**IN THE FIFTH DISTRICT COURT OF APPEAL**
**STATE OF FLORIDA**

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**CASE NUMBER:5D18-0748**
**Lower Case No. 2017-CA-002186**
**On Appeal from the Circuit Court of the Eighteenth Judicial Circuit**
**In and For Seminole County, Florida**

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**GRANT MALOY, SEMINOLE COUNTY CLERK OF THE CIRCUIT COURT AND COMPTROLLER,**

**Appellant,**

**v.**

**SEMINOLE COUNTY, FLORIDA,**

**Appellee.**

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# AMICUS BRIEF OF FLORIDA ASSOCIATION OF COUNTIES, INC. AND THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC. IN SUPPORT OF SEMINOLE COUNTY, FLORIDA

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## STATEMENT OF INTEREST

The Florida Association of Counties, Inc. (the Association) is a Florida not-for-profit corporation that was created specifically to protect, promote, and improve the mutual interests of all counties within the State of Florida. The Association represents all of the State's 67 counties

The Florida Association of County Attorneys ("FACA") is a Florida not-for-profit corporation organized to protect, promote and improve the mutual interest of those attorneys who represent the board of county commissioners across the State of Florida. All but six of Florida counties have one of its attorneys as a member of FACA.

This matter is of great public importance, potentially impacting the authority of the boards of county commissioners of each county to adequately oversee investments made on their behalf by undermining the authority of boards, especially in charter counties like Seminole County, to exercise all powers of local self-government provided in the Florida Constitution. The matter also has implications for the constitutionally-authorized decisions of the electors in Clay, Broward, Desoto, Duval, Orange, Osceola, and Volusia counties, who have eliminated the role of the clerk of court from the fiscal affairs of the county.

## SUMMARY OF ARGUMENT

The default role of the clerk of the court as the *ex officio* clerk of the board of county commissioners and custodian of county funds is established in Article VIII, section 1(d), Florida Constitution. The Clerk argues that the discretion to determine the investment of county surplus funds lies solely within the purview of the clerk of the court, at least in part, due to statutory amendments that eliminated any authority that the boards of county commissioners may have had to direct the investments of the County's surplus funds. These arguments, however, are not supported by the historical background or the text of the statutory scheme governing the investment of local government surplus funds. The Clerk concludes that Section 28.33 of the Florida Statutes, grants the clerk of court the sole authority to dictate investment decisions, ignoring the several counties whose voters have eliminated the role of the clerk of court in county finances, a conclusion which would create confusion in the systems of checks and balances established by the voters of those counties.

## STANDARD OF REVIEW

Amicus Curiae adopts the Standard of Review set forth within Seminole County's Answer Brief.

## ARGUMENT

### I. CHAPTER 2000-264 DID NOT EXPAND THE AUTHORITY OF THE CLERKS OF COURT OVER THE INVESTMENT OF COUNTY SURPLUS FUNDS.

The structure of county government is established in Article VIII, Florida Constitution. Article VIII, section 1(e), Florida Constitution establishes the board of county commissioners as the governing body for each county. Article VIII, Section 1(d) establishes the county constitutional officers, and requires that each county have a sheriff, tax collector, property appraiser, supervisor of elections, and clerk of court, unless otherwise provided by county charter or special act. In most counties, these "county officers" are independent officers who execute state and county directives and are, to varying degrees, annually appropriated their funding by the respective board of county commissioners. Day-to-day operations, including financial management, are typically administered by the county officers.

In the absence of a county charter or special act providing otherwise, the clerk of court is designated as the default clerk, auditor, recorder, and custodian of county funds pursuant to Article VIII, section 1(d) of the Florida Constitution, in addition to serving as the clerk of the circuit court in the county. The dual nature of the office of the clerk is also acknowledged in Article V, section 17, Florida Constitution., which provides for the functions to be bifurcated into two separate offices, the clerk of court and a county comptroller, by special or general law.

When not immediately needed for expenses, the surplus funds of the county and each constitutional officer are to be invested in accord with investment policies adopted pursuant to Ch. 218 of the Florida Statutes. Entitled the "Investment of Local Government Surplus Funds Act," Ch. 218 creates guidelines for the investment of local government surplus funds and encourages the adoption of written investment policies by allowing those local government with written policies a broader range of investment options. Local government investment policies are specifically addressed in Section 218.415, Florida Statutes. Regardless of whether a local government has adopted an investment policy, the investment of surplus funds must be in accordance with Ch. 218, but investment of funds of local governments whose governing body has adopted an investment policy must be also in accordance with the adopted policy. *See* §§ 3-7, Ch. 95-194, Laws of Fla.

The Clerk argues that the Legislature's adoption of Ch. 2000-264, Laws of Fla. amends the statutory scheme outlining the handling of the investment of surplus funds and divests the boards of county commissioners from any authority to decide where the funds are to be invested and places this decision within the sole authority of the clerk of court. Init. Brief, pp 4, 5. However, the Legislature's adoption of Ch. 2000-264 was intended to address shortcoming in the oversight of the existing framework, and Clerk's assertion that the amendments eliminated any

authority of the boards of county commissioners *vis-à-vis* the clerk of court is detached from the historical events that prompted the changes.

Prior to the adoption of Ch. 95-194, investment mismanagement by the county officers in several Florida counties has resulted in significant losses to several local governments. These losses were driven by investment of surplus funds in derivatives, which are by nature complicated and high-risk investment products. *See Black v. State*, 819 So. 2d 208, 213 (2002). The primary defense of the local government money managers had been that they had been misled by their investment brokers and that they themselves had lacked the expertise to properly evaluate the risk inherent in the complicated investment products. For example, the Palm Beach County Sheriff, in a 1996 action, alleged a breach of fiduciary duty on the part of his office's investment broker. The Sheriff argued that the broker was aware that the high-risk investment did not conform to the county's investment policy and that the Sheriff would not have agreed to the purchase of the securities had the broker disclosed the nature of the risks associated with the securities. *McKutcheon v. Kidder, Peabody & Co.*, 938 F. Supp. 820, 821 (1996).

Although the counties had adopted investment policies the constitutional officers in these cases had relied on investment brokers to determine whether recommended products were consistent with the income and risk targets in those policies. A jury in Escambia County convicted the county comptroller's

designated investment broker of racketeering, agreeing that the investment broker was aware of Escambia County's policy but made material omissions by failing to fully advise the Comptroller of the risks of the investments. *Black v. State*, F. Supp. 820 at 821. The Escambia County Comptroller had already been convicted of malfeasance, which included the charge that he had purchased "securities on behalf of Escambia County that he wasn't legally authorized to purchase." David Poppe, *The Money Myth*, Florida Trend, July 1, 1995, *available at* http://www.floridatrend.com/print/article/14255. [R. 207-211],

In response to the financial losses experienced by local governments as a result of these investment practices, the Legislature adopted Ch. 95-194. *See State of Florida Auditor General Report No. 13283, A Survey of the Implementation of Section 218.415, Florida Statutes, By Local Governments* (July 16, 1998). Ch. 95-194 created Section 218.415 and adopted specific requirements for local government investment policies for those local governments that elected to conduct investment activities outside of the basic framework provided in Ch. 218. Section 218.415 requires that local government investment policies include provisions related to the safety and liquidity of the local government investments; these provisions include, among other requirements, that the policy specify authorized investments, and establish standards for risk and diversification, internal controls, and reporting.

Ch. 95-194 also expressly incorporates the county officers into the definition of local government and thus explicitly requires those officers to adhere to Sec. 218.415. *See* §5. Ch. 95-194, Laws of Fla. The authority of the county officers to invest surplus funds is also addressed, with more specificity, in Sec. 219.075, Fla. Stat., "Investment of County Funds by County Officers" and Ch. 95-194 also amended that section to explicitly require the investment of surplus funds by county officers to comply with Sec. 218.415. *See* §6, Ch. 95-194, Laws of Fla.

In July 1998, the Auditor General's office produced a report compiling the results of a survey of local government compliance with Sec. 218.415, undertaken at the request of the Joint Legislative Auditing Committee. *See State of Florida Auditor General Report No. 13283,* Letter of Transmittal (July 16, 1998). In this report, the Auditor General recommends several amendments to the statutory scheme, some of which were adopted in Ch. 2000-264.[1]

Both the Auditor General's Report and the Senate Staff report for Ch. 2000-264 explicitly state the Ch. 95-194 had been adopted to solve the underlying problems that had allowed local governments to fall victim to the derivatives debacle of a few years prior *See State of Florida Auditor General Report No.*

[1] Contrary to the Clerk's argument, the repeal of s. 125.31 did not affect the authority of boards of county commissioners to dictate the manager of invested funds, rather it implemented recommendations by the State Auditor General that the Legislature recodify the various sections addressing local government investment policies into Ch. 218, Part IV, Florida Statutes, the Investment of Local Government Surplus Funds Act. State of Florida Auditor General Report No. 13283, A Survey of the Implementation of Section 218.415, Florida Statutes, By Local Governments (7/16/1998).

*13283* at p.2 ["In response to financial difficulties experienced by local governments across the nation due to investment practices (including Orange County, California, and Escambia County, Florida), the Legislature, in 1995 enacted Chapter 95-194, Laws of Florida…"]. The Senate's staff analysis acknowledges that Ch. 2000-264 amends "the first statutory policy made on this subject by the Legislature in 1995 following widespread financial adversity in market experiences with derivative investments." *See* Ch. 2000-264, Laws of Fla., Senate Staff Analysis to CS/SB 372, p 8 (February 10, 2000).

One of the conclusions of the Auditor General's report, was that the high rate of non-compliance with Section 218.415 was due in part to the failure to effectively implement the system of internal controls and operations procedures that were required to be in each policy. *See Auditor General Report* at p 21. Based on this, the report recommends that local government auditors increase the emphasis on review of the local government's investment controls. *Id.* at 22. In an effort to provide additional oversight, Ch. 2000-264 instituted a requirement that certified public accountants conducting audits of local governments review whether the local government had complied with the investment policy requirements of Section 218.415 and required the Auditor General to report those local governments not in compliance to the Joint Legislative Auditing Committee. *See* Section 218.415 (22), Fla. Stat. and Section 218.415 (23), Fla. Stat.

The focus on increased internal controls highlights the significance of the role that the clerk's independence plays in assuring fidelity to the county's adopted investment plan. Mandating that the county's auditor also serve as the county's investment manager undermines the independence of the clerk as auditor by creating an incentive to conceal mismanagement of the county's investments. On the other hand, the clerk's independence is maintained when his role is solely to invest the funds as directed by the board. Though county finances are subject to third-party audits, the legislative action illustrates the inherent challenge to the clerks independence created by mandating that the county's auditor also serve as its investment manager. [2]

In effect, the Clerk argues that the legislative response to the county officers' mismanagement of their investment authority was to grant more authority to the clerk of court, an independent county officer, and to remove authority from the elected, collegial boards of county commissioners. This would be counterproductive, particularly in Florida, where the Sunshine Law would require that the decision, if made by the board of county commissioners, be done in a noticed meeting, open to the public, removing the authority from a collegial body

[2] For this reason, the American Institute of Certified Public Accountants' rules require that accountants be "independent in fact and appearance" when providing audit services, specifically stating that "an accountant's independence will be impaired if the accountant makes investment decisions on behalf of audit clients or otherwise has discretionary authority over a client's investments." *See* https://www.aicpa.org/interestareas/personalfinancialplanning/resources/practicecenter/professionalresponsibilities/independenceconflictsofinterest.html.

and placing it in the hands independent elected official makes the process significantly less transparent. For example, the convicted broker in the Escambia County, was able to gain the business of the county "[b]y placing a 'cold call' from Houston" to the then-County Comptroller. *Black,* 819 So. 2d at 214. This a less than ideal method to select an investment broker and one that is less likely to be used of the decision is being made by an elected board, like the board of county commissioners. The Clerk's conclusion is wholly unsupported by the legislative history of Ch. 2000-264 and is contrary to the stated goal of increasing oversight of the investment process and compliance with the investment policies adopted pursuant to Sec. 218.415.

## II. THE STATUTORY FRAMEWORK DOES NOT LIMIT THE AUTHORITY OF THE BOARD OF COUNTY COMMISSIONERS TO DIRECT INVESTMENT OF SURPUS FUNDS

The Clerk argues that the Board does not have the authority to direct investment of its surplus funds because "[n]othing in Florida law gives the Commission the power to dictate to the Clerk how and when specific investments are to be made" and that without explicit authorization in Section 218.415 the Board lacks the "power…to direct or restrict specific investment decisions of the Clerk." Init. Brief at p. 3. However, this is not appropriate standard to determine whether the board of county commissioners of a charter county may take an action.

As the governing body of a charter county, the Florida Constitution empowers the Seminole County Board of County Commissioners to exercise "all powers of local self-government *not inconsistent* with general law." [Emphasis added.] Article VIII, section 1(e), Florida Constitution. Absent a direct conflict with the statute, the Board is constitutionally authorized to take those actions it judges in the best interest of the public. Unlike the board of county commissioners, the office of the clerk of the court is a constitutional office that has those powers delegated to it by statute. *Alachua County v. Powers,* 351 So. 2d 32, 35 (Fla. 1977)

The authority for the county officers, including the clerk of court, to invest funds under their control is provided in Section 219.075., entitled *County Public Money, Handling by State and County*. This section requires that all county officers "having, receiving, or collecting any money, either for his or her office or on behalf of and subject to subsequent distribution to another officer of state or local government" should invest surplus funds as provided in Section 218.415. *See* Section 219.075(1)(c), Fla. Stat. This provision guiding investment by county officers also applies to the clerk with respect to funds held as part of the clerk's county-related functions but expressly excludes funds held by the clerk of the court as part of the clerk's court-related functions. *See Id.* ("[t]his section does not apply

to the clerk of the court *with respect to money collected as part of the clerk's court-related functions"* [Emphasis added]).

When read in *pari materia* with Section 218.415 and Section 219.075. it becomes clear that the purpose of Section 28.33 is to distinguish between the clerks' investment of county funds and the clerks' investment of court funds requiring that: (1) if the clerk is delegated the authority to invest county funds, that such investment of county funds must be pursuant to an investment policy adopted consistent with Section 218.415; (2) all interest earned from such moneys be deemed income to the county; and, (3) if the clerk invests court-related funds, the clerk is entitled to a 10 percent fee from the interest accruing on the court's funds. *See* Section 28.33.

The Clerk points to Section 28.33 of the Florida Statutes as the ostensible source of the clerks of courts' unconstrainted authority to direct the investment of the boards' surplus funds. However, the argument relies on the assumption the Legislature has delegated the authority in Section 28.33, which is related to the functions of the clerks of court generally, rather than the portions of the statutory scheme that provide much greater specificity regarding the investment of county surplus funds.

The Clerk's interpretation has the effect of treating boards of county commissioners differently from other local governing bodies, though Section

218.415 does not differentiate between the various types of governing bodies subject to it. Governing bodies of counties, school boards, municipalities and special districts are all treated equally. However, under the Clerk's interpretation of Section 28.33, unlike the other governing bodies, the boards of county commissioners would be granted the authority to adopt a policy governing the safety and liquidity of the investment of county surplus funds but would have no authority to direct investments pursuant to that policy. The Clerk fails to explain why, in his view, the Legislature has determined that school boards, municipalities, and special districts are competent to direct the investment of surplus funds while the boards of county commissioners' investments must be directed by the clerk of court. This is likely because the Legislature drew no such distinction.

Were this Court to adopt the interpretation of the Clerk, the boards of county commissioners would have very little recourse if faced with investment mismanagement by the clerk of the court. In cases of misfeasance or malfeasance the county could pursue criminal charges or removal from office, but a less burdensome option should also be available to the board if it determines that its investments would simply be better managed in other hands. In the absence of specific authorization for the clerks of court to select the investment manager to guide their investment of county funds, this authority should and does remain with the boards of county commissioners.

## III. MANDATING THAT THE CLERK MUST SERVE AS THE INVESTMENT MANAGER FOR THE COUNTY DISRUPTS THE VOTER-APPROVED CHECKS AND BALANCES IN SEVERAL COUNTIES.

The intent to allow local discretion over county financial matters is most evident in the constitutional authorization for the electors or the Legislature to completely eliminate the role of the clerk of court in county finances, either through charter amendment or special act. *See* Article V, section 17, Florida Constitution and Article VIII, section 1(d) Florida Constitution. Several counties operate under the bifurcated system, in some cases the clerk of court's role was eliminated because of mismanagement of a clerk, but in some cases the change was simply intended to create efficiencies. Adoption of the Clerk's position that Section 28.33 functions to place the sole authority for directing investment decisions in the hands of the clerk of court would undermine the intent of special laws applicable to Volusia, Desoto, Duval and Orange Counties and charter provisions in Broward, Clay, and Osceola Counties.

In the midst of a grand jury investigation into financial mismanagement, the voters of Clay County in 1998 eliminated the clerk's role in overseeing County finances even though the Governor had already removed the clerk from office. the grand jury ultimately found that the clerk had improperly spent thousands of dollars on promotional items, including political advertisements on emery boards and lollipops. Caren Burmeister, *Voters to Pick Clerk, Duties*, Jacksonville Times-

Union, April 11, 1998 *available at* Jacksonville.com/tu-online/stories/041195/nec_clclerkj.html. The clerk of the court was replaced by an independent auditor, who answers directly to the Board of County Commissioners. Clay County's first auditor, a professional auditor who had taught finance and accounting classes at the University of North Florida, was credited with recovering $50,000 in over-paid cable fees and improving efficiencies by overhauling the County's record-keeping and accounting practices. S*ee* R. Michael Anderson, *Clay County's Auditor Leaving for New Job: Shannon's Work Earns Praise from Officials*. Jacksonville Times-Union, June 19, 2002, *available at* http://jacksonville.com/tu-online/stories/061902/nec_9690108.shtml.

The Clerk's brief implies a need for evidence of poor performance by the clerk of court to justify a decision to change the role of the clerk in county finances. Init. Brief, p 2. However, in many cases, the voters exercised their right to remove the clerk of court's authority merely to improve county fiscal operations, absent any evidence of misfeasance or malfeasance by the clerk of court. For example, in 1970, the Florida Legislature adopted Ch. 70-966, Laws of Fla., empowering the citizens of Volusia County to adopt a charter which would abolish the office of tax collector and move those functions and duties along with all duties of the clerk of court as *ex officio* clerk of the board, to create a department of finance within the county's administration. The goal of this, in the words of the

Legislature, was "to create a more responsible and efficient local government." *See* Id. at Section 101. The voters of Broward County have also chosen this model, but the change was made by charter amendment instead of special act. *See* Broward County Charter, Section 3.06.

The Legislature, by adoption of Ch. 72-461, Laws of Fla., authorized the creation of the Orange County Comptroller, an independently elected county official responsible for providing financial, audit, and records administration oversight for the board of county commissioners. Consistent with these duties, the Board of County Commissioners has, by ordinance, authorized the county comptroller to invest surplus funds in accord with the adopted investment policy. *See* Orange County Code, § 17-5.

All county officers of Duval County have been consolidated into the City of Jacksonville. Charter of the City of Jacksonville, Section 1.101(a). The consolidated government has the jurisdiction of a charter county throughout Duval County, and also a municipal government (except within the jurisdiction of the Cities of Jacksonville Beach, Atlantic Beach, Neptune Beach, and the Town of Baldwin). Id. at Section 1.101(b). The City Charter provides that the clerk of court "shall no longer have any duty or right to act as clerk of the board of county commissioners or the ex officio auditor of the county." *See* Ch. 69-1175, Laws of Fla. and Charter of the City of Jacksonville, Section 12.06.

Though each of Florida's 67 counties has an elected clerk of the court, not all of those clerks also fill the role of the clerk of the board of county commissioners. The application of the Clerk's interpretation of the authority granted the clerks of courts in Section 28.33 would have the absurd consequence of placing the responsibility for investing county funds in the hands of officials who have no other relationship with the county's finances, despite the expressed language of special acts of the Legislature and the will of the voters of those counties.

## CONCLUSION

The authority of the clerks of court is not unchecked power, not in the specific question of the authority to select an investment manager or in with respect to the broader constitutional structure. The consequence of giving an independent official the sole authority to make investment decisions was seen in the fall-out of the derivatives scandal. Local discretion over county fiscal affairs is an important element of the checks and balances built into Florida's system and no action by the Legislature has removed this discretion, whether exercised by the voters of the boards or county commissioners.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail, on this 5th day of July, 2018, to the following counsel:

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## CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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