

IN THE SUPREME COURT OF THE STATE OF FLORIDA  
Case No. SC09-2190

COLLIER COUNTY BOARD OF COUNTY  
COMMISSIONERS,

Petitioner,

Second District Case No.  
2D07-4549

vs.

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

L.T. Case No. 04-941-CA  
Consolidated with  
Case No. 05-953-CA and  
Case No. 05-1506-CA

Respondent.

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**RESPONDENT'S AMENDED ANSWER BRIEF<sup>1</sup>**

On Petition for Discretionary Review from the  
District Court of Appeal, Second District, State of Florida

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<sup>1</sup> Respondent has filed this Amended Answer Brief to correct record cite references only. The changes are shown in italics.

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## **PREFACE**

The parties will be referred to as the Clerk and the County. The record will be referred to as “R.\_\_\_\_\_”. *This is the same as the “APA MI” reference used by the Petitioner which refers to the Appeal Clerk’s Appellant Master Index.*

## **STATEMENT OF THE CASE AND FACTS**

We cannot agree with the County's statement of the case and facts because it is too broad and ignores the fact that this case, which involved three issues below, now involves a single issue. That issue is whether the Clerk, who is the auditor of the County, can audit (question) the propriety of a County payment after the payment has been made. The County portrays this appeal as if the Clerk insists on infringing on the financial audit responsibility of the outside independent auditor which is required by Section 218.32, Fla. Stat., but that is an entirely different audit. As the Second District Court of Appeal recognized:

Such audits [which the clerk does] are distinct from the "financial audits" of financial statements defined in sections 11.45(1(c) and 218.31(17), Florida Statutes (2007).

*Brock v. Board of County Comm’r*, 21 So. 3d 844, 847 (Fla. 2d DCA 2009). The County can always hire an external auditor to perform whatever services it wants. But that does not mean that the Clerk cannot perform his internal audit function to fulfill his separate and distinct constitutional and statutory roles.

This dispute began when the Clerk discovered that County fire district personnel were keeping County money in an account they opened using the County's tax identification number (R. 53). The account was not maintained within the custody of the Clerk and was not subject to the traditional controls of County finances. (R. 53). It was not reflected in the County's financial statements, payments from the account were not subject to the Clerk's normal due diligence, and the Clerk did not have custody over the funds deposited into the account. (R. 47-77).

When the Clerk was unable to obtain custody of the funds, he filed the declaratory judgment action to verify that it was appropriate for him to ask about the account and to have the employees account for and return the funds to him. (R. 47-77). The County ultimately ordered its employees to turn the remaining unspent funds over to the Clerk. (R. 5530, Mudd depo. p. 78).

In the meantime, the County filed a quo warranto action broadly attacking the role of the Clerk in conducting internal audits. (R. 951-1285). The main contention made by the County was that the Clerk could not conduct internal audits without its permission because that would constitute impermissible "post-auditing." (R. 951-1285).

In his response the Clerk contended that the audits the County was attacking were not "post-audits," but internal audits designed to promote good internal controls needed (1) for the proper preparation of the County financial statements, (2) to maintain safe

custody of County assets, and (3) to assure the legality of payments on the County's behalf. (R. 2055-2088).

After much discovery the Clerk moved for a partial summary judgment asking the trial court to rule as a matter of law that: (a) the Clerk had the legal roles of auditor, recorder and custodian of all County funds, (b) the Clerk was the accountant for the County, and as such had a duty to prepare and certify the accuracy of the County's financial statements, including the annual management representation letter submitted by the County to its outside auditors, and (c) the Clerk had a duty to determine the legality of all expenditures made by the County. (R. 8940-8955).

The County responded with cross motions for summary judgment on all issues. (R. 8956-9996, 10394-10404 and 10405-10418). The County agreed that the Clerk was the auditor, recorder and custodian of all County funds, but argued that his roles were limited. *Id.* First, the Clerk could not assert custody over funds which had yet to be received by the Clerk, either through funds delivered by the Board or fees collected by the Clerk. (R. 8979-8980). Second, the County argued that the Clerk's ability to determine the legality of payment was limited to whatever due diligence could be done before payments were made. *Id.* at pp. 21-23. The Clerk could look at financial transactions after they occurred only with the County Manager's permission or formal approval of the Board. *Id.* Third, the County argued that it had the authority to prepare

the financial statements, could direct the Clerk to do so and could withdraw that direction or modify how it was carried out. *Id.* at pp. 23-25.

The trial court granted the County's motion for summary judgment on all issues. The trial court ruled that the Clerk's financial roles were subject to the control of the County or its staff. (R. 1-16). The trial court acknowledged the Clerk was the financial custodian of County funds, yet ruled that the Clerk had no ability to "investigate" funds which had yet to be physically received by the Clerk. In addition, the trial court acknowledged that the Clerk had the responsibility to determine the legality of payments made by the County, but held that the Clerk could not conduct post-payment internal audits to verify the validity of the County's payment controls. The Clerk's authority, the trial court ruled, ended once payment was made. Finally, the trial court recognized that the Clerk was the "accountant" for the County and that, as a matter of practice, he prepares the County's financial statements. Yet, the trial court concluded that the Clerk's accounting work in the preparation of the County's financial statements could be granted, removed, or "modified" by the County. *Id.*

The Clerk appealed to the Second District Court of Appeal, raising three issues which were described by the Court of Appeal as follows:

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.

*Brock*, 21 So. 3d at 845.

The Second District reversed the trial court on the first issue -- the custody of County funds -- stating:

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.

*Id.* at 847. The County has not raised the issue of custody of County funds in its initial brief. The amicus brief filed in support of the County does address it.

The only issue raised by the County before this Court is whether the Clerk can do a post-payment audit. The District Court of Appeal reversed the trial court on this issue, stating:

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.

*Id.* at 847.

The third issue raised by the Clerk in the Court of Appeal – preparation of financial statements -- was affirmed, and is subsumed within the issue on appeal. That is, if the Second DCA decision is affirmed then the Clerk will have no trouble preparing the County's financial statements because he will be able to look at transactions after they have occurred and record them appropriately. If this Court reverses, however, then it will be impossible for the Clerk to prepare and certify the County's financial statements because they are, by definition, a recording of completed transactions. (R. 7038 – 7057; 7058 – 7065).

### **STATEMENT OF THE ISSUE**

The County frames the issue as:

**THE TRIAL COURT PROPERLY RULED, AS A MATTER OF LAW, THE CLERK, AS A CONSTITUTIONAL OFFICER, HAS NO POWER THAT IS NOT CONFERRED UPON HIM BY THE FLORIDA CONSTITUTION OR GENERAL LAW. THE DISTRICT COURT ERRED WHEN IT DETERMINED THE CLERK OF COURTS HAS THE POWER TO CONDUCT POSTPAYMENT AUDITS OF THE BOARD, SINCE SUCH POWER IS NEITHER PRESCRIBED BY LAW NOR PROVIDED FOR UNDER THE FLORIDA CONSTITUTION.**

We submit the issue should be restated as follows:

**DOES THE CLERK OF THE CIRCUIT COURT, WHO IS THE ACCOUNTANT, AUDITOR AND CUSTODIAN OF ALL COUNTY FUNDS, HAVE THE POWER TO AUDIT (REVIEW) A PAYMENT MADE BY THE COUNTY, AFTER THE PAYMENT HAS BEEN MADE?**

### **SUMMARY OF ARGUMENT**

As argued by the County and Amicus, the concept of post-payment audits appears to be complicated. The simplicity of it becomes evident in a hypothetical.

Assume, for example, that a public works project is under way and the Clerk has made five payments to the general contractor. When the Clerk audits or reviews the invoice for the sixth payment, the Clerk discovers what appears to be a fraudulent bill from a subcontractor, which causes the Clerk to become suspicious about prior payments. The County says the Clerk has no legal authority to go back and review the prior payments in order to determine if the County was defrauded or if payment of the sixth invoice should be withheld. The Clerk's hands are tied the moment he cuts the check unless he obtains permission from the County. The Second District Court of Appeal rejected the County's position explaining:

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.

...

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.

*Brock*, 21 So. 3d at 846-47.

If the Clerk cannot look back at payments made as the County contends, it would preclude the Clerk from auditing the history of the account in order to determine if the County money was misspent or improperly reported. There is no case or statute which differentiates between prepayment audit and postpayment audit. Even the dissenting opinion in the Second District conceded that the Clerk

must be able to inspect and examine the County accounts "at all times." *Id.* at 853, 854 (Silberman, J. concurring in part and dissenting in part). It is difficult to understand why the County would not want the Clerk (its auditor and accountant), who is personally liable for approving illegal payments, to be able to review past payments. The decision of the Second District should be affirmed.

### **STANDARD OF REVIEW**

The standard of review of a summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000). Constitutional and statutory interpretation are also reviewed *de novo*. *Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004).

### **ARGUMENT**

Article V, Section 16 of the Florida Constitution establishes the office of clerk of court and defines one of the Clerk's duties as "serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds." In addition, Article VIII, Section 1(d) makes the Clerk one of five elected county officers and states 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." Collier County is not a charter county, and no general or special law has assigned the two functions of the Clerk elsewhere.

Thus, the Clerk remains vested with the constitutional duties of "auditor, recorder and custodian" of all County funds.

Section 129.09, Florida Statutes, limits the Clerk to making payments which are legal and properly budgeted, and makes the Clerk personally responsible, even criminally, depending upon his intent, for illegal or unapproved payments. The role to make legal payments was defined by this Court in *Alachua County v.*

*Powers:*

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.

*Alachua County v. Powers*, 351 So. 2d 32, 37 (Fla. 1977).

Thus, the Clerk's role to determine the legality of payment means that the Clerk has the power to determine whether County funds are spent for a public purpose, in conformity with County purchasing procedures or statutory bidding procedures, and to make sure expenditures do not overspend budgeted amounts.

In *W&F Ltd. v. Dunkle*, 444 So. 2d 554 (Fla. 4th DCA 1984), the court affirmed the trial court's decision that a non-profit corporation chartered by the

board to handle money used to pay for a public construction project was invalid because it deprived the Clerk of his ability to fulfill this role.

The public has every right to be concerned with the legitimacy of each and every payment involved in this project. The taxpayers look to the Clerk's audits to shield them from the kinds of misuse of public funds that have recently surfaced in other Florida communities and in other jurisdictions. They fervently hope his ministrations will be an effective antidote to several political maladies found in other communities: the soap syndrome - one hand washes the other; complacency - be concerned only when someone gets caught, and lockjaw - don't rock the boat.

*Id.* at 558.

The County relies heavily on the terminology "post-audit" used in *Alachua County*. Since, under that case, the Clerk could not perform "post-audits," the County argues it must follow that the Clerk could not look at transactions after they have occurred. When that case was decided (1977), however, the term "post-audit" meant "an audit made at some point after the completion of a transaction or a group of transactions." § 11.45(1)(c), Fla. Stat. (1975). The person who could perform a "post audit" under that statute--the auditor general or an independent auditing firm--was external to the governmental organization being audited. After that, in 1979, the definition was removed and replaced with the term "financial audit." §11.45(1)(c), Fla. Stat. (1979). "Financial audit" now means an examination of financial statements in order to express an opinion on the fairness with which they present the organization's financial condition and operations, in

accordance with generally accepted governmental accounting principles. § 11.45(1)(c), Fla. Stat. (2005). This definition is the same as that used in section 218.31(17), Florida Statutes. This is the same accounting standard by which the County's external auditor (KPMG) evaluates the County's financial statements. (R. 7722-7838; Coletta depo., Ex. 2 CAFR September 30, 2005). When the external auditor conducts his "financial" or external audit, he applies government accounting standards and laws to scrutinize the County's financial reporting practices. (R. 5753-5761; 5765-5767, Jones depo. pp. 31-39; 43-45). KPMG does review the County's internal control structure -- not by performing internal audits itself -- but by making sure that someone in county government (here, the Clerk) is performing routine and regular internal control monitoring.

The County confuses standards of independence which apply to external auditors from those which apply to internal auditors. For instance, the rules of the auditor general of the state of Florida and the requirements set out in Chapter 11 contain standards of independence governing auditors external to the organization being audited. (R. 7061, ¶10). They do not apply to internal auditors. (R. 7062, ¶¶10, 11). The Clerk maintains sufficient independence and objectivity to perform an adequate internal auditor function. He is a separately elected constitutional officer. He is subject to personal and criminal liability if he makes an improper payment. The scope of his work is not defined or limited by the management



organization being subject to the internal audit. (R. 7063, ¶12). Under the County's construct, however, the very part of County government being audited gets to decide what the internal auditor looks at and doesn't look at.

In both Chapter 11 and Chapter 218, Florida Statutes, the term "financial audits" refers to those performed by the auditor general or an independent public accountant. § 218.31(15) ("Auditor" means an independent certified public accountant ..."). They are external audits performed by persons who are not part of the organization being audited. In this case, the external auditor for the County was KPMG (R. 7722-7838, Coletta depo. p. 57).

The part of the *Alachua County* holding relied on by the County does not accordingly apply to this case. As the Second District explicitly found, the Clerk never claimed the authority to perform any form of external audit, including those defined under Chapter 11. *Brock*, 21 So. 3d at 847. The "post-audits" as referred to in *Alachua County* were repealed and now can no longer form any basis on which to define the Clerk's role.

In the accounting realm, the term "post-audit" is not defined by any standard. (R. 5838; Jones depo. p. 116). In usage, it has a variety of definitions. The County's retained expert had no fewer than four definitions of post-audit. (R. 7231, 7233, 7235 and 7341; Thabit depo. pp. 21, 23, 25 and 131). The County's external auditor testified that the term "post-audit" was not defined in accounting

standards. (R. 5838; Jones depo. p. 116). Indeed, he testified that if what was meant by a “post-audit” was an internal audit, then it was perfectly reasonable for the Clerk to perform them to assure the soundness of internal financial controls as part of a “pre-audit” function. (R. 5839-5844; Jones depo. pp. 117-122).

*Alachua County*, which is the entire basis of the County's position, did not say that the Clerk’s “pre-audit” or “legality of payment” function stopped once a payment was made. There is no language in *Alachua County* prohibiting the Clerk from performing internal audits. The Clerk’s internal audits do not interfere with the County’s ability to hire external auditors to conduct whatever examinations it deems appropriate. This is true even if the auditors’ work overlaps. In *Alachua County* this Court said: “A duplication of official duties is not invalid when within the purview of the constitution.” *Alachua County*, 351 So. 2d at 37.

Because it is physically impossible and economically prohibitive to exhaustively scrutinize each request for payment, the Clerk relies upon a system of internal controls and conducts internal auditing to monitor those controls. (R. 7038-7057). For example, in one internal audit, the Clerk’s office found that the County's Parks and Recreation Department did not have good internal controls to monitor employee use of County credit cards. (R. 3027-3255, Tab 15). This led to questionable purchases and practices. In the audit, the Clerk’s staff reviewed past credit card purchases and met with County staff. *Id.* The Clerk recommended that

the department clarify its procedures for purchase approvals and better monitor credit card purchases for compliance. *Id.* This internal audit was designed to promote better controls over County purchases and payments. *Id.* In turn, the Clerk would be able to rely on those controls when determining the legality of future payments.

Under the County's view, the authority which the Clerk has for determining the legality of County payments is severely curtailed. The County would prohibit the Clerk from examining past payments and the controls associated with them to determine whether a future payment is legal and budgeted. The Clerk could not, for instance, look at how County employees and staff handled prior construction draw payments on a public works project to see what lessons could be learned and what systems could be improved before approving a future payment. While the County would allow the Clerk to do due diligence before a payment is made, that due diligence may not include an examination of prior payment history and procedures.

Indeed, this was the situation that occurred in *Mayes Printing Co. v. Flowers*, 154 So. 2d 859 (Fla. 1<sup>st</sup> DCA 1963). In *Mayes* the state's competitive bidding statute required that any county expenditure of more than \$1,000 be subjected to a competitive bidding process and the contract awarded to the "lowest responsible bidder." *Mayes*, 154 So. 2d at 862. The county judge of Escambia

County contracted with the plaintiff to buy a counter and other furniture that cost over \$3,000. The furniture was installed in three phases and three separate invoices were submitted, each under the \$1,000 threshold. After approving the first two invoices for payment, the clerk became aware that the third invoice was actually part of a single contract that in total exceeded the \$1,000 amount permitted by the competitive bidding statute. Accordingly, the clerk refused to pay the third installment. The plaintiff sought a court order requiring the clerk to approve the final installment for payment. The trial court found that the plaintiff was not entitled to payment due to violation of the competitive bidding statute and the First District Court of Appeal agreed:

Had a single invoice covering the entire purchase in the original sum of \$3,058.00 been submitted for approval, audit and payment, no doubt the question of the propriety of the purchase would have been immediately apparent. Inquiry could have been made concerning the advertisement for competitive bids as required by law. However, the plaintiff installed the counters one at a time but within a space of two or three days, and submitted a separate invoice or claim for each section, yet no claim exceeded \$1,000.00. . . .[I]nvoices for purchases may not be split and the statute thus avoided. Were it otherwise, evasion of competitive bidding would be possible with complete impunity.

*Id.* at 863. Thus, the court found that the clerk would not be required to approve the final installment for payment and, indeed, even provided a mechanism for the

clerk to recover the initial two installment payments that had already been made. *Id.* at 865.

Had *Mayes* been decided under the rule advocated by the County here, the clerk would have had no ability to investigate the initial two installment payments that were made. He would have been deprived of any tools or ability to discover that the payments, while each individually below the competitive bidding threshold, actually comprised one large contract that violated the statute. Had he paid each installment, which individually appeared proper, the County would deprive the clerk of any ability to piece together past installment payments with installments yet to be made in order to determine the legality of the entire contract and of future payments.

The County's hyper-technical time restriction leads to other absurd results. Let's say one month after the Clerk's office makes a payment the Clerk discovers a mistake. The mistake could be one caused by the County staff presenting inaccurate information on which a deputy Clerk relies before issuing payment or it could be that the deputy Clerk simply makes a human error. Under section 129.09, Florida Statutes, the Clerk is personally liable. Yet the Clerk could do nothing about it. The County would require the Clerk to ask permission from the County Manager or the Board to do a post-payment audit. If, for some malevolent or incompetent reason permission is denied, the Clerk is stuck with personal liability

for the mistake and expenditure. That outcome will lead, for sure, to the erosion of the principle of checks and balances described in *Alachua County, Dunkle and Mayes*. Or, at best, it will lead to increased bureaucracy and expense in County government. What clerk in his right mind will ever approve of a payment about which there is any doubt? The County's position is so extreme that it would deny the Clerk the right to examine County accounts "at all times" -- a right even the Second District *dissent* found the Clerk possessed. *Brock*, 21 So. 3d at 853-54 (Silberman, J.).

The County cannot take issue with the fact that the Clerk is the County's auditor under the Constitution, Article VIII, Section 1(d), and the County's accountant by statute. Section 28.12, Fla. Stat. The Clerk can be civilly and criminally liable for improper payments of County funds. Section 129.09, Fla. Stat. Given those facts, the Second District Court of Appeal had to conclude that:

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).

*Brock*, 21 So. 3d at 847. As noted above, even the dissenting opinion in the court of appeal conceded that the Clerk must be able to inspect and examine the County accounts "at all times." *Id.* at 853-54 (Silberman, J.).

## **RESPONSE TO THE AMICUS BRIEF FOR COUNTIES**

The Amicus argues that the Clerk cannot review a payment already made because the "Clerk is a ministerial officer with no discretionary authority." Amicus at 14. In *Mayer* the court recognized that the clerk exercises discretion in his financial responsibilities for the expenditure of county funds:

Implicit in the word 'auditor' itself is that some responsibility shall attach to inquire into the legality of the claim. . . The Court therefore concludes that the Clerk of the Circuit Court does exercise a discretion pertaining to the expenditure of county funds and may properly in his official capacity seek a determination of the validity of the claim in controversy.

*Mayer*, 154 So. 2d at 861-62. The holding in *Mayer* was relied on by this Court in *Alachua County* and by the Fourth District in *Dunkle*.

The County and Amicus both cite *Escambia County v. Bell*, 717 So. 2d 85 (Fla. 1st DCA 1998), but that case dealt with the tax collector's ministerial function of placing a statement about a special assessment on the tax notice. The court held the tax collector had no authority to question the constitutionality or propriety of the levy, but had the duty to execute the notice. The tax collector was simply implementing the policy decision of the County. A ministerial duty is a

duty involving no discretion in its exercise, but mandatory and imperative. *Id.* at 88. Likewise, cases like *Pan Am. World Airway, Inc. v. Gregory*, 96 So. 2d 669 (Fla. 3d DCA 1957), say that the Clerk’s judicial record-keeping function, unlike his accounting and auditing functions, is purely ministerial.

The circumstances here are completely different because the Clerk, as county auditor, is specifically charged by the Florida Statutes with determining the legality of County expenditures. That determination is not a ministerial function, but rather requires the exercise of independent judgment. The Clerk has the affirmative duty to ensure that the funds are spent for a public purpose, in conformity with county purchasing procedures or statutory bidding procedures, and that the expenditures do not overspend any account or fund of the budget as finally adopted. *Alachua County*, 352 So. 2d at 37. These are obligations that require investigation and professional discretion.

The Amicus also argues an issue raised below, but not by the County in this Court, about the custody of the fire district funds. Although it has not been raised by the County in its brief, we briefly respond to Amicus.

The Clerk’s role as “custodian” derives from Article V, Section 16 and Article VIII, Section 1(b) of the Florida Constitution. The role of custodian is implicit in the language of section 28.12, Florida Statutes, which calls upon the Clerk to “keep the ... accounts ... ” and in section 125.17, Florida Statutes, which



states that the Clerk shall “keep their ... accounts ... .” The laws which call upon the Clerk to make payments for the County imply that the Clerk has custody of, or at least access to, County funds. *See, e.g.*, § 28.235, Fla. Stat. (2007) (allowing the Clerk to make advance payments on behalf of the County for certain goods and services) and § 129.09, Fla. Stat. (2007) (making the Clerk, as County auditor, liable for payments which are illegal or in excess of an allowed expenditure). Neither the Constitution, statutes, nor case law, state that “custody” of County funds comes into existence only upon physical possession of funds.

In *Alachua County* this Court struck down a section of Chapter 71-443 which allowed the County Commission to retain custody of the funds. That was an impermissible attempt to “designate a different custodian of county funds.” *Alachua County*, 351 So. 2d at 38. This is what was constitutionally wrong in the fire district case here: County employees who operated the unsupervised and off-balance sheet accounts became the “custodians” of those accounts in place of the Clerk.

Contrary to the County’s parade of horrors, the Clerk is not looking for the power to conduct grand-jury type investigations or issue subpoenas, and there is no evidence of the Clerk acting arbitrarily or capriciously in this regard. Rather, the Clerk conducts internal audits to make sure that County revenues are properly collected and safeguarded. (R. 7038-7057). For example, one audit showed that

the County was not properly collecting impact fees, resulting in over \$100,000 in lost revenues. (R. 2589 - 2796, Tab 39). In another audit, the Clerk found that the County was failing to collect road impact fees for golf courses, resulting in over \$2 million in revenues owed for 16 golf course developments. (R. 2277-2588, Tab 29).

In some cases, the Clerk learns that funds belonging to the County are not properly deposited in County depositories. The fire district account which was the subject of the declaratory judgment action here is one example. (R. 47-77). Checks made payable to the County fire district were deposited into an account controlled by County employees, using the County tax identification number, and yet not turned over to the Clerk for custody. *Id.* In another instance, the fire district required a developer, as part of the developer's land use approval, to donate funds for the purchase of a fire rescue boat. (R. 2055-2088). The check was made payable to the County fire district. Instead of the money going to the Clerk, it was deposited into the same non-governmental account bearing the County's tax identification number, subject to the control of unnamed, unelected, and unaccountable County employees. *Id.* In both instances the checks, accounts, and funds bore indicia of ownership by the County but were kept from the Clerk's custody and off the County's books. *Id.* The Clerk simply asked County employees to explain and account for these funds, and when they did not, he

resorted to the courts. If he had not done so, he would have been shirking his duties as custodian of County funds.

There was also no evidence presented by the County that the Clerk ever questioned the legislative or policy decisions by the County on how to spend County funds. The Board of County Commissioners gets to decide whether to build a new road or County building. The Clerk does not question that decision. He is responsible for and does question, however, whether the County receives the goods and services for which the Board contracts and whether the payments made for those goods and services have been properly budgeted, documented and paid.

The Clerk's general practice is to provide notice to the County of his intent to conduct an internal audit, clear dates for the audit with the relevant department staff and work together with the staff to minimize the disruption caused by an audit. For example, the Clerk's office prepared a multi-year audit plan identifying areas in departments of County government which the Clerk proposed to audit over a four-year period. In preparing this plan, the Clerk's office conducted a survey of County Commissioners, County Division Directors and the County Manager for their input. This plan facilitated coordination and cooperation between the Clerk's office staff and the County staff, and the Clerk did not receive any objections to the proposed audits. (R. 7042, ¶¶ 8-9). The 67 audits referred to in the County's initial brief cover a 10-year period, so that is fewer than seven per year on average.

A number of those internal audits were on the four-year plan, a number were requested and a number received favorable commentary from the County staff member in whose department the audit was conducted. (R. 7038-7057, ¶¶ 8 – 11; R. 3027-3255, Tab 23; R. 2589-2796, Tab 39; R. 2277-2588, Tab 29). The County offered no evidence below that any of those audits were disruptive and no evidence that they occurred during election years.

The County argues that only it may determine when, how, or even if the Clerk may investigate the whereabouts and disposition of County funds. While nearly all of the Clerk's audits are planned and conducted with notice to the appropriate County employees, some cash audits are unannounced. (R. 7038-7057). Experience has taught internal auditors that giving advance notice of a cash count can defeat the purpose of the audit. Given advance notice of a cash audit, an unscrupulous or incompetent employee will always make sure that their cash account is in balance by the time the internal auditor arrives. The County's retained expert, a former auditor from Broward County, recognized the validity of surprise cash audits. He testified that to get permission from the County, the Clerk would have to be "evasive" about the need for the audit, so that the surprise nature of the cash count would not be given away. (R. 7298-7299; Thabit depo. pp. 88-89). One County Commissioner testified that to do cash audits the Clerk would need to go privately to each Commissioner to get permission. (R. 7964-7965;

Coyle depo. pp. 47-48). These proposed solutions would not be lawful because, after all, County approval would have to be done openly, honestly, and in public under the Florida Sunshine Laws.

There are further unreasonable or absurd consequences of an interpretation of “custody” with a time constraint. If the Clerk has no authority to ask about funds yet to be received by the County, how is he supposed to report on accounts receivable in the County’s financial records? If, as in Audit Report No. 2000-5, the Clerk has a reasonable question about whether funds to which the County is entitled under its impact fee laws are collected, why shouldn’t he be able to conduct an internal audit on that issue? (R. 2277-2588, Tab 29). The Clerk cannot be responsible for the custody of County funds and yet not have the power to make reasonable inquiries about receivables or improperly deposited funds.

## CONCLUSION

The decision of the Second District Court of Appeal should be affirmed.

Dated: August 17, 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 17th day of August, 2010 to the following:

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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). The font is Times New Roman, 14-point.

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