

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S
MOTION FOR AWARD OF ATTORNEYS' FEES**

I. FACTUAL BACKGROUND.¹

More than two years ago, in July of 2003, the Florida Judicial Qualifications Commission (“JQC” or the “Commission”) filed a Notice of Formal Charges (“Charges”) alleging that Judge Gregory P. Holder had plagiarized an Air War College (“AWC”) paper and falsely stated that it was his original work. To support its allegations, the JQC relied on a copy of an AWC paper submitted by E. David Hoard in 1996 (“Hoard paper”) (Exhibit “B” to the Charges) and copies of a paper that contains material from the Hoard paper and which the JQC alleged was submitted to the AWC by Judge Holder in 1998 (“purported Holder paper”) (Exhibit “A” to the Charges).

At the time the purported Holder paper mysteriously “surfaced,” Judge Holder was a cooperating witness in a criminal investigation into judicial corruption at the Hillsborough County Courthouse. The troubles within the Courthouse ultimately led to the resignation of at least two circuit

¹ Some description of the background of this case is necessary here, in part because the JQC has elected not to transcribe the record.

judges. The targets and subjects of the investigation, who faced not just loss of position but potential incarceration, clearly had a motive to discredit or seek retribution against Judge Holder.²

In the midst of that investigation, an unmarked envelope (“Envelope”) was anonymously slipped under the door of Jeffrey Del Fuoco, an Assistant United States Attorney who had been involved in the Courthouse corruption probe. Del Fuoco testified at trial that he found the Envelope early one weekend morning in January of 2002, when he was serving at the Army Reserve Headquarters in St. Petersburg, Florida. The Envelope purportedly contained a typewritten note (“Note”) to the effect that “I thought you would be interested in this” or “something should be done about this.” The Note purportedly contained no handwriting but only a typed “signature” of “a concerned citizen” or “a concerned taxpayer.” The Envelope allegedly contained copies of the purported Holder paper and the Hoard paper (the “Papers”) along with the Note.

In December of 2002, the U.S. Attorney’s Office provided these Papers to the JQC. Although the Papers had been in the possession of the U.S. Attorney’s Office for approximately 11 months, this referral inexplicably occurred within weeks of Judge Holder writing a letter to the

² The investigation extended beyond the Courthouse and into other areas of corruption in the community.

Department of Justice Office of Professional Responsibility complaining about apparent inactivity in the courthouse corruption investigation. On July 16, 2003, the JQC filed its Charges, alleging that Respondent had “violat[ed] . . . [the] Canons of the Code of Judicial Conduct, and the Rules of Professional Conduct” and had engaged in “conduct unbecoming a member of the judiciary.” Commission’s Resp. to Mot. For Award of Attorneys’ Fees (“ JQC Resp.”), Ex. A. ¶ 3.³

The central issue in this proceeding was whether the purported Holder paper was genuine. Despite the fact that: (a) the JQC admitted that it had no witness who could testify based on personal knowledge that the purported Holder paper was an authentic copy of the actual paper that Judge Holder submitted to the Air War College (*See* Response to Resp.’s 1st Req. for Admissions ¶ 1); (b) both the Note and the Envelope inexplicably vanished from the U.S. Attorney’s Office and were never forensically tested for fingerprints or otherwise to attempt to identify their source; (c) no original of Judge Holder’s actual AWC paper was ever located; and (d) multiple witnesses who saw Judge Holder’s actual paper at or about the time he submitted it to the Air War College swore that the purported Holder paper

³ Because the submission of an Air War College paper also required the completion of a signed certification of the paper’s originality, the JQC also alleged that Respondent had violated 18 U.S.C. § 1001. JQC Resp., Ex. A. ¶ 2.

was not authentic, the JQC nevertheless vigorously prosecuted this case.⁴

Judge Holder never contested that the purported Holder paper contained approximately ten pages of nearly verbatim text from the Hoard paper. Instead, Respondent maintained that the purported Holder paper was fabricated to discredit him because of his role as a cooperating witness in the courthouse corruption investigation. Judge Holder was forced to defend these serious charges by hiring counsel,⁵ conducting extensive discovery, filing and litigating (including full briefing and oral argument) numerous motions to dismiss the Charges based on multiple evidentiary inadequacies,⁶

⁴ For example, immediately upon filing the Charges, the JQC sought to suspend Judge Holder from the bench despite the fact that the alleged misconduct occurred over 5 years earlier.

⁵ Sidley Austin Brown & Wood LLP, one of the law firms retained by Judge Holder, performed its services with the express understanding that in the event of a favorable outcome, it would be entitled to seek recovery of attorneys' fees from the State of Florida. Respondent's other law firms were engaged on an hourly fee basis.

⁶ Judge Holder filed the following motions on the referenced dates: 1) Motion in Limine to Exclude Testimony of David Leta (8/27/04); 2) Motion in Limine to Exclude All Documents provided to the JQC by Jeffrey Del Fuoco (8/27/04); 3) Motion in Limine to Exclude All Documents provided to the JQC by the United States Air Force (8/27/04); 4) Motion in Limine to Exclude Testimony of Jeffrey Downing (8/27/04); 5) Motion in Limine to Exclude Testimony of Jeffrey Del Fuoco (8/27/04); 6) Motion in Limine to Exclude Evidence on Best Evidence Grounds (8/27/04); 7) Motion in Limine to Exclude Evidence on Due Process Grounds (8/27/04); 8) Motion in Limine to Exclude Copies of the Purported Holder Paper on Authentication

and securing experts regarding document authentication, the creation of documents (*e.g.*, the purported Holder paper) using Photoshop® software, forensic computer analysis, and other issues.

At trial, Judge Holder presented compelling evidence that the purported Holder paper was fabricated to retaliate against him for his participation in the courthouse corruption investigation. After six days of trial, which included the testimony of more than 25 witnesses, the Hearing Panel of the JQC voted unanimously to dismiss the charges against Judge Holder. JQC Resp., Ex. B.

II. ISSUE PRESENTED.

On July 25, 2005, Judge Holder moved this Court to enter an order awarding attorneys' fees incurred by him in the successful defense of this JQC proceeding pursuant to *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914 (Fla. 1990). In *Thornber*, this Court held that a public official is entitled to attorneys' fees following the successful defense of a case if "the litigation . . . (1) arise[s] out of or in connection with performance of [his] official duties and (2) serve[s] a public purpose." *Id.* at 917. The purpose of

Grounds (8/27/04); and, 9) Motion to Dismiss the pending Charges or in Limine to Exclude the Purported Holder Paper and Hoard Paper Based on Evidentiary Improprieties (3/21/05). However, despite the fact that several of these motions were dispositive of the charges, the JQC failed to timely rule on them. Instead, these motions were carried over into and through the trial and were summarily denied in the Order of Dismissal.

this rule is “to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently.” *Id.*, citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. 3d DCA 1981).

Thus, the public policy expressed in *Thornber* requires that Judge Holder’s attorneys’ fees be paid. As this Court has recognized, judges in JQC proceedings are entitled to counsel as a matter of due process, Judicial Qualifications Commission Rule 15(a), and to effective, affordable counsel as a matter of fairness. *See In re Hapner*, 737 So. 2d 1075, 1077 (Fla. 1999) (recognizing as to costs that “[i]t is particularly important that an accused judge not be placed in the position of foregoing a defense against unwarranted charges because he or she might otherwise face financial ruin if unsuccessful in the proceeding.”) Otherwise, judges in Respondent’s position would face a Hobson’s choice between loss of reputation and removal from the bench on one hand, and mounting an effective defense (which could lead to financial ruin) on the other. Everyone involved—including the voters who repeatedly elected Judge Holder—would be damaged by the perpetuation of such a situation.

In its response to Judge Holder’s motion, the Commission, relying upon the Attorney General of Florida, concedes that *Thornber* applies to judges in proceedings before the Commission. *See JQC Resp.* at 5 (citing

Attorney General’s Opinion 93-21, 1993 WL 361721 (Fla. A.G. 1993). The JQC also concedes that the second prong of the *Thornber* test is satisfied, stating that “[u]nquestionably, the resolution of the highly publicized charges against Judge Holder and matters relating thereto served a public purpose.” JQC Resp. at 5. Thus, the only issue is whether the JQC’s case against Judge Holder arose “out of or in connection with” the performance of Judge Holder’s official duties.

III. ARGUMENT.

A. The JQC Proceeding Arose Out Of Or In Connection With The Performance Of Respondent’s Official Duties.

The Charges clearly arose in connection with the performance of Judge Holder’s judicial duties. Specifically, the Charges and the resulting litigation arose in connection with an attempt by an anonymous person or persons⁷ to interfere with Judge Holder’s participation in the federal investigation of judicial corruption at the Hillsborough County Courthouse.

In fact, Judge Holder’s participation in the corruption investigation was integral to the performance of his judicial duties. Judicial Canon 3D(1) states that “A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of

⁷ *I.e.*, whoever fabricated the purported Holder paper, typed the Note, and slipped the Envelope under Jeffrey Del Fuoco’s door.

this Code *shall take appropriate action.*” (Emphasis added.)

Consequently, when Judge Holder was approached by law enforcement agents in connection with the investigation, he did the only proper thing under the Judicial Canons, tell the agents what he knew and suffer the attendant consequences.⁸ By cooperating with the courthouse corruption investigation, Judge Holder discharged responsibilities that the Judicial Code required.

In fact, Judicial Canon 3D(3) conclusively answers the “official duty” issue before this Court. It states that “[a]cts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) *are part of a judge’s judicial duties...*” Judicial Canon 3D(3) (emphasis added). Thus, when viewed in context, this case clearly arose in connection with Judge Holder’s performance of his official duties.

In its response, the Commission ignores the facts presented at trial. The Commission asserts that “The preparation of the Air War College research paper and signing the certification did not arise out of or in connection with the performance by Judge Holder of his official judicial

⁸ One law enforcement agent testified at trial that the corruption investigation team was concerned that Judge Holder’s activities were being monitored by targets of the investigation. Judge Holder was advised by federal law enforcement agents to carry a weapon, and he was provided with a secure cell phone with which to communicate with federal agents.

duties” and thus “there is not a sufficient nexus between the writing of the paper and the certification and the performance of Judge Holder’s official duties as a Circuit Judge to satisfy the first prong of the Thorner list [sic].” *Id.* at 5, 6.

The Commission’s position is grounded in neither fact nor law. First, the Commission ignores the fact that it lost before the hearing panel. It tried but could not establish that the purported AWC paper was created in connection with Judge Holder’s Air Force duties. Instead, the overwhelming evidence presented at the hearing established that the paper was not in fact Judge Holder’s AWC paper and instead was a fabrication. Indeed, the courthouse corruption investigation and Judge Holder’s participation in it were the sole motivation for someone fabricating the document. In fact, a law enforcement officer testified during the hearing that other witnesses cooperating in the courthouse corruption investigation had been retaliated against through the use of fabricated documents. Indeed, Special Counsel himself, in his closing argument, conceded Judge Holder’s actual paper and the Hoard paper (the source of the plagiarized material) were unlawfully stolen from Judge Holder’s chambers before the Envelope was surreptitiously slipped under Jeffrey Del Fuoco’s door. Indeed, the fact that the Envelope containing the papers was slipped under the door of Mr.

Del Fuoco—and not the door of an Air Force or JQC official—demonstrates that derailing the judicial corruption investigation was the focus: Mr. Del Fuoco had been the AUSA assigned to the investigation of corruption at the Hillsborough County Courthouse.

Second, the Commission’s argument simply misinterprets the *Thornber* test. The test focuses not on the conduct alleged, but the proceeding itself. The issue is whether the *litigation* “arise[s] out of *or in connection with* the performance of [Judge Holder’s] official duties.” *Thornber*, 568 So. 2d at 917 (emphasis added).

Third, the JQC took the position below that the Charges were sufficiently related to Judge Holder’s judicial duties to justify seeking suspension despite the fact that the alleged conduct took place over five years earlier. To now assert that the events in question are not sufficiently related so as to satisfy the first prong of the *Thornber* test is a disingenuous switch in position.

The inquiry this Court set forth in *Thornber* looks to the litigation as a whole, including context, cause, and motivation. The *Thornber* test is not answered by the conclusion that the charges against a public official involved *alleged* facts or conduct outside the scope of his official duties. If that were the test, any public official could be subjected to protracted

litigation that could cost him his job and savings based on false allegations of improper conduct unrelated to his judicial duties. This is especially true of judges because the Canons of Judicial Conduct broadly govern their behavior. As the General Counsel to the Commission has recognized:

"The canons require a judge to deal honestly in all his affairs," MacDonald said. "Our Supreme Court has held that a judge is a judge 24 hours a day, seven days a week. Whether he does it within or without his judicial offices is beside the point."

Thomas A. MacDonald, Esq., quoted in *Tampa Tribune*, "Committee Proceeds with Trial of Holder" (Mar. 5, 2004).⁹

Where, as here, a judge prevails against allegations clearly intended to prevent him from effectively performing a judicial duty (in this case, cooperating with law enforcement investigating alleged corruption among

⁹ The JQC argued in its formal Charges that the acts do relate to official duties: "These acts, if they occurred as alleged, would impair the confidence of the citizens of this State in the integrity of the judicial system and in you as a judge, would demean your judicial office, would constitute a violation of the cited Canons of the Code of Judicial Conduct, and the Rules of Professional Conduct, would constitute conduct unbecoming a member of the judiciary, would demonstrate your present unfitness to hold the office of judge, and would warrant discipline, including, but not limited to, your removal from office." JQC Resp., Ex. A ¶ 3. The Commission's position is inconsistent: It simultaneously concedes that Judge Holder's conduct was sufficiently connected to the performance of official duties to charge him and seek his suspension, yet not sufficiently connected to support repayment of his fees now that he has prevailed. If no such connection existed, the Commission had no authority to take jurisdiction in the first place.

his colleagues), it should not matter that the false allegations concerned the preparation of an Air War College paper.¹⁰ Instead, as Judge Holder established below, the key factor is that the charges were made in an effort to impair the judicial corruption investigation with which he was cooperating. Accordingly, the *litigation* here arose “*out of or in connection with*” performance of his official duties.

The issue in this case is not merely an issue personal to Judge Holder, but one which goes to the heart of judicial independence. The denial of fees in this case will impair the ability of any judge to defend against anonymous false charges designed to derail a judge from doing his job. The correct result in these instances is to permit a judge to recover reasonable attorneys’ fees when the judge prevails.

B. The Successful Defense Of The Case Served A Public Policy Goal.

Judge Holder’s successful defense of the charges against him, arising as they did from the troubled circumstances in the Hillsborough County Courthouse, has the effect of restoring public confidence in the judiciary and

¹⁰ There are undoubtedly cases involving alleged personal moral failures of judges which do not involve official conduct but which would directly affect their fitness to serve. Unless the litigation of such charges is accompanied by an improper intention (on the part of the charging party) to interfere with their ongoing performance of judicial duties, the granting of relief in the instant proceeding would not control the result in such cases.

in the JQC process for supervising the judiciary. From the inception of the Commission's case against Respondent, this case has been viewed in Hillsborough County as entwined with the troubles of the Courthouse and the resulting judicial corruption investigation. Judge Holder's successful defense was also perceived in that context. *See* Appendix A (press coverage of this proceeding).

The Commission has acknowledged that Judge Holder's defense served a public purpose: "Unquestionably, the resolution of the highly publicized charges against Judge Holder *and matters relating thereto* served a public purpose...." JQC Resp. at 5-6 (emphasis added). Indeed, the Commission explains those related matters in a footnote as Judge Holder's "participation as an undercover agent in an FBI investigation of corruption." JCQ Resp. at 6 n.1. But if, as the Commission contends, the litigation passes the public purpose prong of the *Thornber* test because of Judge Holder's status as an "undercover agent," the Commission should not be able to shield that same fact from the "official duties" prong of the same test. The selective relevance urged on this Court by the Commission is not persuasive. The Commission's own characterization of the litigation concedes that it did "arise out of or in connection with" the public corruption investigation with which Judge Holder cooperated as provided for by the

Judicial Canons. Accordingly, he is entitled to reasonable attorneys' fees.

C. The Commission's Arguments Do Not Compel Denial Of Judge Holder's Motion.

The Commission contends that *In re Hapner*, 737 So. 2d 1075 (Fla. 1999), establishes a rule forbidding the award of attorneys' fees in this case. JQC Resp. at 7. That case is inapposite. In *Hapner*, the Commission sought and was denied attorneys' fees as costs under Article V, Section 12 of the Florida Constitution. *Hapner's* application of that provision, however, is irrelevant to a *Thornber* common law attorney fee award—which the Commission concedes applies in this context. Indeed, a case like the instant proceeding is precisely the situation envisioned by *Thornber*, in which the absence of reimbursement may lead to “the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently.” *Thornber*, 568 So. 2d at 917, citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. 3d DCA 1981).

If this Court finds that Judge Holder is entitled to attorneys' fees, such fees will, of course, be limited to the amount deemed necessary and reasonable in the context of this case. The determination of the amount of recoverable attorneys' fees should be determined by a special master based on well-established principles of Florida law. In fact, a decision by this Court that Judge Holder is entitled to recover reasonable attorneys' fees

would not be the beginning of a raid on the judicial branch treasury. As a historical matter, judges rarely prevail in JQC hearings. In fact, the last time a judge prevailed at trial against the JQC was approximately 19 years ago in 1986.¹¹ In this rare case, Judge Holder denied all wrongdoing and prevailed. Thus, the Commission's *Thornber* obligation to reimburse reasonable attorneys' fees will not unduly deter the Commission from carrying forth its duties.

IV. CONCLUSION.

For the reasons set forth above, Respondent's Motion for Award of Attorneys' Fees should be granted and a special master appointed to make a recommendation as to the amount of a reasonable attorneys' fee which should be awarded to Judge Holder.

(Attorney signature appears on following page.)

¹¹ Moreover, if a judge prevails only in part, but is otherwise sanctioned, the judge likely would not qualify as a prevailing party. *In re: Cope*, 848 So. 2d 301 (Fla. 2003).

Dated: August 18, 2005

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 18, 2005, a copy of the foregoing, Memorandum of Law in Support of Respondent's Motion for Award of Attorneys' Fees, has been served by regular U.S. Mail to Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302; Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell, Ditmar, DeVault, Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501.

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