

FILED
THOMAS D. HALL

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

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DWIGHT E. BROCK, CLERK OF THE
CIRCUIT COURT OF COLLIER COUNTY,
FLORIDA

CLERK, SUPREME COURT

BY _____

Appellant/Respondent,

Case No. 2D07-4549

v.

L.T. Case No. 04-941-CA

BOARD OF COUNTY COMMISSIONERS OF
COLLIER COUNTY, FLORIDA on behalf of
COLLIER COUNTY, a Political Subdivision of
the State of Florida,

FILED
2009 NOV 25 AM 10:30
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

Appellee/Petitioner.

_____ /

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Appellee/Petitioner Collier County, pursuant to *Florida Rules of Appellate Procedure* 9.030(a)(2)(A)(iii) and (iv) and 9.120(b) and (c), as well as Article V, section 3(b)(3) of the *Florida Constitution*, hereby invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court issued on September 23, 2009, and rendered on November 13, 2009 (the date of this Court's denial of the timely filed motions of Appellee for rehearing and certification).

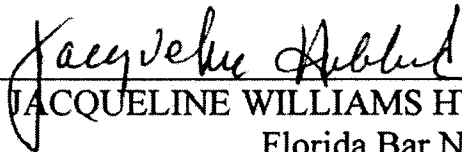
The nature of the decision on review is a decision of a district court of appeal that (a) expressly affects two classes of constitutional officers, the Clerks of

Court and the County Boards of County Commissioners and (b) expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

Conformed copies of this Court's September 23, 2009 decision and November 13, 2009 order denying rehearing and certification are attached herewith as Exhibits "A" and "B" respectively.

Dated this 24th day of November, 2009.

Respectfully Submitted,

BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court was delivered via U.S. mail, postage prepaid and facsimile to: David Ackerman, Esquire, Glory Ross, Esquire, Ackerman, Link & Sartory, P.A. 222 Lakeview Ave., Suite 1250, West Palm Beach, FL 33401, (561) 838-5305; Anthony Pires, Esquire, Steven Blount, Esquire, Woodward, Pires & Lombardo, P.A., 3200 North Tamiami Trail, Suite 200, Naples, FL 34103, (239) 649-7342; Jon L. Mills, Esquire, Timothy McLendon, Esquire, P.O. Box 2099, Gainesville, FL 32602, (352) 336-0270; Fred W. Bagett, Esquire, M. Hope Keating, Esquire, Greenberg Traurig, P.A., 101 East College Ave., Tallahassee, FL 32301, (850) 681-0207; David Hallman, Esq., President, Florida Association of County Attorneys, Inc., 96135 Nassau Place, Suite 6, Yulee, Florida 32097-8635, (904) 321-2658; Herbert W. A. Thiele, Esquire, Florida Association of County Attorneys, Inc., 301 S. Monroe Street, Suite 202, Tallahassee, FL 32301 (850) 606-2501; Virginia Saunders Delegal, Esq., General Counsel, Florida Association of Counties, Inc., 100 South Monroe Street, Tallahassee, FL 32301 (850) 488-7501; Christine Davis Graves, Esquire, Carlton Fields, P.A., 215 South Monroe Street, Suite 500, Tallahassee, FL 32301, (850) 222-0398; on this 24th day of November, 2009.

BY: 
JACQUELINE WILLIAMS HUBBARD, ESQ.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DWIGHT E. BROCK, CLERK OF THE)
CIRCUIT COURT OF COLLIER COUNTY,)

Appellant,)

v.)

BOARD OF COUNTY COMMISSIONERS)
OF COLLIER COUNTY, as ex-officio the)
Governing Board of the Ochopee Area Fire)
Control and Emergency Medical Care)
Special Taxing District a/k/a the Ochopee)
Fire District, a Municipal Services Taxing)
Unit pursuant to Section 125.01(1)(q), F.S.,)
and on behalf of Collier County, a Political)
Subdivision of the State of Florida; LINDA T.)
SWISHER; and PAUL WILSON,)

Appellees.)

Case No. 2D07-4549

OFFICE OF THE
COUNTY ATTORNEY

2009 SEP 25 AM 11:50

Opinion filed September 23, 2009.

Appeal from the Circuit Court for Collier
County; Michael T. McHugh, Judge.

David P. Ackerman and Glory P. Ross of
Ackerman Link & Sartory, P.A., West Palm
Beach, Anthony P. Pires, Jr. and Steven V.
Blount of Woodward, Pires & Lombardo,
P.A., Naples, and Jon L. Mills and Timothy
McLendon, Gainesville, for Appellant.

Theodore L. Tripp, Jr. of Garvin & Tripp,
P.A., Fort Myers, Jacqueline W. Hubbard of
Office of the County Attorney, Naples, and

Elisa S. Worthington of Elisa S. Worthington, P.A., Pineland, for Appellee Board of County Commissioners of Collier County.

No appearance for Appellees Linda T. Swisher and Paul Wilson.

Fred W. Baggett and M. Hope Keating of Greenberg Traurig, P.A., Tallahassee, for Amicus Curiae Florida Association of Court Clerks.

Herbert W. A. Thiele, Tallahassee, for Amicus Curiae Florida Association of County Attorneys, Inc.

Walter T. Dartland, Tallahassee, for Amicus Curiae Common Cause.

CANADY, Associate Judge.

In this case involving a dispute between appellant, the Clerk of the Circuit Court of Collier County (Clerk), and appellee, the Board of County Commissioners of Collier County, we consider questions concerning the scope of the powers exercised by the Clerk acting in his capacity as county auditor and custodian of all county funds.

The establishment by county employees of a checking account for a fire district controlled by the county precipitated the dispute underlying this litigation. Although the funds in the fire district checking account were ultimately surrendered to the Clerk, the litigation of a declaratory judgment action instituted by the Clerk and quo warranto proceedings instituted by the county moved forward. In the declaratory judgment action, the Clerk sought a determination that it was appropriate for him to make inquiries regarding an account such as the fire district account and to obtain custody of the funds contained in the account. In addition, the Clerk sought a

determination that certain other actions were within the scope of his powers with respect to the county's fiscal affairs. In the quo warranto proceedings, the county sought a judgment limiting the Clerk's activities related to the county's fiscal affairs.

In the consolidated declaratory judgment and quo warranto proceedings, the circuit court entered summary judgment in favor of the county. On appeal, the Clerk challenges the circuit court's ruling on three issues. First, the Clerk challenges the ruling that the Clerk has no authority to investigate the status of county funds which were not in the actual custody of the Clerk. Second, the Clerk challenges the ruling that the Clerk is not authorized to conduct postpayment internal audits concerning county expenditures. Third, the Clerk challenges the ruling that the Clerk does not have independent authority to prepare the county's financial statements.

With respect to the third issue, the trial court ruled that "the Clerk's authority to prepare financial statements on behalf of the County is not derived from a specific grant of constitutional or statutory power, but rather is derived from a delegation of authority by the Board of County Commissioners" and that the "scope of this delegation is within the discretion of the Board of County Commissioners, and may be granted, removed or modified." We affirm the trial court's ruling on this issue without further comment. With respect to the other two issues, however, we reverse the trial court's ruling for the reasons we explain below.

On the issue of the Clerk's power to investigate county funds which are not in the Clerk's custody, the circuit court ruled as follows:

[T]o the extent that the Clerk is the custodian of all County funds, he necessarily can only be the custodian of those funds to which he has been given custody, which would presumably encompass all County funds. Even if the Clerk

becomes aware or suspects that there are County funds of which he has not been given custody, this Court is unaware of any constitutional or statutory authority that would allow the Clerk to initiate an independent investigation or attempt to recover those funds, absent instruction from the Board of County Commissioners.

The court went on to state that this "does not preclude the Clerk from seeking authority to pursue these funds or making these funds known to any appropriate authority, but . . . the Court cannot acquiesce to the Clerk[s] making unilateral investigations into these funds." On the issue of the Clerk's authority to conduct postpayment audits with respect to county expenditures, the circuit court ruled as follows:

[P]rior to signing any warrant for the payment of any claim, bill or indebtedness from county funds, the Clerk is required to insure that the payment is lawful. Consequently, any auditing necessary to insure the legality of the expenditure prior to the payment is proper. However, the Court is unable to find that the Clerk has been granted any specific constitutional or statutory authority to perform further audits beyond the time that the warrant is signed, unless so directed by the Board of County Commissioners.

Article 8, section 1(d) of the Florida Constitution provides that "[w]hen not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds." There is no special law or charter provision divesting the Clerk of the duties specified in this constitutional provision. As is the case with other state and county officers, the powers and duties of the clerk of the circuit court "shall be fixed by law." Art. II, § 5(c), Fla. Const. Section 28.12, Florida Statutes (2007), provides that the "clerk of the circuit court shall be clerk and accountant of the board of county commissioners," and that the Clerk "shall keep the minutes and accounts and perform such other duties as provided by law." Section

136.08, Florida Statutes (2007), provides that the "accounts of each and every board and the county accounts of each and every depository . . . shall at all times be subject to the inspection and examination by the County auditor." Section 136.06(1) requires that checks or warrants drawn on county accounts shall be "attested by the clerk." Section 129.09, Florida Statutes (2007), imposes both personal civil liability and criminal liability on any clerk of the circuit court acting as county auditor who signs a warrant for any illegal or unauthorized payment of county funds.

"A statutory grant of power or right carries with it by implication everything necessary to carry out the power or right and make it effectual and complete." Deltona Corp. v. Fla. Pub. Serv. Comm'n, 220 So. 2d 905, 907 (Fla. 1969).

It is the well settled rule in this state that if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose, it also confers by implication every particular power necessary or proper for complete exercise or performance of the duty, that is not in violation of law or public policy.

Peters v. Hansen, 157 So. 2d 103, 105 (Fla. 2d DCA 1963); see also Bailey v. Van Pelt, 82 So. 789, 792 (Fla. 1919).

We conclude that the trial court's ruling prohibiting the Clerk from investigating county funds that have not been placed in his custody unduly limits the Clerk's ability to carry out his responsibilities as the custodian of all county funds. A public officer with the right and responsibility to maintain custody of public funds necessarily has the authority both to investigate circumstances in which public funds have wrongfully been withheld from the officer's custody and to seek to obtain custody of the withheld funds. Restricting the Clerk's authority to do so is inconsistent with the goal of protecting public funds from misappropriation, and it is inconsistent with the

effectual and complete exercise of the Clerk's authority as custodian of all county funds. We make no comment on the availability of any specific legal processes that the Clerk may seek to utilize in investigating county funds that have been withheld from his custody.

Similarly, we conclude that the trial court's ruling prohibiting postpayment audits is inconsistent with the Clerk's statutory power to inspect and examine all county accounts at all times and with the Clerk's statutory duty to ensure that all payments of county funds comply with applicable legal requirements. Postpayment audits to verify the legality of payments that have been made are necessary to effectively carry out the Clerk's duty to ensure that county funds are expended only as authorized by law. Verification of the legality of payments already made—a process which tests the soundness of existing internal controls—is directly related to ensuring that future payments are legal. To deny the Clerk the ability to conduct such postpayment audits would compromise the Clerk's duty and power to guard against the illegal use of county funds. Such audits are distinct from the "financial audits" of financial statements defined in sections 11.45(1)(c) and 218.31(17), Florida Statutes (2007).

Affirmed in part; and reversed in part.

FULMER,¹ J., Concur.

SILBERMAN, J., Concurring in part, dissenting in part, with opinion.

¹Judge Fulmer has been substituted for Judge Stringer, an original panel member in this proceeding, and she has viewed and listened to a recording of the oral argument.

SILBERMAN, Judge, Concurring in part and dissenting in part.

The majority correctly states that the issues before us involve the scope of the power of the Clerk to perform certain functions. In my view, the trial court correctly resolved the questions before it. Thus, I concur in the majority's decision to affirm on one of the issues, but I dissent from the decision to reverse on the remaining issues.

Background

Procedurally, the Clerk brought a declaratory judgment action against the Board of County Commissioners of Collier County (the county), as ex-officio the Governing Board of the Ochopee Area Fire Control and Emergency Medical Care Special Taxing District (the fire district), and county employees, Paul Wilson and Linda T. Swisher. Wilson is the fire chief of the fire district and he supervises Swisher, an administrative secretary.² The trial court entered final summary judgment in favor of the county and its employees. In cases that were consolidated with the declaratory judgment action, the county and Wilson each instituted quo warranto proceedings against the Clerk, and the trial court entered final summary judgment in favor of the county and Wilson in those actions as well. All three cases deal with the scope of the Clerk's authority in financial matters of the county.

This dispute arose when the Clerk discovered that county employees controlled a fire district checking account in the name of "Ochopee FCD Volunteers." The Clerk did not have custody over the funds deposited in the account, and the account was not subject to the normal financial controls of the county. The county

²Wilson and Swisher have not made an appearance in this appeal.

contended that only funds raised by volunteers were deposited in the account and that the funds were used to purchase equipment for the fire department. The Clerk sought a determination that it was appropriate for him to inquire into such an account and have the employees account for and return the funds to him.³ The Clerk also sought a determination of the general rights and duties of the Clerk. In the quo warranto action, the county sought to prohibit the Clerk from exercising powers to which he is not entitled relating to fiscal affairs of the county.

The trial court determined that there were no disputed issues of material fact and that the determination of the rights, powers, and duties of the Clerk involved issues of law. An appellate court's review of a trial court's ruling on a motion for summary judgment concerning issues of law is by the de novo standard of review.

Pinellas County v. City of Largo, 964 So. 2d 847, 851 (Fla. 2d DCA 2007).

The Clerk and the county agreed, and the trial court found as a matter of law, that "the Clerk is the auditor, recorder and custodian of all County funds, that the Clerk is the accountant for the Board of County Commissioners, and that the Clerk has the duty to determine the legality of all County expenditures before issuing a warrant for payment." The Clerk challenges the trial court's rulings that the Clerk's powers do not include (1) preparing and certifying the accuracy of the county's financial statements; (2) controlling funds not in his custody and conducting investigations of outside bank accounts that he suspects may contain county funds; and (3) conducting internal audits beyond the Clerk's pre-audit function required before a warrant for payment is signed.

³The county later had its employees turn over the remaining funds in the account to the Clerk and account for how funds had been spent.

The Clerk argues that the powers at issue are necessarily implied from a constitutional or statutory source. In Coca-Cola Co., Food Division, Polk County v. State, Department of Citrus, 406 So. 2d 1079, 1081-82 (Fla. 1981), the Florida Supreme Court addressed implied powers and explained that they include powers that are necessary to accomplish a stated governmental purpose and those that are necessary to carry out a power and make it effectual and complete.

The county contends that the trial court ruled properly as a matter of law because the Clerk, as a constitutional officer, has no power that is not conferred upon him by the Florida Constitution or general law. See Escambia County v. Bell, 717 So. 2d 85, 87 (Fla. 1st DCA 1998) (citing White v. Crandon, 156 So. 303, 305 (Fla. 1934)). The Clerk "only has such authority as is clearly conferred by statute or is necessarily implied from express statutory powers or duties." Id. (citing White, 156 So. at 305). In Escambia County, the court recognized that "'while an express power duly conferred may include implied authority to use means necessary to make the express power effective, such implied authority may not warrant the exercise of a substantive power not conferred.'" Id. at 88 (quoting Op. Att'y Gen. Fla. 82-95 (1982)). "'[W]here there is doubt as to the existence of authority, it should not be assumed.'" Id. (quoting White, 156 So. at 305). With these principles in mind, I would resolve each of the issues as follows.

Preparation of Annual Financial Statements

As to this issue, I agree with the majority's decision to affirm. The Clerk is an elected county officer, and unless otherwise provided by county charter or special law, "the clerk of the circuit court shall be ex officio clerk of the board of county

commissioners, auditor, recorder and custodian of all county funds." Art. VIII, § 1(d), Fla. Const. The powers and duties of the Clerk, as a county officer, "shall be fixed by law." Art. II, § 5(c), Fla. Const. Section 28.12, Florida Statutes (2007), provides, "The clerk of the circuit court shall be clerk and accountant of the board of county commissioners. He or she shall keep the minutes and accounts and perform such other duties as provided by law." Section 125.17, Florida Statutes (2007), provides, "The clerk of the circuit court for the county shall be clerk and accountant of the board of county commissioners. He or she shall keep their minutes and accounts, and perform such other duties as their clerk as the board may direct." Thus, other than keeping the minutes and accounts, the Clerk shall perform other duties only as provided by law or as the board directs.

The Clerk must keep "books of account and of record in accordance with s. 218.33." § 116.07, Fla. Stat. (2007). Section 218.33(2), Florida Statutes (2007), provides that a "local governmental entity shall follow uniform accounting practices and procedures as promulgated by rule of the department to assure the use of proper accounting and fiscal management by such units. Such rules shall include a uniform classification of accounts." Section 136.05, Florida Statutes (2007), provides that "[t]he board of county commissioners shall keep an accurate and complete set of books showing the amount on hand, amount received, amount expended and the balances thereof at the end of each month for each and every fund carried by" the board.

General law does not specifically give the Clerk the duty to prepare the annual financial statements. Instead, it is the board's duty to prepare and submit the annual financial statements. Section 218.32(1)(a) provides as follows:

218.32 Annual financial reports; local governmental entities.—

(1)(a) Each local governmental entity that is determined to be a reporting entity, as defined by generally accepted accounting principles, and each independent special district as defined in s. 189.403, shall submit to the department a copy of its annual financial report for the previous fiscal year in a format prescribed by the department. The annual financial report must include a list of each local governmental entity included in the report and each local governmental entity that failed to provide financial information as required by paragraph (b). The chair of the governing body and the chief financial officer of each local governmental entity shall sign the annual financial report submitted pursuant to this subsection attesting to the accuracy of the information included in the report. The county annual financial report must be a single document that covers each county agency.

In accord with section 218.39(1), unless the county is notified that the Auditor General will perform a financial audit in that fiscal year, the county must have an annual financial audit performed by an independent certified public accountant. Section 218.32(1)(d) requires that the county submit the audit report and financial report to the Department of Financial Services. The county argues that nowhere in the Florida Statutes is there a requirement that the Clerk prepare the financial report or that he serve as the county's chief financial officer.

Therefore, any duty for the Clerk to prepare the financial statement is "as the board may direct." § 125.17. Thus, the trial court properly determined that the Clerk's authority to prepare financial statements is derived from a delegation of authority by the board and that the scope of that delegation is within the board's discretion to grant, remove, or modify.

Power to Investigate Outside Accounts and to Collect and Deposit Funds

I disagree with the majority's analysis of this issue and would affirm. In my view the county, and not the Clerk, has the power and the duty to investigate into accounts that are not maintained by the Clerk and to pursue remedies for wrongdoing.

The Clerk, as ex officio clerk of the board of county commissioners, is "custodian of all county funds." Art. V, § 16, Art. VIII, § 1(d), Fla. Const. His powers and duties in this regard must be "fixed by law." Art. II, § 5(c), Fla. Const. General law provides for county officers who are authorized to collect funds due to the county to pay those sums into the county treasury "not later than 7 working days from the close of the week in which the officer received the funds." §§ 116.01(1), 219.07. All persons who receive county funds must turn them over to the Clerk by depositing the funds in a qualified county depository. See § 136.03. The Clerk's duty is to keep accounts of the funds in county depositories. Section 136.08 provides that "[t]he accounts of each and every board and the county accounts of each and every depository, mentioned or provided for in this chapter, shall at all times be subject to the inspection and examination by the county auditor and by the Auditor General." Thus, the Clerk, as county auditor, has the power to inspect and examine the accounts in county depositories. This allows the Clerk to keep accounts of county funds.

As the county argues, the duty to collect and deposit county funds does not shift to the Clerk if the county officers fail to perform these duties. Section 219.08 provides that "[e]ach of the duties required to be performed or done under the provisions of this act which is not done or performed at or within the time or times herein prescribed shall continue to be the duty of the person charged therewith until it is

actually and completely performed." The Clerk has not pointed to any statutory provision that gives him the authority to collect funds or compel their collection, and in my view, it is not necessary to find that the Clerk has an implied power to undertake such actions when that responsibility is already specified by law as the responsibility of county officers. Therefore, I agree with the trial court's ruling

that to the extent that the Clerk is the custodian of all County funds, he necessarily can only be the custodian of those funds to which he has been given custody, which would presumably encompass all County funds. Even if the Clerk becomes aware or suspects that there are County funds of which he has not be [sic] given custody, this Court is unaware of any constitutional or statutory authority that would allow the Clerk to initiate an independent investigation or attempt to recover those funds, absent instruction from the Board of County Commissioners.

The trial court further determined that "[t]his does not preclude the Clerk from seeking authority to pursue these funds or making these funds known to any appropriate authority, but as stated above absent any constitutional or statutory grant of power the Court cannot acquiesce to the Clerk making unilateral investigations into these funds."

With respect to investigations, section 125.01(1)(s), Florida Statutes (2007), gives the board of county commissioners, as governing body of the county, the power to "[m]ake investigations of county affairs; inquire into accounts, records, and transactions of any county department, office, or officer; and, for these purposes, require reports from any county officer or employee and the production of official records." Further, section 125.01(1)(b) gives the board the power to "[p]rovide for the prosecution and defense of legal causes" on behalf of the county. Section 125.74(1)(g) gives the county administrator the power to "[s]upervise the care and custody of all county property." The trial court correctly concluded, "This Court is unable to find any

constitutional or statutory authority that would give the Clerk the power to investigate the nature of funds not currently in its custody or to supervise the care and custody of funds not currently in its custody or to file a lawsuit regarding those funds."

Conducting Postpayment Audits

I also disagree with the majority's conclusion as to this issue and would affirm. The Clerk contends that the trial court erred in concluding that the Clerk's duty to determine the legality of payments ends once the warrant for payment is signed. The Clerk argues that no statute or case law places time limits on the actual exercise of his role to determine legality of payments. He further argues that, as a matter of modern accounting, this time restriction on his auditing role makes his job impossible. The trial court ruled as follows:

[T]he Court finds as a matter of law, that prior to signing any warrant for the payment of any claim, bill or indebtedness from County funds, the Clerk is required to insure that the payment is lawful. Consequently, any auditing necessary to insure the legality of the expenditure prior to the payment is proper. However, the Court is unable to find that the Clerk has been granted any specific constitutional or statutory authority to perform further audits beyond the time that the warrant is signed, unless so directed by the Board of County Commissioners.

The county contends that the supreme court's decision in Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977), supports the trial court's ruling. In Alachua County, the supreme court addressed the clerk's role as auditor.⁴ The Clerk contends, however, that because Alachua County determined that the clerk could not perform "post-audits"

⁴Note, however, that section 218.31(15) defines "auditor" as "an independent certified public accountant licensed pursuant to chapter 473 and retained by a local governmental entity to perform a financial audit." Thus, the Clerk's role as "auditor" must have a different meaning because the Clerk is clearly not an external auditor as defined by section 218.31.

and that term has been replaced in the statutes by "financial audit" that Alachua County has no application to the internal audits the Clerk performs to assure good payment controls.

The Clerk's constitutional and statutory role as county auditor "shall be fixed by law." Art. II, § 5(c), Fla. Const. The supreme court recognized that the clerk's pre-audit function stems from the responsibility to refuse to sign illegal warrants and the corresponding civil and criminal liability imposed for violating this requirement. See 351 So. 2d at 36; § 129.09. The court stated that "there must be some type of pre-audit review of the disbursement in order to be sure that the funds will not be used for an unlawful purpose." 351 So. 2d at 36. The court described the clerk's role as pre-auditor of county funds but also recognized that "the board has the right to audit its own funds and make such investigations as may be necessary before the use of any public funds." Id. at 37; see also § 125.01(1)(s) (providing for the board's power to investigate county affairs and inquire into county "accounts, records, and transactions"); § 125.01(1)(x) (providing for the board's power to employ an independent accounting firm to conduct audits). The court declared that

[t]he constitutional and statutory language discussed above require that the auditing function in making such an investigation be carried out by one of three entities: pre-auditing by the clerk in his capacity as county auditor, performance audit by an independent certified public accountant (or independent accounting firm), and post-audit by the auditor general or the independent auditing firm.

351 So. 2d at 37. The supreme court further explained as follows:

The clerk has the authority and responsibility to perform the auditing functions both as an arm of the board in auditing the records of constitutional officers and as a watchdog of the board in the case of pre-auditing accounts of the board in

determining legality of expenditure. The phrase "legality of expenditure" includes that the funds are spent for a public purpose, that the funds are spent in conformity with county purchasing procedures or statutory bidding procedures, that the expenditure does not overspend any account or fund of the budget as finally adopted and recorded in the office of the clerk. If the board becomes concerned, it has the authority to require a performance audit or post-audit by an independent accounting firm.

Id.

The term "postaudit" was defined in section 11.45(1)(c), Florida Statutes (1975), and is no longer in the statutes. Chapter 11 now contains the term "financial audit." See § 11.45(1)(c), Fla. Stat. (2007). The Clerk does not claim to have authority to do a financial audit, because a financial audit is an external audit. Rather, he contends that Alachua County does not prohibit him from performing internal audits after transactions occur as part of determining the legality of payment. However, as the county points out, the Clerk cannot exercise any authority unless that authority is conferred upon him by law. In Alachua County, the court recognized that the clerk has the authority to inspect and examine county accounts.⁵ See 351 So. 2d at 36; see also § 136.08 ("The accounts of each and every board and the county accounts of each and every depository, mentioned or provided for in this chapter, shall at all times be subject to the inspection and examination by the county auditor and by the Auditor General.").

The Clerk cites to W & F Ltd. v. Dunkle, 444 So. 2d 554 (Fla. 4th DCA 1984), to support his view that he has the power to do more than pre-audit before a warrant is signed. In W & F Ltd., a board of county commissioners created a nonprofit

⁵It seems self-evident that the inspection and examination of accounts is less extensive than what is contemplated by an audit, a financial audit, an operational audit, or a performance audit, as those terms are defined in section 11.45(1)(a), (c), (g), (h).

corporation that controlled disbursements for a public construction project, and the trial court determined that the corporation was the alter ego of the county. Id. at 557. The Fourth District stated that the issue on appeal was "whether there is substantial competent evidence in the record, supported by applicable law, to justify affirmance of the trial court's determination that the appellee clerk has the authority to pre-audit the contemplated expenses of this project and to audit those which have been expended." Id. at 557 (emphasis added). It appears that the clerk in W & F Ltd. never had the opportunity to perform his pre-auditing function as to funds that had already been expended. See id. at 556. This may explain the Fourth District's determination that the clerk could audit expenses of the project that had already been paid.

In affirming the trial court's judgment, the Fourth District quoted Alachua County, reiterating the role of the clerk, as county auditor, to perform pre-audit review of disbursements to ensure they are not made for an unlawful purpose. Id. at 557-58 (quoting Alachua County, 351 So. 2d at 36). The W & F Ltd. court recognized that the legislature had "wisely not done anything since [the Alachua County] decision to devitalize the caretaking of public funds." Id. at 558. As noted, Alachua County recognized the clerk's authority to inspect and examine accounts under section 136.08. See 351 So. 2d at 36.

I would affirm the trial court's ruling that any auditing by the Clerk "necessary to insure legality of the expenditure prior to the payment is proper" and, under the circumstances here, that the Clerk does not have the power to conduct a postpayment audit absent authorization by the county. I make one observation as to the following statement that the trial court made: "However, the court is unable to find

that the Clerk has been granted any specific constitutional or statutory authority to perform further audits beyond the time that the warrant is signed, unless so directed by the Board of County Commissioners." Concerning that statement, while the Clerk's audit powers are limited by law, the Clerk remains entitled to inspect and examine county accounts. See § 136.08; see also § 125.17 (providing that, as accountant for the board, the clerk shall keep the board's accounts). The statutory provisions contain no time limits; in fact, section 136.08 states "at all times" regarding the Clerk's authority to inspect and examine county accounts.

For these reasons, I would affirm the final judgment.

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

November 13, 2009

**CASE NO.: 2D07-4549
L.T. No. : 04-0941-CA**

Dwight E. Brock, Collier
County Clerk Circuit Ct.

v. Board Of County
Commissioners, Et Al.

Appellant / Petitioner(s),

Appellee / Respondent(s),

2009 NOV 17 AM 11:46
OFFICE OF THE
COUNTY ATTORNEY

BY ORDER OF THE COURT:

Appellee's motion for rehearing is denied.
Appellee's motion for certification is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Leonard Berger, Esq. Virginia Delegal, Esq. Thomas R. Grady, Esq.
Richard J. Brener, Esq. Jacqueline Williams Hubbard, Esq. Theodore L. Tripp, Jr., Esq.
Herbert W.A. Thiele, Director Dwight E. Brock, Clerk David Hallman, Esq.

me


James Birkhold
Clerk



SECOND DISTRICT COURT OF APPEAL OF FLORIDA
P.O. BOX 327
LAKELAND, FLORIDA 33802-0327
(863) 499-2290

FILED
THOMAS O. HALL

2009 NOV 25 P 2:27

CLERK, SUPREME COURT

BY _____

November 25, 2009

Re:

Dwight E. Brock, Collier County
Clerk Circuit Court

vs.

Board of County Commissioners, et al.,

Appeal No.: 2D07-4549

Trial Court No.: 04-0941-CA

Trial Court Judge:

Dear Mr. Hall:

Attached is a certified copy of the notice invoking the discretionary jurisdiction of the Supreme Court, pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and is attached.

The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this court.

Petitioner/Appellant has been previously determined insolvent by the circuit court or our court in the underlying case.

Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

No filing fee is required because:

- Summary Appeal, pursuant to rule 9.141
- From the Unemployment Appeals Commission
- A Habeas Corpus proceeding
- A Juvenile case
- Other - _____.

If there are any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

James Birkhold
Clerk

By: Jennifer Capelitti

JB:jc

SECOND DISTRICT COURT OF APPEAL OF FLORIDA
P.O. BOX 327
LAKELAND, FLORIDA 33802-0327
(863) 499-2290

November 25, 2009

Re: Dwight E. Brock, Collier County
Clerk Circuit Court
vs.
Board of County Commissioners, et al.,
Appeal No.: 2D07-4549
Trial Court No.: 04-0941-CA
Trial Court Judge:

FILED
THOMAS D. HALL
2009 NOV 30 A 10:51
CLERK, SUPREME COURT
BY _____

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If there are any questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Check

James Birkhold
Clerk

By: *Jennifer Capelito*

JB:jc