FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-423

MARY BETH JACKSON,

Appellant,

v.

THE SCHOOL BOARD OF
OKALOOSA COUNTY, FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

August 2, 2021

RAY, J.

Mary Beth Jackson, a former Superintendent of Schools for Okaloosa County, appeals an order dismissing her complaint against the Okaloosa County School Board seeking reimbursement for attorney's fees and costs incurred in challenging her suspension from office by the Governor. Because judicial review of this matter would violate the separation of powers and constitute an unjustified expansion of the common law, we affirm the circuit court's order dismissing her complaint with prejudice.

Facts and Procedural Background

Jackson was serving her second term as the elected Superintendent of Schools for Okaloosa County when Governor

DeSantis suspended her from office under article IV, section 7(a) of the Florida Constitution. As detailed in Executive Order 19-13, Jackson's suspension followed the Commissioner of Education's recommendation and was based in part on grand jury reports stemming from allegations of a teacher abusing developmentally challenged students. The executive order alleged that Jackson was incompetent and neglected her duty as Superintendent "due to her failure to provide adequate, necessary and frequent training, a lack of supervision of school district personnel, and a failure to implement adequate safe-guards, policies, and reporting requirements to protect the safety and well-being of the students." Fla. Exec. Order No. 19-13 (Jan. 11, 2019).

Jackson disputed the allegations of the executive order and requested a formal hearing before the Florida Senate.[1] The Senate President appointed a special master to receive evidence and render an advisory report on Jackson's suspension and potential removal from office. After the final hearing but before the special master issued his final report, the Governor reinstated Jackson to her former position as Superintendent "in expectation of [her] immediate resignation." Fla. Exec. Order No. 19-166 (July 17, 2019). Upon reinstatement, Jackson immediately resigned.

Jackson then filed a complaint seeking reimbursement from the Okaloosa County School Board of the substantial attorney's fees and costs she incurred in challenging her suspension. Jackson alleged that she is entitled to such reimbursement under the common law as explained in *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990), and related authority. She argued this common law remedy is independent of statute and is not barred by sovereign immunity. Jackson then sought a partial summary judgment as to her entitlement to reimbursement.

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[1] The Senate proceedings were temporarily abated after Jackson initiated a quo warranto action in the Florida Supreme Court contending that the Governor had exceeded his suspension authority. The supreme court denied her petition. *Jackson v. DeSantis*, 268 So. 3d 662, 663 (Fla. 2019).

In response, the School Board moved to dismiss Jackson's complaint, arguing that section 112.44, Florida Statutes (2019), provides the sole method of recovering fees and costs in suspension and removal proceedings, and she had failed to satisfy the preconditions for an award under that statute. The School Board also argued that the doctrine of separation of powers prevents an award to Jackson under the common law.

After a hearing on both motions, the circuit court agreed with the School Board's arguments and dismissed Jackson's complaint with prejudice. Given the final order of dismissal, the court did not rule on Jackson's motion for partial summary judgment. This appeal followed.

Analysis

"A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review." *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.,* 752 So. 2d 582, 584 (Fla. 2000); *Todd v. Johnson*, 965 So. 2d 255, 256 (Fla. 1st DCA 2007). In reviewing a final order of dismissal of a complaint, this court must accept as true a complaint's well-pleaded factual allegations and must draw all reasonable inferences from these allegations in the plaintiff's favor. *Allen v. Frazier*, 132 So. 3d 361, 363 (Fla. 1st DCA 2014).

Florida courts generally follow the "American Rule," under which parties pay their own attorney's fees absent a fee-shifting statute or contractual provision that allows the successful litigant to collect his or her fees from the losing party. *See Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1198 (Fla. 2009); *see also Main v. Benjamin Foster Co.*, 192 So. 602, 604 (Fla. 1939).

But here, Jackson asserts a common law right to reimbursement of her legal expenses from the School Board for actions taken by the Governor. She argues that she is entitled to relief under the test announced in *Thornber*, 568 So. 2d at 917, because the allegations of misconduct that formed the basis for her suspension arose during the performance of her public duties, and she successfully defended against such suspension by virtue of her reinstatement by the Governor.

However, *Thornber* and the other cases on which Jackson relies are materially distinguishable. In fact, both parties agree that the issue here—whether a court may award attorney's fees and costs incurred by a public official in challenging a suspension order issued by the Governor under article IV, section 7(a)—is one of first impression.

In all prior cases when Florida courts have awarded attorney's fees to a public official in the absence of a statutory basis, the public official succeeded in litigation arising from civil, criminal, or administrative actions. *See, e.g.*, *Thornber*, 568 So. 2d at 916 (finding city council members entitled to reimbursement of attorney's fees incurred in "successfully enjoining a recall petition calling for their removal from office and in defending against a federal civil rights action"); *Leon Cnty. v. Stephen S. Dobson, III, P.A.*, 957 So. 2d 12, 13 (Fla. 1st DCA 2007) (finding county commissioner entitled to reimbursement of attorney's fees incurred in "successfully defend[ing] himself against criminal charges"); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. 1st DCA 1981) (finding county property appraiser properly included in the department's annual budget payment for attorney's fees incurred in "successfully defending charges of official misconduct before the Florida Ethics Commission").

By contrast, this case involves the suspension and reinstatement of a public official where the Constitution has vested all power in the executive and legislative branches, save for limited judicial review. To begin, the power of suspension lies exclusively with the Governor. Art. IV, § 7(a), Fla. Const.; *see also State ex rel. Kelly v. Sullivan*, 52 So. 2d 422, 425 (Fla. 1951) ("The Governor alone has the power to suspend a public officer."). And "so long as the Governor acts within his jurisdiction as charted by [the Constitution], his action may not be reviewed by the courts." *State ex rel. Hardie v. Coleman*, 155 So. 129, 133 (Fla. 1934).

Beyond this narrow jurisdictional review, the check on the executive suspension power rests with the Senate. "The Senate is nothing less than a court provided to examine into and determine whether or not the Governor exercises the power of suspension in keeping with the constitutional mandate." *Id.* at 134. To be sure, the Senate has the exclusive authority to remove or reinstate a

suspended officer, unless the Governor reinstates the officer before Senate removal. Art. IV, § 7(a)–(b), Fla. Const. Neither the evidence supporting the Governor's order of suspension nor the Senate's judgment of removal or reinstatement may be reviewed by the courts. *See Israel v. DeSantis*, 269 So. 3d 491, 495 (Fla. 2019).

With this constitutional framework in mind, Jackson has already exhausted the limited mechanism by which the courts may review the exercise of the Governor's suspension power. Her challenge to the Governor's authority to suspend her from office failed. *Jackson,* 268 So. 3d at 663. This should end the judicial inquiry, as the separation of powers doctrine provides that one branch may not encroach upon the powers of another. *See Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991); Art. II, § 3, Fla. Const. "Whether there is any merit to the grounds listed in [the executive order] for Jackson's suspension from office is a determination to be made exclusively by the Florida Senate under the Constitution." *Jackson*, 268 So. 3d at 665 (Lagoa, J., concurring in result).

For her part, Jackson argues that she is not asking the courts to delve into the merits of her suspension or reinstatement, which she agrees is an inquiry inappropriate for the courts to entertain. Yet she calls the suspension order "improvident" and lacking in justification, contends that she was wrongfully suspended, and proclaims that the "truth regarding [her] faithful and upstanding service as Superintendent was revealed" by her reinstatement. In essence, Jackson is asking the courts to pass judgment on a value determination constitutionally committed to another branch of government.

It is true that the Governor exercised his constitutional prerogative to reinstate Jackson to office—in the expectation of her imminent resignation—but beside the point. "[T]he courts may not inquire into the factual basis for reinstatement, any more than they may inquire as to the sufficiency of the evidence for suspension." *Sullivan*, 52 So. 2d at 425.

At bottom, there is simply no constitutional space, or judicially discoverable or manageable standards, for a court to

determine whether Jackson "successfully defend[ed] against unfounded allegations of official misconduct." *Ellison*, 397 So. 2d at 354. For this reason, Florida law reserves to the legislative branch as part of its plenary authority over expulsion proceedings the sole mechanism for awarding attorney's fees and costs to a reinstated public official. *See* § 112.44, Fla. Stat.[2]

We therefore affirm.

JAY, J., concurs; BILBREY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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[2] Section 112.44, Florida Statutes, titled "Failure to prove charges; payment of attorney's fees or salary" provides:

> In the event any officer suspended by the Governor shall not be removed by the Senate, the officer shall be reinstated, and the Senate may provide that the county, district, or state, as the case may be, shall pay reasonable attorney's fees and costs of the reinstated officer upon his or her exoneration; or the Legislature may at any time after such reinstatement provide for the payment from general revenue funds of reasonable attorney's fees and costs or the salary and emoluments of office from the date of suspension to the date of reinstatement. The appropriation for such fees, costs, and salary and emoluments may be contained in the General Appropriations Act or any other appropriate general act. This part shall constitute sufficient authority for the payment of such attorney's fees and costs as the officer may reasonably have incurred in his or her own defense.

BILBREY, J., dissenting.

Because I believe the Legislature has not abrogated Mary Beth Jackson's common law right to seek reimbursement for the legal expenses she incurred and that Jackson can assert her common law right without violating separation of powers, I would reverse the dismissal and remand for further proceedings. Since the majority affirms, I respectfully dissent.

Unless "inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state," the common law remains in effect. § 2.01, Fla. Stat. (2019). As the majority notes, Jackson sought relief under the common law right of a public officer to secure reimbursement for expenses incurred in "litigation arising from the performance of [her] official duties while serving a public purpose." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 916–917 (Fla. 1990); *see also Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982).

The purpose of this common law right is "to avoid 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. Importantly, the common law right is "independent of statute, ordinance, or charter." *Id.*; *see also Lomelo*, 423 So. 2d at 976; *Webb v. Sch. Bd. of Escambia Cty.*, 1 So. 3d 1189, 1190 (Fla. 1st DCA 2009) (reaffirming that the common law right to reimbursement under *Thornber* "is separate and apart from any statute").

Separate from the common law right, section 112.44, Florida Statutes (2019), allows for fees in limited circumstances and provides:

> In the event any officer suspended by the Governor shall not be removed by the Senate, the officer shall be reinstated, and the Senate may provide that the county, district, or state, as the case may be, shall pay reasonable attorney's fees and costs of the reinstated officer upon his or her exoneration; or the Legislature may at any time after such reinstatement provide for the payment from general revenue funds of reasonable attorney's fees and

> costs or the salary and emoluments of office from the date of suspension to the date of reinstatement. The appropriation for such fees, costs, and salary and emoluments may be contained in the General Appropriations Act or any other appropriate general act. This part shall constitute sufficient authority for the payment of such attorney's fees and costs as the officer may reasonably have incurred in his or her own defense.

Section 112.44 does not state that it supersedes a public official's common law right to reimbursement, and there is no basis for concluding that statute and common law cannot co-exist. *See Webb*, 1 So. 3d at 1190 ("There is a presumption that a statute makes no change in common law unless the statute unequivocally states that it does so or is so repugnant to common law that the two cannot co-exist.").

Jackson was not removed from office by the Florida Senate. The Governor reinstated Jackson before the Senate took any action on her suspension. Thus, under the plain terms of section 112.44, Jackson did not qualify for a statutory award of fees. But her entitlement to relief under the common law is unaffected by section 112.44. *See Thornber*, 568 So. 2d at 917; *Webb*, 1 So. 3d at 1190.

Further, unlike the majority, I do not think this case implicates the separation of powers doctrine of Article II, section 3 of the Florida Constitution. Such doctrine would be implicated if the merits of the Governor's decision to suspend or reinstate a public officer had to be considered by the judicial branch in determining whether to pay the officer's expenses. *See State ex rel. Hardie v. Coleman*, 115 Fla. 119, 155 So. 129, 133 (1934) (holding that a court is only permitted to look at "the jurisdictional facts, in other words, the matters and things on which the executive grounds his cause of removal"); *State ex rel. Kelly v. Sullivan*, 52 So. 2d 422, 425 (Fla. 1951) ("[T]he courts may not inquire into the factual basis for reinstatement, any more than they may inquire as to the sufficiency of the evidence for suspension."). But by her complaint in the trial court, Appellant was not contesting the merits of her suspension. *See Thornber*, 568 So. 2d at 918.

In *Thornber*, the Florida Supreme Court stated, "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." *Id.* at 917; *see also Chavez v. City of Tampa*, 560 So. 2d 1214, 1218 (Fla. 2d DCA 1990) (describing a "public interest" for purposes of the common law reimbursement to equate to a "public interest" with no "taint" of "private interest"). As this court held in *Maloy v. Board of County Commissioners of Leon County,* 946 So. 2d 1260, 1264 (Fla. 1st DCA 2007), sovereign immunity does not bar a public official from seeking common law reimbursement of legal fees following an accusation of misconduct while performing official duties and serving a public purpose.

The School Board contends, and the majority agrees, that for the trial court to determine whether Jackson is entitled to reimbursement of her legal fees, the trial court would have to invade the province of the Florida Senate by trying the allegations levied by the Governor against Jackson. I disagree based in part on *Maloy*. There, in analyzing various cases on the common law right to reimbursement we stated, "the cases discussing a public official's right to reimbursement of legal fees arise from *an allegation* of improper official conduct—that is the very nature of an ethics violation. It is not the tenor of the conduct, but rather the *context of the allegation* upon which the *Thornber* right is based." *Maloy*, 946 So. 2d at 1264 (emphasis added).

In *Maloy*, we discussed our earlier case *Ellison v. Reid*, 397 So. 2d 352 (Fla. 1st DCA 1981), in stating, "Nevertheless, the *accusation* in *Ellison* suggested an ethical violation while the appraiser carried out his public duties and served a public purpose. The specific *conduct alleged* did not defeat the claim." *Maloy*, 946 So. 2d at 1264 (emphasis added). I believe that if the dismissal were reversed, then the factfinder at trial could look solely at the allegations against Jackson to determine whether they concern the performance of her official duties. This determination of the first prong of the common law *Thornber* test could be made without having to determine the truth of the allegations, since doing so would invade the province of the Senate as the majority discusses.

In addition to determining whether the allegations concerned the performance of Jackson's official duties, the second prong of *Thornber* requires a public purpose for Jackson to receive reimbursement. *Id.* at 917. Whether reimbursement for a public official's litigation serves a public purpose is a question of fact. *See Pizzi v. Town of Miami Lakes*, 286 So. 3d 814, 819 (Fla. 3d DCA 2019); *see also Chavez*, 560 So. 2d at 1218. As the court explained in *Pizzi*, determining whether a public official is entitled to common law reimbursement requires "fact-weighing assessments of a claimant's performance of official duties and whether there was truly a public purpose" without "any taint of a 'private interest.'" *Id.* at 819 (quoting *Chavez*, 560 So. 2d at 1218). It falls to the factfinder then to weigh the various factual considerations for determining whether Jackson's legal challenge to her suspension ultimately served a public purpose.[*]

In reviewing the motion to dismiss, we must assume that the factual allegations of Jackson's complaint are true and draw all reasonable inferences in favor of Jackson. *Id.* at 815. As such, I would conclude that Jackson's common law claim for reimbursement is legally sufficient to defeat the School Board's motion to dismiss. I would therefore remand for further

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[*] It is also not clear that Jackson succeeded in her defense. Success on the part of a public official in litigation about official duties is not an expressed factor under the two-part *Thornber* test. But case law does suggest that a public official who fails in litigation about his or her public duties may not be entitled to reimbursement under the common law since a public purpose was not served by the litigation. *Id.* at 916 ("We discuss only the council members' claim for reimbursement of attorney's fees spent in successfully enjoining a recall petition calling for their removal from office and in defending against a federal civil rights action filed against the city, the mayor, and themselves in their official and individual capacities."); *Ellison*, 397 So. 2d at 354 ("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.").

proceedings which could occur without implicating the separation of powers doctrine. Since the majority affirms, I respectfully dissent.

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