

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SIXTH DISTRICT

FLOW WAY COMMUNITY
DEVELOPMENT DISTRICT,

Appellant,

v.

CASE NO.: 6D23-0986

TAYLOR MORRISON OF
FLORIDA, INC., ET AL.,

LT CASE NO.: 2020-CA-004147-
000 I-XX

Appellees.

_____ /

**APPELLANT'S RESPONSE IN OPPOSITION TO
APPELLEES' MOTION FOR APPELLATE ATTORNEY'S FEES**

Pursuant to Florida Rule of Appellate Procedure 9.300(a) and 9.400, Appellant Flow Way Community Development District (Flow Way) requests that this Court deny the Appellees' motion for appellate attorneys' fees for the following reasons:

1. Appellees Andrew Miller, John Wollard, Stephen Reiter, Adam Painter, and Christopher Nirenberg (collectively, "Employee Supervisors") moved for appellate attorney's fees on one ground: Section 111.07, Florida Statutes (2020). Characterizing that statute as a traditional prevailing-party statute, the Employee Supervisors argue that if they prevail in the appeal, then they are entitled to

appellate attorney's fees since they will have succeeded on the appeal's significant issues.

2. Accepting their characterization of the statute for the moment, if this Court reverses the judgment, then the Court should concomitantly deny the Employee Supervisors' fee request because they will *not* be the prevailing party in the appeal and, as a result, will *not* be entitled to attorney's fees under their theory.

3. But regardless of who prevails in the appeal, the Court should deny the Employee Supervisors' request for a much more fundamental reason: namely, section 111.07 is not a traditional prevailing-party fee provision. Rather, as argued in the initial brief (at 38–43 & 52–55), it has limits, elements, and defenses that have nothing to do with who won the appeal or other proceeding. *See, e.g., Maloy v. Bd. of Cnty. Comm'rs of Leon Cnty.*, 946 So. 2d 1260, 1262–65 (Fla. 1st DCA 2007) (prevailing in the underlying proceeding where the fees were incurred, but still denying reimbursement for not meeting the statute's elements); *Chavez v. City of Tampa*, 560 So. 2d 1214, 1215–18 (Fla. 2d DCA 1990) (same).

4. Here, the Employee Supervisors failed to show entitlement under section 111.07's limits, elements, and defenses.

5. For example, the Employee Supervisors cannot overcome section 111.07's limitation against recovering attorney's fees for litigating about whether they are entitled to statutory reimbursement of their attorney's fees. Stated differently, public officials cannot recover attorney's fees incurred in their efforts to prove entitlement to reimbursement under section 111.07—which is all this appeal concerns. *See, e.g., Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) (“Even though the council members are entitled to reimbursement for attorney's fees incurred in the recall election and in the federal civil rights action, they are not entitled to attorney's fees in their efforts to collect those fees.”); *Am. & Foreign Ins. Co. v. Avis Rent-A-Car Sys., Inc.*, 401 So. 2d 855, 858 (Fla. 1st DCA 1981) (“The general rule appears to be that attorney's fees incurred in defense of a claim indemnified against are part of the damages and allowable, but attorney's fees incurred in establishing the right to indemnification are not allowed.”).

6. As explained in the initial brief (at 38–43) and incorporated here by reference, claims for reimbursement under section 111.07 are generally sought in a *separate* lawsuit filed *after* the lawsuit incurring the fees ends. *See, e.g., Thornber*, 568 So. 2d at 918–19; *Nuzum v. Valdes*, 407 So. 2d 277, 278–79 (Fla. 3d DCA 1981); *Pizzi v. Town of Miami Lakes*, 286 So. 3d 814, 815–16 & 818 (Fla. 3d DCA 2019). In other words, a section-111.07 claim essentially seeks indemnity for a prior lawsuit’s legal expenses, which is the statutory claim’s damages element. *See Indemnity*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.”).

7. The fact that the Employee Supervisors are bringing this claim within the same lawsuit that the fees are being incurred should not change this limitation. This conclusion is especially true here where all appellate issues revolve around whether the trial court properly struck the arbitrator’s denial of the Employee Supervisors’ counterclaim for reimbursement under section 111.07. Under

Thornber and by analogy *Avis*, the Employee Supervisors are not entitled to appellate attorney's fees regardless of the appeal's results.

8. Similarly, section 111.07 has elements that the Employee Supervisors failed to allege and prove. To reimburse public officials for their legal-defense expenditures under the statute (or for that matter, the common law), the public official must prove that “the lawsuit arise[s] from (1) the performance of the officer’s *official duties* and (2) while serving a *public interest*.” *Chavez*, 560 So. 2d at 1218 (emphasis original). See initial brief at pages 38–43 and 52–55, which are incorporated here by reference.

9. The only element the Employee Supervisors made any attempt to prove was the first—i.e., that the lawsuit “related solely to the Former Supervisor’s actions as Flow Way public officials.” (1/27/2023 Mot. For App. Att. Fees at ¶ 3). They made no attempt to prove that their performance served the public interest. This failure to even allege this element supports denying their fee motion.

10. But even had this element been alleged, the Employee Supervisors could not satisfy it. The caselaw makes clear that the public official’s performance of his or her official duty must be purely

in the public interest and “exclude[] any taint of ‘private interest.’ ” *Chavez*, 560 So. 2d at 1218; *Pizzi*, 286 So. 3d at 819.

11. The Employee Supervisors cannot prove that their vote to approve the preserves transfer without the endowment fund purely served the public interest and was devoid of any taint of private interest. Indeed, the arbitrator expressly found that their “rubber stamp” decision at their employer’s insistence served to unjustly enrich their employer. (R7613, R7617, R7622, R7624; *see also* IB 54–55 (summarizing the relevant evidence)); *cf.* *Chavez*, 560 So. 2d at 1218 (similarly refusing to award attorney’s fees because public official’s vote on land-use application advanced her private interest, even if it had some public benefit).

12. These factual findings by the arbitrator are conclusive at this point because the trial court confirmed them by reducing them to judgment after the Employee Supervisors never timely challenged them under section 44.103(5), Fla. Stat. (2020). (R9605 (¶ 1)). This element’s failure independently supports denying their motion for appellate fees irrespective of the appeal’s result.

13. Finally, the Court should deny the Employee Supervisors' motion because the arbitrator factually found that the Employee Supervisors had "acted in bad faith...." (R7624; *see also* R7615–17). Irrespective of whether they can show that the arbitrator lacked authority to decide the ultimate attorney-fee issue, the arbitrator at least had authority (and the duty) to "identify and resolve the legal and factual issues upon which the determination of attorney's fees will be based...." *A-1 Duran*, 865 So. 2d at 603; *see also R.M. Stark & Co., Inc. v. Noddle*, 941 So. 2d 401, 403–04 (Fla. 4th DCA 2006). This factual finding is presumed correct, and neither this Court nor the trial court can substitute their judgment for the arbitrator's. *Merritt-Chapman & Scott Corp. v. State Rd. Dep't*, 98 So. 2d 85, 86 (Fla. 1957). In fact, this factual finding was among the arbitrator's findings that the judgment adopted. (R9601–05). And since bad faith is an absolute defense to reimbursing the Employee Supervisors from the public treasury under section 111.07, this provides a fourth independent basis for denying their motion for appellate fees.

WHEREFORE, Appellant Flow Way requests that this Court deny the Employee Supervisors motion for appellate attorney's fees and grant any other relief this Court deems just and proper.

Respectfully submitted,

ROETZEL & ANDRESS, LPA
*Appellant Attorney for FLOW WAY
COMMUNITY DEVELOPMENT DISTRICT*

/s/ Christopher D. Donovan
CHRISTOPHER D. DONOVAN, ESQ.
Florida Bar No. 0833541
ROETZEL & ANDRESS, LPA
999 Vanderbilt Beach Road,
Suite 400
Naples, FL 34108
Telephone: 239.649.6200
Facsimile: 239.261.3659
Email: cdonovan@ralaw.com
Secondary: serve.cdonovan@ralaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2023, the foregoing Appellant’s response in opposition to Appellees’ motion for appellate attorney’s fees was electronically transmitted to the Clerk of Court via the Florida Courts E-Filing Portal (“FCEP”) for filing and transmittal of electronic mailing to the following FCEP registrant(s) or pro se parties in the manner specified:

Via Email

Kevin S. Hennessy, Esq.
Florida Bar No. 602558
Richard P. Green, Esq.
Florida Bar No. 0119530
Nicole J. Poot, Esq.
Florida Bar No. 118858
LEWIS, LONGMAN, WALKER
100 Second Avenue South
Ste. 501-S
St. Petersburg, FL 33701
Email: khennessy@llw-law.com
Email: rgreen@llw-law.com
Email: npoot@llw-law.com
Email: STPService@llw-law.com
*Attorneys for Taylor Morrison of
Florida, Inc., Taylor Morrison
Esplanade Naples, LLC,
Anthony Burdett, Stephen
Reiter, David Truxton, Adam
Painter, Christopher Nirenberg,
Andrew Miller and John
Wollard*

Via Email

Peter J. Cambs, Esq.
Florida Bar No. 84063
**GOEDE, ADAMCZYK &
DEBOEST, PLLC**
6609 Willow Park Drive, 2nd
Floor Naples, FL 34109
Email: pcambs@gadclaw.com
Email:
dmezzoline@gadclaw.com
Email: avaughan@gadclaw.com
*Attorneys for Defendant,
Esplanade Golf & Country Club
of Naples, Inc.*

Via Email

Joseph A. Brown, Esq.
Florida Bar No. 25765
KUTAK ROCK LLP
P.O. Box 25765
Tallahassee, FL 32302
119 South Monroe Street
Ste. 300
Tallahassee, FL 32301
Email:
Joseph.Brown@KutakRock.com
Email:
Kim.Hancock@KutakRock.com
*Co-counsel for Defendants,
Taylor Morrison of Florida, Inc.,
Taylor Morrison Esplanade
Naples, LLC, Andrew Miller,
John Wollard, Stephen Reiter,
Adam Painter and Christopher
Nirenberg*

Via Email

Gregory N. Woods, Esq.
Florida Bar No. 175500
Jessica F. Tolin, Esq.
Florida Bar No. 124266
Quentin R. Welborn, Esq.
Florida Bar No. 1032613
**WOODS, WEIDENMILLER,
MICHETTI & RUDNICK, LLP**
9045 Strada Stell Court, Suite
400
Naples, FL 34109
Email:
gwoods@lawfirmnaples.com
Email:
Jtolin@lawfirmnaples.com
Email:
Qwelborn@lawfirmnaples.com
Email:
mdipalma@lawfirmnaples.com
Email:
service@lawfirmnaples.com
Attorneys for the CDD

/s/ Christopher D. Donovan
CHRISTOPHER D. DONOVAN
Florida Bar No. 0833541