IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1171

INQUIRY CONCERNING A JUDGE, NO. 02-487

RE: GREGORY P. HOLDER

RESPONDENT'S REPLY BRIEF

David B. Weinstein
Florida Bar No.: 604410
Kimberly S. Mello
Florida Bar No.: 0002968
Bales Weinstein
Post Office Box 172179
Tampa, Florida 33672-0179
Telephone: (813) 224-9100
Telecopier: (813) 224-9109

Juan P. Morillo
Florida Bar No.: 0135933
Steven T. Cottreau
Specially Admitted
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Telecopier: (202) 736-8711

Counsel for Judge Gregory P. Holder

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INTRODUCTION

In his Initial Brief, Judge Holder demonstrated that he is entitled to reimbursement of his attorneys' fees under Florida common law that stretches back over a century. As this Court noted in *Thornber* v. *City of Fort Walton Beach*, "Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation." 568 So. 2d 914, 916-17 (Fla. 1990).

In fact, in its Answer Brief, the Judicial Qualifications Commission ("JQC") concedes that the principles enunciated in *Thornber* apply when a judge prevails in a JQC proceeding. *See* JQC Answer Br. at 7-9 ("Answer Br."). However, in an effort to deny Respondent fees, the JQC takes two new positions. The JQC now claims that Respondent waived his right to attorneys' fees. And, incredibly, the JQC contends that the case against Judge Holder—which the JQC vigorously litigated for over two years—served no public purpose. Neither of these positions has merit.

I. RESPONDENT IS ENTITLED TO ATTORNEYS' FEES UNDER THIS COURT'S DECISION IN *THORNBER*.

Under this Court's decision in *Thornber*, "[f]or 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." 568 So. 2d at 917. Nonetheless, the JQC asserts (a) that Judge Holder

waived his right to attorneys' fees, (b) that the proceedings did not serve a public purpose, and (c) that the litigation did not arise out of or in connection with Respondent's judicial duties. On the facts of this case and under the law of this State, the JQC is wrong on all three scores.

A. Respondent Did Not Waive His Right To Attorneys' Fees.

The JQC claims that Judge Holder waived his right to attorneys' fees because he failed to "plead an entitlement to attorneys' fees in his Answer." Answer Br. at 6. The JQC relies upon this Court's decision in *Stockman* v. *Downs*, 573 So. 2d 835 (Fla. 1991), and related cases, which held that a party must plead a ***contractual or statutory*** (but not common law) claim for attorneys' fees against a litigation adversary. The JQC, however, never raised this issue in its initial brief in response to Respondent's claim for attorneys' fees. *See* JQC's Resp. to Mot. for Award of Attorneys' Fees (Aug. 8, 2005) ("JQC Resp."). The waiver argument lacks merit for three primary reasons.

First, the *Stockman* pleading requirement applies, by its own terms, only to "a claim for attorney's fees, whether based on statute or contract" where "'the prevailing Party [is] entitled to recover … attorney's fees'" from its litigation adversary. *Stockman*, 573 So. 2d at 836, 837 (quoting the parties' contract).[1] This

[1] *But see Ganz* v. *HZJ, Inc.*, 605 So. 2d 871, 872 (Fla. 1992) (per curiam) (holding that party need not plead attorneys' fee claim under § 57.105(1), Florida Statutes);

Court, however, has never held that a public official must plead a common law claim under *Thornber* to be entitled to a defense "at public expense." In short, the rule set forth in *Stockman* applies only to contractual or statutory attorneys' fee claims that ***arise by their nature against a litigation adversary***—not to common law claims for reimbursement of attorneys' fees from the public treasury.[2]

In *Thornber* itself, the governmental entity required to pay fees—the City of Fort Walton Beach—was not even a party to the underlying proceedings that caused the public official to incur fees. Instead, the underlying litigation that gave rise to the attorneys' fee claim against the City was filed by the city council members against the Chairman of the Recall Committee. *See*, *e.g.*, *Taylor* v. *Thornber*, 418 So. 2d 1155 (Fla. 1st DCA 1982).[3] Accordingly, the council members never pled a claim for fees against the City in the underlying proceedings. Nevertheless, this Court upheld the council members' claims,

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Tampa Letter Carriers, Inc. v. *Mack*, 649 So. 2d 890, 891 (Fla. 2d DCA 1995) (same with respect to § 768.79, Florida Statutes).

[2] *See Wentworth* v. *Johnson*, 845 So. 2d 296, 298-99 (Fla. 5th DCA 2003) ("A request for fees and costs contained within a complaint or answer simply puts one's ***adversary*** on notice that a claim for fees and costs will be sought at the conclusion of the case." (emphasis added)); *Diaz* v. *Bowen*, 832 So. 2d 200, 201 (Fla. 2d DCA 2002) ("A request for fees and costs contained within a complaint or answer … merely places one's ***adversary*** on notice that a claim for fees and costs will be made at the conclusion of the case." (emphasis added)).

[3] *See also Garvin* v. *Jerome*, 730 So. 2d 802, 802 (Fla. 5th DCA 1999) (vacating *Thornber* award of attorneys' fees in underlying action because the city was not joined as a party and did not appear, but permitting public official to renew application for fees and litigate against the city if necessary).

holding that the city was required to pay attorneys' fees even though the public officials did not raise claims for attorneys' fees until after the resolution of the underlying proceedings.[4] Given this precedent from this Court, the JQC's assertion that Respondent waived his claim for attorneys' fees is untenable.

In fact, in most underlying cases, the public entity obligated to pay the *Thornber* claim will not be a public official's litigation adversary (or even a party to the underlying action). Moreover, *Thornber* claims often arise in criminal and administrative proceedings—proceedings where the public official does not file a civil pleading. *See*, *e.g.*, *Lomelo* v. *City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1983) (requiring payment of attorney fees incurred defending criminal indictment).

Thornber claims are clearly more analogous to claims for indemnification from a corporate employer. Such corporate indemnification claims, like *Thornber* claims, do not arise against an employer by virtue of its status as a litigation adversary. Instead, the claims arise against the party that employs or is represented by the individual seeking indemnification.[5] Similarly, *Thornber* claims create an

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[4] This Court did not find waiver even though the public officials never pled common law claims for attorneys' fees. Instead, they pled only claims under § 111.07, Fla. Stat. Nonetheless, this Court held that they were entitled to fees under Florida common law: "we hold that the council members' failure to claim fees under common law does not preclude their recovery." 568 So. 2d at 919 n.8.

[5] *See* § 607.0850(3), Fla. Stat. (providing for mandatory indemnification of corporate directors, officers, employees, or agents that have "been successful on the merits or otherwise in defense").

entitlement to reimbursement by the governmental entity that employs or is represented by the public official. In fact, *Thornber* claims have been called indemnification claims. *See Garvin* v. *Jerome*, 730 So. 2d 802, 803 (discussing *Thornber* claim as claim to "indemnify"). Accordingly, *Thornber* claims should be treated similarly to corporate indemnification claims, which do not accrue until after the resolution of the underlying proceeding and can be asserted following the conclusion of that proceeding.[6]

Second, even if *Stockman* applied to *Thornber* claims generally, it should not apply in JQC Hearing Panel proceedings. Most importantly, under the JQC Rules, a Hearing Panel lacks jurisdiction to award attorneys' fees: it only has authority to "receive and hear formal charges from the Investigative Panel" and make recommendations to the Supreme Court regarding "appropriate discipline."[7] Fla. JQC Rule 2(3). *See also* Art. V, § 12(a)(1), (b), Fla. Const. Given the limited authority of the Hearing Panel, a party should not be required to plead issues in proceedings before the Hearing Panel that the panel has no power to resolve.

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[6] *See* § 607.0850(9), Fla. Stat. (permitting indemnification claim to be raised after conclusion of underlying proceeding). *See generally Castle Constr. Co.* v. *Huttig Sash & Door Co.*, 425 So. 2d 573, 575 (Fla. 2d DCA 1982) (indemnification claim accrues once "the litigation against the [indemnitee] has ended").

[7] Indeed, motions for contempt of the JQC must be filed in Circuit Court as the JQC itself lacks authority to issue "orders and judgments" related thereto. *See* Fla. JQC Rule 26.

Moreover, the application of *Stockman* to JQC Hearing Panel proceedings also would be inappropriate in light of the procedural differences between Circuit Court and JQC proceedings. Under *Stockman*, a party must plead a claim for attorneys' fees in an answer filed following the resolution of any motions to dismiss.[8] Unlike defendants in ordinary civil actions, however, a respondent in a JQC proceeding is not required to file an answer. *Compare* Fla. JQC Rule 9 ("the judge ***may*** serve and file an Answer" (emphasis added)), *with* Fla. R. Civ. P. 1.140(a)(1) ("[a] defendant ***shall*** serve an answer" (emphasis added)).

Third, even if the *Stockman* pleading requirement were to apply to *Thornber* claims in JQC proceedings, Respondent's claim for attorneys' fees falls within the exception this Court recognized in *Stockman.* As this Court explained, the requirement to plead an entitlement to attorneys' fees is about putting an adversary on "notice" and avoiding "unfair surprise." *Stockman*, 573 So. 2d at 837. Accordingly, this Court crafted an exception to the pleading requirement where the adversary receives notice of the claim before trial and fails to object:

> Where a party ***has notice that an opponent claims entitlement*** to attorney's fees, and … ***otherwise fails to object*** to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.

Stockman, 573 So. 2d at 838.

[8] *See Green* v. *Sun Harbor Homeowners' Ass'n*, 730 So. 2d 1261, 1263 (Fla. 1998) (holding that claim for attorneys' fees under "Declaration of Covenants" need not be asserted in a motion to dismiss filed before an answer is required).

The JQC had repeated notice of Respondent's intentions to seek attorneys' fees in this case. During pretrial proceedings, the parties engaged in discussions to resolve this matter without submission of the case to the Hearing Panel. In those discussions, counsel for Respondent informed Special Counsel for the JQC that Respondent would seek reimbursement for his attorneys' fees in the event that he was successful in obtaining a dismissal of the charges. At no time did the JQC object to the failure to plead entitlement to attorneys' fees. Indeed, even after Respondent filed his claim for attorneys' fees on July 25, 2005, the JQC did not object to the claim based upon a failure to plead. Instead, on August 8, 2005, the JQC filed an eight-page opposition to the claim that does not raise a *Stockman* objection for failure to plead. *See* JQC Resp. Under these circumstances, the JQC has waived any notice objection.[9]

B. <u>This Litigation Clearly Served A Public Purpose.</u>

Initially, the JQC conceded that the "public purpose" prong of the *Thornber* test was satisfied: "***[u]nquestionably***, the resolution of the highly publicized

[9] If this Court were to make new law and hold that *Stockman* applies to *Thornber* claims, the Court should not apply this new requirement retroactively to bar Respondent's claim. Respondent should have been able to rely upon *Thornber*, which, as noted above, upheld claims for attorneys' fees that were first asserted following the resolution of the underlying proceedings giving rise to those claims. *See*, *e.g.*, *Wagner* v. *Daewoo Heavy Indus. Am.*, 314 F.3d 541, 544 (11th Cir. 2002) (en banc) (applying new procedural rule prospectively because "application of the new rule in the instant case [would] be inequitable" and "issue [was one] of first impression the resolution of which was not clearly foreshadowed").

charges against Judge Holder and matters relating thereto served a public purpose." JQC Resp. at 5-6 (emphasis added). In its Answer Brief, however, the JQC takes an agnostic approach, noting that it is possible that this Court in *Thornber* held that the "conduct" at issue had to serve a public purpose, not the litigation itself. *See* Answer Br. at 20.

Creating unnecessary confusion, the JQC focuses on a phrase this Court used in describing the historical pedigree of public official reimbursement: "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." *Thornber*, 568 So. 2d at 916-917. The JQC assumes that "serving a public purpose" modifies "performance of their official duties" and thus the public purpose inquiry may focus on the conduct at issue. This "serving" phrase, however, is more naturally read as modifying the preceding noun "litigation."

Indeed, that is precisely what this Court intended, as it made clear when it unambiguously stated its holding in *Thornber*: "the ***litigation*** must … serve a public purpose." *Id.* at 917 (emphasis added). In fact, this holding is made plain by the Court's analysis in *Thornber*, which focused upon whether the litigation served a public purpose, not whether the alleged misconduct did. *See id.* (concluding that the "council members' action [filing litigation] in defending

against the recall petition also served a public purpose and, thus, satisfied the second prong of th[e] test"). The focus on the litigation—not the unproven conduct—is sensible because the underlying proceeding will almost always involve an allegation of misconduct. The *Thornber* public purpose prong would be difficult to satisfy if the focus were on the alleged conduct because misconduct does not serve a public purpose.[10] Thus, the relevant focus is on the litigation and, here, the litigation "unquestionably" served a public purpose.

C. <u>This Litigation Arose Out Of Or In Connection With The Performance of Judge Holder's Official Duties.</u>

In his Initial Brief, Respondent explained how this litigation grew out of an effort to stop his judicially-required participation in a federal courthouse corruption investigation. As noted in that brief, the paper at issue was slipped under the door of the federal prosecutor in charge of the federal investigation. Resp't's Initial Br. ("Initial Br.") at 8-9. The JQC does not appear to dispute that the litigation's connection to the courthouse corruption investigation would satisfy *Thornber*'s requirement that the litigation "arise out of or in connection with" official duties. Instead, the JQC only contends that the connection to the courthouse corruption

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[10] Focusing on the litigation also ensures that reimbursement is not permitted in private matters. Thus, for example, a judge would not be eligible for reimbursement in a child custody case when the issue is whether the judge spends too much time on his official duties to be a fit parent. This is so because the ***litigation*** concerns private interests, even though the conduct at issue (the performance of judicial responsibilities) serves a public purpose.

investigation "was raised by the defense" and that the mysterious surfacing of the paper "was not done to discredit" Respondent. Answer Br. at 10-11. The JQC is wrong on both points.

In fact, the JQC took precisely the opposite position before the Hearing Panel. At that hearing, Respondent put on overwhelming evidence that this litigation grew out of an effort to discredit Judge Holder for his cooperation with inquiries into judicial misconduct that led to several of his fellow judges leaving the bench. After hearing that evidence, Special Counsel for the JQC ***conceded*** that this case grew out of an effort to discredit Respondent. On closing, Special Counsel unequivocally stated that "Someone, someone wanted to get [Judge] Holder." [Pillans Tr. p. 27, at Supp. App. 1.][11] According to the JQC Special Counsel, one or more anonymous persons (what Special Counsel deemed a "simple conspiracy") broke into Judge Holder's chambers in the Hillsborough County Courthouse, stole his paper from the desk drawer in his ante room, determined which federal prosecutor led the undercover investigation with which Respondent was cooperating, determined the location of that prosecutor's weekend office at his part-time job, and slipped Judge Holder's paper under the door of that

[11] Indeed, the ***only*** evidence presented at the hearing regarding the appearance of the purportedly plagiarized paper was that someone "wanted to get" Respondent as a result of his judicially-mandated cooperation with a federal corruption investigation.

office. [Pillans Tr. pp. 25, 32, at Supp. App. 1.] Thus, even based on the JQC's own theory of its case—which did not prevail at the hearing—this proceeding was unquestionably linked to Judge Holder's judicial duties. In short, this litigation had the "sufficient nexus" to Respondent's official duties that *Thornber* requires. 568 So. 2d at 917.

II. SOVEREIGN IMMUNITY DOES NOT RENDER THIS COURT'S *THORNBER* DECISION A NULLITY.

The JQC does not contend that sovereign immunity poses a bar to a *Thornber* award of attorneys' fees. *See* Answer Br. at 6 (offering only that a "claim may be barred"). Of the numerous courts (including this one) that have considered a public official's right to reimbursement, none has ever suggested that sovereign immunity poses a bar.

Indeed, this is in accord with the position repeatedly taken by the State itself. In numerous Attorney General Opinions, the State has taken the position that public officers, including judges, are entitled to reimbursement and that governmental units ***must*** pay where *Thornber* is satisfied. No opinion has suggested that the State or a municipality could avoid payment by resorting to sovereign immunity. *See* Op. Att'y Gen. Fla. 93-21, 1993 WL 361721 at *1

(1993) (concluding that "a county judge is entitled to reimbursement for expenses incurred in successfully defending charges pending before the [JQC]").[12]

Moreover, as this Court has recognized, the doctrine of sovereign immunity is "not universal." *See* Initial Br. at 24 (quoting *State Road Dep't of Fla.* v. *Tharp*, 1 So. 2d 868, 748 (Fla. 1941)). In fact, this Court has held that sovereign immunity is inapplicable in actions sounding in contract. *See Pan-Am Tobacco Corp.* v. *Fla. Dep't of Corrections*, 471 So. 2d 4, 5 (Fla. 1985) ("where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract"). And the reimbursement obligation in *Thornber* and its predecessors may be fairly read as recognizing an obligation growing out of a duly authorized public employment arrangement (which is contractual in nature). As such, the doctrine of sovereign immunity is inapplicable.

Respondent set forth many other reasons why sovereign immunity does not bar his claim for fees. Initial Br. at 23-26. Among them, the common law right to reimbursement set forth in *Thornber* may not be abolished consistent with the

[12] *See also* Op. Att'y Gen. Fla. 98-12, 1998 WL 65015 at *2 (1998) ("If the [*Thornber*] test is satisfied, the public official is entitled to reimbursement of attorney's fees in successfully defending his or her actions."); Op. Att'y Gen. Fla. 91-58, 1991 WL 528191 at *3 (1991) (concluding that if the test in *Thornber* is met, "the official's legal fees incurred in successfully defending against such action ***must be paid*** by the city" (emphasis added)).

Florida Constitution. *See* Art. I, § 21, Fla. Const. ("The courts shall be open to every person for redress of any injury …."). As this Court has explained,

> where a right of access to the courts for redress for a particular injury … has become a part of the common law of the State …, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries ….

Kluger v. *White*, 281 So. 2d 1, 4 (Fla. 1973) (holding unconstitutional a statutory limitation on automotive tort suits that denied plaintiff a legal remedy).

The JQC suggests that *Kluger* does not apply because § 111.07, Florida Statutes, provides a reasonable alternative to a common law reimbursement claim. *See* Answer Br. at 26. It does not. As this Court recognized in *Thornber* in rejecting a similar suggestion, that statutory provision is much narrower in coverage than the common law right to reimbursement. *See* 568 So. 2d at 916, 919 n.7.[13] In sum, the doctrine of sovereign immunity does not bar reimbursement of Respondent's attorneys' fees.[14]

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[13] Equally unavailing is the JQC's suggestion that the constitutional right to access to courts only protects causes of action that are "traditional" and predate 1968. *See* Answer Br. at 26-27. Beyond lacking any legal support, this assertion is also factually wrong. As this Court noted in *Thornber*, the common law right to reimbursement has been "long recognized" and can be traced back at least to 1890. *See* 568 So. 2d at 916-17.

[14] Even if sovereign immunity applied to shield the State from a *Thornber* money judgment, the doctrine would not prevent this Court, the State Courts Administrator, or other appropriate party from determining that Respondent is entitled to fees. Sovereign immunity would only arise (if at all) in the context of a

III. NO ADDITIONAL PARTIES ARE NECESSARY TO DETERMINE ENTITLEMENT TO ATTORNEYS' FEES.

In repeatedly holding that a public official is entitled to reimbursement at public expense, this Court and the lower courts have not had occasion to explain precisely how to identify the governmental entity or subdivision responsible for paying this "public expense" and the mechanism for doing so. *See Thornber*, 568 So. 2d 914 (holding that city liable for city council members' fees, but not explaining whether the city's liability stemmed from its role as employer, the council members' status as representatives of the city, or some other basis). *See also* Op. Att'y Gen. Fla. 93-21, 1993 WL 361721 at *1, *2 (1993) (concluding that "[s]ince the county judge is a state officer, reimbursement for such expenses [under *Thornber*] should be sought from the state" and that a "judge seeking reimbursement may wish to contact the State Courts Administrator on this matter").[15] The JQC has explained that it "is not aware of any additional parties that are necessary for a proper and full determination of the issues presented by

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subsequent adversarial proceeding where Respondent sought a money judgment after the appropriate party refused to reimburse Respondent in the first instance.

[15] *See also* Op Att'y Gen. Fla. 93-21, 1993 WL 361721 at *2 (concluding that "circuit court judges are 'state officers'" based "upon the provisions of the State Constitution").

th[is] Motion." Answer Br. at 6. Respondent agrees.[16] However, if this court requires that another party is necessary to secure reimbursement, Respondent respectfully requests that he be granted leave to amend his application for attorneys' fees or take other action to comply with this Court's ruling.

CONCLUSION

For the reasons set forth herein and in Respondent's prior filings, Respondent is entitled to reimbursement of attorneys' fees.

(Attorney signature appears on following page.)

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[16] Judge Holder is elected by the citizens of Hillsborough County, serves within the Florida's judicial branch, and appears to be employed by the State of Florida (Tom Gallagher, Chief Financial Officer, 200 E. Gaines St., Tallahassee, FL 32399).

Dated: March 24, 2006.

Respectfully Submitted,

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David B. Weinstein
Florida Bar No.: 0604410
Kimberly S. Mello
Florida Bar No.: 0002968
Bales Weinstein
Post Office Box 172179
Tampa, FL 33672-0179
Telephone: (813) 224-9100
Telecopier: (813) 224-9109

-and-

Juan P. Morillo
Florida Bar No.: 0135933
Steven T. Cottreau
Specially Admitted
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Telecopier: (202) 736-8711

Counsel for Judge Gregory P. Holder

CERTIFICATE OF SERVICE

I certify that on March 24, 2006, a copy of the foregoing, Respondent's Reply Brief, has been served by regular U.S. Mail to Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302; Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell, Ditmar, DeVault, Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501.

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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.

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Attorney