

TO: Manatee County Commissioners  
CC: William Clague, County Attorney

May 7, 2021

FROM: Matt Bower, District 3 Manatee County Citizen

**Memorandum in Opposition to an Award of Attorney Fees  
for Commissioners Kevin Van Ostenbridge and James Satcher.**

In opposition of County Attorney William Clague's Memorandum supporting the Manatee County's authority to pay attorney fees incurred by Kevin Van Ostenbridge and James Satcher, I submit the following for serious consideration.

**1. Attorney Fees Actually Paid**

At this time, no documentation has been presented to the Board or to the Public giving rise that these two commissioners actually paid for the legal services they are requesting reimbursement. Considering the asset and income disclosure by each of these two commissioners at the time of their filing for county commissioner, it is difficult to believe either commissioner personally paid for such legal services. At a minimum, to even consider whether such legal fees should be reimbursed, the burden of proof is upon these two commissioners to submit proof (ie. Copies of checks, wiring of funds or otherwise) that such fees were paid and incurred.

**2. Reasonable Attorney Fees**

At this time, no attorney fee billing ledger has been provided. As attorney Clague is fully aware of, if an award of attorney's fees is granted, those fees must be considered reasonable. Moreover, those fees must be awarded in the context of a civil action and not a potential criminal action. It is NOT legal to award attorney fees for an official against criminal charges in connection with the official's public duties (see A GO 69-40).

Thus, without a billing ledger from the commissioners' attorney, no board member, nor the public, is in position to grant this request. Granting this request for an award of attorney's fees without evaluating how reasonable and related to the lawsuit filed by Mr. Barfield would be inappropriate and provide grounds for a lawsuit opposing such decision.

Further supporting the lack of reasonable fees, one must only look at the Plaintiff's bills which is 1/10 lower than defendants' bills to conclude how unreasonable an award of \$60,000 is.

Additionally, I find it disingenuous that a billing ledger has not been provided. For two commissioners to preach transparency, I find it overwhelmingly ironic no such records have been provided. As a result, one must insinuate that there is information in the billing ledger that they do not want us to see.

Lastly on this subject, it's also ironic that the request comes to an even number of \$60,000.00. Anyone who has ever been involved in award of attorney's fees and costs would consider this a red flag.

**3. Precedent Already Established – Prevailing Party**

While Mr. Clague's Memorandum supporting an award of attorney's fees appears well thought out, he left out key pieces of information and case law that goes directly against his supporting theory.

Moreover, it was Mr. Clagues' own predecessor, Mr. Palmer, that wrote an opinion and recommendation to the BOCC with nearly the same fact pattern concerning Commissioner Robin Disabitino denying such request. Mr. Palmer's opinion is attached from May 24, 2016.

Mr. Clague knows or should know that a prevailing party, on its face, it's not solely determined by a voluntary dismissal in favor of the defendant (in this case Satcher and Van Ostenbridge) as he cites *Thornber* supporting his recommendation.

Florida law requires that in order to accomplish the obligation set forth in *McCoy v. Pinellas County*, 920 So. 2d 1260, 1261 (Fla. 2d DCA 2006), the Court, or in this case the BOCC must look behind a voluntary dismissal at the facts of the litigation "to determine whether a party is a 'substantially' prevailing party.

In *Padow v. Knollwood Club*, 839 So 2d 744,745 (Fla 4<sup>th</sup> DCA 2003), *Padow* court expanded on its view of the proper prevailing party analysis by noting:

"The test for determining the 'prevailing party' under [F.S.] §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 F.S. §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."

In *Kelly v. BankUnited, FSB*, 159 So. 3d 403 (Fla. 4th DCA 2015), the Fourth District interpreted and expanded on its ruling in the *Padow* case. It did so by denying an award of statutory "prevailing party" fees when the dismissal of the litigation was by means of a compromise settlement.

In the case against Van Ostenbridge and Satcher, each defendant entered into a settlement curing the very issues leading to the lawsuit. When applying the above-referenced standard and case law, when an official incurs defense counsel fees, but then for any reason elects to settle with the plaintiff rather than obtain a final judgment on the merits, the official has not prevailed. This is particularly true when part of the consideration includes payment of the plaintiff's attorney's fees since the exact relief is almost always monetary relief.

Lastly, much of the above referenced information can be found in this article written by another colleague of Mr. Clague. <https://www.floridabar.org/the-florida-bar-journal/when-is-a-public-official-entitled-to-prevailing-party-attorneys-fee-reimbursement-in-public-records-act-cases-part-ii/>

#### **4. Conflict of Interest**

As we are aware, Van Ostenbridge and Satcher are not permitted to vote on this matter. However, as Mr. Clague points out, there is a third defendant, Commissioner Vanessa Baugh, whose lawsuit has not been concluded. That said, if and when Mr. Baugh's lawsuit is concluded, it's obvious her request for a return of attorney's fees will not be far behind. Therefore, Ms. Baugh has an overwhelming conflict of interest with her vote. It is obvious Ms. Baugh has an incentive to vote in favor of this request while she will expect the same when it is time to vote in favor of her request regarding the same exact matter. If there was ever a clear moment of a conflict with a voting party having an obvious gain, this is the case. Should this request be approved, Ms. Baugh's vote on the matter presents a clear ability to overturn the findings through a Court of law. Therefore, I respectfully request Ms. Baugh's conflict be acknowledged and precluded from voting on this matter.

#### **5. Public Purpose**

Under common law, for a public official to be awarded attorney's fees, a two-prong test must be met: 1. Arising out of or in connection with the performance of his or her official duties and, 2. Serve the public interest.

While I believe there is an argument as to the performance of their duties, I respectfully request the Board consider whether this was a matter of serving the public interest. Meaning, had these two commissioners simply complied with the records request in the first place and be transparent as they preach, this lawsuit and the subsequent attorney's fees would have never been incurred. Their personal decision not to comply with the records request served their own interest, not the public. There was no reason for these two commissioners (as well as Baugh) not to comply. Therefore, any reasonable person would conclude Van Ostenbridge and Satcher did NOT act or serve the public interest. Rather to the contrary.

#### **CONCLUSION**

As illustrated above, there are a litany of problems with the request for the Manatee County Taxpayers to foot the bill to reimburse attorney's fees for Commissioners Van Ostenbridge and Satcher.

Not only has these two commissioners not proven they actually paid the fees (versus bill still outstanding or someone else paid for it themselves), they have not provided a billing ledger substantiating the reasonableness of the bill or its relation to the case.

Contrary to the County Attorney's opinion, the two commissioners did NOT prevail in the lawsuit against them. They agreed to pay Plaintiff's attorney fees which is part of how these cases are resolved short of a trial and judgement. A voluntary dismissal standard is trumped by their paying the plaintiff.

Chairperson Baugh should not be permitted to voting on this matter considering her conflict of interest and what she has to gain as part of her vote.

The BOCC has already set its precedent relating to an award of attorney's fees. A vote against this precedent will open the door for further litigation and goes against well-established case law.

Lastly and maybe most importantly, the result of this lawsuit was not public serving. Van Ostenbridge and Satcher chose not to comply with the records request resulting in the lawsuit. They could have chosen to be more cooperative to avoid the lawsuit and, also avoiding to agreeing to pay the Plaintiff's attorney fees.

In conclusion, the BOCC has every right and reason to deny this request. It's the correct and right thing to do for the Manatee County taxpayers.