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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.

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**PETITIONER'S REPLY BRIEF**

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

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## ARGUMENT

The Second District's decision has extremely broad impact. Attempting to convince this Court otherwise, the Board incorrectly states that the 13<sup>th</sup> Check pension benefit is the only one of its type. The Board also incorrectly states that the "special act" adopting that benefit makes it distinct from other "local law plans." In fact, at least twelve other firefighter and police officer pension plans have similar 13<sup>th</sup> check benefits. Moreover, the pension plan at issue is a local law plan. Section 175.032(11) expressly states that firefighter "local law plans" are pension plans "established by municipal ordinance, special district resolution or special act of the Legislature." Likewise, section 185.02(10) expressly states that police "local law plans" are pension plans "established by municipal ordinance or special act of the Legislature. (Emphasis added.)

Local law plans (such as the plan here) can award additional benefits over and above the benefits required by chapters 175 and 185. But the Board's statutory and fiduciary duties to properly administer those plans (a breach of which formed the basis for the lawsuit here) are still the same and still controlled by chapters 175 and 185—regardless of the type of local law plan or benefit at issue. If the Second District's opinion stands, no fees can ever be awarded to any firefighter or police officer who successfully sues a board for its failure to provide additional benefits required by a local law plan—even though chapters 175 and 185 expressly

mandate such fees. The conclusion is confirmed by Florida Jurisprudence's recent inclusion and summary of the Second District's decision in its section on firefighter and police pension funds:

Supplemental pension distribution fund established by a special law specifically for city firefighters and police officers in one jurisdiction was not controlled by attorney fees provisions found in statutory sections that governed pension funds statewide.

39 Fla. Jur. 2d *Pensions and Retirement Funds* § 127 (Westlaw On-line Cumulative Supp. Aug. 2013).

In addition, the Board's arguments on the merits are erroneous. The Board concedes pension statutes must be liberally construed. It concedes its fiduciary duties and powers are governed by chapters 175 and 185—which include the duty to properly administer all plans and the power to defend lawsuits filed for any alleged breach of that duty. It concedes those chapters provide for prevailing party attorney's fees. And it concedes the Board breached its fiduciary duty in this case by failing to provide firefighters and police officers with the 13<sup>th</sup> check to which they were entitled. The Board also concedes that the local law and plan at issue contain provisions mandating that, to the extent the law or plan conflict with chapters 175 and 185, those chapters prevail.

The Board's only argument is that this case was brought to require payment of a "special" benefit and, because the complaint contains no reference to chapters 175 and 185, and because the local law and plan are silent as to fees, no such fees

can be awarded. That argument ignores explicit language in the complaint implicating chapters 175 and 185. It also ignores that local law plans would never need to mention attorney's fees because sections 175.061(6) and 185.05(7) prohibit a local law plan from altering the attorney's fee provisions. By law, local law plans can provide greater benefits; but those plans cannot alter the Board's duties, the Board's power to bring and defend lawsuits, or the prevailing party attorney's fees provisions.

The certified question should be answered in the affirmative and the Second District's opinion should be quashed.

**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.**

As discussed in the initial brief, sections 175.061 and 185.05 contain the prevailing party attorney's fees provisions at issue. Those sections explicitly apply to "any" local law plan. In this case, the pension plan is a local law plan under chapters 175 and 185. Although the Board, as did the Second District, characterizes the pension plan at issue as a "unique" plan adopted by special act, such a characterization completely disregards the definition of a "local law plan"—which is always established by either municipal ordinance, special district resolution, or special act of the legislature. §§ 175.032(11), 185.02(10).

Over the years, numerous police and firefighter pension plans have been established by special act. In fact, the Index to Special and Local Laws, 1845-1970 and the Index to Laws of Florida, Special and Local Laws, 1972-2008 contain hundreds of special and local laws establishing, implementing, modifying and abolishing municipal firefighter and police pension plans and benefits.<sup>1</sup> In addition, 13<sup>th</sup> Check programs are also common. According to the Division of Retirement's Summary of Plan Benefits, there are at least a dozen other 13<sup>th</sup> check programs.<sup>2</sup> Thus, neither the local law plan nor the 13<sup>th</sup> Check benefit at issue here

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<sup>1</sup> The Board asserts that "[n]o other Special Act plans are identified in the list of police and fire plans" contained in Exhibit A, Tab 2 of the Petitioner's Appendix. Ans. Br. at 1, n.1. This statement is misleading because the exhibit, which is from the Florida Department of Management Services' website, identifies plans only as "LL" (local law) or "Chapter." It does not identify how those plans were adopted. In fact, a substantial number of the local law municipal police and/or firefighter pension plans were established by special act, including, but not limited to Ch. 18615 (1937) and 69-1172, Laws of Florida (creating pensions for the Jacksonville police and fire departments); Ch. 23414, Laws of Fla. (1945) (creating the City Pension Fund for Firefighters and Police Officers in the City of Miami Beach; Ch. 23444, Laws of Fla. (1945) (creating the Pension Fund of the Fire Department of the City of Orlando, Florida); Ch. 22414, Laws of Fla. (1943) (creating the Pension Fund of the Police Department of the City of Orlando, Florida); Ch. 21483, Laws of Fla. (1941) (creating the Fireman's Relief and Pension Fund of Pensacola); Ch. 24981, Laws of Florida (1947) (creating pensions for the West Palm Beach police and fire departments).

<sup>2</sup> These other 13<sup>th</sup> check programs include: Boynton Beach firefighters, Cooper City firefighters, Cooper City police, Lake Worth firefighters, Lauderhill police, Pembroke Pines police, Royal Palm Beach police, Sebring police, Sunrise police, Tamarac police, Vero Beach firefighters, West Palm Beach firefighters and police. See The Division of Retirement's Summary of Plan Benefits, *available at*



are unique. But even if they were, attorney's fees are still mandated by chapters 175 and 185 because, as established in the initial brief and here, this lawsuit was brought "under or pursuant to" those chapters.

First, as noted, sections 175.061 and 185.05 apply to "any" local law plan. Second, those sections establish boards of trustees as the entities that operate and properly administer local law plans. Third, those sections grant pension plan boards the power to bring and defend lawsuits of every type. In addition, although a local law plan can provide greater (not fewer) benefits than those mandated by chapters 175 and 185, a board of trustees is prohibited from altering any of the provisions of sections 175.061 and 185.05—which are the sections which include the mandatory attorney's fee provisions. §§ 175.061(6); 185.05(7).

Here, the Board is the entity created under sections 175.061 and 185.05 to administer the plan. The Board is operating the local law plan here under and pursuant to chapters 175 and 185. Both the Board's and the plan's very ability to exist is authorized and governed by those chapters. And the lawsuit here was brought to force the Board to adhere to its duties to properly administer the plan at issue under and pursuant to chapters 175 and 185. Given the statutes' plain language that the attorney's fees provisions apply to "any" local law plan, and given the prohibition against a local law plan's changing sections 175.061 and

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[http://www.rol.frs.state.fl.us/forms/Benefit\\_Comparison\\_Chart.pdf](http://www.rol.frs.state.fl.us/forms/Benefit_Comparison_Chart.pdf) (last visited October 4, 2013).

185.05—which includes the statute's attorney's fee provisions—it makes no sense to interpret the "under or pursuant to" language in the attorney's fees provisions as meaning some lawsuits for benefits are brought under or pursuant to chapters 175 and 185 but others are not.

The Board nevertheless argues this lawsuit was not brought "under or pursuant to" chapters 175 and 185 because (1) the complaint does not explicitly mention those chapters, and (2) the benefit at issue (the 13<sup>th</sup> Check) is a benefit created by special act, and neither the act nor the pension plan affording that benefit mention attorney's fees.

As to the first assertion (*i.e.*, no mention of chapters 175 and 185 in the complaint), the Board concedes a complaint need not designate or refer to a statutory section to maintain an action under it as long as the facts pleaded bring the allegations of the complaint within a statute. [Ans. Br. at 10-11] The Board nonetheless contends that, because the complaint specifically mentions the pension plan and the special act but not chapters 175 and 185, attorney's fees are only awardable if the pension plan and the special act authorize such an award. The Board overlooks the following allegations in the complaint:

- "The defendant Board of Trustees of the City Pension Fund for Firefighters and Police Officers of the City of Tampa (the 'Trustees'), is a statutorily created board given exclusive responsibility for administering the Pension Trust Fund for Firefighters and Police Officers for the City of Tampa." [V1 21-22 ¶ 2 (emphasis added)]

- "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 plan and special act "based upon an incorrect assumption" regarding investments not required by statute or the Florida Constitution. [V1 25 ¶ 20 (emphasis added)]

As the complaint illustrates, it was brought against the Board as the statutorily created entity charged with administering the pension plan because of its failure to properly administer the plan. Under the Board's argument, the complaint had to expressly state it was brought against the Board as the statutorily created entity under sections 175.061 and 185.05 and failed to properly administer the plan as required by chapters 175 and 185.<sup>3</sup> The law does not require this level of specificity.

This Court has repeatedly stated that its fundamental concern as to the pleading requirement for attorney's fees is "notice." *Caufield v. Cantele*, 837 So. 2d 371, 377 (Fla. 2002); *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991). As this Court recognized in *Caufield*: "By pleading a claim to attorney's fees, a party notifies the opposing party and prevents unfair surprise." 837 So. 2d at 377. This Court has explicitly held, however, that the authority on which those fees are based "need not be specifically pled, and that failure to plead the basis of such a claim

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<sup>3</sup> Chapters 175 and 185 explicitly vest the "sole and exclusive administration of, and the responsibilities for, the proper operation of [local law plans]" in the Board. §§175.071(5); 185.06(4). As noted in the initial brief, boards of trustees have the authority to, as here, secure insurance to afford the Board protection when they are sued in this regard. *See* [Ini. Br. at n.10 (citing §112.656(3); V3 464, 467-70)]

will not result in waiver of the claim." *Id.* at 378. This is because, "merely pleading a claim for attorney's fees is sufficient to notify the opposing party and allow it to consider the claim in a decision on whether to proceed." *Id.* at 377-78.

Here, the Complaint makes an express claim for attorney's fees. The Complaint was filed to require the Board to properly fund the pension plan benefits. The statutes creating the Board expressly provide for attorney's fees in the very next sentence following the sentence granting the Board the power to bring and defend lawsuits. And the special act and pension plan at issue do not alter those powers or attorney's fees provisions. Under these circumstances, the Board was clearly placed on notice that attorney's fees would be sought against it.

As to the second assertion (*i.e.*, no mention of attorney's fees in the special act or pension plan—and the special act controls over the general law), the Board acknowledges that the statutory maxim of the specific controlling over the general only applies when two statutory provisions conflict. [Ans. Br. at 8 n.2] The Board asserts there is conflict because chapters 175 and 185 mention attorney's fees but the special act does not. This alone, however, does not establish any conflict between the special act and the general fee provisions in chapters 175 and 185.

To the contrary, this Court has held that, when two laws govern the same subject area, courts must harmonize those laws and the legislature is presumed to have intended that both laws are to operate coextensively and have the fullest

effect possible. *See, e.g., Palm Bch. Co. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287-88 (Fla. 2000). Where both general and specific laws govern the same subject matter, each must be given its legitimate field and scope of operation. *Bryan v. Landis*, 106 Fla. 19, 142 So. 650, 653 (1932). A court cannot construe a law as inapplicable by "implication" in a subsequently enacted law where nothing indicates the legislature intended to render the earlier statute inapplicable. *Olmstead v. Federal Trade Comm.*, 44 So. 3d 76, 82-83 (Fla. 2010); *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 774 (1914).

In this case, there is the general statutory provision in chapters 175 and 185 governing firefighter and police pension plans, which provides for prevailing party attorney's fees in suits against boards of trustees who fail to properly exercise their duties under and pursuant to chapters 175 and 185. And there is the special act granting 13<sup>th</sup> check benefits. However, the general statutory construct in chapters 175 and 185 still governs the general responsibilities of boards of trustees who administer those benefits. Nothing in the special act indicates the legislature intended to change or eliminate the attorney's fee provisions in chapters 175 and 185 simply because of the type of benefit at issue.

In fact, the statutory scheme confirms just the opposite—that the Legislature intended the prevailing party attorney's fees provisions to apply to all local law plans, regardless of the type of benefits at issue. Again, it is simply illogical to

conclude that the legislature intended prevailing party attorney's fees to apply only when disputes involve plans providing the minimum benefits mandated by the general statute but not for disputes involving greater benefits. And without any such legislative indication, this Court should conclude that the prevailing party attorney's fees provisions apply to 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.**

As discussed in detail in the initial brief, the outcome of this case will have statewide impact far beyond the litigants in this case. Florida has hundreds of "unique" local law pension plan programs for firefighters and police officers. All are established by special law (as here), municipal ordinance, or special district resolution specific to one jurisdiction. *See* §§ 175.032(11), 185.02(10). If fees are not available for successfully pursuing benefits here, they will likewise not be available for successfully pursuing benefits from any of those unique local law pension plans.

This Court's own filings indicate boards of trustees are already using the Second District's decision here to try to limit awards of attorney's fees in other jurisdictions. *See* Petitioner's Brief in Support of Jurisdiction to Review a Decision of the District Court of Appeal for the First District at 2-6, *Bd. of Trustees of the*

*Jacksonville Police/Fire Pension Fund v. Kicklighter*, No. SC13-427. Indeed, the latest version of Florida Jurisprudence on Pensions and Retirement Funds, which addresses funding of firefighter and police pension plans, now cites the Second District's decision for the following proposition: "Supplemental pension distribution fund established by a special law specifically for city firefighters and police officers in one jurisdiction was not controlled by attorney fees provisions found in statutory sections that governed pension funds statewide." 39 Fla. Jur. 2d *Pensions and Retirement Funds* § 127 (Westlaw On-line Cumulative Supp. Aug. 2013). As this discussion illustrates, attorney's fees will no longer be available for disputes involving local law plans that provide greater benefits for local firefighters and police if the Second District's decision is not quashed.

### **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 October 4, 2013 a true and correct copy of the foregoing 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 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).

/s/Katherine E. Giddings  
KATHERINE E. GIDDINGS

**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.

/s/Katherine E. Giddings  
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