

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

Case No. SC09-2190
L.T. Case No. 2D07-4549

v.

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

Respondent.

**MOTION TO REVIEW ORDER DENYING
MOTION TO STAY MANDATE**

Petitioner Collier County, pursuant to Florida Rule of Appellate Procedure 9.310(f), requests this Court to review the Second District Court of Appeal's order denying Collier County's Motion to Stay Mandate. Collier County requests that this Court issue an order staying the case pending review in this Court.

I. BACKGROUND

At issue in this case is "the scope of the powers exercised by the [Respondent Clerk of Courts ("Clerk")] acting in his capacity as county auditor and custodian of all county funds." Brock v. Bd. of County Comm'rs of Collier County, No. 2D07-4549, 2009 WL 3012705 (Fla. 2d DCA Sept. 23, 2009). Specifically, the trial court considered whether the Clerk has constitutional or

statutory authority to “inspect and examine” bank accounts of the Collier County Board of County Commissioners, and whether the Clerk has authority to conduct post-payment audits of any and all expenditures of the Board at any time. Id. at *1-2.

The trial court made three rulings, two of which the Board has requested this Court to review. First, the trial court ruled that the Clerk has no authority to investigate the status of county funds which were not in the actual custody of the Clerk. Id. The court reasoned that the Clerk can necessarily only be the custodian of those funds to which he has been given custody, and there is no statutory or constitutional authority that would allow the Clerk to initiate an independent investigation or attempt to recover County funds absent instruction from the Board of County Commissioners. Id. Second, the trial court ruled that the Clerk is not authorized to conduct post-payment audits concerning county expenditures. Id. Again, the court found there was no statutory or constitutional authority to perform further audits beyond the time that the warrant for payment is signed, unless so directed by the Board. Id.

The Second District reversed these two rulings. Id. at *2-3. It first held that the Clerk does have the authority to investigate county funds, even if those funds are not in the Clerk's possession. Id. The court further held that the Clerk is authorized to conduct postpayment audits.

Collier County thereafter requested the Second District stay issuance of its mandate pending review in this Court. The Second District denied that motion, without prejudice to Collier County seeking review in this Court.

Simultaneous with its motion to stay mandate filed in the Second District, Collier County filed its notice to invoke the discretionary jurisdiction of this Court. Jurisdictional briefs already have been filed by both parties.

II. ARGUMENT

If this case is not stayed pending review by this Court, Collier County will suffer significant and irreparable harm. The following factors are used to determine whether to stay or recall a mandate and all favor a stay in this case: (1) the likelihood that jurisdiction would be accepted by this Court, (2) the likelihood that Petitioner will prevail on the merits in this Court, (3) the likelihood of harm if the stay is not granted, and (4) the likelihood that the harm will be irreparable in the absence of a stay. Fla. R. App. P. 9.120 (Committee Notes); see also State v. Miyasato, 805 So. 2d 818, 825 (Fla. 2d DCA 2001) (citing State ex rel. Price v. McCord, 380 So. 2d 1037 (Fla. 1980)); Oliviera v. State, 765 So. 2d 90 (Fla. 4th DCA 2000) (quoting Committee Note to Fla. R. App. P. 9.120).

A. This Court Will Likely Accept Jurisdiction.

Collier County respectfully believes this Court will accept jurisdiction over this action because the Second District's opinion expressly affects a class of

constitutional officers -- all boards of county commissioners (see art. VIII, § 1(e), Fla. Const.) and county clerks (see art. VIII, § 1(d), Fla. Const.) in all of Florida's 67 counties. See Art. V, § 3(b)(3) (granting supreme court jurisdiction over cases involving classes of constitutional officers). That is made clear from the first sentence in the Second District's opinion: "[W]e consider questions concerning the scope of powers exercised by the Clerk acting in his capacity as county auditor and custodian of all county funds." Brock, 2009 WL 3012705, at *1. In making this determination, the court necessarily also construed and limited the powers of the boards of county commissioners of all of Florida's 67 counties.

This is not simply a case where the court was required to interpret a statute. To the contrary, the court was required to define the scope of powers of the county and clerk in a context that had never been considered before. The Second District held that clerks may investigate county accounts even though those accounts are not maintained by them, and they may pursue remedies for wrongdoing. But, as the concurring and dissenting opinion found, the Legislature has not specifically granted county clerks any such power, and county clerks only have power specifically delineated by statute. Id. at *6-7 (Silberman J., concurring and dissenting in part) (citing Art. II, § 5(c), Fla. Const.). The scope of power established by law to statewide clerks and boards of county commissioners is directly impacted by the Second District's decision.

The same is true for the Second District's additional holding that clerks are authorized to conduct post-payment audits. The court's broad holding appears to grant county clerks unlimited power to conduct post-payment audits of county boards at any time and for any reason. This is contrary to how boards and clerks statewide historically have construed their powers. As the concurring and dissenting opinion stated: "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." Brock, 2009 WL 3012705, at *8 (Silberman, J., concurring and dissenting in part) (emphasis added).

The statewide impact on clerks and boards of county commissioners statewide is self evident. The Second District's decision expressly expanded the scope of powers granted to county clerks and limited the powers of boards of county commissioners.

As this Court has recognized, the "obvious purpose" of the jurisdictional provision at issue was to "permit this Court to review a decision which directly affects one state officer and in so doing similarly affects every other state officer in the same category." Fla. State Bd. of Health v. Lewis, 149 So. 2d 41, 43 (Fla. 1963). That is exactly what the Second District's decision does. Indeed, this Court

has previously accepted jurisdiction in cases involving the constitutional officers at issue here. See, e.g., Cook v. City of Jacksonville, 823 So. 2d 86 (Fla. 2002) (reviewing decision affecting county clerks); Chief Judge of Eighth Judicial Circuit v. Bd. of County Comm'rs of Bradford County, 401 So. 2d 1330 (Fla. 1981) (reviewing decision affecting county commissioners); City of Waldo v. Alachua County, 249 So. 2d 419 (Fla. 1971) (same).

This Court also will likely accept jurisdiction based on express and direct conflict between the Second District's decision and its decision in Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977). In Alachua County, this Court recognized that county clerks have the power to act as preauditor of funds and make investigations as may be necessary before the use of public funds. The Court held that auditor generals -- not county clerks -- have the power to perform post-audits. Id. at 37. The Second District's decision, holding that county clerks can conduct postpayment audits, expressly and directly conflicts with the clerk's powers set forth in Alachua County.

B. Collier County Will Likely Prevail On The Merits In This Court.

Collier County will likely prevail on the merits in this Court. One of the judges on the three-judge appellate panel and the trial judge both agreed that there is no statutory or constitutional authority allowing the Clerk to initiate an independent investigation or attempt to recover funds not in its custody or to

conduct audits of payments already made.

The Clerk only has power and authority that is fixed by law. Art. V, § 5(c), Fla. Const.; § 28.12, Fla. Stat. As the trial court explained:

[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.

Brock, 2009 WL 3012705, at *1-2 (quoting trial court's order). Accordingly, "the Court cannot acquiesce to the Clerk['s] making unilateral investigations into these funds." Id.

Furthermore, the law does not grant the Clerk authority to conduct postpayment audits with respect to county expenditures. While the Clerk has the authority to ensure a payment is lawful prior to the signing of a warrant for payment of a claim, no specific constitutional or statutory authority authorized the Clerk to perform further audits beyond the time that the warrant is signed, unless so directed by the Board of County Commissioners.

Thus, the Second District's decision improperly expands the power of a county clerk beyond that which is expressly granted by constitution or statute, which in turn, creates an improper conflict of interest. For example, in Collier

County, the Clerk is an integral part of county management and is in charge of the County Finance Department, as well as the accountant and custodian of county funds. In performing an audit beyond pre-payment, the Clerk would have a divided loyalty because as the party that approves the payment, he would be auditing himself. Accordingly, the Clerk does not have the requisite independence to conduct a postpayment audit of the Collier County Commissioners' actions. The United States Supreme Court has recognized the danger in such an outcome. United States v. Arthur Young & Co., 465 U.S. 805 (1984) (recognizing the need for an auditor to maintain "total independence" from the client at all times and to act with complete fidelity to the public trust); see also Rule 10.551(2), Rules of the Auditor General of the State of Florida, Local Governmental Entity Audits (2009).

For these reasons, it is likely that Collier County will prevail on the merits in this Court.

C. Without A Stay Of This Case Pending Review, Collier County Will Be Irreparably Harmed.

If this Court does not issue a stay, the Clerk will be permitted to take actions that it is not constitutionally or statutorily authorized to do. Accordingly, for the same reasons Collier County will likely succeed on the merits on appeal, it will be irreparably harmed if the action is not stayed. The Clerk would be able to take action that is beyond that permitted by law and do so with a significant and improper conflict of interest. See Arthur Young & Co., 465 U.S. 805. The

constitutional impact of this case, particularly in the context of the separation of powers, is both dramatic and unprecedented.

III. CONFERENCE WITH OPPOSING COUNSEL

Undersigned counsel contacted counsel for Respondents to confer about this motion and has been advised that counsel for Respondents oppose this motion.

IV. CONCLUSION

Petitioner Board of County Commissioners of Collier County, requests that this Court stay this case pending review by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Jurisdictional Brief was delivered via U.S. mail to the following on this 30th day of December, 2009:

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