

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO. SC13-890

v.

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

Respondent.

PETITIONER'S INITIAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Introduction.

This case is before this Court on a question certified to be of great public importance by the Second District Court of Appeal. *See* [App. 1]¹ Petitioner, John N. Parker, for himself and other retired firefighters and police officers, successfully sued the Respondent pension Board² for benefits wrongly withheld. The trial court awarded prevailing party attorney's fees under chapters 175 and 185, Florida Statutes, which are the chapters regulating municipal firefighter and police pension plans, respectively.

The Second District reversed the statutory attorney's fee award, reasoning that the attorney's fee provisions do not apply where, as here: (1) the firefighter and police pension plan is a "local law plan," which is a plan organized under a local ordinance or special legislative act, and (2) the retirement benefit at issue—labeled the "13th check program"—is an additional retirement benefit over and above the minimum retirement benefits required by chapters 175 and 185.

The Second District recognized that its ruling on the attorney's fee issue was one of great public importance—over 95% of police and firefighters in Florida are

¹ References to this brief's appendix will be to tab number. For example, [App. 1] refers to tab 1 of the appendix.

² "Board" refers to the Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa.

covered by local law pension plans. The court certified the question of whether the prevailing party attorney's fee provisions of the relevant pension statutes are applicable where, as here, the lawsuit asserts a claim for benefits under a local law plan or special act.³ For the reasons stated herein, Petitioner asks this Court to answer the certified question in the affirmative and quash the Second District decision.

Background.

A. The Statutory Scheme Governing Firefighter and Police Pension Funds.

Chapters 175 and 185, respectively, govern firefighter and police officer pension funds. Other than their numbering schemes, the pertinent portions of the chapters are substantially identical. An understanding of these chapters and the legislative mandates therein is critical to resolution of the issue in this case.

The general Florida Retirement System does not cover municipal firefighters and police officers. Instead, a number of options are available to them, all of which are governed by chapters 175 and 185. As the legislative purpose of these

³ The certified question states:

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

Bd. of Trustees of City Pension Fund for Firefighters & Police Officers in City of Tampa v. Parker, 113 So. 3d 64, 70 (Fla. 2d DCA 2013).

chapters illustrates, firefighters and police officers are unique and extremely important to our society. They routinely put their lives at risk to ensure the safety of Florida's citizens—so the Legislature has created pension plan requirements for these very special men and women separate and apart from the general state retirement system. Section 175.021(1), Fla. Stat. (2007),⁴ provides:

(1) It is hereby declared by the Legislature that firefighters, as hereinafter described, perform state and municipal functions; that it is their duty to extinguish fires, to protect life, and to protect property at their own risk and peril; that it is their duty to prevent conflagration and to continuously instruct school personnel, public officials, and private citizens in the prevention of fires and fire safety; that they protect both life and property from local emergencies as defined in s. 252.34(3); and that their activities are vital to the public safety. . . . Therefore, the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of firefighters [T]he Legislature hereby determines and declares that the provisions of this act fulfill an important state interest.

(Emphasis added.)

As to police officers, section 185.01(1) likewise provides:

(1) It is hereby found and declared by the Legislature that police officers as hereinafter defined perform both state and municipal functions; that they make arrests for violations of state traffic laws on public highways; that they keep the public peace; that they conserve both life and property; and that their activities are vital to public welfare of this state. Therefore the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of police officers as hereinafter defined and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal police officers' retirement trust fund systems and plans, that such retirement systems or plans be

⁴ All statutory references are to the 2007 version unless otherwise indicated.

managed, administered, operated, and funded in such manner as to maximize the protection of police officers' retirement trust funds. Therefore, the Legislature hereby determines and declares that the provisions of this act fulfill an important state interest.

(Emphasis added.)

Chapters 175 and 185 grant firefighters and police officers a number of options for the types of retirement plans best suited for their respective municipalities and districts. The two primary options are either a "chapter plan" or a "local law plan." Regardless of the type of plan, however, the duties imposed on those who administer these plans are governed by chapters 175 and 185. First, as section 175.021(2) illustrates, both "chapter plans" and "local law plans" must comply with chapter 175 and 185's mandates:

This chapter hereby establishes, for all municipal and special district pension plans existing now or hereafter under this chapter, including chapter plans and local law plans, minimum benefits and minimum standards for the operation and funding of such plans, hereinafter referred to as firefighters' pension trust funds. The minimum benefits and minimum standards set forth in this chapter may not be diminished by local charter, ordinance, or resolution or by special act of the Legislature, nor may the minimum benefits or minimum standards be reduced or offset by any other local, state, or federal law that may include firefighters in its operation, except as provided under s. 112.65.

(Emphasis added); *see also* § 185.01(2).

A "chapter plan" is a pension plan that adopts by reference the terms of chapters 175 and 185. Section 175.032(2) defines a chapter plan as follows:

“Chapter plan” means a separate defined benefit pension plan for firefighters which incorporates by reference the provisions of this chapter and has been adopted by the governing body of a municipality or special district. Except as may be specifically authorized in this chapter, provisions of a chapter plan may not differ from the plan provisions set forth in ss. 175.021-175.341 and 175.361-175.401. Actuarial valuations of chapter plans shall be conducted by the division as provided by s. 175.261(1).

See also § 185.02(3).

Section 175.032(11) states a "local law plan" is a pension plan established by ordinance, special district resolution, or special act of the Legislature. *See also* § 185.02(10). Local law plans may vary from chapters 175 and 185, but any such variance must provide a greater benefit for firefighters and police officers. Section 175.032(11) defines local law plans as follows:

“Local law plan” means a defined benefit pension plan for firefighters, or for firefighters or police officers where included, as described in s. 175.351, established by municipal ordinance, special district resolution, or special act of the Legislature, which enactment sets forth all plan provisions. Local law plan provisions may vary from the provisions of this chapter, provided that required minimum benefits and minimum standards are met. Any such variance shall provide a greater benefit for firefighters. Actuarial valuations of local law plans shall be conducted by an enrolled actuary as provided in s. 175.261(2).

(Emphasis added); *see also* § 185.02(10).

All pension plans created under chapters 175 and 185—regardless of whether they are chapter plans or local law plans—are governed by a "board of trustees." §§ 175.061, 185.05. The statutory framework governing the pension

plans and boards of trustees emphasize that the board members' fiduciary responsibilities in administering the plans govern all pension plans. Sections 175.061, 175.071, 185.05, and 185.06—which contain the requirements governing the boards—all begin with an introductory provision similar to the following:

For any municipality, special fire control district, chapter plan, local law municipality, local law special fire control district, or local law plan under this chapter:

§ 175.061 (emphasis added). The sections then specify the makeup of the boards of trustees for local law plans ("The membership of boards of trustees for local law plans shall be as follows:"). §§ 175.061(1)(b), 185.05(1)(b). The sections go on to provide how the boards are elected and how often they must meet. §§ 175.061(2), (3), 185.05(2), (3).

The boards are also subject to the standards set forth in the Florida Protection of Public Employee Retirement Benefits Act, applicable to all governmental retirement systems. *See* § 112.61. Local plans must assure compliance with this act. §§ 175.351(2), 185.35(2). Among a Board member's fiduciary duties is to "discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." § 112.656(1) (emphasis added). The term "benefit" is also defined in section 112.625(6) for all retirement plans as follows: " 'Pension or

retirement benefit' means "any benefit, including a disability benefit, paid to a member or beneficiary of a retirement system or plan . . ." (Emphasis added.)

Chapters 175 and 185 further declare the boards of trustees to be legal entities with the power to sue and be sued regarding lawsuits "of every kind, nature and description":

Each board of trustees shall be a legal entity with, in addition to other powers and responsibilities contained herein, the power to bring and defend lawsuits of every kind, nature, and description.

§ 175.061(4) (emphasis added); *see also* § 185.05(4).

Immediately following this provision empowering the Board to bring and defend lawsuits of every kind, is the mandatory, prevailing party attorney's fee provision at issue. Sections 175.061(5) and 185.05(5) provide:

In any judicial proceeding . . . brought under or pursuant to the provisions of this chapter [175 or 185 respectively], the prevailing party shall be entitled to recover the costs thereof, together with reasonable attorney's fees.

(Emphasis added.)

The sections go on to provide that no local law plan can alter these provisions. § 175.061(6) ("The provisions of this section may not be altered by a participating municipality or special fire control district operating a chapter plan or local law plan under this chapter."); *see also* § 185.05(7).

The plan at issue in this case was implemented under and is governed by this statutory construct.

B. The Plan At Issue In This Proceeding.

In this case, the pension plan is a "local law plan" (the "Plan") created by the Legislature and entered into between the City of Tampa ("City") and its firefighters and police officers, pursuant to a special act in accordance with chapters 175 and 185. *See* Ch. 01-288, § 1, at 3261, Laws of Florida; [App. 4, 5; V19 3523]⁵

Like most local law plans, the Plan provides greater than benefits for firefighters and police officers. One of those benefits is known as the "13th Check Program." [App. 4; App. 5 at 14-15; V19 3523] The 13th Check Program, which is described in section 27 of the Plan and chapter 2001-288, Laws of Florida, provides a supplemental benefit. [App. 4; App. 5 at 14-15; V19 3523] It gives eligible retired members and surviving spouses a 13th pension check each year, depending on certain conditions being met. *Id.*

The Board is the statutorily created entity given exclusive responsibility for administering the Plan. *See* §§ 175.061, 185.05; [V19 3522-23] Like all firefighter and police pension boards of trustees discussed above, the Board was created, and is governed, by chapter 175 and chapter 185.

Consistent with the provisions set forth above granting the Board the power to defend lawsuits of every kind—and providing for prevailing party attorney's fees—Petitioner filed suit against the Board, claiming he and other members of the

⁵ Record citations refer to the volume and page number of the circuit court record transmitted to the Second District Court of Appeal and this Court.

class were entitled to payment of the 13th Check for the fund fiscal year ending September 30, 2004. [V1 21-49] The Board had refused to pay that check based on its use of an erroneous additional condition, namely that all prior investment losses to the Plan had to be made up before a 13th Check could be issued. [V19 3524] Petitioner argued no such requirement existed in the pension contract creating the 13th Check Program or in any written Board policy regarding the program or the Plan. [V1 25] He also argued such condition was not required by statute or necessary to fund payment of the 13th Check on a "sound actuarial basis" as required—because the only actuarial requirements were the requisite investment return and "cumulative actuarial gains." [V1 25]

Petitioner's lawsuit had the unusual posture of being brought as a class action. [V1 23] Most reported cases addressing suits for benefits under firefighter and police pension plans brought against boards of trustees are for individual benefits.⁶ Because the benefit at issue impacted all eligible firefighters, police officers, and surviving spouses who did not receive the 13th Check, Petitioner brought this as a class action. [V1 22-23]

⁶ See, e.g., *Bd. of Trustees of the City of Miami Fire Fighters' & Police Officers' Retirement Trust v. Fernandez*, 675 So. 2d 638 (Fla. 3d DCA 1996); *Haddix v. City of Panama City*, 624 So. 2d 801 (Fla. 1st DCA 1993); *Terry v. Board of Trustees of the City Pension Fund for Police Officers & Firefighters in the City of Pembroke Pines*, 11 Fla. L. Weekly Supp. 622b (Fla. 17th Cir. Ct. Apr. 28, 2004).

The underlying circuit court case was filed June 15, 2007. [V1 21-49] The Board responded with a motion to dismiss for lack of subject matter jurisdiction. [V1 54-67] While the motion to dismiss was pending, the Board undertook an "additional review" of the issues raised in the complaint. [V19 3524] After six months of review the Board reversed its decision, agreed with Petitioner's position, and voted to pay substantially all of the 13th Check for 2004. [V19 3517, 3525] This amounted to a payment in February 2008 of approximately 98% of the principal sum of the 13th Check due or approximately \$7.6 million. [V3 491; V16 2896] However, the Board retained the 2% balance of the principal and refused to pay accrued interest on the \$7.6 million, which together totaled \$2.1 million. [V1 119-20; V8 1370-71, 1380]

Notwithstanding the payments described above, the Board did not withdraw its motion to dismiss for lack of subject matter jurisdiction. The case went forward, and the circuit court denied the Board's motion to dismiss. [V1 116] The Board then answered, admitting the 13th Check should have been paid, but denying the class was entitled to a declaratory judgment or damages. [V1 117-22] The Board claimed the 13th Check had not been paid because "[t]he [F]und's actuary did not certify that the payment could be made on a sound actuarial basis until recently." [V1 121]

C. The Class Settlement and Stipulated Final Declaratory Judgment.

As the suit proceeded, the circuit court entered an order granting Petitioner's motion for class certification and certifying the class. [V2 243-49] Ultimately, the parties negotiated a settlement agreement and a stipulated final declaratory judgment which provided that each member of the class would be paid the balance of the principal of the 13th Check being held by the Board, plus interest, totaling \$2.1 million. [V3 482-509] The \$2.1 million, together with the \$7.6 million previously paid, represented a 100% recovery for the class under Petitioner's class action suit. The stipulated final declaratory judgment also granted Petitioner the declaratory relief sought, *i.e.*, the proper construction of the actuarial requirements for payment of the 13th Check. [V19 3521-27]

The \$2.1 million was placed in a separate money market account pending the outcome of appellate proceedings. [V3 491; V8 1380] Clearly the \$2.1 million is owed to the class members. The question is whether attorney's fees are to be paid from this money or are to be paid separately by the Board. As noted, chapters 175 and 185 both contain mandatory, prevailing party attorney's fee provisions. *See* §§ 175.061(5), 185.05(5), Fla. Stat.

D. The Attorney's Fee Award.

Despite the mandatory, prevailing party attorney's fees provisions in chapters 175 and 185, the Board denied liability for payment of fees, insisting

instead that such fees had to be paid from the retirees' interest money.⁷ Petitioner filed for partial summary judgment, requesting the trial court find the Board liable for attorney's fees under chapters 175 and 185. [V3 428-81] That motion was granted.⁸ [V4 632-33] Under the court's ruling, the firefighters and police officers were to be made whole and receive 100% of the 13th Check with interest—and, pursuant to the prevailing party attorney's fee provisions in chapters 175 and 185, the Board was liable for attorney's fees. [V4 632-33]

Thereafter, upon receiving extensive testimony and receiving evidence at hearings over the better part of four days as to the amount and entitlement to fees, the trial court entered final judgment in Petitioner's favor for \$1,160,927.28 including prejudgment interest and costs. [V19 3509-20, 3528]⁹

⁷ The Board also alleged Petitioner's counsel engaged in conduct vitiating attorney's fees in this case. [V7 1253-68] After considering extensive argument and evidence regarding the issue, the circuit court found no impropriety whatsoever. [V12 2188] Although the Board raised this issue on appeal, the Second District found it not worthy of mention in its decision.

⁸ The trial court also held fees were recoverable against the Board under the "substantial benefit" doctrine. [V4 633] That decision was reversed by the Second District but is not at issue in this proceeding. *See Parker*, 113 So. 3d at 68-69.

⁹ This award included a contingency fee multiplier [V19 3515-18], which the Second District later upheld in *Parker*. 113 So. 3d at 69-70. The amount of the fees is not at issue in this proceeding.

E. The Board's Appeal to the Second District Court of Appeal.

The Board appealed the attorney's fee judgment to the Second District Court of Appeal. *See Parker*, 113 So. 3d at 66. The Second District acknowledged the mandatory prevailing party attorney's fee provisions in chapters 175 and 185, but concluded that "this case is not governed by chapters 175 and 185." *Parker*, 113 So. 3d at 67. Rather than looking to the statutory provisions governing lawsuits brought by or against pension plan boards of trustees in chapters 175 and 185—in which those attorney's fee provisions are contained—the Second District focused on the benefit at issue. It concluded that, because the 13th Check Program was created by a special law unique to the City's Plan, chapters 175 and 185 and their respective prevailing party attorney's fee provisions did not apply. *Parker*, 113 So. 3d at 67-68.

Accordingly, under the Second District's decision, the prevailing party attorney's fees provisions in chapter 175 and 185 do not apply to judicial proceedings brought against pension plan boards of trustees to enforce benefits provided under local laws, plans, or special acts that are not applicable statewide. *Parker*, 113 So. 3d at 67-68. Nevertheless, recognizing this was a pure question of statutory construction impacting firefighters and police officers throughout the state of Florida, the Second District certified to this Court the question of great

public importance stated in footnote 2 above. *Id.* at 70. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

Chapters 175 and 185 expressly govern actions of the Board, and claims against the Board—including awards of prevailing party attorney's fees—regardless of whether the claim is for a benefit required by chapters 175 and 185 or for a greater benefit provided by a local plan adopted pursuant to those chapters. The Second District erred in concluding that chapters 175 and 185 and their prevailing party fee provisions do not apply to proceedings to enforce claims for benefits "unique" to local law plans or special acts.

The Second District's conclusion that the Plan is "not part of the general statutory construct of chapters 175 and 185" fails to recognize that these chapters explicitly contemplate and govern both "chapter plans" and "local law plans" adopted thereunder. The statutes specifically define "local law plans," stating they are permissible only if they meet the same minimum standards and provide the same minimum benefits as chapter plans. The only variance can be that local law plans can provide greater benefits. But those plans—and benefits afforded thereunder—are still created under and governed by chapters 175 and 185. In fact, the plans are the beneficiaries of special state insurance premium tax monies for their operations and benefits as well as being subject to state actuarial requirements and regulation under these chapters. Ninety-five percent of all firefighter and police pension plans created under chapters 175 and 185 are local law plans.

In addition to authorizing extra benefits, chapters 175 and 185 provide minimum standards for operation of firefighter and police pension plans. Section 175.061 and 185.05 mandate that (1) each plan be governed by a board of trustees, (2) the board is solely responsible for administration of the trust fund, (3) the board has the power to sue and be sued, and (4) in any such litigation, the prevailing party is entitled to attorney's fees.

Although the case here involved a class action, that is a unique circumstance. Most lawsuits are brought by individuals. Without application of the prevailing party attorney's fee provision, many firefighters and police officers will be unable to find counsel willing to bring a lawsuit where damages or benefits are small. Moreover, application of the prevailing party attorney's fee provision discourages meritless lawsuits. A finding that prevailing party attorney's fee provisions apply only to claims for benefits explicitly required by chapters 175 and 185—and not to claims for other benefits afforded by local law plans—is contrary to the plain language of those statutes and is a result clearly not contemplated or intended by the Legislature.

Accordingly, the decision should be quashed and the certified question answered in the affirmative.

ARGUMENT

Standard of Review

This Court reviews entitlement to statutory attorney's fees *de novo*. See *Diamond Aircraft Indus. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013).

Argument

I. CHAPTERS 175 AND 185, AND THE PREVAILING PARTY ATTORNEY'S FEE PROVISIONS THEREIN, APPLY TO JUDICIAL PROCEEDINGS TO ENFORCE CLAIMS FOR BENEFITS PROVIDED UNDER LOCAL LAW PLANS OR SPECIAL ACTS.

The purpose of chapters 175 and 185 is to ensure retirement plans for firefighters and police officers are provided in a "uniform retirement system," including "minimum standards for the operation and funding of such plans." §§ 175.021(1), (2), 185.01(1), (2). The boards of trustees established by these chapters to manage firefighter and police pension plans—such as the Board here—are vested with "[t]he sole and exclusive administration of, and the responsibilities for, the proper operation of the [firefighters' and police officers' pension] trust fund[s]." §§ 175.071(5), 185.06(4). Sections 175.071 and 185.06 expressly state that they apply to "any . . . local law plan." (Emphasis added.)

Moreover, the boards are subject to the fiduciary and other standards of the Florida Protection of Public Employee Retirement Benefits Act in chapter 112,

Florida Statutes. *See* §§ 112.61, 175.351(2), 185.35(2).¹⁰ Board members must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." § 112.656(1) (emphasis added). " 'Pension or retirement benefit' means any benefit, including a disability benefit, paid to a member or beneficiary of a retirement system or plan . . ." § 112.625(6). Thus, the Legislature, by explicit incorporation of chapter 112 into chapters 175 and 185, has mandated that the provisions in those chapters apply to all benefits under all plans; and not just the minimum benefits provided by chapters 175 and 185.

Sections 175.061 and 185.05, which govern the Board, likewise expressly state that they apply to all local law plans created under those chapters. The sections then declare the boards of trustees to be legal entities with the power to sue and be sued regarding lawsuits "of every kind, nature and description". §§ 175.061(4), 185.05(4) (emphasis added). Thus, under the plain language of the statutes, the provisions governing pension plan lawsuits against boards are not limited to lawsuits brought for the minimum benefits afforded under chapters 175 and 185—those provisions apply to lawsuits of every kind, nature and description.

¹⁰ Section 112.656(3) also allows retirement systems to purchase liability insurance for their fiduciaries to cover liability for losses incurred by reason of their acts or omissions such as that at issue here. The Board in this case maintains such insurance. [V3 464, 467-70]

Immediately following this provision empowering the Board to bring and defend lawsuits of every kind, is the mandatory prevailing party attorney's fee provision at issue. §§ 175.061(5), 185.05(5). And, just to be clear that such prevailing party attorney's fees are mandatory and apply to all benefits under both chapter plans and local law plans, the sections go on to provide that no local law plan can alter these provisions. §§ 175.061(6), 185.05(7). Thus, for any chapter plan or local law plan:

(1) In each municipality . . . there is hereby created a board of trustees of the firefighters' pension trust fund [or municipal police officers' retirement trust fund] which shall be solely responsible for administering the trust fund. . . .

. . . .

(4) Each board of trustees shall be a legal entity with, in addition to other powers and responsibilities contained herein, the power to bring and defend lawsuits of every kind, nature, and description.

(5) In any judicial proceeding . . . brought under or pursuant to the provisions of this chapter [175 or 185 respectively], the prevailing party shall be entitled to recover the costs thereof, together with reasonable attorney's fees.

(6) The provisions of this section may not be altered by a participating municipality . . . operating a chapter or local law plan under this chapter.

§ 175.061 (emphasis added); *see also* § 185.05.

Thus, under the express statutory language, any case brought against a board by a firefighter or police officer to recover any benefits 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]."

Consistent with the above provisions, Petitioner brought this class action¹¹ against the Board to recover benefits under and pursuant to chapters 175 and 185 because the Board failed to properly administer the Plan.¹² [V1 21-49] The Board misconstrued the Plan, thereby breaching its fiduciary duty to provide benefits when due. [V1 21-26] Indeed, the formula for funding of the 13th Check Program was the crux of the case. *Id.* The Board had, by its misinterpretation of the 13th Check Program, added an additional requirement which was not in the text of the Plan. [V1 25] This additional requirement was that the Plan had to make up all prior investment losses before the Board would consider the 13th Check to be funded on a "sound actuarial basis." *Id.* Funding on a "sound actuarial basis" is a

¹¹ As noted earlier, actions for benefits under these chapters can be, and typically are, brought as individual actions. Because the issue in this case is one of pure statutory construction, it matters not whether it is a class action or individual action.

¹² Below, the Board argued that this case was not brought under and pursuant to chapters 175 and 185 because the complaint did not explicitly reference those chapters. [Ini. Br. filed in 2nd DCA at 13-15] This argument fails because a plaintiff is 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. *See Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367, 1369 (Fla. 4th DCA 1981) (citing *City of Lakeland v. Select Tenures, Inc.*, 176 So. 274 (Fla. 1937)). Moreover, it is not necessary to plead the statutory basis of a claim for attorney's fees in the complaint itself. *See Caufield v. Cantele*, 837 So. 2d 371, 378 (Fla. 2002).

statutory requirement to protect the Plan. §§ 112.61, 175.021(1), 185.23(1); Art. 10, § 14, Fla. Const. Petitioner's position, with which the Board eventually agreed, was that the make up of prior investment losses was not necessary to satisfy the statutory condition of funding on a "sound actuarial basis."

The result of this lawsuit was to correct the Board's misinterpretation of an "element of a local law plan" under chapters 175 and 185. §§ 175.032(17), 185.02(15). As such, as a matter of law, the issues in this case fall squarely within chapters 175 and 185's scope of governance and regulation.

The Second District's decision recognized chapters 175 and 185 authorize local municipalities to form local law plans "pursuant to special laws and ordinances, regarding pension funds with firefighters and police officers." *Parker*, 113 So. 3d at 66-67 (emphasis added). Yet, the decision incorrectly concluded the prevailing party attorney's fee provisions in these chapters do not apply to judicial proceedings to enforce claims for benefits provided by local laws, plans, or special acts. *Id.* at 67-68. Respectfully, the district court's finding that "[t]he [Tampa] Special law is not part of the general statutory construct of chapters 175 and 185", *Parker*, 113 So. 3d at 67, is simply wrong—it wholly fails to recognize these chapters explicitly contemplate and govern both "chapter plans" and "local law plans."

Every aspect of the Plan must comply with the standards of chapters 175 and 185. Every challenge to the administration of the Plan and the proper exercise of the Board's duties is necessarily an action brought "under or pursuant to Chapters 175 and 185." Otherwise, there would be no purpose in juxtaposing the adjacent statutory provisions granting the Board authority to bring and defend suits and providing for prevailing party attorney's fees. §§ 175.061(4),(5); 185.05(4), (5). These adjacent provisions must be read *in pari materia* to provide for attorney's fees in actions by or against the Board regarding administration of a plan.

"[I]n construing statutory language [this Court] must give consideration 'not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purpose of the statute's enactment.' " *Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 313 (Fla. 2006) (quoting *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997)). Moreover, courts should avoid construing a statute in a way that defeats the purpose the statute was intended to serve. *Becker v. Amos*, 141 So. 136, 140 (Fla. 1932). "Pension statutes are to be liberally construed. . . ." *State ex rel Holton v. City of Tampa*, 159 So. 292, 293 (Fla. 1934). Although no doubt exists here as to the proper interpretation—to the extent any such doubt

exists, this Court must look to the legislative purpose in establishing a statute. *See, e.g., Weiss v. Leonardy*, 36 So. 2d 184, 186-87 (Fla. 1948).

As the Second District's decision acknowledges, the Plan at issue is a local law plan in Tampa and goes back to at least 1955.¹³ *See Parker*, 113 So. 3d at 67 (citing Ch. 31310, Laws of Fla. (1955)). The Tampa plan has grown to have total fund assets well in excess of a billion dollars.¹⁴ Along the way, it has been amended and supplemented by many subsequent special acts, including an amendment in 1998 which authorized the City of Tampa to enter into a supplemental contract with its active and retired firefighters and police officers to add both a DROP program and a 13th Check Program. Ch. 98-515, Laws of Fla.; [App. 3] The funding for the 13th Check was changed in chapter 2001-288, Laws of Florida, amending the pension contract. *See* [App. 4] Again, all of these amendments to the Plan and contract were specifically contemplated, authorized by and subject to chapters 175 and 185. *See, e.g.,* §§ 175.021(2), 175.261(2), 185.01(2), 185.221(2). Indeed, chapter 98-515, Laws of Florida, section 5, and

¹³ A comprehensive review of the history underlying firefighter and police retirement is located at:

http://www.dms.myflorida.com/human_resource_support/retirement/local_retirement_plans/municipal_police_and_fire_plans/overview (last accessed July 17, 2013). The Tampa Plan's website can be accessed at: www.tampagov.net/dept_fire_and_police_pension/ (last accessed July 17, 2013).

¹⁴ The pension fund balance was \$1,328,733,649 as of fund fiscal year ending September 30, 2005. [V17 3064]

chapter 2001-288, section 1, both insert a "conflict of laws" paragraph into the pension contract to provide:

(D) Conflict of Laws.- To the extent that any 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 law plans established by municipal ordinance or special act... the Board of Trustees is hereby delegated the authority to adopt by rules changes to 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.

[V15 2576]; [App. 3 at 281; App. 4 at 5; App. 5 at 15]

The rationale for allowing local law plans under chapters 175 and 185 is simply to provide flexibility for establishing greater eligibility and benefits tailored to local communities that are not available through chapter plans. But local law plans are still "part of the general statutory construct of chapters 175 and 185." As noted, local law plan boards are specifically created by those chapters and the plans are the beneficiaries of state tax monies as premiums for their operations and benefits. Additionally, they are subject to state actuarial requirements and regulation under these chapters. §§ 175.341, 185.23.

In other words, that one particular local law plan has an additional benefit over and above the minimum required by chapters 175 and 185 does not change the fact that the plan itself and challenges thereto are governed by those chapters. Indeed, once a local law plan meets the minimum benefits and standards of chapters 175 and 185, any additional state premium tax revenues received by the

board must, with limited exceptions, be used to provide extra benefits. §§ 175.351(1), 185.35(1). Since the statutes expressly contemplate "extra" benefits, "additional" benefits, and "supplemental" benefits, it would be antithetical to the purpose of the law for their prevailing party attorney's fees provisions to be inapplicable in a successful suit to recover benefits simply because they were not "ordinary" or "minimum" benefits offered in plans statewide.

Indeed, supplemental benefits such as the 13th Check are contemplated, described, and governed by these chapters. *See* §§ 175.032(17), 185.02(15). So are additional retirement options such as the "Deferred Retirement Option Plan," commonly known as "DROP." §§ 175.032(5), 185.02(6). The plan at issue also has a "post retirement adjustment account" ("PRAA") or "COLA" plan that provides for cost of living adjustments in retirement benefits. These options or "supplemental plans" are governed and regulated by chapters 175 and 185 because they are "element[s]" of the entire plan. §§ 175.032(17), 185.02(15). Obviously, how these options or supplemental plans are administered can affect the viability of the entire plan. That is why the 13th Check had to be funded on a "sound actuarial basis" and why chapter 2001-288, Laws of Florida, the law creating the 13th Check benefit [V1 44; App. 4], and the Plan contract repeatedly reference governance by chapters 175 and 185. *See* [V1 27-43 §§ 2, 3, 25, 26, 27; App. 5]

At bottom, the Second District's holding that recovery of fees is limited to actions involving only claims for minimum benefits applicable statewide would mean that someone asserting rights under their DROP account, or contesting administration of their PRAA (COLA) account, would be at a great disadvantage in trying to obtain the assistance of counsel if litigation became necessary. Such a result would be contrary to the purpose of these chapters and Florida case law. Every aspect of the Plan here must comply with the standards of chapters 175 and 185.

Accordingly, the mandatory, prevailing party attorney's fee provisions in chapters 175 and 185 apply to actions brought to enforce benefits provided under local law plans or special acts such as the action brought by Petitioner in this case.

II. THE DECISION HAS STATEWIDE IMPACT WELL BEYOND THE LITIGANTS IN THIS CASE AND DEPRIVES RETIRED MUNICIPAL FIREFIGHTERS AND POLICE OFFICERS COVERED BY LOCAL LAW PLANS OF ENTITLEMENT TO STATUTORILY-MANDATED ATTORNEY'S FEES.

The decision will have statewide impact well beyond the litigants in this case—it deprives 95% of Florida's retired municipal firefighters and police officers of their entitlement to prevailing party attorney's fees mandated by chapters 175 and 185 for claims brought for additional benefits provided under local law plans. The Second District determined the Plan is "unique to the City of Tampa." *Parker*, 113 So. 3d. at 67. In fact, just the opposite is true. That the City has its own local law plan under chapters 175 and 185, with specific benefits thereunder, is typical. While certain aspects of the Plan—such as the 13th Check—may be unique, as of September 30, 2010, there were 351 Florida municipal police and firefighter pension funds participating under chapters 175 and 185. *See* [App. 2 at Exh. B p. 6] Only 18 of those were "chapter plans"; 333 were "local law plans." *See id.*

Thus, the Second District's decision that the attorney's fee provisions do not apply to local law plans offering additional benefits is a rule which impacts 95% of the plans regulated under chapters 175 and 185 (and the individuals covered thereunder)—almost all of which provide benefits unique to their communities and that were passed by a local ordinance or special act. Under the Second District's interpretation of chapters 175 and 185, no prevailing retired firefighter 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 and not available statewide. No reported decision has so held, until now.

The unusual feature of this case is that the Board wrongly withheld benefits from an entire class, so a class action was feasible. But the precedent set by the decision would apply to individual claims as well as class claims. Clearly the Legislature created a prevailing party attorney's fee provision in both chapter 175 and 185 to assure that if a retired police officer or firefighter had to bring suit in order to obtain benefits wrongly withheld, the retiree would be able to obtain counsel and be made 100% whole. These special men and women who risk their lives for all of us on a daily basis maintain a special place in our society—and the Legislature, by inclusion of a prevailing party attorney's fee provision, has attempted to ensure they are made whole whenever any benefits are wrongly withheld. These fee provisions favor a public policy of compensating a retiree for attorney's fees for bringing a legitimate suit, as in this case. They also deter a retiree from bringing a frivolous one.

Based on the foregoing, the decision should be quashed and the certified question answered in the affirmative.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests this Court quash the Second District's decision and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18, 2013 a true and correct copy of the foregoing and appendix has been 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 by E-Mail to: Bruce S. Rogow, Esq. and Tara A. Champion, Esq., Bruce S. Rogow, P.A., 500 E. Broward Boulevard, Suite 1930, Ft. Lauderdale, Florida 33394 (brogow@rogowlaw.com) and (tcampion@rogowlaw.com); and Patrick H. Gonyea, Esq., Demahy, Labrador, Drake, 150 Alhambra Cir PH, Coral Gables, Florida 33134 (pgonyea@dldlawyers.com) (Attorneys for Respondent).

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CERTIFICATE OF FONT COMPLIANCE

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

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