motion was also based upon Section 57.111(2), Florida Statutes, but he has abandoned that claim.

based upon their private meeting to discuss a pledge to clean up city government by seeking the resignation of the city attorney and dismissal of the city manager and their vote at a public city council meeting for resolutions calling for the attorney's and manager's resignations. This Court held that the council members were entitled to reimbursement of their attorneys' fees under the common law holding that public officials are entitled to representation at public expense in litigation arising out of or in connection with the performance of their official duties. This Court then noted that

> unquestionably, the vote taken at the public meeting was within their official duties. There is a sufficient nexus between the firing of these employees and the Council members' official duties to satisfy the first prong of this test.

568 So.2d at 917.

In Ellison, the question was whether the Palm Beach County Property Appraiser properly expended public funds for the payment of attorneys' fees incurred by him in successfully defending charges of official misconduct before the Florida Ethics Commission. The charge was that the Property Appraiser improperly gave examination papers to his employees who were attending a training program sponsored by the Department of Revenue and plagiarized an appraisal report in order to obtain a

professional property appraiser's designation. The Circuit Court found that the expenditure for attorneys' fees was proper and the First District Court of Appeal affirmed because the Department of Revenue training program was required by statute to upgrade assessment skills in both state and local assessment personnel and "there is no doubt a valuable public purpose is served in protecting the effective operation and maintenance of the administration of a public office." (397 So.2d at 54). The District Court did not specifically address the issue of whether Ellison was entitled to be reimbursed for defending the plagiarism charge. *See also* Attorney General's Opinion 93-21, 1993 WL 361721 (Fla. A.G.), in which the Attorney General in answer to a question from a County Attorney stated that a County Judge was entitled to reimbursement from the State of expenses incurred in defending charges before the Judicial Qualifications Commission if "the proceedings arose out of or in connection with the performance of the judge's official duties ..."

A.

The Charges Did Not Arise Out Of or In Connection With the Respondent's <u>Official Duties</u>

The Respondent claims that "the Charges and the resulting litigation clearly arose out of or in connection with an attempt by an anonymous person or persons to interfere with Judge Holder's participation in the courthouse corruption investigation". (Respondent's Initial Brief, p. 16). Although Judge Holder refers to himself as a cooperating witness in a federal investigation, he also describes his involvement "as participation as an undercover agent in the courthouse corruption investigation". (Respondent's Initial Brief, p. 21). The Respondent then makes the contention that his participation in the corruption investigation was a part of his official duties, under Canon 3D(1) of the Code of Judicial Conduct, which provides that a judge shall take appropriate action when he receives information or has actual knowledge that a potential likelihood exists that another judge has committed a violation of the Code.

The Respondent contends that "overwhelming evidence at trial established the requisite connection to the courthouse corruption investigation, including fabrication of the purported

Holder paper". (Respondent's Initial Brief, p. 17). This "connection" was raised by the defense, not put in issue by the Commission, and was based upon speculation, not "overwhelming evidence". Moreover, the dubious contention ignores the substantial evidence as to why the paper was not a fabrication and even if it was, it was not done to discredit Judge Holder's participation in a corruption investigation.

The Respondent has cited favorable testimony supporting his contention that the Air War College paper was not written by him. (Respondent's Initial Brief, pp. 9-10). In so doing, he ignores the strong circumstantial evidence supporting the Commission's charges, including the following:

1. Respondent was a Lieutenant Colonel in the United States Air Force Reserve.

2. In 1997-98 the Respondent was enrolled in the Air War College at MacDill Air Force Base, Tampa, Florida, the completion of which was important for promotion to full Colonel.

3. As a requirement of the course, the Respondent wrote a research paper on the Anglo-American Combined Bomber Offensive in Europe During World War II (the "Holder paper").

4. The Respondent was the only member of the class who wrote on this topic.

5. On or about September 5, 1997, Colonel E. David Hoard, at the Respondent's request, faxed to the Respondent a paper he had written on the same topic in 1995 for an Air War College course (the "Hoard paper"). The fax cover page and the first two pages of the Hoard paper is in the Commission's Appendix at Tab 8.

6. Respondent has admitted that the handwriting on the cover of the Hoard paper, including changing the number and date of the course to the 1997-98 MacDill Air Force Base course and identifying the Respondent as the author, is his handwriting. (Commission's Appendix, Tabs 8 and 9, pp. 8-11).

7. The Hoard paper was retyped at the computer terminal of the Respondent's legal assistant, Lorraine Nasco, on or about December 5, 1997 and stored on the 1998 H drive backup tape of the Hillsborough County Courthouse computer network (the "H drive paper").

8. The Respondent cites the testimony of Lorraine Nasco that she typed the Air War College paper and the plagiarized paper is not the one she submitted to the Air Force (Respondent's Judicial Brief, p. 19), but ignores the evidence that in December 1997 Ms. Nasco was under stress and taking medication and described as "zonked out ... a wreck", that she

was so angry at the Respondent that she did not want to look at him or talk to him and just wanted out and that the courthouse records show that she was on vacation from December 22, 1997, with the exception of December 29th, through January 5, 1998, the day the paper was due. (Commission's Appendix, Tab 10, pp. 14-15).

9. When the paper was prepared, Respondent was transferring from the Juvenile to the General Civil Division of the Court, was physically moving his office and has admitted that it was a very stressful time, that it was very chaotic, that he had a tremendous workload and that his focus was different than on preparation of the paper. (Commission's Appendix, Tab 10, pp. 14-15).

10. Substantial portions of the H drive paper were incorporated verbatim, including typographical errors and unusual punctuation, into the Holder paper. (Commission's Appendix, Tabs 1 and 10, pp. 18-23).

11. The paper was due on January 5, 1998 and the Respondent has admitted that he went to his office at the courthouse on Sunday evening, January 4, 1998 to edit the paper on his computer (Commission's Appendix, Tab 9, pp. 17-19) and the Courthouse computer system shows that at 8:10 p.m. a file on

his computer was opened entitled “AWCPAPER”, although there is nothing in the file.

12. The Respondent admitted that the Holder paper bears his signature. (Commission’s Appendix, Tab 9, pp. 14-15).

13. The Holder paper bears the handwritten comments of Colonel William O. Howe, Jr., who was the grader of the 1997-98 MacDill Air Force Base Air War College research papers.

Although the Respondent asserts as a proven fact that the paper was fabricated as part of a plot or conspiracy to derail his participation as an undercover agent in the corruption investigation (Respondent’s Initial Brief, pp. 17-18), the Hearing Panel made no such finding. Instead, the Hearing Panel simply found that the evidence “did not rise to the level of clear and convincing evidence of guilt”.

In attempting to make the link between the paper and the Respondent’s participation as an undercover agent in the corruption investigation, the Respondent ignores compelling evidence that there was no relationship, including the following:

1. Judge Holder admitted that he discovered his paper missing in 2001 and, therefore, Judge Robert Bonanno who was seen in Judge

Holder’s office in July of 2000 could not have taken the paper.[5]

2. The Respondent’s participation in the investigation began in September of 2001.

3. The Hoard paper, from which portions were transposed and incorporated verbatim into the Holder paper, was stored on the courthouse backup tape in 1998, at least three years before the Respondent’s participation in corruption investigation began. (Commission’s Appendix, Tab 10, pp. 18-23).

4. The conspirators, according to the Respondent’s theory, would have had to obtain the courthouse backup tapes from the safe in which they were stored, fabricate the 1998 backup tape by adding the Hoard paper to it and/or on all subsequent backup tapes and return them to the safe in the

[5] The reference in Respondent’s Initial Brief (p.7) to this incident is apparently to suggest that Judge Bonanno was involved in the conspiracy.

courthouse. (Commission's Appendix, Tab 10, pp. 18-23).

5. The fabricators would have to write a paper on Judge Holder's topic and then incorporate the portions of the Hoard paper that were fabricated on the backup tape. (Commission's Appendix, Tabs 1, 10, pp. 18-23).

6. The conspirators would have had to obtain grading comments in the handwriting of Colonel Howe, including unique grading marks and arrows drawn through the text, and then place them on the Holder paper where they are relevant to the text of the paper. (Commission's Appendix, Tabs 1 and 10, pp. 18-26).

7. According to John Vento, one of the Respondent's witnesses, there were a number of factual inaccuracies in the Holder paper (Respondent's Appendix, Tab 12, pp. 37-44) which the conspirators would have to have inserted into the paper knowing they were

incorrect and then inserting comments by Colonel Howe questioning their inaccuracies. (Commission's Appendix, Tab 10, pp. 19-25).

While the Respondent presented expert testimony that all of this is technically possible, the conspiracy theory requires a level of skill, knowledge, access and sophistication that seems beyond imagination and certainly dispels speculation that the Holder paper was fabricated because of Judge Holder's participation in a corruption investigation.

The Commission has never argued that the charges were related to Judge Holder's judicial duties[6]. The Commission charged that if the alleged "extra-judicial" conduct was proven, it would impair the confidence of the citizens of this State and the integrity of the judicial system and demean Judge Holder's judicial office in violation of the Canons of the Code of Judicial Ethics and would, therefore, warrant discipline. (Respondent's Appendix, Tab 1). In this regard, the conduct with which Judge Holder was charged is no different from charges

[6] Special Counsel did not concede that the charges arose out of Judge Holder's official duties because of the argument that the Holder paper and the Hoard paper were stolen from the Judge's chambers (Respondent's Initial Brief, p. 17). Judge Holder kept his Air Force Reserve papers in a drawer in his desk at the

of illegal campaign contributions and misleading campaign reports, In re Rodriguez, 829 So.2d 857 (Fla. 2002); driving under the influence, Inquiry Concerning Esquiroz, 654 So.2d 558 (Fla. 1995); In re Gloeckner, 626 So.2d 188 (Fla. 1993); furnishing false information about an accident to a police officer, Inquiry Concerning Fowler, 602 So.2d 510 (Fla. 1992); or engaging in sexual activities in a parked automobile in a public parking lot, In re Lee, 336 So.2d 1175 (Fla. 1976). All of this conduct has been held to warrant disciplinary action although it had nothing to do with the judges' judicial duties.

The Respondent cites Canon 3D(1)of the Code of Judicial Conduct which provides that "a judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action." The Respondent then argues that his participation as an undercover agent was a part of his official duties. (Respondent's Initial Brief, pp. 16-17). This, however, overlooks the commentary to the Canon which makes clear that the "appropriate action" may include direct communication with the judge who committed the violation or other direct

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courthouse (Commission's Appendix, Tab 9, pp. 13-14), but this had nothing to do with his judicial duties.

action, if available, or to report the violation to the appropriate authority or agency. The Canon, however, does not authorize involvement as an undercover agent in an ongoing criminal investigation. Indeed, such conduct may call into question Canon 5A(1), which provides that "a judge shall conduct all of the judge's extra judicial actions so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

Judge Holder's dubious contention that his active participation as an "undercover agent" (Initial Brief, p. 21) in an investigation of alleged judicial corruption was part of his official duties is off the mark. The charges against Judge Holder were that he plagiarized a research paper which was the requirement of an Air War College course he was taking at MacDill Air Force Base as a prerequisite for a promotion to Colonel, and that he made a false statement that the research report was his own work, a federal crime under 18 U.S.C. §1001. His conduct was strictly for the purpose of advancing his career as an Air Force reserve officer and had nothing to do with his official duties as a circuit judge. The Respondent, therefore, does not meet the first prong of Thornber.

B.

The Charges Involved Conduct That Did Not Serve a Public Purpose

The Respondent contends, and the Commission has acknowledged, that the hearing on the formal charges served a public purpose.[7] This would satisfy the second prong of the test as stated in Thornber that "the litigation ... served a public purpose" (568 So.2d at 917).

There is a question, however, as to whether it is the purpose of the litigation in which the public official is involved or whether it is the purpose of the conduct with which he is charged that is relevant. There are a number of authorities for the proposition that the second prong of the Thornber test is that the conduct with which the public officer is charged must have been done while serving a public purpose. E.g, Ellison v. Reid, supra at 354; Nuzum v. Valdes, 407 So.2d 277, 279 (Fla. 3d DCA 1981); Attorney General's Opinion 93-21,

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[7] Judicial administration and public confidence in the judiciary was served by the hearing, if for no other reason than the fact that Judge Holder admitted on cross-examination that the judicial corruption investigation did not involve any judicial officers who are currently serving on the Hillsborough County bench. (Commission's Appendix, Tab 9, pp. 35-36).

1993 WL 361721 (Fla. A.G.). In fact, this Court in Thornber stated it both ways. This Court first said:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from their performance of their official duties while serving a public purpose. (Emphasis added).

568 So.2d at 916-917.

The Court then stated:

> For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose. (Emphasis added).

568 So.2d at 917.

In Thornber, this Court cited Chavez v. City of Tampa, 560 So.2d 1214 (Fla. 2d DCA), rev. den., 576 So.2d 285 (Fla. 1990), in which the District Court of Appeal held that a Tampa city councilwoman who voted in favor of an alcohol beverage zoning classification of her own restaurant was not entitled to reimbursement of legal fees incurred in defending an ethics commission charge. Although her vote was in the performance of her official duties, she was not "serving a public purpose", but advancing her own private pecuniary interest.

If the test is whether the litigation served a public purpose, then all Commission hearings, including the one at issue, would meet the public purpose test. If the test is whether the judge's conduct must involve a public purpose, the Respondent's conduct does not satisfy the second prong of Thornber.

III.
Is Respondent's Claim Barred
by Sovereign Immunity?

The Respondent has staked his claim for reimbursement of attorneys' fees upon the common law doctrine recognized by this Court in Thornber v. City of Fort Walton, supra. Thornber, however, did not consider the issue of sovereign immunity and, therefore, may not be good law.

In Thornber, this Court said that "Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose." (568 So.2d at 916-17). The Court cited as support Miller v. Carbonelli,80 So.2d 909 (Fla. 1955); Williams v. City of Miami, 42 So.2d 582 (Fla. 1949); Peck v. Spencer, 26 Fla. 23, 7 So. 649 (1890); Lomelo v. City of Sunrise, 423 So.2d 974 (Fla. 4th DCA 1982), rev. dism., 431 So.2d

988 (Fla. 1983); and Ellison v. Reid, supra. The three prior decisions of this Court, Miller, Williams and Peck, all involved the issue of spending municipal funds for a public purpose. In Miller, the expenditure of village funds was held to be appropriate because the resolution of a challenge to the process by which the mayor was elected was held to have an immediate and direct affect on the proper governance and administration of village affairs. In Williams and Peck, the Court held that it was inappropriate to spend public funds to litigate issues personal to the public official involved. Peck (recall election); Williams (the election of the mayor). None of these cases enunciated the common law rule adopted in Thornber. This Court in Estes v. City of North Miami Beach, 227 So.2d 33 (Fla. 1969) considered the three prior Supreme Court decisions cited in Thornber (Peck, Williams and Miller) and noted that they stand for the proposition that public funds may be used to pay for the defense of legal actions involving public officials where the municipal corporation has an interest in the result such that it might impact the public welfare and property of the municipality. Only in the two District Court of Appeal cases, which involved reimbursement of a public official's expense in defending themselves against criminal charges (Lomelo) or ethics

charges (Ellison), did the courts enunciate the rule later adopted in Thornber.

Both this Court in Thornber and the District Court of Appeal in Ellison cited as authority the earlier decision in Markham v. State, 298 So.2d 210 (Fla. 1st DCA 1974), which, based on Special Counsel's research, is the first time a Florida court set forth the principle adopted by Thornber, but held in that case that the tax assessor's office was not lawfully entitled to pay attorneys' fees to defend an election contest for the office. In sum, only Ellison, Lomelo and Markham stated the common law principle adopted in Thornber.

In Thornber, the Court noted that the entitlement to attorneys' fees arises independent of statute, ordinance or charter and rejected the application of Section 111.07, Florida Statutes. That statute authorizes any agency of the state, municipality or political subdivision to provide an attorney to defend civil actions against public officials for act or omission arising out of or in the scope of his or her employment. The statute was first enacted in 1972 and was limited to court actions against public officials for alleged negligence. (Chapter 72-36, Laws of Florida, 1972). In 1979, the statute was broadened to provide for the defense of any

civil action for acts or omissions arising out of or in the scope of a public official's employment. (Chapter 79-139, Laws of Florida, 1979). This Court approved the decision of the District Court of Appeal in Thornber that Section 111.07 did not authorize reimbursement of attorneys' fees because the public officials in that case were not defendants in a civil action arising from a complaint for damages or injury.

In Chavez, supra, the Second District Court of Appeal held that Section 111.07 supplanted the common law set forth in Thornber and, because the charge of unethical conduct before the Florida Commission on Ethics was not a civil action, the statute did not authorize reimbursement of the attorneys' fees and costs incurred by the city official in defending the charges.

In Thornber, this Court held that Section 111.07 did not supersede the common law remedy and that the statute was not the exclusive mechanism authorizing an award of attorneys' fees to public officials defending against litigation arising from the performance of their public duties. In reaching this conclusion, the Court did not consider the state's sovereign immunity or that under Article X, Section 13 of the Florida Constitution "only the Legislature has authority to enact a general law that waives the state's sovereign immunity".

American Home Assurance Company v. National Railroad Passenger Corporation, 908 So.2d 459, 471-72 (Fla. 2005). In this case, the doctrines of sovereign immunity and the separation of powers call into question the holding in Thornber and the other cases based upon a common law entitlement to a defense at public expense. The proceeding before the Judicial Qualifications Commission, like the proceeding in Chavez, was not a civil action for damages or injury and, if only the Legislature has the authority to waive sovereign immunity, the Respondent is not entitled to reimbursement of his attorneys' fees incurred in defending the Commission's charges.

The Respondent cites Article XII, Section 6(a) of the 1968 Florida Constitution, State v. Egan, 287 So.2d 1 (Fla. 1973), Kluger v. White, 281 So.2d 1 (Fla. 1973), and State v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991), for the proposition that the Legislature cannot abolish a common law right which exists as a part of the laws of Florida prior to 1968 without providing a reasonable alternative. (Respondent's Brief, p. 25). As this Court pointed out in Kluger, however, the Court cannot adopt a complete prohibition against legislative change when an alternative approach is available, even if the alternative is more restrictive. Koch, supra at 8. Thus, the Court may decide

that Section 111.07, Florida Statutes, although not applicable in the case, is a reasonable alternative to the common law rule. More importantly, as discussed above, it appears that the common law principle of Thornber was first recognized in 1974, after adoption of the 1968 Florida Constitution, and, therefore, is not "a traditional and longstanding cause of action" (Kluger, supra at 4) which cannot be abolished.

The Respondent also contends that sovereign immunity does not apply because the motion for an award of attorneys' fees is not a suit against the State (Respondent's Brief, p. 23). But commonly, claims for the payment or reimbursement of attorneys' fees are by way of a suit against a state agency or official, E.g. Thornber, Chavez, Lomelo, Ellison, and the outcome should not be determined by the procedure by which the fees are sought.

The Respondent cites Dade County v. Carter, 231 So.2d 241 (Fla. 3d DCA 1970) for the proposition that when the State brings an action it cannot hide behind sovereign immunity (Respondent's Initial Brief, pp. 23-24), but the Respondent does not point out that the case was a contract action brought by the county and the holding was that when the State appears in litigation in a proprietary rather than a governmental capacity,

it waives its immunity and may be subject to costs in the same manner as a private litigant.

IV.
No Additional Parties Are Proper or Necessary For a Full Determination of the Issues Presented

The Commission is not aware of an additional parties that are necessary for a proper and full determination of the issues presented by the motion. The Respondent has taken the opportunity to respond to this question by suggesting a number of ways an award of attorneys' fees may be funded, but a discussion of that issue was not requested and it is not before the Court.

CONCLUSION

For the foregoing reasons, the Motion for Award of Attorneys' Fees should be denied.

Respectfully submitted,

Thomas C. MacDonald, Jr.
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
(813) 254-9871
(813) 258-6265 (Facsimile)

General Counsel for the Florida
Judicial Qualifications Commission

- and -

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

By /s_Charles P. Pillans, III__________
Charles P. Pillans, III
Florida Bar No. 0100066
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
(904) 353-9307 (Facsimile)

Special Counsel to the Florida
Judicial Qualifications Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by United States mail this 27th day of March, 2006.

Honorable John P. Kuder
Circuit Judge
Judicial Building
190 Governmental Center
Pensacola, FL 32501
Chairman of the Hearing Panel

John R. Beranek, Esquire
Post Office Box 391
Tallahassee, FL 32302-0391
Counsel for the Hearing Panel

David B. Weinstein, Esquire
Bales Weinstein
Post Office Box 172179
Tampa, FL 33672-0179

Juan Morillo, Esquire
Steven T. Cottreau, Esquire
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
Attorneys for Circuit Judge Gregory P. Holder

s/_Charles P. Pillans III__________
Attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

__s/Charles P. Pillans, III_______
Attorney