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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

DOUGLAS UNDERHILL,

Petitioner,

Case No.: 2021 CA 000148
Division: J

v.

ESCAMBIA COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent.
_____/

ESCAMBIA COUNTY'S RESPONSE TO ALTERNATIVE WRIT IN MANDAMUS

Respondent, Escambia County, Florida (County or Board), responds to the Alternative Writ in Mandamus (AWM) and requests that it be denied for the following reasons:

INTRODUCTION

County will adhere to the procedure for response announced in *Holcomb v. Department of* Corrections, 609 So. 2d 751, 753 (Fla. 1st DCA 1992) and will set forth its answer and affirmative defenses after its Argument in Support of Denial of the AWM.

Because County's Legal Representation Policy (LR Policy) establishes five alternative actions that could be taken by the Board in response to Petitioner's request for attorney's fees, the Board's discretionary authority in

this regard is repugnant to the performance of a ministerial duty, thereby requiring that the AWM be denied.

ARGUMENT IN SUPPORT OF DENIAL OF THE ALTERNATIVE WRIT IN MANDAMUS

I. FACTUAL BACKGROUND.

On June 7, 2019, an action styled Miller v. Underhill, 2019 CA 000931 (Fla. 1st Jud. Cir.), was filed by an Escambia County citizen who alleged the Petitioner made defamatory comments about him on a public forum Facebook page (the "Defamation Action"). On October 4, 2019, the circuit court granted summary judgment in Petitioner's favor concluding that his actions were within the scope of his official duties and, therefore, he was entitled to absolute immunity irrespective of whether the statements were defamatory. (Pet Ex. D.).[1] Thereafter, on July 31, 2020, the circuit court's order was affirmed per curiam by a panel of the First District Court of Appeal, and the mandate issued on September 14, 2020. Petitioner now seeks mandamus relief to compel the Board to pay Petitioner's legal fees incurred defending the Defamation Action by invoking the Board's LR Policy. (Pet. Ex. A.).

[1] Petition for Writ of Mandamus is incorporated by reference in the AWM. It will be abbreviated as "Pet." when used to refer to its allegations. Exhibits will be cited as "Ex."

II. AN ALTERNATIVE WRIT IN MANDAMUS IS AN EXTRAORDINARY REMEDY DIRECTING THAT A MINISTERIAL DUTY BE PERFORMED ONLY IN CIRCUMSTANCES WHERE A CLEAR AND LEGAL RIGHT TO COMPEL PERFORMANCE IS SHOWN.

Mandamus is a civil remedy to compel a public official to perform a ministerial duty required by law. *Browning v. Young*, 993 So. 2d 64, 65 (Fla. 1st DCA 2008); *Fair v. Davis*, 283 So. 2d 377, 378 (Fla. 1st DCA 1973). Entitlement to the extraordinary writ of mandamus requires the petitioning party to establish: 1) a clear legal right to performance of the act requested; 2) an indisputable legal duty; and 3) no adequate remedy at law. *Butler v. City of Melbourne Police Dep't*, 812 So. 2d 547, 548 (Fla. 5th DCA 2002); *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993).

A "clear legal right" may not be one that is subject to differing reasonable interpretations. *Sancho v. Joanos*, 715 So. 2d 382, 385 (Fla. 1st DCA 1998). "To that end, the extraordinary writ of mandamus may not be used to establish the existence of an enforceable right, but rather only to enforce a right already clearly and certainly established in the law." *Id.*; *see also MDXQ, LLC v. Miami-Dade County*, 271 So. 3d 68, 69 (Fla. 3d DCA 2019) (affirming dismissal of petition for mandamus because petitioner failed to demonstrate a clear legal right to receive a consistency determination); *Austin v. Crosby*, 866 So. 2d 742, 744 (Fla. 5th DCA 2004) (affirming denial of petition for mandamus where inmate failed to establish

clear legal right to perform certain religious rites in prison and the Department of Corrections did not have an indisputable ministerial duty to accommodate the Petitioner's request); *Williams v. Schulman on Behalf of Sch. Bd. of Palm Beach County*, 721 So. 2d 1244, 1245 (Fla. 4th DCA 1998) (affirming denial of mandamus relief to a teacher seeking to compel the School Board to award a contract he was not clearly entitled to receive); *Centrust Sav. Bank v. City of Miami*, 491 So. 2d 576, 577 (Fla. 3d DCA 1986) (holding a writ of mandamus does not lie to compel a city to inspect property for possible building code violations).

If there are any outstanding factual matters that must be resolved before a party can demonstrate a clear entitlement to relief, then mandamus is unavailable as a matter of law. *Browning v. Young*, 993 So. 2d at 65; *PCA Life Ins. Co. v. Metro. Dade County*, 682 So. 2d 1102, 1103 (Fla 3d DCA 1995); *Tallahassee Mem'l Reg'l Med. Ctr v. Lewis*, 399 So. 2d 106, 108 (Fla 1st DCA 1981).

In addition, if a petitioner cannot demonstrate satisfaction of all conditions precedent to an existing legal entitlement, mandamus is unavailable. *Miami-Dade County Bd. Of County Commissioners v. An Accountable Miami-Dade*, 208 So. 3d 724, 726 (Fla. 3d DCA 2016). Even if a petitioner demonstrates the satisfaction of any substantive and

procedural conditions, eligibility for the relief requested is not tantamount to a clear legal entitlement and eligibility may not serve as the basis for mandamus relief. *Simeone v. State*, 276 So. 3d 797, 803 (Fla. 4th DCA 2019).

With this legal framework, County will show in the pages to follow that the AWM should be denied, as the Petition for Writ of Mandamus (Petition) incorporated within it is based upon erroneous allegations and the misapplication of Florida law.

III. PETITIONER HAS NOT ESTABLISHED A CLEAR, LEGAL ENTITLEMENT TO ATTORNEYS' FEES BECAUSE HE HAS FAILED TO ALLEGE SATISFACTION OF MANDATORY CONDITIONS PRECEDENT.

Both Florida law and the LR Policy provide for substantive and procedural conditions precedent that must be satisfied before the Board can consider payment of attorney's fees. The Petition fails to allege that Petitioner has met these mandatory conditions.[2] *See Miami-Dade County v. An Accountable Miami-Dade*, 208 So. 3d at 726.

[2] As reflected in the exhibits to the Petition, Petitioner misreads the LR Policy and otherwise misstates some underlying facts. Florida law establishes, however, that, documents attached to a pleading become part of the pleading, for all purposes, and, in the event of a conflict between documents attached to a pleading and the allegations of a pleading itself, the documents attached are controlling. *See Fladell v. Palm Bch. Cnty. Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000) ("If an exhibit facially negates the cause of action asserted, the document attached as an exhibit controls and must be considered in determining a motion to dismiss.") (quoted in *Wal-Mart Stores, Inc. v. Robbins*, No. 02-19876 CA32, 2002 WL

A. Substantive Conditions Precedent.

1. <u>Statutory.</u>

Under Florida law, a public body is prohibited from compensating its agent for legal fees if "in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Section 111.07, Fla. Stat. (2021). In accordance with the statute, the LR Policy instructs the County Attorney, when reviewing a request for attorneys' fees, to recommend denial of the request if "there has been a finding or it appears clear from the relevant materials that the person is personally liable, acted outside the scope of employment, or in bad faith, with malicious purpose or wanton disregard of human rights, safety or property." (Pet., Ex. A, § D.).

The application of statutes authorizing the expenditure of public funds for legal representation rests with the government unit that is being asked to expend such funds. *Florida Dept. of Ins., Div. of Risk Management v. Amador*, 841 So. 2d 612, 614 (Fla. 3d DCA 2003) (judiciary is not involved in applying individual statutes governing legal representation of public

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33984683, at *2 (Fla. 11th. Jud. Cir. Nov. 8, 2002) (dismissing mandamus action because transcript attached to complaint demonstrated no entitlement to relief)).

officers); *Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981). Here, County has made the determination as to whether a public expenditure should be made to reimburse Petitioner for attorney's fees costs under § 111.07. It has declined to do so. That determination, by its very nature, requires the exercise of discretionary authority and is not merely ministerial.

The Petition does not allege that Petitioner acted in good faith, without malicious purpose, or without wanton and willful disregard of human rights, safety, or property. Although the circuit court in the Defamation Action found that Petitioner was entitled to absolute immunity for actions taken in the scope of his public duties, this finding is not dispositive as to whether Petitioner acted in good faith for purposes of attorneys' fees. (Pet., ¶ 13, Ex. D.). The trial court in the Defamation Action did not make any findings about the validity of Mr. Miller's claim of defamation, nor Petitioner's motivations for making the statements posted on Facebook. Instead, the court simply held that Petitioner, whether or not he committed an intentional tort, was nonetheless entitled to immunity by virtue of his public position. (Pet., Ex. D.). This holding cannot be construed as any indication or finding that Petitioner's conduct was not willful, wanton or in bad faith.

Alongside the order on summary judgment, the Board is still entitled to make its own discretionary determination of bad faith under the plain language of the LR Policy. According to the LR Policy, the County Attorney may make her own "finding" as to whether bad faith exists, pursuant to which the County Attorney must make a recommendation to the Board. (Pet., Ex. A, § E.). The Board, however, has no obligation to accept the County Attorney's recommendation. (Pet., Ex. A, § E.). Instead, the LR Policy permits the Board to make its own "appropriate findings," and deny the request for attorneys' fees. (Pet., Ex. A, § E.). Thus, even if the Petition did allege that Petitioner had acted in good faith, or if the court in the Defamation Action had made such a finding, the Board would nevertheless be entitled to draw its own conclusions.

Attempting to limit the Board's discretionary authority to grant or deny a request for payment of attorney's fees and costs, Petitioner has given the order granting summary judgment the appearance of precedential authority that is not warranted. Although Judge Pitre's order was affirmed by the First District Court of Appeal, it was affirmed *per curiam* without a written opinion. A *per curiam* affirmance without written opinion has no precedential value. *Department of Legal Affairs v. District Court of Appeals, 5th District*, 434 So. 2d 310 (Fla. 1983); *Silver Shells Corporation v. St. Maarten at Silver Shells*

Condominium Association, Inc., 169 So. 3d 197 (Fla. 1st DCA 2015). Although the *per curiam* affirmance may have a *res judicata* effect[3] between Petitioner and Mr. Miller, the legal effect of that doctrine is separate from the principle that trial courts do not set precedent. *See State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991) ("[i]f a trial court establishes its own unique rules, those rules are not binding even in the adjacent court room."); s*ee also William v. McDonough*, 2006 WL 2849714 at *2, n.2 (N.D. Fla. Sept. 29, 2006) (quoting from *State v. Bamber* that trial court rulings are not precedent "even in the adjacent courtroom")).

With all due respect to Judge Pitre's holding that public discourse on a Facebook page is part of the duties of a county commissioner and is entitled to absolute immunity, his ruling in granting summary judgment goes no further than his courtroom. No other trial court in the First Judicial Circuit, nor any other circuit in the State of Florida, need follow Judge Pitre's ruling. Thus, the County has the discretion to deny the request for attorney's fees. When the application for attorney's fees and costs was brought before the Board in November 2019, one of the commissioners expressed concern that the statements made by Petitioner were not something that a county

[3] It should be noted that Petitioner was sued individually by Mr. Miller as a natural person. (Pet. Ex. B, ¶ 3). County was not a party and, therefore, is not bound by Judge Pitre's ruling through *res judicata*.

commissioner should be making and that voting to pay Petitioner's attorney's fees and costs could be construed as endorsing name-calling and the making of *ad hominem* attacks on citizens. (Pet., ¶ 18).

The Board's ability to make its own findings as to substantive entitlement to attorneys' fees necessarily undermines Petitioner's claim to a "clear legal entitlement" to the relief requested. Thus, mandamus is unavailable, as a matter of law. At a minimum, however, the fact that this issue has not been resolved precludes mandamus relief because mandamus cannot be used to establish rights.

Accordingly, Petitioner's reliance on *Soto v. Board of County Commissioners of Hernando County*, 716 So. 2d 863 (Fla. 5th DCA 1998) is misplaced, as the written personnel policy adopted by Hernando County set forth a grievance process for personnel actions. It is clear that Hernando County intended the policy to act as the only method by which an employee could grieve a personnel action. Hernando's refusal to allow a grievance to contest the denial of a promotion was a violation of its own policy. The Fifth District Court of Appeal found that the employee had shown a clear legal right to compel Hernando County to follow its own personnel policy and to process his grievance. *Id*. at 864-865.

In contrast to the Hernando policy, the Board, by the express terms of its LR Policy, had before it five alternative actions that it could have pursued in disposing of an application for attorney's fees and costs. The LR Policy does not mandate that any particular alternative be chosen by the Board in the face of an application and, in fact, provides for the denial of a request and the making of appropriate findings. (Pet., Ex. A., Section E., Board Action).

2. <u>Common Law</u>

Under the common law doctrine, public officials seeking reimbursement of attorney's fees with public funds must satisfy a two-prong test. The litigation for which the official seeks reimbursement must: 1) arise out of and in connection with the performance of his official duties; and *2)* serve a public purpose. See *Thornber*, 568 So. 2d at 917.

Under *Thornber*, a public official is not entitled to representation simply because the alleged misconduct may arise in the course of his official duties. *Maloy v. Bd. of County Commissioners of Leon County*, 946 So. 2d 1260, 1264, (Fla. 1st DCA 2007). It is not the tenor of the conduct, but rather the context in which the misconduct arose must also serve a public purpose. *Id.*; *see also Chavez v. City of Tampa*, 560 So. 2d 1214, 1215 (Fla. 2d DCA 1990) (city council member who successfully defended

charges of unethical conduct was not entitled to reimbursement of attorney's fees under the common law where the conduct giving rise to the investigation did not serve a public purpose).

The foregoing authority merely authorizes the County to provide payment for attorney's fees with public funds under certain conditions. The Board must determine whether reimbursement for a particular matter is authorized by statute or under the common law. As part of this substantive analysis, the Board must determine whether the "official" conduct served a public purpose, as required under the common law, or whether the conduct was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

In a conclusory fashion, the Petitioner asserts a "clear legal right" to reimbursement under the LR Policy by virtue of the court's ruling in the underlying defamation action. (Pet., p.8). While the court found Petitioner was entitled to absolute immunity for actions taken in the scope of his public duties, this finding is not dispositive as to whether Petitioner's conduct served a public purpose nor whether Petitioner acted in good faith for the purpose of determining whether reimbursement of attorney's fees is appropriate. The court did not make any findings about the validity of the defamation claim or Petitioner's motivation for posting the statements on

Facebook. Instead, the court simply held that Petitioner, whether or not he committed an intentional tort, was nonetheless entitled to immunity by virtue of his public position. Notwithstanding any findings by the trial court, the Board still retains the discretion to determine whether reimbursement is authorized at the public's expense.

A petition for writ of mandamus is appropriate to compel the performance of a particular action required by law, but cannot be used to compel the exercise of discretionary authority in a particular manner. *Adams v. State*, 560 So. 2d 321, 322 (Fla. 1st DCA 1990); *see* also *Kloski v. Matecumbe Marina, Inc.*, 598 So. 2d 275, 276 (Fla. 3d DCA 1992) (holding trail court lacked authority to compel the Planning Commission to approve petitioner's expansion plan, noting "while mandamus lies to require an administrative tribunal to rule one way or the other where it has discretion, the reviewing court may not instruct the tribunal, by mandamus, how to rule"). The County's LR Policy instructs the Board to consider requests from commissioners on a "case by case basis" and outlines five alternative actions the Board "may" take subject to its own independent finding of eligibility. (Pet. Ex. A, §§ B. and E.). This Court is powerless to make the Board pick any particular alternative action.

Even assuming the Petitioner followed the proper procedure, the LR

Policy does not impose a legal duty upon the Board to grant a request for reimbursement or otherwise require the performance of a particular action. Unlike a case involving a County employee, there is no language stating the Board "will" prospectively provide legal representation or pay reasonable attorney's fees. Rather, the LR Policy merely authorizes, but does not require the Board to take the action Petitioner seeks to compel. (Pet. Ex. A. §§ B. and E.).

B. Procedural Conditions Precedent.

In addition to the substantive limitations on the Petitioner's eligibility for payment of attorney's fees, the Petitioner failed to allege any facts demonstrating he complied with the procedural conditions precedent set forth in the County's LR Policy. As it relates to commissioners,[4] the LR Policy provides in relevant part:

> "Cases involving current or former County Commissioners personally named in any civil . . . case that arises out of and in connection with their scope of County function shall be addressed by the Board of County Commissioners on a case-by-case basis. Florida law shall be followed with regards to any payment or reimbursement of legal fees or prospective retention of legal representation. Any current or former County Commissioner personally named in a civil . . . action and who desires the County pay for on an ongoing basis or reimburse

[4] The Petition misrepresents the LR Policy by quoting the portion of the policy that is applicable to County employees rather than County commissioners.

legal fees **shall** follow the procedures set forth in this policy ..." (Pet. Ex. A, § C.). [emphasis added].

The procedures set forth in the LR Policy require "[a]ny person who believes that he or she is allowed or entitled to payment or reimbursement of reasonable attorney's fees and costs or retention of legal representation shall, as a condition precedent to payment, retention or reimbursement, notify the County Attorney in writing within 10 days of their knowledge of the relevant action or within 10 days of retaining a private attorney, whichever is applicable." (Pet. Ex. A, § D.). The LR Policy further specifies the minimum information that must be provided in the written request to the County Attorney. (Pet. Ex. A, § D.).

Following receipt of a timely written request, the policy instructs the County Attorney to review the request and prepare a recommendation for the Board's consideration. (Pet. Ex. A, § E.). "In any case where the County Attorney believes the matter can be ethically, legally, and expeditiously handled in-house, the recommendation shall so state. In all other instances, the County Attorney shall make a recommendation on the applicability of this policy to the request for retention of legal representation or payment or reimbursement of reasonable attorney's fees." (Pet. Ex. A, § E.).

The LR Policy defines "reasonable attorney's fees" as "fees earned by an attorney and/or attorneys licensed to practice law in the State of Florida, based on the customary rate, whether a flat fee or per hour, charged in

Escambia County, Florida, for similar work performed by attorneys within the County, but in no event to exceed $250 per hour unless a higher amount is approved by the Board due to extraordinary circumstances." (Pet. Ex. A, § B.). Petitioner has not alleged that he provided the County Attorney with a written request within 10 days of his knowledge of the litigation. In fact, a written request was never provided by Petitioner as required by the LR Policy.[5] Rather, the issue was first presented to the Board at the Petitioner's request without any written information as a "discussion item" on the Board's July 18, 2019 agenda. (Pet. Ex. C.). This was 41 days after the suit was filed, 31 days after the Petitioner was served with the complaint,[6] and at least 10 days after the Petitioner retained private counsel.[7]

By disregarding the procedures set forth in the LR Policy, the County Attorney was not afforded the opportunity to timely evaluate the request and

[5] By correspondence dated November 5, 2019 and December 29, 2020, Petitioner's private counsel submitted requests to the County Attorney seeking payment of legal fees incurred defending Petitioner. (Pet. Ex. E & G.). Neither request included the required information and neither request was timely submitted as required under the LR Policy.

[6] The docket reflects, on June 7, 2019, the complaint was filed in the Defamation Action. The Petitioner was served with the complaint on June 17, 2019. (Pet. Ex. B.).

[7] Petitioner failed to allege when his private counsel was retained, but the sequence of Petitioner's purported "Facts" erroneously indicated Petitioner retained private counsel *after* July 18, 2019. (Pet. ¶11.). According to the docket, Petitioner's counsel filed a notice of limited appearance on July 8, 2019, 10 days before the Board meeting on July 18, 2019.

provide the Board with a recommendation to deny the request, undertake the representation in-house, or assume the cost of the Petitioner's private counsel based upon an approved "reasonable" hourly rate.

In addition, the invoices for legal services attached to the Petition reflect an average hourly fee of $275, which exceeds the rate permitted under the LR Policy. (Pet. Ex. G.). Petitioner has not alleged nor provided any corresponding documentation showing the Board agreed to waive the maximum hourly rate of $250 "due to extraordinary circumstances" as required by the LR Policy. To the contrary, the minutes of the July 18, 2019 Board meeting reflect the Board took no action on the Petitioner's request to assume the cost of his counsel and waive the Board's policy to allow billing not to exceed $350 per hour. (Pet. Ex. F.).

An opinion from the Third District Court of Appeal is instructive. In *City of Sweetwater v. Alvarez,* 14 So. 3d 1210 (Fla. 3d DCA 2009), police officers, who were acquitted of felony battery and official misconduct, applied to have their legal fees paid by the city according to Florida statutory procedures. The police officers did not follow statutory protocol to request that the city provide an attorney for them, but instead chose private counsel and then sent their legal bills to the city. The city rejected the bills, which caused the officers to file an application for fees with the

court having jurisdiction over the criminal cases, according to prescribed statutory procedure. The circuit court then ordered the city to pay the fees. *Id*. Although the alleged misconduct for which they had been sued was done in the performance of a public duty and served a public purpose, the court agreed that the officers were required to request the city to designate an attorney to represent them before having their fees paid by the city. *Id*. at 1212-1213. Therefore, the circuit court's order requiring payment was reversed.

Here, the same reasoning of *City of Sweetwater* would apply. Based upon the allegations of the petition and its attached exhibits, it is clear to see that Petitioner has not complied with the LR Policy and has not made a written request with the required information in order to allow the County Attorney to make a recommendation to the Board as to whether legal representation should be provided to Petitioner. Like the police officers in *City of Sweetwater*, Petitioner bypassed established procedures and decided for himself when and whom he should retain as an attorney.

Thus, under the LR Policy, the Board could determine that Petitioner acted in bad faith in making the comments protected by absolute immunity and find him ineligible for attorneys' fees. The Board could also determine that Petitioner as a commissioner, when reviewing the facts at issue in the

Defamation Action, does not warrant expenditure of public funds to defend the suit because of the lack of a public purpose in making the statements. The Board could also, in theory, approve the request, but it has repeatedly failed to do so, indicating that one of the two former options is more likely indicative of their decision-making. Similarly, if Petitioner had followed the procedural requirements of making a written request for attorneys' fees, the Board could have chosen to use in-house representation or prospectively pay for legal counsel. The Board could have also denied Petitioner's request based on the fact it exceeded the $250 per hour limitation on "reasonable attorneys' fees," or that it lacked a public purpose.

Given these range of options, Petitioner, at most, could force the Board to select one of the options, including denying the request and make appropriate findings, which could only happen if Petitioner could prove that he had satisfied the conditions precedent such as timely service on the County Attorney of a specific written request, in the form contemplated by the LR Policy. However, even ignoring the facts that the prerequisite conditions precedent were plainly not satisfied, there is no allegation that the Board has improperly failed to consider a written request.

Petitioner has failed to demonstrate that he satisfied the substantive and procedural conditions precedent so as to establish his eligibility for, much

less a legal entitlement to, the reimbursement of legal fees at public expense. Even assuming Petitioner was able to demonstrate he satisfied these conditions precedent, a showing of eligibility does not constitute a "clear legal entitlement" to the relief requested. Thus, the request for mandamus relief must fail as a matter of law.

IV. COUNTY'S TECHNOLOGY POLICY PROHIBITED PETITIONER'S STATEMENTS FROM BEING PROTECTED BY COUNTY'S LEGAL REPRESENTATION POLICY.

As further grounds for Board's discretionary authority to deny the request, attached to this Response as Exhibit 1, is the Technology Policy which was in effect at the time that Petitioner posted on the Escambia Citizens Watch Facebook page on April 25, 2019, and which posting became the subject of the defamation suit.[8] The Technology Policy was in force on April 25, 2019. It prohibited a commissioner from discussing County business on social media sites such as Facebook. (Exhibit 1, Section B, ¶ 5). From a reasonable reading of Judge Pitre's Order, it appears that the

[8] This Court can consider documents outside the allegations of a complaint, if they are authentic and have been impliedly incorporated by reference. *See One Call Property Services, Inc. v. Security First Insurance Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) (citing case)(on a motion to dismiss). Here, the Petition alleges that Petitioner posted comments on a Facebook page which predicated the civil defamation suit against him. (Pet., Ex. B). The Technology Policy is thereby impliedly incorporated by reference. *See also Morette Co. v. Southern-Owners, Ins. Co.*, 301 F. Supp. 3d 1175, 1183 (N.D. Fla. 2017) (citing *One Call Property*).

Escambia County Citizens Watch Facebook page published the alleged defamatory material, albeit found to be immune from suit. Because Petitioner violated the County's Technology Policy, he is subject to the sanctions set forth in the policy for its violation including denial of payment of costs and attorney's fees, unless specifically allowed by State law. (Exhibit 1, Section C., Enforcement).

Thus, the County may exercise its discretion to insist that the Technology Policy be followed before a commissioner invokes the benefits of the LR Policy. The LR Policy enables the Board to determine a commissioner's request on a case-by-case basis. (Petition, Ex. A, § C). The Board has the discretion to spend public monies to reimburse a commissioner's attorney's fees and costs, or it may deny the request when that commissioner has violated other adopted policies. This discretionary authority is fatal to the extraordinary remedy of mandamus relief.

ANSWER AND AFFIRMATIVE DEFENSES

Respondent answers the allegations of the Petition as incorporated in the AWM, and alleges:[9]

[9] For the purposes of clarity and ease of reading, County will repeat the allegations of the Petition with its response immediately below the allegation. Petitioner's footnotes are omitted when citing to video recordings of proceedings. Footnotes 1 and 4 are placed in brackets following the allegation to which the footnote refers.

1. Underhill is a duly elected Commissioner for District Two (2) of Escambia County, Florida.

ANSWER: Admitted.

2. Board is a political subdivision and agency of the State of Florida.

ANSWER: Admitted.

3. Board has a written policy ("Policy") by which it establishes rules governing the right of County Commissioners to obtain payment of their reasonable attorneys' fees and costs in the even that a Commissioner is "encumbered by the expense of defending a civil . . . action predicated upon their official acts." A true an accurate copy of the Policy is attached as Exhibit "A" hereto.

ANSWER: Admitted that "Policy" is County's Legal Representation for Commissioners and County Employees, which will be referred to as LR Policy. The LR Policy allows commissioners to request payment of reasonable attorney's fees.

4. The Policy further states in relevant part:

A. Purposes:

… the Board of County Commissioners finds that it is necessary to encourage the continued participation in County government by alleviating the potential liability of persons having to expend their own funds for the payment of reasonable attorney's fees and costs when such persons are named in a … civil … action.

…

C. Policy:

It is the Board's policy that for cases involving current . . . County employees . . . personally named in any civil . . . action for any action within the scope of their duties and responsibilities, the County will prospectively provide legal representation or pay reasonable attorney's fees and costs if the procedures in this policy are followed and if allowed by Florida law.

. . .

E. <u>Board Action</u>:

. . . The Board may:

1. Request additional relevant information from the applicant or County Attorney; or

2. Continue the request to a date and time certain; or

3. Take action upon the written request and determine if the attorney's fees and costs shall be reimbursed or paid, and if so, in what amount; or

4. Allow the County Attorney to represent the applicant or other counsel to be retained; or

5. Deny the request and make appropriate[1] findings.

[[1] The "appropriate findings" supporting denial are governed by the Policy.]

ANSWER: Admitted in part and denied in part. Petitioner has omitted from his quotation, the complete policy under Section C, as it relates to a County commissioner. The quoted section of the policy is applicable only to County employees. The LR Policy, as it pertains to a County commissioner, is to be decided on a case-by-case basis and requires the County commissioner to follow the procedures for submitting a written request for attorney's fees or representation as set forth in Section D of the LR Policy. County further denies that Section E of the LR Policy has been quoted in its entirety. County denies that the language "make appropriate findings" is solely governed by the LR Policy as alleged in footnote 1.

5. The Policy provides a mechanism by which a County employee who is has been sued as a result of performing his public duty may seek payment or reimbursement of reasonable attorneys' fees and costs from the Board.

ANSWER: Admitted that County has an LR Policy pertaining to requests for reimbursement of attorney's fee and costs by a County employee. It is denied that Petitioner is a County employee.

6. On July 7, 2019, Underhill was sued for defamation by Scott Miller. A true and accurate copy of that suit is attached hereto as Exhibit "B."

ANSWER: It is admitted that Petitioner was sued for defamation by Scott Miller, but it is denied that the suit was filed on July 7, 2019. The suit was actually filed on June 7, 2019.

7. On July 18, 2019, the Board discussed providing a legal defense for Underhill according to the Policy.

ANSWER: Admitted.

8. On July 18, 2019, Commissioner Steven Barry stated: "If your comments were made in your public capacity, I would be open minded [to the Board providing Underhill a legal defense]."

ANSWER: Admitted. It is denied that this excerpt was the entirety of Commissioner Barry's remarks.

9. *On July 18, 2019, Commissioner Lumon May (acting as Chairman of the Board) stated: "If . . . there is a legal opinion that says you were acting in line with your job . . . you are going to find my support . . . It may be politically unpopular, if the judge . . . concludes . . . that it was in the line of your duty as a county commissioner, you are going to have my support . . . I would humbly ask you . . . to litigate that and bring it back once you get the results . . ."*

ANSWER: Admitted. It is denied that this excerpt was the entirety of Commissioner May's remarks.

10. On July 18, 2019, no action was taken to provide a defense or pay Underhill's fees. A true and accurate copy of the portion of minutes pertaining to the discussion of paying Underhill's fees and costs is attached hereto as Exhibit "C."

ANSWER: Admitted.

11. Underhill retained the law firm of McDonald Fleming, LLP to defend him against Scott Miller's claim of defamation, and, in doing so, litigate the question of whether Underhill's statements were made in the course of his duties as a County commissioner.

ANSWER: It is admitted that Petitioner retained the law firm of McDonald, Fleming, LLP to defend him against Scott Miller's claims of defamation. However, it is denied that the sole purpose of the defense was to litigate the question of whether Petitioner's statements concerning Mr. Miller were made in the course of his duties as a County Commissioner.

12. On October 4, 2019, Underhill was awarded summary judgment on his defense of absolute immunity.

ANSWER: Admitted.

13. In awarding summary judgment, this Court[4] found that Underhill made the allegedly defamatory statements while acting within the scope of his duties as a County Commissioner and was, therefore, entitled to absolute immunity for the statements. A true and accurate copy of the summary judgment is attached as Exhibit "D."

[[4] The Honorable Judge Pitre presiding]

ANSWER: Admitted.

14. A Notice of Appeal was filed on November 1, 2019.

ANSWER: Admitted.

15. On November 7, 2019, following the October 4th summary judgment finding that Underhill had acted within the scope of his duties, Underhill's request for reimbursement of his attorney's fees and costs was again brought before the Board. A true and accurate copy of the November 5, 2019 letter sent by Attorney Ed Fleming to the County Attorney is attached as Exhibit "E", hereto.

ANSWER: Admitted.

16. At the November 7, 2019, Board meeting, Commissioner Bergosh stated:

> *"I have a hard time paying [Underhill's attorney's fees] right now. I will say this for the record. . . had this case not been appealed, I would have walked in here and we would have paid that tonight. But my issue is and I strongly believe that we have no business paying this until we get a dispositive ruling once and for all and this thing is brought in for a landing at the appellate court . . . . But, I do agree that [Underhill's attorney] needs to be paid."*

ANSWER: Admitted. It is denied that this excerpt was the entirety of Commissioner Bergosh's remarks.

17. At the November 7, 2019, Board meeting, Commissioner Bergosh further stated:

> *". . . Had this suit just ended right here at the circuit court level, there is no doubt we would have had to pay, and that is why I would have been prepared to pay . . . The fact of the matter is . . . had this not been appealed . . . we should have had to pay. Otherwise, I have no doubt that this would have been taken to court, and we would have been compelled to pay, and then we would have been paying even more. We would have been paying fees on top of fees . . . The wrinkle is this appeal.*

ANSWER: Admitted. It is denied that this excerpt was the entirety of Commissioner Bergosh's remarks.

18. At the November 7, 2019, Board meeting, Commissioner Barry stated, ". . . I feel to pay this . . . is to enable, and to a degree endorse behavior that I don't agree with . . . ."

ANSWER: Admitted. It is denied that this excerpt was the entirety of Commissioner Barry's remarks.

19. At the November 7, 2019, Board meeting, Underhill's motion to have his attorney's fees and costs paid in accordance with the statute died for lack of a second. A true and accurate copy of the relevant minutes of that meeting are attached hereto as Exhibit "F."

ANSWER: It is admitted the motion died for a lack of a second, but it is denied that the Board violated any statute by allowing the motion to die for lack of a second.

20. Subsequent to the November 7, 2019, Board meeting, the First District Court of Appeal per curiam affirmed the ruling of this Court.

ANSWER: Admitted.

21. A true and accurate copy of Attorney R. Todd Harris', December 29, 2020, letter to the County Attorney providing an updated copy of invoices for Underhill's legal fees and requesting the payment of the fees and costs, again, be considered by the Board is attached hereto as Exhibit "G."

ANSWER: Admitted.

22. On January 21, 2021, the payment of Underhill's attorney's fees and costs was, again, brought before the Board. A true and accurate copy of the agenda item, is attached hereto as Exhibit "H."

ANSWER: Admitted.

23. On January 21, 2021, Underhill's motion that the Board approve the payment of his legal fees in keeping with the Policy, again, died for lack of a second. No further action was taken by the Board. A true and accurate "draft" copy of the relevant minutes of that meeting are attached hereto as Exhibit "I."

ANSWER: It is admitted that the motion died for lack of a second, but it is denied that the Board's action violated the LR Policy.

FIRST AFFIRMATIVE DEFENSE

The AWM does not meet the legal requirements necessary to compel the execution of a ministerial duty, as the Board has the discretionary authority to deny Petitioner's request for legal fees and costs according to the terms of the LR Policy.

SECOND AFFIRMATIVE DEFENSE

Petitioner has violated the LR Policy by not complying within ten days of having been served with a suit or having retained counsel and submitting the information required by Section D., Procedures, contained in the LR Policy, which is a mandatory obligation imposed on Petitioner.

THIRD AFFIRMATIVE DEFENSE

Petitioner is not entitled to seek reimbursement for legal fees and costs, as his conduct in using social media networking sites to interact with Scott Miller violated the County Commissioners' Technology Policy, adopted on August 20, 2009, which was in force on the date that Petitioner made his online comments concerning Scott Miller. A copy of the Technology Policy is attached to this response as Exhibit 1 and incorporated by reference.

CONCLUSION

The Alternative Writ in Mandamus must be denied as the Legal Representation Policy involves more than just a ministerial duty to grant attorney's fees on a rubber stamp basis, but empowers the Board to apply its discretionary authority in reviewing a commissioner's written request for attorney's fees and costs. The LR Policy mandates that a commissioner comply with its procedures to obtain publicly-funded legal representation. Moreover, Petitioner has violated the County's Technology Policy by discussing County business on a Facebook page with a constituent. Based upon the foregoing reasoning and cited authorities, the Alternative Writ in Mandamus must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished via electronic mail to Edward P. Fleming and R. Todd Harris, McDonald Fleming, LLP, 710 S. Palafox Street, Pensacola, FL 32502, Attorneys for Petitioner at epfleming@pensacolalaw.com and harrisservice@pensacolalaw.com, this 18th day of June 2021.

/s/ *Charles V. Peppler*
By: Charles V. Peppler, Deputy County Attorney
Florida Bar No.: 239739