

**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC13-890**

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**JOHN N. PARKER, for himself and others similarly situated,**

Petitioner,

vs.

**THE BOARD OF TRUSTEES OF THE CITY PENSION FUND FOR  
FIREFIGHTERS AND POLICE OFFICERS, IN THE CITY OF TAMPA,**

Respondent.

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On Review from the District Court of Appeal for the Second District of Florida

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**RESPONDENT'S ANSWER BRIEF**

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## STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts are essentially accurate.<sup>1</sup> The Petitioner seeks review of a Second District opinion that held there was no entitlement to chapter 175 and 185 attorney fees for a lawsuit brought pursuant to a Special Law authorizing the City of Tampa to contract with its firefighters and police officers for a "13<sup>th</sup> check" as a supplemental pension distribution to certain pensioners. The court wrote:

To that end, there exists within the pension fund a separate account specifically for the 13<sup>th</sup> check program distributions. The provisions of the 13<sup>th</sup> check program do not apply to all of the petitioners generally, a fact critical to our determination of this case.

*Board of Trustees of the City Pension Fund for Firefighters and Police Officers of the City of Tampa v. Parker*, 113 So. 3d 64, 67 (Fla. 2d DCA 2013)(attached as Appendix A).

The Second District continued:

The Special Law is not part of the general statutory construct of chapters 175 and 185. It does not apply

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<sup>1</sup> The juxtaposition of words in at least one sentence of that statement suggests that the court below recognized that "95% of police and firefighters are covered by local law pension plans" (Petitioner's Brief at 1) and that therefore added to the public importance of the issue. The court did not say that, and the local law pension plans are not to be confused with the Special Law 13<sup>th</sup> check plan in this case. We do not deny the importance of pensions, but the difference between classic local law and chapter plans, and the Special Law provision here, is underscored by Exhibit A to Tab 2 of the Petitioner's Appendix. No other Special Act plans are identified in the list of police and fire plans.

statewide, and it has not often been, if ever, reproduced in other jurisdictions. We are not persuaded that the Florida Legislature intended that a unique program, established solely by a special law specific to one jurisdiction, be controlled by an attorney's fee provision fund in a regimen governing pension funds statewide.

*Id.* at 67.

Responding to Petitioner's post decision motions, the court certified this question:

ARE THE PREVAILING PARTY ATTORNEY'S FEES PROVISIONS OF SECTION 175.061(5) AND 185.05(5), FLORIDA STATUTES, APPLICABLE TO JUDICIAL PROCEEDINGS TO ENFORCE CLAIMS UNDER LOCAL LAWS PLANS OR SPECIAL ACTS?

*Id.* at 70.

We respectfully suggest that given the facts and circumstances and statutory Special Law predicate for this case, that the certified question should be narrowed and limited to whether the attorney's fees provision should be applicable under the Special Law which was the genesis for the claim in this case.

The answer to that question in this specific case as to this Special Act plan is "No." There is no dispute that the Complaint *was not* brought pursuant to chapters 175 and 185. The Complaint plainly set forth that it was brought "under or pursuant to:"

1. This is a complaint for declaratory and supplemental relief pursuant to Chapter 86, Florida Statutes, and/or for damages for breach of the City of

Tampa Firefighters and Police Officers Pension Contract (the "Pension Contract") and for violation of Chapter 2001-288, Laws of Florida, all of which claims involve amounts in excess of \$15,000, exclusive of interest, costs and attorney's fees. A true and correct specimen copy of the Pension Contract is attached hereto as Exhibit A and incorporated herein by reference. A true and correct copy of Chapter 2001-288, Laws of Florida, is attached hereto as Exhibit B and incorporated herein by reference.

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5. The plaintiff, John N. Parker ("Parker"), is a citizen and resident of Hillsborough County, Florida. Parker is a retired City of Tampa firefighter who retired on September 13, 1983 and, thus, had been retired more than one year on September 30, 2004. As a retired City of Tampa firefighter, Parker is a "retired member" of the Fund, and therefore, is entitled to certain benefits under the Pension Contract and under Chapter 2001-288, Laws of Florida.

6. One of the benefits to which Parker is entitled is known as the "13<sup>th</sup> Check Program," which benefit is set forth and described in Section 27 of the Pension Contract and Chapter 2001-288, Laws of Florida. The 13<sup>th</sup> Check program is a supplemental program to provide all retired members and eligible surviving spouses with a 13<sup>th</sup> pension check each year, depending upon certain conditions.

Complaint at 1- 2 (attached as Appendix B).

There is no dispute as to whether the Board erred in not paying the 13<sup>th</sup> check. The stipulated final declaratory judgment resolved the actuarial rules for paying the 13<sup>th</sup> check, and the sums to be paid to the pensioners in the Special Law 13<sup>th</sup> check program. The only question remaining was whether the attorney fees of

\$1,160,927.28 were to be paid by the Board. The Second District, seeing a distinction between the 13<sup>th</sup> check Special Law and chapters 175 and 185, concluded that those chapters did not apply where there was a “special statute covering a particular subject matter [because it] is controlling over a general statutory provision covering the same and other subject in general terms,” *quoting McDonald v. State*, 957 So. 2d 605, 610 (Fla. 2007).

Thus the question presented is simple: Are attorney fees encompassed by the Special Law?

### **SUMMARY OF ARGUMENT**

The decision below was narrow and limited to the facts of this case: a Special Law that provided a unique benefit; a Special Law that specifically provided for the ability of the parties to adjust the terms of the contract authorized by the Special Law to comport with chapters 175 and 185, Florida Statutes, if there was a need to do so. Neither the Special Law nor the contract contained any provision for chapter 175 and 185 attorney fees. Nor did the Petitioner’s Complaint assert that his claim was brought under chapters 175 and 185. To the contrary, he pled only the silent-as-to-attorney fees Special Law and contract.

Attorney fees are only awardable if authorized by statute or contract. Neither source was present (or pled) here. The court below was correct in applying the common fund theory to the facts and law of this case.



## Standard of Review

The standard of review is *de novo*. *Diamond Aircraft Indus. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013).

## ARGUMENT

### THE SPECIAL LAW WHICH WAS THE BASIS OF THE CLAIM FOR PENSION BENEFITS DOES NOT ENTITLE THE PETITIONER TO ATTORNEYS FEES

#### A. The Statutes

Section 175.016(5) and 185.05(5) contain the same language: “In any *judicial proceeding* or administrative proceeding under Chapter 120 *brought under or pursuant to the provisions of the chapter*, the prevailing party shall be entitled to recover the costs thereof, together with reasonable attorney’s fees.” (Emphasis supplied).

The Complaint was brought under Chapter 2001-288, Laws of Florida. That Special Law is attached as Appendix C. The Complaint was also brought under Section 27 of the City of Tampa Firefighters and Police Officers Pension Contract. That contract is attached as Appendix D.

Neither the Special Law nor the contract – the basis for the underlying lawsuit – provide for attorney’s fees. Bringing an action “under” (the 175 and 185 standards) or “pursuant to” (the language of the complaint), has meaning. “Under” means “subject to the authority, direction, or supervision of” or “authorized” by. *See*

WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Gramercy (Revised ed. 1996); *See also*, BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 2d ed. (1995). “Pursuant to equals (1) in accordance with; (2) under; (3) as authorized by.”

The Special Law leaves no doubt that it is unique, special, self-contained, and dependent upon the City of Tampa subsequently entering a “supplemental contract” for a 13<sup>th</sup> check:

Section 27. 13TH CHECK PROGRAM –  
Notwithstanding any other provisions of this contract, and subject to the provisions of this section, the 13<sup>th</sup> Check Program is a program which authorizes the Board of Trustees to establish and make a supplemental pension distribution pursuant to the following terms and conditions. . . .

Appendix D at 14.

The 13<sup>th</sup> check program authorized by the Special Law was “contingent upon contractual agreement through the collective bargaining agreement process between the City of Tampa and each of the respective certified bargaining agents for firefighters and police officers.” Exhibit C at 5, ¶ E, § 2. Importantly, the Special Law contained a “Conflict of Laws” section which specifically referenced chapters 175 and 185 and provided for the possibility of addressing the issue presented here – what to do if the Special Law was not in accord with chapters 175 and 185.

(D) Conflict of Laws – To the extent that a provision of this section is in conflict with sections 112.60 – 112.67 Florida Statutes, *or those provisions of Chapters 175 and 185, Florida Statutes, that apply to local plans established by municipal ordinance or special act*, or provisions of Florida Statutes made applicable to pension funds established by special act, or to the extent that any provision of this section would result in the loss of tax exempt status of the pension Fund, the Board of Trustees is hereby delegated the authority to adopt rules changes in this section in order to comply with said laws, which shall have the force of law and shall be considered part of this pension contract.

*Id.* at ¶ (D) (emphasis supplied).

The Pension Contract echoes the Special Law. It contains exactly the same language. Appendix D at 15, ¶ D. Thus it is clear from the respective documents – the Special Law and the Pension Contract – that both recognized the potential for conflict with chapters 175 and 185 and both provided for the ability “to adopt by rules changes” provisions which complied with chapters 175 and 185. No such changes were made. Neither the Special Law nor the Contract provided for attorney fees.

The Second District’s application of the rules of statutory construction was correct and consistent with the governing standard:

This Court follows the “American Rule” that attorney’s fees may only be awarded by a court pursuant to an entitling statute or an agreement of the parties. *See Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985), *modified*, *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

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A general rule of statutory construction in Florida is that courts should not depart from the unambiguous language of the Statute. *Citizens of State v. Public Serv. Comm'n*, 425 So. 2d 534, 541-42 (Fla. 1982). Moreover, it is also a well-established rule in Florida that “statutes awarding attorney’s fees must be strictly construed.” *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass’n*. 539 So. 2d 1131, 1132 (Fla. 1989).

*Dade County v. Pena*, 664 So. 2d 959, 960 (Fla. 1995).

Those principles, applied to the clear language of the Special Law and the subsequent contract authorized by it, compel the conclusion that there was no basis for awarding attorney’s fees under chapters 175 and 185. The “well settled rule of statutory construction ... that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms” adds cement to the argument. *Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959). *McDonald v. State*, 957 So. 2d 605, 610 (Fla. 2007), applied that principle in two sentencing cases but the statutory construction principle is a staple of the law in myriad settings.<sup>2</sup>

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<sup>2</sup> “When the same statute contains general and specific provisions on the same subject matter, each must be given its legitimate field and scope of operation. However, when two statutory provisions are in conflict, the specific statute controls over the general statute. Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control. Thus, a specific statute covering a particular subject always controls over a statute covering the same and other subjects in more general terms.” 48A Fla. Jur. 2d *Statutes* §185 (2013).

Here, the Legislature, in the Special Law, not only omitted an attorney's fee provision, it specifically provided that *any* inconsistency with chapters 175 and 185 could be remedied if the parties so chose. They did not. The Court must look at the plain language in deciding this case: the Legislature's Special Act sequestration of chapter 175 and 185 and silence with regard to fees.

It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. . . . In determining that intent, we have explained that we look first to the statute's plain meaning.

*Knowles v. Beverly Enterprises – Florida, Inc.*, 898 So. 2d 1, 5 (Fla. 2004). Here the plain meaning is that fees are not encompassed by the Special Law by virtue of the omission of fees, the acknowledgement of the potential for conflict with chapters 175 and 185 and no effort to reconcile that conflict in the contract that was authorized by the Special Law.

**B. The Petitioner's Construct Is Unavailing**

The Petitioner's construct is simple and superficially appealing. It goes this way: (1) under chapters 175 and 185, a Board of Trustees for police and firefighters' pension funds is mandated; (2) those boards are responsible for administering pension funds created under chapters 175 and 185 or local law plans; (3) the boards can bring and defend lawsuits of every kind; (4) "in any judicial proceeding ... brought under or pursuant to" chapters 175 and 185 the prevailing party is entitled

to attorneys fees; (5) a municipality may not alter the provisions creating the board of trustees and their duties. See Petitioner’s Initial Brief at 19-20.

The Petitioner sums up his argument this way: “Thus, under the express statutory language, *any* case brought against a board by firefighters or police officers to recover *any* benefit under a *local law plan* – whether the benefit is ‘unique’ or not – is brought ‘under or pursuant to the provisions of [chapters 175 or 185 respectively].” *Id.* (emphasis in original).

There are several fatal flaws in that submission. First, recognizing that the Complaint was not “brought under or pursuant to” chapters 175 and 185, Petitioner asserts he was “not required to specifically designate or refer to a statutory section to maintain an action under it, so long as the facts, as here, are pleaded to bring the allegations of the complaint within the statute.” *Id.* at 20, n. 12. The Petitioner offers *Vance v. Indian Hammock & Riding Club, Ltd.*, 403 So. 2d 1367, 1369 (Fla. 4th DCA 1981) but *Vance*, and the case it cites – *City of Lakeland v. Select Tenures, Inc.*, 176 So. 274 (Fla. 1937) – do not carry the weight assigned to them.

*Vance* held that “plaintiffs were not required to specifically designate or refer to Section 817.41(1) Florida Statutes [unlawful to disseminate any misleading advertisement] in order to maintain an action under it, so long as they pleaded sufficient facts to bring the allegations of the complaint within the statute.” *Vance*, 403 So. 2d at 1369. *City of Lakeland* said “it is not necessary to plead the statute if

the facts pleaded are sufficient to bring the case within it.” *City of Lakeland*, 176 So. at 344.

Here, the Petitioner pled facts that actually decried reliance on chapters 175 and 185, choosing to assert a Special Law fact, and a contract fact – neither of which embraced the chapters:

20. The decision of the Trustees not to fund the 13<sup>th</sup> Check for fiscal year ending September 30, 2004 was erroneous and in violation of the Pension Contract and Chapter 2001-288, Laws of Florida. It was based upon an incorrect assumption that all prior investment losses allocable to the Base Plan had to be made up prior to the issuance of a 13<sup>th</sup> check. This assumption is not contained in the Pension Contract or in any written policy regarding the 13<sup>th</sup> Check Program or the Fund. This assumption is not required by statute, nor is it required by Section 14, Article 10 of the State Constitution. Moreover, the makeup of prior investment losses is not necessary in order to fund payment of the 13<sup>th</sup> check on a “sound actuarial basis.” In short, there is no requirement in the 13<sup>th</sup> Check Program of the Pension Contract that all prior investment losses be made up in order for the 13<sup>th</sup> Check Program to be funded. Rather, there is only the actuarial requirement that the Base Plan have “cumulated actuarial gain.”

Exhibit B, at 5.

Not only was the pleading deficient *vis a vis* facts “to bring the complaint within the statute,” it was doubly deficient because the issue here is not the facts of the cause of action, it is the claim for attorney’s fees. We recognize that the specific statutory or contractual basis for fees need not be pled (*Caufield v. Cantele*, 837 So. 2d 371, 378 (Fla. 2002)). But no case holds that where a lawsuit is brought pursuant

to a statute or contract that *does not* provide for attorney’s fees, a complaint’s barren request for fees suffices to enable a plaintiff to secure fees *via* a statute never asserted in a complaint that did not plead facts covered by the unstated, unpled, unasserted statute. And, to make the notion of incorporation of chapters 175 and 185 more unavailing, here the Special Law and the contract specifically provided that if those chapters were out of sync and in conflict with the Special Law and the contract, the contracting parties could have cured the conflict. *See*, Exhibit C at 5, ¶ D and Exhibit D at 14.

The Petitioner misstates the holding below when he writes that the Second District decided “that the attorney’s fee provisions do not apply to local law plans offering additional benefits” and that the decision means that “no prevailing retired firefighters or police officer would be entitled to attorney’s fees in an action brought to enforce a right to additional benefits under a local law plan not available statewide.” Petitioner’s Initial Brief at 27-28.

The Second District was very careful. Nothing in the decision affects local law plans that exceed chapter plans. The court’s extremely narrow focus was on a “unique program, established solely by a special law specific to one jurisdiction. . . .” Appendix A at 67. The Petitioner’s effort to broaden the import of the decision, and his understandable emotional assertions (Petitioner’s Initial Brief at 28), should



not distract the Court from the very limited and circumscribed nature of the decision below and its rationale.

The court cited favorably to a number of chapter 175 and 185 cases that “relate generally to firefighters and police pensions in Florida” (*id.*), and nothing in the decision suggests that actions to enforce additional benefits under local law plans would not have the benefit of chapter 175 and 185 attorney fee provisions.

Indeed, the Petitioner’s contention that the “decision will have statewide impact” (Initial Brief at 27) is not so. The Petitioner concedes that “certain” aspects of the Plan – such as the 13<sup>th</sup> Check – may be unique” (*id.*), but assiduously avoids the critical distinction between this “unique” provision and the “333” (*id.*) local law plans, *none of which* were the product of a Special Law providing both a variable employee contribution and creating a 13<sup>th</sup> check program with a variable benefit.<sup>3</sup>

The Petitioner’s hyperbolic assertion that the decision below “deprives 95% of municipal firefighters and police officers of their entitlement to prevailing party attorney’s fees mandated by chapter 175 and 185 for claims brought for additional benefits provided under local law plans” (Petitioner’s Initial Brief at 27) is no

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<sup>3</sup> See, The Division of Retirement’s Summary of Plan Benefits: [https://www.rol.frs.state.fl.us/forms/Benefit\\_Comparison\\_Chart.pdf](https://www.rol.frs.state.fl.us/forms/Benefit_Comparison_Chart.pdf). (last visited Sept. 5, 2013).

substitute for a fair reading of the decision below and its adherence to statutory construction principles arising from the Special Law.

## **CONCLUSION**

We recognize that pension statutes are to be liberally construed; that police officers and firefighters are important to our lives; that police officers and firefighters' pensions are earned and well deserved. We recognize that chapters 175 and 185 provide for attorney fees for actions brought under or pursuant to those chapters. We recognize that the Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa has a fiduciary duty to its constituents and that in this case, the actuarial gains obtained for its beneficiaries were sufficient to provide them with a "13<sup>th</sup> Check" under the Special Law enacted by the Legislature and the ensuing contract authorized by that law.

The Board recognizes its obligations under the Special Law and the contract. But, like the Petitioner, who believed (in his Complaint) that his action was brought under the Special Law and its provided for contract, not pursuant to chapters 175 and 185, the Board's duties included its obligations to abide by the provisions of the Special Law and the contract. Neither provide for attorney fees.

The decision below was correct. It should be affirmed and the certified question narrowed to the facts and law of this case and answered in the negative.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 6, 2013, a true and correct copy of the foregoing and appendix was electronically uploaded to the e-Portal for the Supreme Court of Florida and further certify that a true and correct copy of the foregoing and appendix has been furnished via E-Mail to counsel listed below:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the font used in this brief is Times New Roman, 14 point font, and that the brief complies with the font and spacing requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Bruce S. Rogow  
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## APPENDIX

- A *Board of Trustees of the City Pension Fund for Firefighters and Police Officers of the City of Tampa v. Parker*, 113 So. 3d 64 (Fla. 2d DCA 2013)
- B Complaint, *Parker v. The Board of Trustees*, case no.: 07-07198
- C Special Law, Chapter 2001-288
- D City of Tampa firefighters and Police Officers Pension Contract