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MEMORANDUM

DATE: May 19, 2016

TO: Manatee County Board of County Commissioners

THROUGH: Mitchell O. Palmer, County Attorney MOP 5/19/16

FROM: Robert M. Eschenfelder, Chief Assistant County Attorney

RE: Reimbursement of Commissioner Attorney Fees Upon Commissioner's Settlement of Records Act Suit; *Barfield v. DiSabatino*, Case No.: 2013-CA-0810 (CAO Matter No. 2016-211)

ISSUE PRESENTED:

Where a County Commissioner is sued for violation of the Public Records Act, and thereafter retains private counsel to defend the suit but ultimately settles the case resulting in the agreement to pay plaintiff attorney fees and refrain from certain conduct for the remainder of her Commission tenure, is the Commissioner entitled to reimbursement from the County of her own attorney fees?

BRIEF ANSWER:

In order for a County Commissioner to be eligible to receive reimbursement for private attorney fees from the County for his/her defense of a Public Records Act lawsuit, she/he must have, at a minimum, prevailed in the litigation. Under the facts of this case, the Commissioner did not prevail, and is therefore not entitled to recover her fees.

DISCUSSION:

This matter arises from a Public Records Act lawsuit filed in 2013 against Manatee County and Commissioner Robin DiSabatino individually. The County was eventually dismissed from the case, but Commissioner DiSabatino remained a party as to e mails generated using her personal account. Florida Statute § 119.011(5) defines "Custodian of public records" as:

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> the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.

Under current Florida law, once an email or text involving agency business is created using a public official's personal account, the public official becomes the "agency" and is thus personally responsible for complying with the state records retention policies, including the need to establish a method of retaining records per the State's records retention schedule. ***Butler v. City of Hallandale Beach*, 68 So.3d 278 (4th DCA 2011)**. According to the Florida Attorney General, "The individual public official, *not the governmental agency*, *should bear the* duty (and thus the *expense) of responding* to a public records request involving his or her personal accounts. AGO 08-07. Emphasis added.

The general issue of payment of attorney fees to defend a public official from various charges or suits is addressed under both statutory and common law rules. I will discuss the relevant statutes first, followed by a discussion of the common law.

Reimbursement Under the "Defense of Civil Actions" Statutes

Florida Statutes § 111.07, entitled *Defense of civil actions against public officers, employees, or agents*, provides:

> Any agency of the state, or *any county*, municipality, or political subdivision of the state, *is authorized to provide an attorney to defend any civil action arising from a* ***complaint for damages or injury*** suffered *as a result of any act or omission of action of any of its officers*, employees, or agents for an act or omission *arising out of and in the scope of his or her employment or function*, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Defense of such civil action includes, but is not limited to, any civil rights lawsuit seeking relief personally against the officer, employee, or agent for an act or omission under color of state law, custom, or usage, wherein it is alleged that such officer, employee, or agent has deprived another person of rights secured under the Federal Constitution or laws. Legal representation of an officer, employee, or agent of a state agency may be provided by the Department of Legal Affairs. However, *any attorney's fees paid from public funds for any officer*, employee, or agent who is *found to be personally liable by virtue of acting outside the scope of his or her employment, or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, may be recovered by the* state, *county*, municipality, or political subdivision in a civil action *against such officer*, employee, or agent. *If any* agency of the state or any *county*, municipality, or political subdivision of the state is authorized pursuant to this section to provide an attorney to defend a civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents and *fails to provide such attorney*, *such* agency, *county*, municipality, or political subdivision *shall reimburse any such defendant* **who prevails** in the action *for court costs and reasonable attorney's fees.*

Emphasis added. In turn, Florida Statutes § 111.071, entitled "*Payment of judgments or settlements against certain public officers or employees*", provides:

> (1) Any county, municipality, political subdivision, or agency of the state which has been excluded from participation in the Insurance Risk Management Trust Fund is *authorized to expend available funds* to pay:
>
> > (a) Any *final judgment, including* damages, costs, and *attorney's fees*, ***arising from a complaint for damages or injury*** suffered as a result of any act or omission of action of any officer, employee, or agent *in a civil or civil rights lawsuit described in s. 111.07.* If the civil action arises under s. 768.28 as a tort claim, the limitations and provisions of s. 768.28 governing payment shall apply. If the action is a civil rights action arising under 42 U.S.C. s. 1983, or similar federal statutes, payments for the full amount of the judgment may be made unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally.
> >
> > (b) *Any compromise or settlement of any* claim or *litigation as described in paragraph (a)*, subject to the limitations set forth in that paragraph.
> >
> > (c) Any *reimbursement required under s. 111.07 for* court costs and *reasonable attorney's fees when the county*, municipality, political subdivision, or agency of the state has *failed to provide an attorney* **and the defendant prevails**.
>
> (2) For purposes of this section, a "final judgment" means a judgment upon completion of any appellate proceedings.
>
> (3) "Agency of the state" or "state agency," as used in this section, includes an executive department, a constitutional officer, the Legislature, and the judicial branch.
>
> (4) This section is not intended to be a waiver of sovereign immunity or a waiver of any other defense or immunity to such lawsuits.

When read together, these two statutes require two things in order for reimbursement to be appropriate: 1) the civil lawsuit/action brought against the public official must be a "complaint for damages or injury"; and 2) the public official must be the "prevailing party."

There may be instances wherein counsel for a governmental entity may not be able to undertake representation of an individual employee or official of that entity. Such situations can include a determination that the representation creates a conflict between the defense strategy of the entity and that of the official or employee, or that the Rules Regulating the Florida Bar prohibit such representation. While the statutes do not mandate a public body to defend an employee or official when litigation begins, ***Greer v. Mathews*, 409 So.2d 1105 (1st DCA 1982)**, they provide for reimbursement if the conditions noted above have been met when the litigation concludes.

For the reasons discussed below, it is my opinion that the facts of the case at issue for which reimbursement of defense costs is being sought do not support a finding that the Commissioner can satisfy either of these two requirements.

"Complaint for Damages or Injury" Requirement

As to the first requirement, the action brought against the Commissioner was not one for damages or injury. Rather, the *Complaint* filed on February 7th 2013 makes no mention of, nor demand for, damages nor assertion of injury. Rather, the *Complaint* asserts that the Plaintiff "has no adequate remedy at law", that the Public Records Act was violated, that the Court should find and declare that the Act had been violated, that the Court enjoin the Commissioner from continuing to violate the Act, and that Plaintiff was "entitled to collect an attorney fee". None of these allegations constitute a "complaint for damages or injury." In fact, the Plaintiff's assertion that he had no adequate remedy at law is analogous to confirming he was not seeking money damages.

It is a basic rule of statutory construction that, where a statute contains plain and simple language, it is the duty of the courts to apply the literal meaning of the statute. See, ***Alligood v. Florida Real Estate Commission*, 156 So.2d 705 (2d DCA 1963)**. And see, ***Fine v. Moran*, 77 So. 533 (Fla. 1917)** (the general rule is that where language is unambiguous, the clearly expressed intent must be given effect, and there is no room for construction); ***Osborne v. Simpson*, 114 So. 543 (Fla. 1927)** (where statute's language is plain, definite in meaning without ambiguity, it fixes the legislative intention and interpretation and construction are not needed). Moreover, it is a well-established rule of statutory construction that where a statute enumerates the things on which it is to operate, it is to be construed as excluding from its operation all things not expressly mentioned--*expressio unius est exclusio alterius*. See, ***Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976)**; ***Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952)**; ***Ideal Farms Drainage Dist. v. Certain Lands*, 19 So.2d 234 (Fla. 1944)**.

Applying those statutory construction rules to this matter, the Legislature chose to use the words "complaint for damages or injury" as opposed to just "action", "lawsuit", or "civil action." The Legislature clearly intended to create the eligibility for fee reimbursement to a narrower subset of general civil actions by adding the modifying words "for damages or injury". Black's Law Dictionary, 9th Edition, defines "Damages" as:

> Money claimed by, or ordered to be paid to, a person as compensation for loss or injury. Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong.

Citing Frank Gahan, *The Law of Damages* (1936). Review of the Plaintiff's claims in this case confirms this Public Records Act suit was not a complaint seeking damages.

"Prevailing Party" Requirement

In addition to the fact that the Public Records Act suit at issue was not a suit for damages, the Commissioner was also not the "prevailing party" under Florida law.

In arguing to our Office that the Commissioner was the prevailing party, counsel for the Commissioner does correctly note that as a general rule in Florida, a party benefitting from the dismissal of a lawsuit will be seen as having "prevailed." For instance, in ***Sacks v. Rickles*, 155 So.2d 400 (3rd DCA 1963)**, the Court held that a dismissal of a suit against a police officer operated to terminate finally any proceeding against the officer and that as such, he prevailed. Also, in ***State Department of Health and Rehabilitative Services v. Hall*, 409 So.2d 193, 195 (3rd DCA 1982)**, the Court observed that "a merits determination is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the party who prevails." See also, ***Metropolitan Dade County v. Evans*, 474 So.2d 392 (3rd DCA 1985)**.

In ***City of Fort Walton Beach v. Grant*, 544 So.2d 230 (1st DCA 1989)**, affd. in part by ***Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990)**, the First District Court of Appeal held:

> In general, when a plaintiff takes a voluntary dismissal the defendant is the prevailing party. ***Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp. of Martin County*, 493 So.2d 1136 (Fla. 4th DCA 1986)**. In *Evans*, a police officer and the county were sued in a civil action for damages which arose out of the officer's official duties. The officer was dismissed with prejudice as a result of a settlement negotiated by the county. The trial court found that the officer had "prevailed" and therefore, was entitled to reimbursement of his attorney's fees pursuant to section 111.07, Florida Statutes (1983). The appellate court affirmed, stating that "the dismissal operated to terminate any proceeding against the officer ... a merits determination is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the party who prevails." **474 So.2d at 393**. In the instant case, Grant prevailed because the dismissal with prejudice in the federal lawsuit signaled an end to the litigation against him and *under these circumstances* a merits determination was not necessary.

Id., at 235. Emphasis added.

I do not dispute the general proposition that a "determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party." ***Metropolitan Dade County v. Evans*, 474 So.2d 392 (3rd DCA 1985)**; ***State Department of Health & Rehabilitative Services v. Hall*, 409 So.2d 193 (3rd DCA 1982)**. There must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed. ***Simmons v. Schimmel*, 476 So.2d 1342 (3rd DCA 1985)**, review denied, **486 So.2d 597 (Fla. 1986)**.

In certain cases, where a governmental entity itself and one or more of its individual employees or officers are both joined in a suit for damages, and the governmental entity brokers a global resolution to include the privately-represented individual(s), there is some authority to support payment of the private attorney fees. For instance, in ***Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990)**, city council members were found to be prevailing parties entitled to reimbursement for attorney fees incurred in a civil rights action for damages brought by a police chief after members voted to discharge him where the chief voluntarily dismissed the members in their individual capacities with prejudice *as part of a settlement with the city* on condition that they would not seek their attorney fees against him.

In the ***Metropolitan Dade County v. Evans*** case cited above, a police officer who was joined as a codefendant with his employer (the county) in a civil damages action arising out of his official duties, and who was not represented by the county, "prevailed" within meaning of Florida Statutes § 111.07 when the case against the officer was dismissed with prejudice *pursuant to a settlement effected by the county*. However, this general rule is not to be applied in the rigid black and white manner suggested by counsel for the Commissioner. Rather, as our own Second District Court of Appeal has ruled:

> Although a voluntary dismissal by the plaintiff may provide a sufficient predicate for the defendant to seek attorneys' fees, entitlement to such fees is determined by, and is dependent upon, the specific statute under which the fees are sought.

***McCoy v. Pinellas County*, 920 So.2d 1260, 1261 (2d DCA 2006).** I advise that current Florida law requires that in order to accomplish the obligation set forth by the Court in *McCoy*, a court may, and indeed must, look behind a voluntary dismissal at the facts of the litigation "to determine whether a party is a 'substantially' [a] prevailing party." ***Padow v. Knollwood Club Ass'n, Inc.*, 839 So.2d 744, 745 (4th DCA 2003).**

In *Padow*, the parties had been litigating over unpaid condominium association fees. After protracting the litigation for some time, defendant, Dr. Padow paid most of the association fees his association sought. Determining, correctly, that now that it had obtained its fees it need not continue in the litigation, the plaintiff association dismissed the suit. Thereafter, Dr. Padow sought to recover his fees because the defendant had dismissed the case and thus he had "prevailed."

The Fourth District Court of Appeal relied on the *Thornber* case to identify an exception to the general rule entitling a defendant to attorney's fees under a prevailing party statute or contract provision after a plaintiff's voluntary dismissal of an action. The Court stated that it would look behind a plaintiff's voluntary dismissal to find that Dr. Padow, the defendant, was not a prevailing party entitled to fees, because prior to the dismissal the defendant had "paid the substantial part of the association's claim for delinquent assessments." **839 So.2d at 746.** The *Padow* Court took time to elaborate on the proper prevailing party analysis:

> The test for determining the "prevailing party" under Florida Statutes § 718.303(1) is "whether the party 'succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Munao, Munao, Munao & Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park, Inc.*, 740 So.2d 73, 78 (Fla. 4th DCA 1999) (construing Florida Statutes § 723.068 and quoting *Moritz v. Hoyt Enters., Inc.*, 604 So.2d 807, 809-10 (Fla. 1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983))). Here, the association succeeded on the primary issue in the litigation, recovering most of the unpaid assessments that it sought.
>
> Padow argues that a court "cannot look past a voluntary dismissal to determine whether a party is a 'substantially' prevailing party." He cites the general rule that "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914, 919 (Fla. 1990). As the Supreme Court explained:

> A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party. *Metropolitan Dade County v. Evans*, 474 So.2d 392 (Fla. 3d DCA 1985); *State Department of Health & Rehabilitative Services v. Hall*, 409 So.2d 193 (Fla. 3d DCA 1982). There must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed. *Simmons v. Schimmel*, 476 So.2d 1342 (Fla. 3d DCA 1985), review denied, 486 So.2d 597 (Fla. 1986).

Thornber, 568 So.2d at 919.

This case presents an exception to the general rule stated in *Thornber*. *Thornber* contemplates that after a voluntary dismissal a trial court must "determine whether the party requesting fees has prevailed." Id. (emphasis added). This language indicates that a defendant is not automatically the prevailing party for the purpose of an attorney's fee statute when a plaintiff takes a voluntary dismissal. Here, Padow cannot be a "prevailing party" within the meaning of Florida Statutes § 718.303(1) because he paid the substantial part of the association's claim for delinquent assessments prior to the voluntary dismissal.

Padow relies on *Oakwood Plaza, L.P. v. D.O.C. Optics Corp.*, 708 So.2d 959 (Fla. 4th DCA 1998), abrogated on other grounds by *Caufield*, 837 So.2d at 373-74; *Boca Airport, Inc. v. Roll-N-Roaster of Boca, Inc.*, 690 So.2d 640 (Fla. 4th DCA 1997), and *Griffin v. Berkley South Condominium Ass'n*, 661 So.2d 135 (Fla. 4th DCA 1995). However, in none of these cases did the plaintiff's voluntary dismissal follow the defendant's payment of substantially all of the plaintiff's claim.

For example, in *Griffin*, an association filed suit against a unit owner to foreclose a lien for delinquent assessments. Id. at 135. After discovering that it had been improperly charging the owner late fees, the association "acknowledged that [the unit owner] actually had a credit balance and voluntarily dismissed the case." Id. At the hearing on attorney's fees, the association put on testimony that it was mistaken about the unit owner's credit balance; the owner still owed a small amount, "which would not have been enough to warrant the filing of the suit." Id. This court held that the unit owner was the prevailing party entitled to attorney's fees under section 718.303. Id. Significantly, in *Griffin*, the unit owner paid no money toward the claim prior to the association's voluntary dismissal.

We agree with the county court that to declare Padow the prevailing party in this case would be contrary to a goal of the statute, which is to discourage needless litigation by encouraging settlement. The judge found that "to continue the lawsuit [ ] would have been a waste of resources...." Consistent with the intent of the statute, the association took the expeditious course of unilaterally dismissing the case to put an end to the litigation, foregoing its colorable claim for attorney's fees.

***Padow*, at 745-46.**

Clearly, as of the 2003 and 2006 *Padow* and *McCoy* decisions, the simplistic "dismissal = prevailing" formula some had asserted had been established in the *Thornber* case was being refined so as to allow more logical and nuanced analysis of fee recovery cases.

Turning to more recent cases, three years ago, the Second District Court of Appeal, in ***Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So.3d 1034, 1041–42 (Fla. 2d DCA 2013)**, summarized the holding in *Padow*, saying:

> *Padow* teaches that courts must look to the substance of litigation outcomes—not just procedural maneuvers—in determining the issue of which party has prevailed in an action. " '[I]t is [the] *results*, *not* [the] *procedure*, which govern the determination' of which party prevailed for purposes of awarding attorney's fees[.]" *Bessard v. Bessard*, 40 So.3d 775, 778 (Fla. 3d DCA 2010) (second and third alterations in original) (quoting *Smith v. Adler*, 596 So.2d 696, 697 (Fla. 4th DCA 1992)).

***Tubbs*, 125 So.3d at 1041**. Emphasis added. And, last summer, the Fourth District interpreted and further expanded its ruling in the *Padow* case. It did so in ***Kelly v. Bankunited, FSB*, 159 So.3d 403 (4th DCA 2015)** wherein it denied an award of statutory "prevailing party" fees where the dismissal of the litigation was by means of a compromise settlement. In so doing, the *Kelly* court created a further exception to the general rule noted in *Thornber* by announcing the following rule:

> ...in a situation where both Appellant and Appellee compromised in effectively agreeing to a settlement to end their litigation, we will not hold Appellee responsible for payment of Appellant's attorneys' fees, as Appellee's dismissal of the pending complaint following the settlement was the obvious and appropriate course of action. Where a plaintiff's voluntary dismissal results in neither party substantially prevailing in the litigation outcome, neither party is the prevailing party for purposes of attorneys' fees. In such a case, as here, neither the general rule, nor the exception in *Padow*, applies.
>
> We note that this holding does not require trial courts "to look behind a voluntary dismissal to decide whether the dismissal represents 'an end or finality to the litigation on the merits[,]' " which has been an approach rejected by our court. See *Alhambra Homeowners Ass'n*, 943 So.2d at 321. The finding that neither party has substantially prevailed by virtue of the voluntary dismissal is regardless of the merits of each party's claim or defense in the underlying action.

Id., at 407.

In the *Barfield v. DiSabatino* case, the Plaintiff did file, on January 4th 2016, a *Notice of Voluntary Dismissal With Prejudice* as to the portion of the suit still pending against the Commissioner. However, on December 4th 2015, Plaintiff took the Commissioner's deposition. Fourteen days later, on December 18th 2015, the Commissioner signed a *Settlement Agreement* with the Plaintiff. The terms of the *Settlement Agreement* Commissioner DiSabatino agreed to with Plaintiff Barfield are set forth below:

VOLUNTARY DISMISSAL WITH PREJUDICE. Plaintiff will file an unopposed stipulated order approving this settlement agreement and providing for the voluntary dismissal with prejudice of all claims made in the Litigation, no later than one (1) day after Plaintiffs (sic) counsel receives the Settlement Sum, with ***each party to bear its own fees*** and costs.

Emphasis added

NONMONETARY CONDITIONS. As long as she is an elected official of Manatee County, Florida, Defendant agrees to the following nonmonetary conditions:

a. Acknowledging that she will continue to seek training on an annual basis relating to the requirements of the Public Records Act.

b. Acknowledging that she will refrain from creating or maintaining public records on any nongovernmental account or, in the event any such public records are made or received by her, that they will be promptly forwarded to her public account no less than seven (7) days after making or receiving such public records.

PAYMENT OF SETTLEMENT SUM. Defendant agrees to pay Plaintiff's attorney the sum of $6,500.00 (Six Thousand Five Hundred Dollars And No Cents) (the "Settlement Sum"), in full and final settlement of all attorneys' fees and costs, and any other amounts that could be claimed, arising out of or related to the Litigation. Plaintiff agrees to accept this amount as full and final payment of his attorneys' fees and costs, and any other amounts, arising out of or related to the Litigation. Defendant or their insurer or designee shall tender a check made payable to the Law Office of Andrea Flynn Mogensen, P.A., on or before January 2, 2016.

AGREEMENTS RELATING TO CONSIDERATION. Each of the parties acknowledges and agrees that the covenants under this Agreement, together with the consideration exchanged hereunder, constitute full, fair and valuable consideration for the transfers, transactions and releases required of and by the parties pursuant to the provisions of this Agreement and that, by virtue of the above-referenced consideration, the parties have received reasonably equivalent value in exchange for their obligations under this Agreement. The parties acknowledge and agree that each has received and reviewed a copy of this Agreement in the presence of their respective, independent counsel retained by them. Each party understands the purport, tenor, and effect of this Agreement, and has entered into this Agreement freely and voluntarily.

REPRESENTATIONS BY PARTIES. The parties represent and warrant that they have entered into this Agreement relying wholly upon their own judgment, belief and knowledge of the nature, extent, effect and duration of any actions, damages and liability therefore. The parties represent that they enter into this Agreement without relying upon any statement or representation of the adverse parties other than what has been set forth in writing in this Agreement. The parties represent that they have had the opportunity to discuss this matter with counsel of their choosing and are satisfied with its counsel and the

> advice received. The parties further declare and represent that no promise, inducement, agreement or understanding not herein expressed has been made to an adverse party and that this Agreement contains the entire agreement between the parties hereto and that the terms of this Agreement are contractual and not a mere recital.

Recall that the standard set forth by the Second District Court of Appeal (and adopted by every other appellate court to consider the matter) is that:

> [C]ourts must look to the *substance of litigation outcomes*—not just procedural maneuvers—in determining the issue of which party has prevailed in an action [and that] it is the *results, not* the *procedure*, which *govern* the determination of *which party prevailed* for purposes of awarding attorney's fees.

***Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So.3d 1034, 1041–42 (Fla. 2d DCA 2013)**, quoting in part ***Bessard v. Bessard*, 40 So.3d 775, 778 (Fla. 3d DCA 2010)**, and ***Smith v. Adler*, 596 So.2d 696, 697 (Fla. 4th DCA 1992)**.

Applying this standard to the facts of *Barfield v. DiSabatino* results in the unquestionable outcome that Mr. Barfield, not Commissioner DiSabatino, "prevailed." The Complaint in the case sought a declaration that the Commissioner had violated the Act, that the Court enjoin the Commissioner from future use of personal accounts to conduct County business communications, and the payment of attorney fees.

Mr. Barfield received, via the settlement agreement signed by the Commissioner, each and every form of relief he sought against the Commissioner save a court declaration that a violation had occurred. The Commissioner agreed to pay $6,500.00 in attorney fees to Plaintiff, and the Commissioner agreed as to the following non-monetary duties for the remainder of the time she is an elected official of Manatee County:

> a. Acknowledging that she will continue to seek training on an annual basis relating to the requirements of the Public Records Act.
>
> b. Acknowledging that she will refrain from creating or maintaining public records on any nongovernmental account or, in the event any such public records are made or received by her, that they will be promptly forwarded to her public account no less than seven (7) days after making or receiving such public records.

In turn, all the Plaintiff agreed to do was to dismiss the underlying lawsuit. Even under the analysis in the recent earlier cited Fourth District Court of Appeal decision in ***Kelly v. Bankunited, FSB***, (holding that "[w]here a plaintiff's voluntary dismissal results in neither party substantially prevailing in the litigation outcome, neither party is the prevailing party for purposes of attorneys' fees) the outcome of this case, taken in the most favorable light to the Commissioner, must still be characterized as "neither party substantially prevailing."

Finally, as to the "prevailing party" question, it should be highlighted that part of the agreement the Commissioner signed provided she would agree to "*bear [her] own fees*."

Florida's courts will not give credit to a litigant who needlessly draws out litigation pursuing positions unsupported by law or fact when easy resolution could be quickly achieved. As the *Padow* Court noted,

> a goal of the statute [allowing reimbursement of prevailing party fees] is to discourage needless litigation by encouraging settlement.

***Padow*, at 746.** While the Commissioner could have, early on, before incurring any significant attorney fees, resolved the charges against her, she elected to aggressively oppose them. Indeed, the defense counsel fees the Commissioner now seeks to have the County reimburse are for time her counsel spent defending the suit.[1] However, as the following summary of relevant court docket events reveals, much of the attorney time spent by defense counsel was either unsuccessful or arguably procedurally dilatory in nature.

Relevant Court Docket Events

- On May 2, 2013, defense attorney Ralf Brooks filed a *Motion to Deny Alternative Writ of Mandamus* (Count I) and an *Amended Motion to Dismiss* (Count II) claiming that mandamus is the appropriate procedure, not a complaint for declaratory relief. Plaintiff filed its Response on May 30, 2013. On June 4, 2013, a hearing was held wherein the motions were argued. These motions were denied on June 10, 2013.

- The court directed Commissioner DiSabatino to respond by order dated June 10, 2015 and, on July 8, 2013, Brooks filed a Response and *Motion for Summary Judgment* on Counts I & II requesting an order from the court finding all records were adequately and lawfully provided by the defendant, and that no attorney's fees be granted. Attachments to the response and in support of the motion included affidavits from County staff which the County Attorney's Office had facilitated the production of. In fact, the County had earlier filed its own Summary Judgment Motion (which resulted in the County being dismissed). It does not appear Mr. Brooks ever set his *Summary Judgment Motion* for hearing.

- On July 17, 2013, Brooks filed an *Amended Notice of Filing of Amended Affidavit* of Robin DiSabatino. Counsel proceeded with attempting to schedule the deposition of Ms. DiSabatino and Mr. Barfield by Notice of Deposition dated October 15, 2013, to be held December 16, 2013. They were later requested be cancelled in a *Motion for Protective Order* filed by Brooks on November 1, 2013. The depositions were also requested to be rescheduled to a later date due to a scheduling conflict for Mr. Brooks.

- On October 19, 2015, a motions hearing was held. Heard were defendants *Motion to Compel*, a date for deposition of the Plaintiff (which was granted). Brooks attempted to also argue a *Motion for Protective Order* but it had to be properly re-noticed.

[1] While the invoices the Commissioner has submitted combine the two, since no criminal charges were ever filed against the Commissioner and thus she was never "acquitted" of same, that part of her fee summary associated with the work performed by her Tampa criminal defense lawyer are not eligible for recovery under any legal theory.

- On October 21, 2015, Brooks filed an *Amended Motion to Dismiss for Failure to Prosecute* since no filings/orders had been docketed since December 11, 2013.

- On November 12, 2015, the *Amended Motion to Dismiss* was withdrawn by Brooks.

- On November 18, 2015, Brooks filed a *Motion for Protective Order* regarding the *Notice of Deposition* for DiSabatino's December 4 deposition due to his asserted unavailability.

- On November 25, 2015, Brooks filed a *Motion for Stay* of the December 4 DiSabatino deposition or alternatively a *Request for Special Set Hearing* for December 3, 2015.

- On December 3, 2015, the court denied the *Motion for Protective Order* and the *Motion to Stay Deposition*, and directed that the deposition of Commissioner DiSabatino proceed.

- On January 4, 2016, the attorney for Plaintiff Barfield, Andrea Mogensen, filed a *Notice of Voluntary Dismissal* after Commissioner DiSabatino signed the terms of a *Settlement Agreement* imposing restrictions and requiring payment of an attorney fee---obligations likely exceeding those which she would have faced had she simply entered into a settlement agreement when the suit was first filed, exposing herself to at most a small attorney fee.

As the review of the record activity above reveals, a substantial amount of attorney time was devoted to procedural maneuvers dedicated to delaying deposition of the Commissioner, and failed or abandoned attempts to have a definitive ruling from the court on dismissal or summary judgment.

Factually, the following relevant excerpts from the deposition testimony the Commissioner did eventually provide on December 4, 2015, only confirmed the core allegations set forth in the Plaintiff's initial *Complaint*-that the Commissioner: 1) utilized a private e mail account to send and receive communications concerning County business, 2) knew the messages constituted public records, 3) knew that she had a duty to retain public records, and 4) failed to retain the records such that she was unable to provide them when the plaintiff requested them.

Excerpts of DiSabatino Sworn Deposition Testimony

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13 Q. What is your understanding of what rules apply
14 there?
15 A. If it's county business, it has to be on the
16 county e-mail. If they send it to your -- any personal,
17 I forward it on to the county. I can get personal
18 e-mails to me at the county, which are not county
19 business, but that's how people might only know how to
20 reach me and then it's not county business. I can
21 forward that to a personal and respond that way and keep
22 it off public record because it's personal.
23 Q. And is it your understanding that those rules as
24 far as public records are the same whether you send or
25 receive?
1 A. Yes.

18 Q. Have you ever actually looked at the statute in
19 Chapter 119 regarding public records? Have you ever
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20 reviewed it?
21 A. No.
22 Q. And have you reviewed -- does Manatee County
23 have any rules with regard to public records and records
24 retention that you're aware of?
25 A. Yes.
1 Q. Have you reviewed those rules?
2 A. I haven't read the rules.
3 Q. Okay. Is that something that you know because
4 of the training?
5 A. Yes.
6 Q. **Have you ever been instructed or learned that if**
7 **you use a private e-mail address or a private computer to**
8 **send or receive Manatee County business, documents,**
9 **e-mails, what have you, that you become the custodian of**
10 **those records?**
11 A. **Yes.**
12 Q. **Where did you learn that?**
13 A. **From the county attorney's office.**

4 Q. Now, let's talk for a moment about 2012 because
5 that's the operative time frame for this litigation. In
6 **2012 you had a personal computer**; is that right?
7 A. **Yes.**
10 Q. And you **occasionally used that for public**
11 **business; is that right?**
12 A. **I would occasionally receive, if they would send**
13 **it to my gmail, if they knew that address,** but then I
14 would have to -- it was my policy to send it back to my
15 county. But if it was personal, I didn't have to.

18 Q. Now, you talked a moment ago about receiving
19 public business on your gmail. **Is it your understanding**
20 **that the rules that we discussed also apply if you send?**
21 A. **Yes.**
22 Q. And **with regard to a private computer, if you**
23 **were to draft correspondence**, use a dropbox or a Google
24 box or something like that **for public business, is it**
25 **also your understanding that those would be public**
1 **records for which you would be the custodian?**
2 A. **Yes.**

14 Q. I understand, and I did watch the meeting and I
15 do understand that from watching the meeting. What I
16 asked you about is I think you said that you sent an
17 e-mail to the others to find out if they knew what parts
18 of 41 there were going to be sidewalks and streetlights
19 added; is that right?
20 A. Yes.
21 Q. Who did you send that to?
22 A. I believe I sent it to the three people who were
23 on the MPO.
8 Q. Okay. This e-mail discourse that we just
9 discussed about the sidewalks and the streetlights where
10 they might be on 41 and Bustle replied and the dialogue
11 that we just had, was that from your gmail account, the
12 communication --
13 A. I don't recall. It's printed somewhere that you
14 have. I don't --

1 Q. Now, let's talk for a moment about October of
2 2012. At some point you received a public records
3 request from Mr. Barfield; is that right?
4 A. Through the county attorney's office.

5 Q. In what manner did you receive that? Did you
6 actually get the original request?
7 A. I don't remember. I really don't remember. I
8 know that the county attorney came in, Mr. Eschenfelder
9 and Mr. Palmer, but I don't -- I mean, it could have, but
10 I don't remember.
11 Q. They talked to you in person you mean?
12 A. Yes.

21 Q. **When you learned of the request, what did you do**
22 **to comply with the request?**
23 A. **That's the day that Eschenfelder sat me down to**
24 **try to retrieve my gmail from the county**.
25 Q. Okay.
1 A. And I didn't know my password, so I had to go
2 home to do it. Okay?
13 A. **Eschenfelder showed me what to do when I got**
14 **home**.
15 Q. So when you were still at the county, the county
16 attorney showed you, okay, here's the search bar and you
17 just put the key words in there?
18 A. Right. As I said, I'm not a computer specialist
19 by any means.
20 Q. Did you do you any computer research to
21 determine, you, yourself -- on this day we're talking
22 about where you went home to try to access them, did you
23 do any computer research to try to determine what else
24 you could do to find them, or did you just do what the
25 county attorney told you to do and then print them?
1 A. Yes.
2 Q. The second part?
3 A. The second part.
4 Q. So can you just tell me what you did so it's not
5 my words, it's yours? You didn't do any research; right?
6 A. No. I wouldn't know how to.
7 Q. Now, did you -- other than the three terms that
8 you just told us, were there other key words that you
9 were supposed to search, if you recall?
10 A. He gave me the list.
11 Q. Okay.
12 A. Eschenfelder gave me the list.
13 Q. Did you search each search term on the list?
14 A. Yes.

13 Q. Now, there came a point where you were starting
14 to experience some problems with your gmail. When was
15 that?
16 A. When I went home to retrieve them because I
17 rarely used that machine. And as you said, I hate to use
18 the word never or always, but **I did not have -- what do**
19 **they call it? That protection stuff**? So things would
20 pop up and I never knew how to cure that. So that's
21 why -- and it would pop up and it would be annoying, so I
22 rarely used the machine.

10 Q. So some of the e-mails to and from her were --
11 certainly not all but some of the e-mails to and from
12 Shelly Johnson were regarding the placement of sidewalks
13 and streetlights that you were interested in when you
14 talked to the FDOT people after the MPO meeting; right?
15 A. Yes. I believe that the one e-mail that I sent
16 her after the FDOT meeting was saying that there will be
17 sidewalks and streetlights on both sides of 41 from
18 Cortez to the county line put in by FDOT.

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19 Q. Okay. At the time of that e-mail that was
20 produced, did you forward it to your Manatee County
21 address?
22 A. I don't recall.
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In addition to the foregoing deposition excerpts, the County Attorney's Office itself, as can be seen from the following summary of e mail exchanges, undertook a substantial amount of work, both prior to and after suit had been filed, working not on the portion of the records request directed to the County's records (which was quickly satisfied), but on the portion of the request surrounding Commissioner DiSabatino's personal e mail account records.

Relevant e Mail Exchanges

10/24/12 original request to Commissioner

10/29/12 RME e mail to requestor saying, in part:

> As to e mails to or from the personal e mail accounts of the two Commissioners, Commissioner DiSabatino has made a physical print out of any e mails from her personal account she feels are responsive to your request, and has provided me with that printout. While I would normally have just scanned them and e mailed them to you, her printouts include a deep blue backdrop of the ocean, which, when photocopied or scanned results in the e mail text not being able to be clearly seen. Thus, I will need to just put them in the mail to you. Please let me know the street address where you would like the printouts sent, and I will put them in the mail to you.

11/5/12 RME e mail to requestor:

> This is just to follow up with you on my last communication with you on October 29. As you know, part of that communication indicated that I would need to mail you the print outs provided by Commissioner DiSabatino related to her personal e mail account, and requesting from you a mailing address where you would like the printouts sent. I had not heard back from you, and wanted to make sure you received my e mail of October 29. Please confirm, and please also provide the requested address so I may send this part of your request to you.

11/8/12 e mail from Requestor to RME:

> The print outs you provided today do not include the entire chain of emails. Only the last email in the chain is included in the hard copy print outs. This is why I requested the emails in electronic or digital format as is required by law. Given that there has already been a delay, please ensure that the commissioner fully complies with my public records request in a timely manner.

11/8/12 RME e mail to Commissioner:

> As you recall, you had printed out e mails from your personal e mail account in response to the records request of Mr. Barfield. While Mr. Barfield came by today to pick up the printouts, he indicates that he desires for you to forward those e mails to him directly. Therefore, please forward the same e mails you printed out and gave to me to Mr. Barfield at the e mail address copied on this note.

11/8/12 e mail to IT staff indicating Requestor has paid his fee, directing the CD of copies of County records to be made, and instructing Trudy Morris to refund $1.50

11/9/12 RME e mail to Requestor responding to his question why no texts or social media were produced:

> I informed the Commissioner of your request for the e mails as forwarded documents yesterday. I'm sure she will do that sometime today. As I had noted to you in a prior communication, them (sic) Commissioner indicated she did not use text messaging for County business, only her e mail.

11/9/12 RME e mail to Marianne Lopata to call and remind DiSabatino to forward e mails:

> I'm out of the office till this afternoon. Would you please call the Commissioner's cell and see when she might be able to forward her personal account e mails to this requestor? We spoke about it yesterday afternoon, but it would be best if she did this today if she can. Remind her to blind copy me on each one, so I can confirm she's done so.

11/14/12 Commissioner e mail to RME and Requestor:

> Dear Mr. E and Mr. Barfield,
>
> I am distraught...with gmail tech support working since last week, i now only have sent emails from the past week or two...this is the only sent email we can find, thus far, that was sent to and from Shelley Johnson.
>
> I just got off the phone with them (8:20 p.m.) my time..India is several hours ahead of us, and they said they will try again tomorrow and call me. I am doing all I can to resurrect this!

11/16/12 RME e mail exchange with Requestor informing that County results were ready to be mailed and obtaining proper mailing address. County results were mailed.

11/16/12 e mail from Requestor to RME:

> I would respectfully request that Commissioner DiSabatino not use the computer in question until I can speak with you on Monday, at which point I will explain my reasons why and suggest an alternative method by which to recover the emails. I'm at a conference in Miami and will not return to my office until Monday.

11/16/12 RME response to Requestor:

> Inasmuch as Manatee County does not own or control Commissioner DiSabatino's personal home computer, it cannot mandate how it is used, or by whom. However, by copy of your e mail you have made your request to the Commissioner, who will make such decision as she deems appropriate. I will be happy to speak with you on Monday if you so desire. My office number is 941.745.3750.

11/16/12 e mail from Commissioner to Requestor and RME:

I am working with tech support to recapture all my files. I will contact them now and have them work over the weekend and determine where the files are and I will not utilize this computer except to have it open for tech support to send me what they currently can retrieve.

I just sent you both some files from Shelley Johnson and others regarding MPO

11/16/12 e mail from Commissioner to Requestor and RME:

I will go to the phone store tomorrow as maybe they can access received and sent emails in the time period.

11/20/12 e mail from Requestor to Commissioner:

Commissioner:

Please stop using you (sic) the computer that is the subject of the requests below. Using the computer will have prevent further efforts to recover public records that you are obligated to retain as a custodian. It is my intention to file a lawsuit in the Circuit Court of the Twelfth Judicial Circuit relating to your inability to produce public records for inspection. Part of the relief I will seek will include a forensic examination of your computer. There are protocols for doing this and several judges in this circuit have followed them under nearly identical circumstances. If you would like to stipulate to this protocol, I will have my attorney send it directly to you and Mr. Eschenfelder. The benefit of the stipulation is that is (sic) minimizes attorney fees that you will ultimately be responsible for. Otherwise my attorney will have to seek emergency injunctive relief and this can become quite expensive in addition to the forensic recovery costs.

Please let me know by 12:00 noon today whether you will agree to refrain from further use of the computer and whether you are interested in considering a stipulation relating to the forensic examination of your computer. If so, I will instruct my attorney to contact you and Mr. Eschenfelder. If I do not hear from you by that time, I will have no alternative but to seek judicial relief.

11/20/12 RME response to Requestor (emphasis added to demonstrate attempt to avoid suit against the Commissioner):

Please note that Commissioner DiSabatino is not in town today, and is not expected to be back in the County until Sunday. However, we have reached her husband at home, and he has confirmed with the Commissioner that she does not object to ceasing using her computer. The tower will be delivered to the County's IT department today. Thereafter, the IT Department will be happy to work with you to identify a forensic expert suitable to conduct searches for the documents at issue, with IT looking on.

In this regard, *I believe your attorney*, in a desire to acquire attorney fees, *is acting without basis in filing an action against the Commissioner* in this matter. The statute provides for attorney fees for a party suing "to enforce" the provisions of the Act, and where the public official "unlawfully refused to permit" inspection and copying of any records.

As you know, the *Commissioner made physical print outs of her e mails*, which you personally were handed. While you subsequently requested she forward you the

electronic versions of same, which she was and has been willing to do, it appears they are not recoverable per her G mail technician. A Commissioner cannot refuse to permit inspection and copying of a thing that no longer exists. And, since *the Commissioner is willing to permit her physical computer to be examined* for any temporary files which remotely may contain some of the e mails at issue, *there is no legal need to file a lawsuit* to "enforce" the Act, as *she is cooperating with your request*, nor is there any need to sign any "stipulation" for the same reason. Therefore, at your earliest convenience, please let me know the names and information of such computer technicians you suggest be used to assist in the forensic search. The County will, of course, compensate the expert so as to not create a cost for you.

At this point, I believe *any suit filed would not be filed in any good faith manner*, but would instead by (sic) filed for the sole purpose of attempting to acquire an attorney fee award, where no judicial enforcement is necessary. Indeed, since the records at issue aren't records of the County but of the Commissioner, your suit would be against the Commissioner, and as she is out of town, you would not be able to achieve service on her in any event. In any event, if you have an attorney, and that attorney (who in spite of being copied on earlier messages has remained silent) desires to file an action, please inform her that I will be representing the Commissioner, and she may communicate with me.

11/20/12 e mail from RME to Requestor:

This is to inform you that the Commissioner's tower has now been delivered to the County's IT department, and will be kept in safe keeping until you identify the forensic specialist you wish to have conduct the review.

11/20/12 Requestor's response to RME:

It would be more helpful if you would abandon the rhetoric and stop attributing motives without a factual basis. Please don't assume that Ms. Mogensen is my attorney in connection with this matter. I never indicated that she was, and you decided to copy her on e-mails for unknown reasons. As for any legal action, the Commissioner is presently unable to produce e-mails to me that are public records. I don't have to do anything but make the request, which I have. The Commissioner has failed to produce the records. I am fully within my rights to enforce the provisions of the Public Records Act. It's not my job to assist the Commissioner in retrieving her e-mails that she has a statutory obligation to produce. You are wrong in stating that "[a] Commissioner cannot refuse to permit inspection and copying of a thing that no longer exists." Commissioner DiSabatino had an obligation to retain the records and inadvertence or negligence in this particular instance is a refusal. Frankly, she should not have been conducting county business on her personal e-mail account and she alone assumed the custodial obligations of archiving and retaining those records. Her inability to do so is tantamount to a refusal.

So, to be perfectly clear, I have more than adequate grounds to file an action to enforce the law as we speak. I offered not to do so to avoid costly attorney fees. That offer was made on the condition that Commissioner DiSabatino stopped using the subject computer until such time as a forensic recovery of her computer could be performed. I take your representations as an acceptance of that condition. As long as we remain in agreement on these issues, I will keep my word in not filing an action to enforce the Public Records Act.

Below, please find the contact information for John Dorling, whose CV is attached. Mr. Dorling has substantial experience and recently assisted the City Attorney for Sarasota in forensic recovery of public records from a private computer. I will leave the costs of that procedure to be negotiated between you and Mr. Dorling. I spoke briefly to Mr. Dorling a few moments ago. He will be out of town for the holiday but will return on Sunday. I indicated to him that since the computer is not being used, I am comfortable with waiting until next week to begin the process of the forensic recovery. Mr. Dorling uses a protocol that is quite standard in the industry and the details of that can be worked out next week.

11/20/12 RME response to Requestor (emphasis added):

Thank you for providing the contact information for the examiner you would like to have conduct the review of the computer's hard drive. I will pass it on to our IT director and, assuming he feels this person has the competency to perform the work (which would seem to be the case per your review of recent things he's done for you), then IT will make arrangements with him in terms of a date and time next week (when he returns) to do the work, as well as compensation. Again, while Commissioner DiSabatino has no objection to the work being done, she would like IT to observe to ensure the work is done well. Obviously, our IT staff will not interfere with the examiner and will only observe, which hopefully you will not have objection to. Obviously, any public records recovered as a result of the search will be provided to you. Please let me know if you have any other questions.

11/21/12 RME instructions to IT staff re drive search:

Assuming his fee is low enough, I would assume your department has the authority to make the purchase. As an initial matter, I would draft up a "scope of work" describing in technical terms what it is he will do. I don't think we need an opinionated narrative report from him. Perhaps you or your staff could memorialize in a memorandum what steps he took, and what data was pulled from the hard drive.

As for scheduling, I would suggest you find times when Commissioner DiSabatino may be free to be present. One thing that will occur is that as he pulls records, someone will need to say "that's a County record" vs. "that's private." Since this is the Commissioner's computer, I would think she is the logical one to do that. We can create option dates around her calendar. I certainly don't want him downloading the totality of her drive onto his own personal storage device and taking it away for "analysis". That can all be done here in our building, with you all watching and the Commissioner saying what's private and what's not.

I would suggest that anything he pulls off which is deemed "public" should be loaded onto a distinct storage device (thumb drive, CD, etc.) so that same can be delivered to the requestor of the records. Of course, as litigation may yet be filed, please keep at least one copy for my use so I can show what was pulled off the hard drive.

This is NOT a meeting of a board or commission, and thus the press is not invited.

Let me know if you have other questions.

11/21/12 IT staff's response to RME:

Okay. We will work to find a time that will work for Commissioner DiSabatino, the consultant, and my staff. We will keep both of you informed

To your point about making a separate copy of the whole hard drive, that is a standard practice. In order to minimize cost and to retain control of the data, we will offer to provide any "consumable" items such as the hard drive onto which a copy will be made as well as thumb drives for the working records for the consultant, the Commissioner, and you Rob.

11/22/12 Purchasing e mail approving IT's non-competitive purchase of forensic examiner services

11/26/12 e mail from RME to Requestor:

At 1:43 today Mr. Dorling provided our IT staff with his cost estimate and technical matters. As he doesn't state a flat fee for the overall work, staff will need to try to nail down the overall cost, so we can use the appropriate purchasing process (some purchasing events require 3 quotes, some are able to be done with purchasing cards, etc.). We're trying to get the agreement done in the most expeditious manner possible while staying within our purchasing rules. I don't anticipate it would be longer than some time tomorrow before that's all squared away. I believe Mr. Dorling has contended he can do the work Wednesday, Thursday or Friday.

11/26/12 e mail from forensic examiner recommended by Requestor declining to perform exam if supervised by IT:

Thank you for the clarification of the work to be performed on Commissioner DiSabatino's hard drive. As the science of Computer Forensics entails different tools for different circumstances any estimate of the work required would be a rough guess on my part. As an example, I cannot and will not do an examination on a live hard drive as it is outside of protocol. Making 2 images of a hard drive as I indicated earlier can take 5 to 18 hours, depending on the size of the hard drive. Professionally and ethically, I have never had anyone question the security and confidentiality of my work. It is pretty sad to think that a county I have the highest respect for and have previously worked for 12 years would do so right now. The reason for the engagement letter is to define the scope of the examination and to protect the client. Obviously, the release of any personal information related to this examination would lend itself to criminal prosecution and/or civil action against me. The scope of the report you are requesting is not an issue, the work involved in an examination is. The examination would include an evaluation of internet cache files, history databases, examination of unallocated hard drive space, evaluation of the hard drive for file deletion and evidence of wiping file space.

I am an independent contractor that performs computer forensics on weekends and evenings due to a limited market in Sarasota and Manatee County. I work full-time for a company that allows me time to perform hard drive acquisition during the day as needed. The scope of the work you are requesting is well within my level of expertise however the requirements to perform all work at the County's IT department prevents me from providing service to you and Commissioner DiSabatino. If your need changes or if you are unsuccessful obtaining the services of another forensic computer examiner, please feel free to contact me.

I have included Mr. Barfield in my response in case he has another recommendation for a forensic computer examiner.

11/26/12 response from Requestor:

This is an unfortunate development. I stated earlier that I was amenable to this process occurring outside the jurisdiction of a court so costs and attorney fees would not be a factor. I also stated that this would require that we adhere to standard industry practices and protocols. The constraints you are insisting on are far outside of standard industry practices. Please let me know no later than noon tomorrow whether you intend to keep our agreement and whether you will be retaining another forensic examiner to perform the required work. Again, we must be able to agree on the precise protocol to retrieve responsive records. I have insisted that we adhere to those accepted by the industry and by court decisions here in the 12th Judicial Circuit. If we are not in agreement on following that protocol, then I will have no alternative but to seek judicial relief.

11/26/12 RME reply to Requestor (emphasis added):

As the County has indicated on numerous occasions, the Commissioner has surrendered her personal computer. She is not using her personal computer. She has done this because you believe that records responsive to your public records request, which she represents are no longer accessible from her g mail account, but which earlier were already printed out and given to you, might, possibly be included on some temporary file on her hard drive. The County has therefore requested that the person you indicated had the qualifications to perform the work to search for those records. If Mr. Dorling no longer desires to perform this search, a search which the County has no intention of interfering with, if he does not get to do it his way, and where he wants to do it, then that is unfortunate. I would hope that Mr. Dorling could explain why he is unable to perform this work at the County's IT headquarters, with staff and the Commissioner having the chance to observe the work. The Commissioner has, and continues to, have no objection for a forensic search for the records you requested. However, the description of the scope created by Mr. Dorling seems to go beyond searching for the requested records, and without a technological reason for such expansion, the Commissioner should not have to surrender her entire personal files to anyone to examine outside of observation. However, if you wish to discuss why this expanded scope is technologically needed, I would be happy to discuss it with you tomorrow morning, should you wish to call.

11/28/12 RME e mail to Requestor:

I didn't hear from you today, but wanted to give you an update of the status. The County's IT Department has examined several firms who specialize in forensic examinations of this type, and have identified Richard Green, CCE, of United States Forensics, as the most qualified to perform the work. This company, based in Pinellas, specializes in these types of projects, and works regularly with law enforcement agencies and government and private business entities on computer security and data examination issues. The firm has agreed to employ industry standards for searching hard drives, and the County will not constrain that work in any way.

It is anticipated that by mid day tomorrow, the IT Department will have paid the firm its initial deposit, and the firm in turn has agreed to begin the work on Friday, as time has already extended on this matter. While it would not promise a hard date, the firm indicated

that Mr. Green's work would be completed, and any results released, by Wednesday of next week.

Of course, I will ensure that the moment there is any work product or documents retrieved, I will pass them on to you. I hope this summary sufficiently updates you. Again, I will keep you posted on the progress of the inspection of the Commissioner's drive.

11/30/12 e mail from IT to RME:

I just arranged with Mr. Green to hand over the PC at 13:00 today at Admin. We will get chain of custody paperwork.

11/30/12 RME e mail to Requestor:

While the County had some concerns over allowing the work to be performed outside of the County's facilities, Mr. Richard Green, CEE, of United States Forensics, noted that he felt his protocols would best be satisfied if it were able to be performed in his secured facilities, with no presence of any parties. Since the County's review of the firm found it to be an established, reputable firm used frequently by government and law enforcement agencies, the County has agreed to his protocols, including the extensive search techniques like those set forth in the protocols you provided.

United States Forensics today began the work of making duplicate copies of the drive so the Commissioner can receive her original tower computer back as soon as possible. The firm will provide a chain of custody form, and will properly secure the drive copies at its facilities while the forensic work is being completed. Mr. Green indicates his understanding that neither the Commissioner nor County wish him to be limited in any way on his search, and that he should have preliminary search results by perhaps Wednesday, with complete detailed forensic searches completed by no later than Friday. Obviously, I will advise you as that process unfolds.

12/6/12 e mail from RME to forensic inspector (emphasis added):

Thanks for the update. What is entailed in the "collection of live g mail" in terms of time and money? Will she need to give you her login and password, or is this something you do with the hard drive?

Another question. Now that we've made sufficient copies of the original drive, are we able to give the commissioner back her tower? Just want to not inconvenience her any more than needed.

12/7/12 e mail from RME to IT staff:

Where are we on getting the Commissioner's computer back?

12/7/12 IT staff response to RME:

I'm sending it downtown with one of my staff (Jon Wunderlich). He'll bring it up to your office in the next 30 - 45 minutes.

12/7/12 e mail from RME to IT staff confirming receipt and return to Commissioner of computer (emphasis added)

> It arrived, and has been returned. The Commissioner sends her thanks to you for ensuring it was all put back together correctly.

12/17/12 e mail from RME to Requestor:

> This is to let you know that today United States Forensics confirmed that it has completed the forensic examination of Commissioner DiSabatino's hard drive, and that the examination did not yield any records responsive to your request. As your request was directly to Commissioner DiSabatino as the agency and custodian of public records generated with her personal e mail account, I confirmed with her today that I would provide you with this final response on her behalf.

12/17/12 RME transmits results reports of forensic examination to Requestor

3/15/13 e mail from Commissioner's lawyer seeking CAO correspondence and other records:

> Pursuant to Florida Statutes Chapter 119 (Florida's "Public Records" Act) please promptly provide me with the following documents as public records:
>
> 1. All public records requests from MIKE BARFIELD requesting emails to or from ROBIN DISABATINO.
> 2. All documents received by Manatee County Attorney's office from ROBIN DISABATINO with regard to any public records requested by MIKE BARFIELD.
> 3. All public records provided to MIKE BARFIELD in response to MIKE BARFIELD's public records requests requesting emails to or from ROBIN DISABATINO.
> 4. All other public records provided to MIKE BARFIELD and any cover letter, transmittal document or emails regarding the response to Mike Barfield public records request(s) requesting emails to or from ROBIN DISABATINO.

3/15/13 RME transmits same to lawyer

3/20/13 County Motion for Summary Judgment hearing cancelled against County's wishes. RME re-sets hearing for April 26 after clearing with counsels' offices.

4/10/13 e mail from Requestor's lawyer to RME:

> I just put a call into your office regarding the above referenced case. It has come to my attention that a court date was set while I was out of the country that was not cleared with my office. There is, apparently, a hearing scheduled for April 26, which must have been an oversight. I will be out of State on that date and would ask that it be rescheduled. I appreciate the accommodation.

4/10/13 RME response to Requestor lawyer:

> To the contrary, I did consult with your office as to dates you were out of the Country or had criminal trial conflicts. Your assistant did the best she could to confirm you didn't have conflicts on the date selected, and she certainly did not mention that your schedule would have you out of state on the date in question. However, your assistant stated that you

have divided your case and schedule management between her (who does only criminal) and your other employee, Mr. Barfield, who does civil cases. She typed Mr. Barfield a message that same day while I was still on the phone asking him to let her know if my date was bad. I never heard another word from your firm, and the notice of hearing has been out there for a long while.

While we have never worked on a case before, please know that I am easy to work with, and wish to maintain the best professional relationships with opposing counsel. If the hearing date chosen, one which comports with your demand in your complaint for an expedited hearing, does not work, please consult with the judge's JA and provide Mr. Brookes and I with a selection of dates upon which both you and the judge are able to have a one hour block for us.

However, I hope you can understand the difficulty you create for me in how you have designed your law office administration. Your staff person who was available, though she could see your schedule, was not authorized to grant dates. She states that I would need to talk to Mr. Barfield, as he handles your civil cases. Yet Mr. Barfield is not only your employee but your client. As you know, per Bar rules, I'm not allowed to talk to Mr. Barfield, as he's represented in this matter...by you. While I fully sympathize with the challenges of being a sole practitioner trying to juggle a case load, it is up to you to ensure opposing counsel have some reasonable accessible way to get hearing time. This is particularly true in a public records case. The County is just as entitled to an expedited review of the matter as your client is, as is the Commissioner, who is represented by Mr. Brookes. If you are unable to schedule time for such a review, then perhaps your professional duty would require you to retain co-counsel to help you with the matter, as you have done in other such cases.

In any event, if you would like to work with the judge's office and provide Mr. Brookes and I with some alternative dates which are of a near-term nature, I'm sure we will both be able to examine our respective schedules and determine whether we can move the hearing with an amended notice. However, absent having a firm new date when my client may have the court review this matter soon, I am not inclined to give up the hearing time we have obtained. Obviously, since this is only a hearing, I'm sure Mr. Brookes and I would not object to your appearing by telephone to argue the matter. Please let me know how you would like to proceed.

4/11/13 e mail from Commissioner's counsel also objecting to April 26 hearing on County motion

4/11/13 e mail from RME finally confirming June 4 as date County summary judgment motion will be heard

5/29/13 e mail from Requestor's attorney to RME:

This shall confirm our agreement that my client is willing to take a voluntary dismissal of the action pending against the County as long as the County maintains a copy of the forensic image of the hard drive. Also, Mr. Barfield is interested in obtaining a duplicate copy of the imaged hard drive in the County's possession. Let me know if this represents our understanding and I will draft the voluntary dismissal.

5/29/13 RME response to Requestor's attorney:

I re-confirmed with our IT security division that our copy of the drive remains in the secured location, and that the seal which we placed on it remains unbroken. We would be more than happy to provide a duplicate of the drive for your client, and I will instruct the IT security staff to begin performing that work. I'm unsure of the cost of the duplicate drive it will be put on, but we may need to charge Mr. Barfield for the device if it has a significant cost.

Once I receive service of your notice of dismissal with prejudice, I will contact the court and withdraw the hearing time. I will leave it for you and Mr. Brookes to discuss whether his motion may be inserted into that time. Let me know if you have any other questions, and thank you for your professionalism in this matter.

5/30/13 e mail from Requestor and his attorney requesting hard drive:

Please let me know when I can retrieve a copy of the imaged hard drive and any costs associated with same. Thank you.

5/30/13 RME response to Requestor and attorney:

IT staff informed me first thing this morning that they have the duplication machine set up, and that they are going to purchase the blank hdd (hard disk drive) upon which they need to duplicate the drive. Given the desire to get that to you sooner than later, I asked them to just purchase it at retail rather than ordering through a County supplier, which may take more time to have the device delivered. I've asked staff to PDF the receipt and once they send it I will pass that on to you for payment.

Staff informs me that once they get the hdd, they should perform the duplication task in short order. I asked them to deliver the duplicated drive to my office by hand, and I can then transfer it to you. Let me know if you want it mailed, or if you want to pick it up at my front desk. I'll let you know when I receive it.

5/30/13 RME e mail to MOP notifying of dismissal:

Attached below please find a Notice of Dismissal of Defendant Manatee County With Prejudice filed by Plaintiff Michael Barfield this morning in the case of Barfield v. Manatee County, et al. As you know, Manatee County's Motion for Summary Judgment was scheduled to be heard next week, and I fully expected that the County would prevail in that Motion. While it is unfortunate that the County expended the resources it has in defense of this baseless suit against it, I am gratified that Plaintiff's attorney recognized that the County did not violate the Public Records Act in any way.

5/31/13 RME e mail to Requestor and attorney re hard drive cost:

I just heard back from our IT security staff (they are housed in the Public Safety Complex, not this building) that the duplication work will be done Monday, and they will deliver the copy to my Office Monday around noon. I will let you know the moment it is delivered to me.

Attached is a copy of the receipt for the drive staff purchased to put the copy on. It was $74.99. You can make the check to Manatee County and I will send it to Finance for

deposit. Let me know if you have any questions in the meantime. Otherwise, you will hear from me Monday once I get the disk.

6/3/13 e mail to Requestor disk may be picked up:

Please see below. IT staff state they are going to drop the disk by my office today @ 11:45. Let's give it till after noon before you drive over just to be safe. I've alerted our receptionist to be on the lookout both for the disk, and then for your arrival. If I'm not in the office when you arrive, you may leave the check with her and she knows to give the disk to you.

6/3/13 e mail from MOP to RME:

Did you and Mogensen exchange any emails relative to our MSJ and her decision to voluntarily dismiss? Robin has asked if those can be shared with her. I suspect that whatever emails exist are innocuous. Let me know.

6/3/13 RME response to MOP:

As I indicated to you last week, I had Trudy send the judge and opposing parties a courtesy copy of my motion and copies of cited case law some time on the week of May 20th. I had every full intention of attending the hearing and arguing my motion. I had no e mail or telephonic communication with either opposing counsel on that matter.

As I also noted to you, when we walked over to the Bar Association meeting on Wednesday the 29th, I checked my messages before the meeting began. I saw I had a phone message from Ms. Mogensen. As the hearing was drawing near, and she is a sole practitioner often out of the office, I elected to return her call from the Pier 22. I got her, and she verbally informed me that after reviewing my motion, she was inclined to take a dismissal. I of course agreed. She asked that we continue to preserve the duplicate drive we have, and make a copy available to Mr. Barfield per public records request if he sought it.

The only e mail I sent to Ms. Mogensen was a response to the only e mail she sent me on the matter, which was a confirmation a few hours later of the conversation we had around noon. I will forward that e mail to you in a moment.

6/3/13 Requestor e mail to RME indicating he will come pay the $75 fee for copying the hard drive and pick it up.

I have a hearing in Sebring at 1:00, so it'll be late today (around 3:30 or 4:00) before I get by there.

6/3/13 RME to Requestor and his lawyer confirming:

Sounds fine, Debbie our receptionist will be expecting you.

Based on the foregoing facts and analysis, I must advise the Board of County Commissioners that Commissioner DiSabatino is not entitled to the reimbursement of fees requested under Florida Statutes §§ 111.07 and 111.071.

Discretion on Application of Reimbursement Statutes
Rests with the County Commission, not the Courts

In addition to the substantive analysis of whether the Commissioner is entitled to the recovery of her attorney fees in this matter, the question of who makes that final decision must be examined.

Individual application of statute governing legal representation of public officers at public expense is to be decided by the respective governmental unit, not the judiciary. As to that question, the Court in ***Florida Dept. of Ins., Div. of Risk Management v. Amador*, 841 So.2d 612 (3rd DCA 2003)** ruled as follows:

> There is no constitutional right in Florida to have one's attorney's fees paid. Furthermore, Amador is not entitled by statute to have his fees paid under § 111.07, Florida Statutes, as individual application of § 111.07 is *to be decided by* the respective *governmental unit* (i.e. the Department), *not the judiciary*. See *Nuzum v. Valdes*, 407 So.2d 277, 279 (Fla. 3d DCA 1981).

Id., at 614. Emphasis added.

See also, AGO 91-51, wherein the Attorney General opined that "it is the duty and responsibility of the board of county commissioners, rather than the particular county officer against whom a claim or litigation has been filed, to determine the appropriateness of and to pay a compromise or settlement of such litigation pursuant to s. 111.071(1)(b), F.S." AGO 91-51. In light of the foregoing authority, the Board of County Commissioners, not the courts, holds the authority to determine if reimbursement is authorized pursuant to the statutes.

Reimbursement Under the Common Law

SUBSTANTIVE ANALYSIS:

"If a public officer is charged with misconduct while performing his official duties and while serving a public purpose, the public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the public officer in successfully defending against unfounded allegations of official misconduct." ***Ellison v. Reid*, 397 So.2d 352, 354 (1st DCA 1981)**. This common law doctrine applies to criminal as well as civil proceedings. ***Lomelo v. City of Sunrise*, 423 So.2d 974, 976 (Fla. 4th DCA 1982)**; ***Leon County v. Stephen S. Dobson, III, P.A.*, 957 So. 2d 12 (1st DCA 2007)**.

Public officials seeking entitlement to reimbursement of attorney's fees must meet a two-prong test. The litigation (meaning the lawsuit the official needed to defend) must:

> (1) arise out of or in connection with the performance of her or his official duties, and
> (2) serve a public purpose.

***Maloy v. Board of County Com'rs of Leon County*, 946 So. 2d 1260 (1st DCA 2007).** As explained by the Florida Supreme Court in ***Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990)**:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. E.g., ***Miller v. Carbonelli*, 80 So.2d 909 (Fla. 1955)**; ***Williams v. City of Miami*, 42 So.2d 582 (Fla. 1949)**; ***Peck v. Spencer*, 26 Fla. 23, 7 So. 642 (1890)**; ***Lomelo v. City of Sunrise*, 423 So.2d 974 (Fla. 4th DCA 1982)**, review dismissed, **431 So.2d 988 (Fla. 1983)**; ***Ellison v. Reid*, 397 So.2d 352 (Fla. 1st DCA 1981)**. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently. ***Nuzum v. Valdes*, 407 So.2d 277 (Fla. 3d DCA 1981)**. This entitlement to attorney's fees arises independent of statute, ordinance, or charter. ***Lomelo*, 423 So.2d at 976**. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose. ***Chavez v. City of Tampa*, 560 So.2d 1214 (Fla. 2d DCA 1990)**. See ***Lomelo; Nuzum; Markham v. Department of Revenue*, 298 So.2d 210 (Fla. 1st DCA 1974), cert. denied, 309 So.2d 547 (Fla.1975)**.

Id., at 917-18. Under *Thornber*, a public official is not entitled to taxpayer funded representation simply because an allegation of misconduct arises in the course of his public duties. Rather, the context out of which the alleged misconduct arose must also serve a public purpose.

Thus, a public official is not entitled to taxpayer-funded representation simply because an allegation of misconduct arises in the course of his or her public duties; rather, the context out of which the alleged misconduct arose must also serve a public purpose. ***Maloy v. Board of County Com'rs of Leon County*, 946 So. 2d 1260 (1st DCA 2007)**.

It is settled that a municipal corporation has the right and power to retain and pay private counsel to protect the interests of the municipality and that invasion of those interests may take the form of an attack on one or more public officers. ***City of North Miami Beach v. Estes*, 214 So.2d 644 (3rd DCA 1968)**, cert. discharged, **227 So.2d 33 (Fla. 1969)**. In ***Markham v. State, Department of Revenue*, 298 So.2d 210, 211 (1st DCA 1974)**, the court explicitly states:

> It is a fundamental concept of the law in Florida and elsewhere that public funds may not be expended for other than public purposes. Public officers are, of course, entitled to a defense at the expense of the public in a law suit arising from the performance of the officer's official duties and while serving a public purpose. *Duplig v. City of South Daytona*, Fla.App. (1st) 1967, 195 So.2d 581.

In ***Lomelo v. City of Sunrise*, 423 So.2d 974 (4th DCA 1982)**, the Court elaborated:

> It is neither remarkable nor legally significant that this rule evolved from cases in which the issue is posed in terms of the propriety, after the fact, of municipalities paying legal fees incurred by public officials. The rule and its rationale apply as well pre-payment as

> post-payment. Thus *Shuler v. School Bd. of Liberty County*, 366 So.2d 1184 (Fla. 1st DCA 1978), involves as does our case the refusal of the body politic (a school board) to employ and pay for an attorney to represent a public official (the superintendent). Shuler exemplifies an application of the rule discussed in these earlier cases and imposes a "duty to pay."

Id., at 976. The *Lomelo* Court went on to note:

> A recent pronouncement of the Third District Court of Appeal on this issue in City of Hialeah v. Bennett, 376 So.2d 483 (Fla. 3d DCA 1979), is worth repeating here:
>
> > Affirmed on the authority of the rule stated as follows in Cahn v. Town of Huntington, 29 N.Y.2d 451, 328 N.Y.S.2d 672, 676, 278 N.E.2d 908, 910 (1972):
> >
> > > [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.
> >
> > Accord, Waigand v. City of Nampa, 64 Idaho 432, 133 P.2d 738 (1943); Braslow v. Barnett, 74 Misc.2d 26, 343 N.Y.S.2d 819 (Dist.Ct.1973); Krahmer v. McClafferty, 282 A.2d 631 (Super.Ct.Del.1971); see City of North Miami Beach v. Estes, 214 So.2d 644 (Fla. 3d DCA 1968), cert. disch., 227 So.2d 33 (Fla.1969); cf. Shuler v. School Board of Liberty County, 366 So.2d 1184 (Fla. 1st DCA 1978), cert. dismissed, 368 So.2d 1373 (Fla.1979).

Id. See also, ***Ellison v. Reid*, 397 So.2d 352 (1st DCA 1981)** (applying this rule in similar fashion).

PREVAILING PARTY STATUS STILL REQUIRED:

In ***Tubbs v. Mechanik Nuccio et al.*, 125 So.3d 1034 (2d DCA 2013)**, the Court ruled that:

> *Thornber* contemplates that after a voluntary dismissal a trial court must "determine whether the party requesting fees has *prevailed*." [568 So.2d at 919] (emphasis added). This language indicates that a defendant is *not automatically the prevailing party* for the purpose of an attorney's fee statute when a plaintiff takes a voluntary dismissal.

Id., at 1041. Emphasis added. In ***Ellison v. Reid*, 397 So.2d 352 (1st DCA 1981)**, the court noted that a "successful" outcome was required for common law reimbursement:

> If a public officer is charged with misconduct while performing his official duties and while serving a public purpose, the public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the public officer in *successfully defending* against *unfounded* allegations of official misconduct.

Id., at 354. Emphasis added.

There are few reported appellate cases in Florida wherein a public official either received, or did not receive, attorney fee reimbursements under the common law doctrine. Below are the reported cases since 1982:

In ***Maloy v. Board of County Com'rs of Leon County*, 946 So.2d 1260 (1st DCA 2007)**, reimbursement pursuant to the common law was *denied* even though the commissioner *won* his Ethics Commission case, since a commissioner's decision to engage in sexual relations with staff did not serve a public purpose.

In ***Leon County v. Stephen S. Dobson, III, P.A.*, 957 So. 2d 12 (1st DCA 2007)**, the court found a county commissioner who *successfully defended himself* against criminal charges associated with his participation in the Florida Association of Counties was entitled to reimbursement of his attorney fees under the common law.

In ***Chavez v. City of Tampa*, 560 So.2d 1214, 1215 (2d DCA 1990)**, a mayoral candidate's political consultant filed an ethics complaint against a city council member for voting on an issue in which she had a private, pecuniary interest. Although the court found the public official was performing her public duties under the first prong of the common law test, the court found the council member did not serve a public purpose when she voted on the matter to her own financial benefit. As a result, the court found *no entitlement* to reimbursement of the council member's ethics defense legal fees.

In ***Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990)**, city council members' successful action to enjoin a recall petition arose out of performance of their official duties and served public purpose, *entitling* the members, under the common law, *to reimbursement* of attorney's fees from city.

In ***Lomelo v. City of Sunrise*, 423 So.2d 974 (4th DCA 1982)**, the court found that a mayor, who had been criminally charged with "corruption by threat against a public servant" for interfering in the arrest of a family acquaintance, and who was *acquitted* of that charge, was *entitled* to reimbursement of fees under the common law as the freeing of the arrested person was within the mayor's charter powers.

None of these cases granted fees where a public official failed to prevail in the underlying charge, but instead elected to settle the case, pay the opponent's attorney fees, and submit to essentially the same restrictions that a finding of violation would have imposed upon the official. Absent such authority, I conclude the common law theory of fee reimbursement entitlement requires the public official to have prevailed in the matter.

Scholarly analysis also undermines the simplistic view that a dismissal in and of itself always results in prevailing party attorney fees. In **Attorneys' Fees—The Confusion Regarding Voluntary Dismissals and "Prevailing Party" Fees**, 4 Fla. Prac., Civil Procedure § 1.420:44 (© 2016 Thomson Reuters), the authors state, in relevant part:

> Close analysis of the cases suggests that the first answer [that a non-merits dismissal cannot produce a prevailing party for purposes of fee recovery under contract or statute] is better supported. The courts that have gone in another direction have tended to rely upon dicta and upon cases that either do not support the propositions on which they rely or come from courts that have later changed position. Further, it seems to the author that the first answer is the best, at least partly for a reason not addressed in any of the cases, i.e., the meaning of "prevailing party" in the statute or contract giving rise to fee entitlement. It seems extraordinarily unlikely that the legislature, in the typical statute, or the typical parties contracting for prevailing party fees, would have intended to provide the remedy for anything short of a merits determination, or would have even contemplated a technical, non-merits dismissal permitting refiling, absent some express language to indicate such intent or contemplation. On the statutory side, in the face of time-worn principles that fee recovery is in derogation of common law and that statutes providing for fees must be strictly construed, it would seem that courts should be particularly reluctant to presume a statutory intent to include parties benefiting from without-prejudice dismissals within the ambit of "prevailing" parties.

Footnotes omitted. See also, *Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body*, 47 A.L.R.5th 553, noting:

> Both common law and statutory law provide for reimbursement by municipalities, under certain circumstances, for attorneys' fees incurred by public officials in defending suits against them. Typically, courts have authorized eligibility for such reimbursement only to those public officials who defend against misconduct occurring in connection with the good-faith performance of their official duties and while serving the public interest *and who ultimately prevail* in that underlying suit.

Emphasis added.

NO AUTHORITY TO GRANT FEE REIMBURSEMENT REQUEST BASED ON "EQUITABLE" REASONS:

Having reviewed both the common law and statutory avenues for recovery of attorney fees and concluded that Commissioner DiSabatino's request for reimbursement does not, under the facts of the case, qualify for reimbursement, a brief examination of granting the request for equitable or sympathetic reasons is in order. In the law, when the legislative body prescribes a right or duty and has established procedures and/or conditions which must be met in order for that right or duty to be triggered, a court must presume that, by logic, the legislative body did not intend for the right or duty to be triggered if the procedure has not been followed or the conditions met.

In ***Chavez v. City of Tampa*, 560 So.2d 1214 (2d DCA 1990)**, the appellate court reversed the trial court's award of attorney fees incurred by a city council member after she successfully defended charges of unethical conduct before the Florida Commission on Ethics. The basis for the reversal was that the city had no authority to make such an award inasmuch as the statute did not expressly authorize the award where a "civil action" was not successfully defended.

The Court noted that:

> ...section 111.07, Florida Statutes [is] the statute under which the appellant claims she is entitled to reimbursement of her fees. This *section contains precise language* that fee awards are authorized "to defend any civil action arising from a complaint for damages or injury suffered." The *statute clearly contemplates a judicial proceeding* in a court of law, before a judicial officer, by the plain meaning of "civil action ... for damages or injury."

Id., at 1216-1217. Emphasis added. Based on this analysis, the Court concluded that the City was, "without authority...under the statute...to make the award of fees and costs in this matter."

Inasmuch as the statute requires a party to have "prevailed", under *Chavez*, the County Commission has no authority to grant reimbursement to the Commissioner. See also, ***Weiner v. American Petrofina Marketing, Inc.*, 482 So.2d 1362, 1364 (Fla. 1986)** (wherein the Supreme Court, in construing provisions of the Uniform Commercial Code, observed that although "general principles of law and equity are applicable to supplement the provisions of the [a statute], they will not prevail when in conflict with [the statute's] provisions").

JURISDICTION OF THE COUNTY COMMISSION TO CONSIDER COMMON LAW FEE CLAIMS:

A Florida governmental agency or subdivision has no common law jurisdiction. ***E. Cent. Reg'l Wastewater Facilities Operation Bd. v. City of W. Palm Beach*, 659 So.2d 402, 404 (Fla. 4th DCA 1995)**. Therefore, the trial court, not the agency, has jurisdiction to hear common law claims. See, ***Webb v. School Bd. of Escambia County*, 1 So.3d 1189, 1191 (1st DCA 2009)** (holding that a school district teacher criminally charged with violation of Public Records Act could assert a common law claim for attorney fees associated with her defense of the charge, but that the court, not the school board, had jurisdiction to hear the claim).

ATTORNEY FEES INCURRED TO ESTABLISH ENTITLEMENT TO ATTORNEY FEES:

For the sake of complete analysis for the client, to the extent the Commissioner does not agree with the conclusion of this opinion that she is not entitled to reimbursement of fees, any subsequent litigation brought against the County to argue this point should not expose the County to any additional attorney fees on the Commissioner's behalf. In ***Leon County v. Stephen S. Dobson, III, P.A.*, 957 So.2d 12 (1st DCA 2007)**, the Court expressly addressed this question when a county commissioner's private attorney sought attorney fees for the time spent establishing entitlement to fees. The Court ruled that the law did not require the county to pay the commissioner's private attorney fees, regardless of the outcome of such efforts.

CONCLUSION:

In order for a County Commissioner to be eligible to receive reimbursement for private attorney fees from the County for her defense of a Public Records Act lawsuit, she must have, at a minimum, prevailed in the litigation.

Both under the statutory analysis as well as the common law analysis, given the facts of this case, the Commissioner did not prevail in the lawsuit. She is therefore not entitled to recover her fees.

Additionally, to the extent reimbursement is sought based upon Florida Statutes §§ 111.07 and 111.071, she must have been sued in a complaint for damages or injury. A Public Records Act violation case does not fall within this class of action, and so the statutes do not provide entitlement to reimbursement.

I trust this overview has provided adequate legal advice and analysis such that the County Commission might properly dispose of the reimbursement request before it.

FORM 8B MEMORANDUM OF VOTING CONFLICT FOR COUNTY, MUNICIPAL, AND OTHER LOCAL PUBLIC OFFICERS

LAST NAME—FIRST NAME—MIDDLE NAME	NAME OF BOARD, COUNCIL, COMMISSION, AUTHORITY, OR COMMITTEE
DiSabatino Robin Sue	Board of County Commissioners
MAILING ADDRESS	THE BOARD, COUNCIL, COMMISSION, AUTHORITY OR COMMITTEE ON WHICH I SERVE IS A UNIT OF:
6647 41st St. Cir E, Manatee	☐ CITY ☒ COUNTY ☐ OTHER LOCAL AGENCY
CITY: Sarasota, FL COUNTY: 34243	NAME OF POLITICAL SUBDIVISION: MANATEE COUNTY
DATE ON WHICH VOTE OCCURRED	MY POSITION IS:
April 6, 2017	☒ ELECTIVE ☐ APPOINTIVE

WHO MUST FILE FORM 8B

This form is for use by any person serving at the county, city, or other local level of government on an appointed or elected board, council, commission, authority, or committee. It applies to members of advisory and non-advisory bodies who are presented with a voting conflict of interest under Section 112.3143, Florida Statutes.

Your responsibilities under the law when faced with voting on a measure in which you have a conflict of interest will vary greatly depending on whether you hold an elective or appointive position. For this reason, please pay close attention to the instructions on this form before completing and filing the form.

INSTRUCTIONS FOR COMPLIANCE WITH SECTION 112.3143, FLORIDA STATUTES

A person holding elective or appointive county, municipal, or other local public office MUST ABSTAIN from voting on a measure which would inure to his or her special private gain or loss. Each elected or appointed local officer also MUST ABSTAIN from knowingly voting on a measure which would inure to the special gain or loss of a principal (other than a government agency) by whom he or she is retained (including the parent, subsidiary, or sibling organization of a principal by which he or she is retained); to the special private gain or loss of a relative; or to the special private gain or loss of a business associate. Commissioners of community redevelopment agencies (CRAs) under Sec. 163.356 or 163.357, F.S., and officers of independent special tax districts elected on a one-acre, one-vote basis are not prohibited from voting in that capacity.

For purposes of this law, a "relative" includes only the officer's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. A "business associate" means any person or entity engaged in or carrying on a business enterprise with the officer as a partner, joint venturer, coowner of property, or corporate shareholder (where the shares of the corporation are not listed on any national or regional stock exchange).

* * * * * * * * * * * * * * * *

ELECTED OFFICERS:

In addition to abstaining from voting in the situations described above, you must disclose the conflict:

PRIOR TO THE VOTE BEING TAKEN by publicly stating to the assembly the nature of your interest in the measure on which you are abstaining from voting; *and*

WITHIN 15 DAYS AFTER THE VOTE OCCURS by completing and filing this form with the person responsible for recording the minutes of the meeting, who should incorporate the form in the minutes.

* * * * * * * * * * * * * * * *

APPOINTED OFFICERS:

Although you must abstain from voting in the situations described above, you are not prohibited by Section 112.3143 from otherwise participating in these matters. However, you must disclose the nature of the conflict before making any attempt to influence the decision, whether orally or in writing and whether made by you or at your direction.

IF YOU INTEND TO MAKE ANY ATTEMPT TO INFLUENCE THE DECISION PRIOR TO THE MEETING AT WHICH THE VOTE WILL BE TAKEN:

- You must complete and file this form (before making any attempt to influence the decision) with the person responsible for recording the minutes of the meeting, who will incorporate the form in the minutes. (Continued on page 2)

APPOINTED OFFICERS (continued)

- A copy of the form must be provided immediately to the other members of the agency.
- The form must be read publicly at the next meeting after the form is filed.

IF YOU MAKE NO ATTEMPT TO INFLUENCE THE DECISION EXCEPT BY DISCUSSION AT THE MEETING:

- You must disclose orally the nature of your conflict in the measure before participating.
- You must complete the form and file it within 15 days after the vote occurs with the person responsible for recording the minutes of the meeting, who must incorporate the form in the minutes. A copy of the form must be provided immediately to the other members of the agency, and the form must be read publicly at the next meeting after the form is filed.

DISCLOSURE OF LOCAL OFFICER'S INTEREST

I, Robin Sue DiSabatino, hereby disclose that on April 6, 2017:

(a) A measure came or will come before my agency which (check one or more)

✓ inured to my special private gain or loss;

___ inured to the special gain or loss of my business associate, ___;

✓ inured to the special gain or loss of my relative, my husband + I;

___ inured to the special gain or loss of ___, by whom I am retained; or

___ inured to the special gain or loss of ___, which is the parent subsidiary, or sibling organization or subsidiary of a principal which has retained me.

(b) The measure before my agency and the nature of my conflicting interest in the measure is as follows:

The item taken up by the Manatee County BOCC involved 6 commissioners voting to hold a future Shade Meeting, to discuss my case against the County. I did not vote as it was addressing me & my situation with the County

If disclosure of specific information would violate confidentiality or privilege pursuant to law or rules governing attorneys, a public officer, who is also an attorney, may comply with the disclosure requirements of this section by disclosing the nature of the interest in such a way as to provide the public with notice of the conflict.

April 10, 2017
Date Filed

[signature]
Signature

NOTICE: UNDER PROVISIONS OF FLORIDA STATUTES §112.317, A FAILURE TO MAKE ANY REQUIRED DISCLOSURE CONSTITUTES GROUNDS FOR AND MAY BE PUNISHED BY ONE OR MORE OF THE FOLLOWING: IMPEACHMENT, REMOVAL OR SUSPENSION FROM OFFICE OR EMPLOYMENT, DEMOTION, REDUCTION IN SALARY, REPRIMAND, OR A CIVIL PENALTY NOT TO EXCEED $10,000.

From:	Vicki Tessmer
To:	Quantana Acevedo
Subject:	FW: Commission on Ethics Form 8B relative to voting conflicts
Date:	Wednesday, April 12, 2017 8:13:37 AM
Attachments:	DiSabatino - Form 8B.PDF

Form received in our office on 4/10/17; Vicki was out of the office on 4/11/17

Vicki Tessmer
Supervisor, Board Records, Tax Deeds, and VAB
For Angelina "Angel" Colonneso
Clerk of the Circuit Court and Comptroller of Manatee County
www.manateeclerk.com
vicki.tessmer@manateeclerk.com
941-741-4081

"Pride in Service, with a Vision to the Future"

Florida has a very broad Public Records Law. This agency is a public entity and is subject to Chapter 119 of the Florida Statutes, concerning public records. E-mail communications are covered under such laws & therefore e-mail sent or received on this entity's computer system, including your e-mail address, may be disclosed to the public or media upon request

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From: Sheri Smith [mailto:sheri.smith@mymanatee.org]
Sent: Monday, April 10, 2017 4:52 PM
To: Mitchell Palmer; Vicki Tessmer; Angel Colonneso
Cc: Robin DiSabatino
Subject: Commission on Ethics Form 8B relative to voting conflicts

Please see the attached.
Thank you,

Sheri Smith
Executive Assistant
Board of County Commissioners
(941) 745-3708
sheri.smith@mymanatee.org