

IN THE SUPREME COURT OF FLORIDA

**FILED**  
SID J. WHITE  
AUG 7 1989  
CLERK, SUPREME COURT  
By *[Signature]*  
Deputy Clerk

PATRICIA THORNER, JOHN FRANKLIN,  
and AL GRANT,  
petitioners,

v

DOCKET NO. 88-00099  
CASE NO 84-1376

THE CITY OF FORT WALTON BEACH,  
Respondent.

---

*74494*

PETITIONERS' JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT  
OF APPEAL, FIRST DISTRICT  
STATE OF FLORIDA

GEORGE E. DAY  
GEORGE E. DAY, P.A.  
32 Beal Parkway SW  
Fort Walton Beach, FL 32548  
(904) 243-1234  
Florida Bar No. 0228818

ATTORNEY FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	1
TABLE OF CITATIONS. . . . .	2
I STATEMENT OF THE CASE AND FACTS. . . . .	3
II SUMMARY OF THE ARGUMENT. . . . .	5
III JURISDICTIONAL STATEMENT . . . . .	6
IV ARGUMENT. . . . .	6
THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH <u>FERRARA V CAVES</u> , 475 So.2d 1295 (Fla. 4th DCA 1985) AND <u>CITY OF HIALEAH V BENNETT</u> , 376 So.2d 483 (Fla. 3rd DCA 1979).	
V CONCLUSION . . . . .	8
VI CERTIFICATE OF SERVICE . . . . .	9

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
<u>Encompass, Incorporated v Alford</u> , 444 So.2d 1085, (Fla. 1st DCA 1984)	7
<u>Ferrara v Caves</u> , 475 So.2d 1295, (Fla. 4th DCA 1985)	5
<u>City of Hialeah</u> , 376 So.2d 483 (Fla. 3rd DCA 1979)	5
 <u>Constitutional Provisions and Statutes</u>	
Article V, Section 3(b)(3), Florida Constitution (1980)	6
Section 111.07, Florida Statutes (1983)	3
 <u>Court Rules</u>	
Florida Rules of Appellate Procedure, 9.030(a)(2)(A)(IV)	6

STATEMENT OF THE CASE AND FACTS

Case Numbers **87-1900** and **88-99** were consolidated on appeal for record purposes only. City of Fort Walton Beach councilmen John Franklin, Patricia Thornber, and Al Grant sued on a six count amended complaint under Section **111.07**, Florida Statutes (**1981**) for attorney fees incurred for private representation in several legal and administrative actions. Said actions arose from Fort Walton Beach's City Council dismissal of the City Manager, Winston Walker, and appointing the Mayor as City Manager pro tem.

At an evidentiary hearing concluded on October **14, 1987**, Okaloosa County Circuit Court Judge Erwin Fleet ruled that Councilman Grant was entitled to a reasonable attorney fee of **\$7,500.00** under Section **111.07**, Florida Statutes (**1981**) and that Councilmen Thornber and Franklin take nothing.

In case number **87-1900**, the City filed an appeal to the First District Court of Appeal, contesting the award of attorney fees to Grant. In case number **88-99**, Thornber, Franklin and Grant appealed to the First District Court of Appeal from the trial court order dismissing counts II, III, and V of their amended complaint and Thornber and Franklin appealed denial of attorney fees for defending a recall action and judgment entered in favor of the City.

On April 14, 1989, the First District Court of Appeal affirmed the judgment in case number 87-1900 and affirmed in part and reversed in part the judgment in case number 88-99. On April 20, 1989, the First District Court of Appeal corrected a clerical error on page 20 in its April 14, 1989 opinion.

In case number 88-99, the district court affirmed the trial court's dismissal of counts 11, 111, IV of Grant's, Thornber's, and Franklin's amended complaint but reversed the trial court's ruling denying Thornber and Franklin a reasonable attorney fee under Count IV of their amended complaint. The "in part reversal" was based upon the district court's finding that the trial court improperly tried "Sunshine Law" issues and therefore the trial court's denial of attorney fees to Thornber and Franklin under Count IV based upon an alleged Sunshine Law violation was improper and Franklin and Thornber were awarded attorney fees pursuant to Section 111.07. Count II of the Councilmen's amended complaint sought attorney fees under F.S. 111.07 for having to initiate circuit court proceedings to stop an illegal recall petition filed against the councilmen. Motion for Rehearing by the City of Fort Walton Beach was denied on July 3, 1989. On June 30, 1989, based on the Appellant/Petitioner's Motion for Clarification, the district court remanded to the trial court to enter judgment for Thornber and Franklin on Count IV of their amended complaint consistent with record evidence in

support of a reasonable attorney's fee. Appellant's motions for rehearing and rehearing en banc were denied on June 30, 1989.

Petitioner's notice to invoke discretionary jurisdiction was timely filed on July 28, 1989.

SUMMARY OF THE ARGUMENT

In this case a portion of the opinion of the district court of appeal held that unless a public officer was a named Defendant he was not entitled to reimbursement of attorney fees under F.S. section 111.07.

The decision of the District Court is in direct conflict with Ferrara v Caves, 475 So.2d 1295 (Fla. 4th DCA 1985) and City of Hialeah v Bennett, 376 So.2d 483 (Fla. 3rd DCA 1979) wherein the respective courts determined that a public officer is entitled to reimbursement for attorney fees for legal services performed for an action when said action arose out of the officer's official duties regardless of whether the officer defended or prosecuted/initiated the action. Thus, the petitioner contends the portion of the decision of the district court that affirms the dismissal of Count II of Councilmen Thornber, Franklin and Grant directly conflicts with the aforesaid decisions of the Third District Court of Appeal, and Fourth District Court of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art V, Section 3(b)(3), Florida Constitution (1980); Fla. R.App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

The portion of the decision of the First District Court of Appeal which applies to the denial of attorney fees for the councilmen under Count II of their Amended Complaint expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Ferrara v Caves, 475 So.2d 1295 (Fla. 4th DCA 1985) and the decision of the Third District Court of Appeal in City of Hialeah v Bennett, 376 So.2d 483 (Fla. 3rd DCA 1979).

The majority opinion bases that portion of its holding which denies Councilmen Thornber, Franklin and Grant attorney fees (for defense of a recall) under Count II of their amended complaint on a requirement of strict judicial construction of Section 111.07. This construction requires that the officer be actually named as a Defendant in the court proceeding in order to be entitled to reimbursement of attorney fees. Such construction of Section 111.07 is in direct conflict with Ferrara and City of Hialeah.

The district court relied on Encompass, Incorporated v Alford, 444 So.2d 1085 (Fla. 1st DCA 1984) in applying strict construction to a statute awarding attorney fees because said statutes are considered in derogation of the common law (see page 15 majority opinion). Encompass has no precedential value in respect to the councilmen's attorney fees entitlement because just as Ferrara cited and the majority opinion stated, "Section 111.07 recognizes the common law doctrine that a public officer is entitled to an attorney at the expense of the public in litigation arising from the performance of his official duties. (See page 14, 22 of court's majority and dissenting opinions). Encompass involved statutory provision for attorney fees in a private matter between private parties involving a mechanic's lien. The present case, just as Ferrara did, involves matters involving public officials and their entitlement to attorney fees at the expense of the public in litigation arising from the performance of official duties while serving a public purpose. Councilmen Franklin, Grant, and Thornber, initiated court proceedings to enjoin a recall action which was initiated as a result of their official actions in firing the City Manager in order to reorganize the City's administration. In Ferrara, the Fourth District Court of Appeal ruled that certain commissioners were entitled to have the City pay their attorney fees which were incurred as a result of these commissioners filing a declaratory

action to have the recall petitions filed against them declared invalid. The councilmen in the present case took the same course of action by filing a circuit court proceeding to enjoin the processing of the recall petitions against them (See footnote, 5, page 4, majority opinion). Ferrara and the present case are in direct conflict on the same issues under the same facts.

Lastly, the portion of the District Court's ruling which denied the councilmen attorney fees under Count II of their amended complaint expressly and directly conflicts with the Third District Court of Appeal's decision in City of Hialeah v Bennett, 376 So.2d 483 (3rd DCA 1979) which held:

"(A) municipal board or officer possesses implied authority to employ counsel in the good faith prosecution or defense of an action undertaken in the public interest, and in conjunction with its or his official duties where the municipal attorney refused to act, or was incapable of, or was disqualified from, acting."


The Petitioners respectfully submit that this court should grant discretionary review and resolve the conflict by quashing that portion of the decision of the district court which denies Councilmen Thornber, Franklin, and Grant attorney fees under Count II of their amended complaint.

#### CONCLUSION

This court has jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the Petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this the 4<sup>th</sup> day of August, 1989, to James E. Moore, P.O. Box 746, Niceville, FL 32578.

  
\_\_\_\_\_  
GEORGE E. DAY  
GEORGE E. DAY, P.A.  
32 Beal Parkway SW  
Fort Walton Beach, FL 32548  
(904) 243-1234  
Attorney for Petitioners  
Florida Bar No. 0228818