Filing # 144852762 E-Filed 03/01/2022 04:48:49 PM

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

ESCAMBIA COUNTY

Plaintiff,

vs. CASE NO.: 2022 CA 000141

PAM CHILDERS,
Clerk of the Circuit Court and
Comptroller for Escambia County,

Defendant.
_____/

MOTION TO QUASH
ALTERNATIVE WRIT OF MANDAMUS

COMES NOW the Defendant, **Pam Childers**, as Clerk of the Circuit Court and Comptroller for Escambia County, (the "Clerk") by and through her undersigned attorneys, and hereby moves to quash the Alternative Writ of Mandamus (including dismissing the County's Amended Complaint incorporated therein). In support hereof, the Defendant states as follows:

1. The Alternative Writ of Mandamus should be quashed and the Plaintiff's Amended Complaint dismissed for two primary reasons.

2. **First**, a writ of mandamus cannot be directed to require an official to perform an act that involves the exercise of discretion, nor can it compel the undoing of an official's discretionary act. *Lee County v. State Farm Mut. Auto. Inc. Co*., 634 So. 2d 250, 251 (Fla. 2nd DCA 1994) (citing *Holland v. Wainwright,* 499 So. 2d 21 (Fla. 1st DCA 1986); *Coral Springs Tower Club II Condominium Assoc. Inc. v. Dizafalo*, 667 So. 2d 966, 967 (Fla. 4th

DCA 1996); *E. L. Eastmore v. Stone*, 265 So. 2d 517, 518 (Fla. 1st DCA 1972) (mandamus will not lie if the act involves the exercise of judgment by the officer).

a. The Clerk, as accountant for the Board of County Commissioners (the "Board"), must approve and pay County funds to a private retirement plan[1] for the benefit of Commissioners Steven Barry, Lumon May, and Robert Bender (the "Three Commissioners"). Plaintiff claims without factual or legal support that such act is simply a ministerial function for which the Clerk has no discretion. That argument fails to recognize that under the Florida Constitution the Clerk serves not only as accountant for the Board, but also as ex officio county auditor and custodian of all county funds. Art. V, §16, Fla. Const.; Art. 8, §1(d), Fla. Const.

b. As auditor of all County funds, Florida Statutes require, and decisions of the Florida Supreme Court and the First District Court of Appeals (one of which involves the Escambia County Board of County Commissioners) confirm, that before approving a County expenditure the Clerk must exercise her discretion to first determine the legality of an expenditure. *Mayes Printing v. J. A. Flowers*, 154 So. 2d 859 (Fla. 1st DCA 1963) (determination of the validity of an expenditure or claim involves discretion); *Alachua v. Powers*, 351 So. 2d 32, 37 (Fla. 1977) (clerk serves as watchdog of the board and responsibility of pre-payment audit is shared by the board and the clerk). Determining the legality of an expenditure includes a determination that an expenditure: meets a public purpose; is in conformity with county purchasing procedure; does not overspend an

[1] References to a "private" retirement plan mean a retirement plan this not part of, nor administered by, the Florida Retirement System.

account or fund of the budget; and is otherwise not unlawful or contrary to county ordinance. *Alachua* at 37.

c. In this instance, the Clerk exercised the judgment and discretion required of her office in determining that the subject contributions to the ICMA Plan[2] (which is a private retirement plan that is not part of the Florida Retirement System[3]) were unlawful and represented unauthorized compensation to the Three Commissioners.

d. If an expenditure fails the legality test during the Clerk's pre-payment audit, then the Clerk is expressly prohibited from making payment. § 129.09, Fla. Stat. (2021).

e. The Clerk's audits serve as part of a system of checks and balances contemplated by the Florida Constitution to safeguard against illegal use of County funds. The decision by the clerk to cease payments to the ICMA Plan for the Three Commissioners is a quintessential example of a discretionary act for which mandamus cannot be directed.[4]

[2] That is, the "Local Plan" as referenced in Plaintiff's Amended Complaint for Writ of Mandamus (hereinafter, the "Complaint").

[3] The Florida Retirement System refers to the statutorily-created system of State of Florida-sponsored retirement and pension benefits contemplated in the Florida Retirement System Act, Fla. Stat. Ch. 121, as administered by the Florida Department of Management Services through its Division of Retirement and overseen by the Florida State Board of Administration. The statutory system is referred to herein as either "Florida Retirement System" or "FRS."

[4] If the Plaintiff disagrees with the Clerk's determination, an action for declaratory judgment would be the appropriate vehicle for Plaintiff to challenge whether the Clerk's decision was correct. The Clerk is filing contemporaneously along herewith an action for declaratory judgment seeking confirmation of the determination and to require disgorgement and return to the public treasury of any improper contributions which heretofore were made.

3. **Second**, for mandamus to issue, the County must demonstrate that it has a clearly and certainly established legal right to the requested relief. *Soto v. Board of County Hernando County*, 716 So. 2d 863, 864 (Fla. 5th DCA); *Florida League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992) (mandamus only proper to enforce a right clearly and certainly established in the law, not to litigate its existence).

a. The County seeks to have the Clerk approve contributions to the ICMA Plan for the benefit of the Three Commissions. Yet, the system for compensation county commissioners established by the Florida Constitution and Florida Statutes does not allow the County to make retirement contributions for its commissioners to a private, non-FRS administered retirement plan. *Op. Att'y Gen. Fla.* 1991-68 (1991) (payment to a private retirement account of a county commissioner who withdrew from FRS represents additional unauthorized compensation and is thus illegal). As such, the County does not have a clearly and certainly established legal right to the requested relief.

b. The Florida Constitution establishes that the compensation of elected county officials shall be fixed by law. Art. II, § 5(c), *Fla. Const*.

c. Chapter 145, Florida Statutes, represents the Legislature's enactment of general law throughout the State fulfilling the Constitutional requirement. Therein, the Legislature reiterated the Constitutional requirement that compensation for elected county officials – including the Three Commissioners – must be provided for by "general law." A general law is one that operates universally throughout the state or uniformly upon subjects

as they may exist throughout the state. *Dep't of Bus. Regulation v. Classic Mile, Inc.,* 541 So. 2d 1155, 1157 (Fla. 1989).[5]

d. Individual county commissions are prohibited from establishing compensation for its commissioners. That subject is reserved to the State. The Legislature determined that requiring county commissioners' compensation to be established by general law (and not at the discretion of individual county commission boards) *"is needed to replace the haphazard, preferential, inequitable, and probably unconstitutional local law method of paying elected county officers."* Section 145.011(2), Florida Statutes (2021).

e. The only general laws allowing a County to make retirement contributions of public funds for the benefit of its county commissioners are those which allow commissioners, as members of the Elected Officers' Class[6], to participate in the Florida Retirement System. There is no general law of the State of Florida allowing a county to contribute public funds to a private, non-FRS retirement plan[7] for the benefit of an elected county commissioner.

[5] A resolution of one county commission – such as Resolution 97-1 as referenced in the Complaint adopting the ICMA Plan – is not a general law.

[6] § 121.052, Fla. Stat., (2021).

[7] County retirement contributions to a private, non-FRS plan for certain County **unelected personnel** is permissible and the Clerk has not questioned those contributions; nor are those contributions the subject of this action.

f. The County asserts that section 121.182, Florida Statutes, provides such express authority in general law.[8] As the Clerk will show in more detail below in the following Memorandum of Law, section 121.182, Florida Statutes, provides authority for municipalities and counties to purchase annuities (not an investment plan) for personnel in the Florida Retirement System with verified out-of-state service or those who have 25 or more years of service and have reached age 50. A reading of the statute's six sentences clearly indicates that the statute does not validate the County's sought-after expenditures.

g. The County alternatively asserts that its home-rule powers permit it to contribute county funds to the ICMA Plan for the benefit of the Three Commissioners. But, Florida Constitution Article II, Section 5(c), and Florida Statutes Chapter 145 reserve for the State the authority to enact laws on the subject of elected county officer's compensation and method of payment. Such reservation includes contributions to a private, non-FRS, retirement account. *Op. Att'y Gen. Fla.* 1991-68 (1991). See also, *Everett v. City of Tallahassee*, 840 F. Supp. 1528, 1541 (N.D. Fla. 1992)(holding that home rule power allows a local government to do anything that "fulfills a municipal purpose" and which it is not otherwise "prohibited from doing by the United States or Florida Constitutions, general or special laws, or a county charter").

[8] Oddly, the County then attaches section 2-151 to its Amended Complaint which expressly states *"[i]n accordance with F.S. § 121.055, which provides that members of the senior management service class may elected to participate in an optional annuity program…"* Section 121.182, Florida Statutes, is not referenced it its Code of Ordinances.

h. In the absence of express authorization in general law for the County to make contributions to the ICMA Plan on behalf of the Three Commissioners[9], such compensation is unlawful.

i. Correspondingly, the County has failed to demonstrate, and will be unable to demonstrate, that there is a clearly established legal right for it to make contributions to the private ICMA Plan for the Three Commissioners. Mandamus cannot lie where there is no clear legal right to the requested relief.

WHEREFORE, for the two reasons set forth above and more fully explained below in the Memorandum of Law, the Clerk requests this Court to quash the Alternative Writ of Mandamus entered on February 8, 2022, including dismissal of the County's Amended Complaint.

Memorandum of Law in Support of
Motion to Quash Alternative Writ of Mandamus

I. Legal Standard.

4. *Mandamus does not lie for the performance of a discretionary act.* Mandamus is a judicial remedy commanding a party to perform some specific duty which that party is obliged under law to perform. Mandamus cannot be directed at a duty that involves the exercise of discretion nor can it compel the doing or undoing of the discretionary act. *Lee County v. State Farm Mut. Auto. Inc. Co*., 634 So. 2d 250, 251 (Fla. 2nd DCA 1994); *Holland v. Wainwright,* 499 So. 2d 21 (Fla. 1st DCA 1986); *Coral Springs*

[9] The Clerk does not question, and has approved, Escambia County contributions to the ICMA Plan on behalf of unelected County staff who are members of the Senior Management Service Class contemplated in Fla. Stat. Sec. 121.055. The Clerk has denied only contributions to the private ICMA Plan for the Three Commissioners.

Tower Club II Condominium Assoc. Inc. v. Dizafalo, 667 So. 2d 966, 967 (Fla. 4th DCA 1996). Mandamus will not lie if the act involves the exercise of judgment by the officer. *E. L. Eastmore v. Stone*, 265 So. 2d 517 (Fla. 1st DCA 1972).

It is fundamental to the writ of mandamus that the duty of the respondent not be discretionary in nature. *Lee County v. State Farm Mut. Auto. Ins. Co*., 634 So. 2d 250, 251 (Fla. 2d DCA 1994). A writ of mandamus may be issued to command the performance only of an act involving no exercise of discretion. *Martin v. Marko*, 564 So. 2d 518, 519 (Fla. 4th DCA 1990). Mandamus does not lie for the performance of a discretionary act. *Martin v. Wilkin*, 784 So. 2d 526 (Fla. 4th DCA 2001); *Caruso v. Baumle*, 776 So. 2d 371, 372 (Fla. 5th DCA 2001); *City of Miami Beach v. Mr. Samuel's, Inc.*, 351 So. 2d 719, 722 (Fla. 1977).

A writ of mandamus cannot be used to compel a public official clothed with discretion to exercise that discretion in any particular manner. *Kraft v. State*, 156 So. 3d 1116, 1117 (Fla. 4th DCA 2015); *PCA Life Ins. Co. v. Metropolitan Dade County*, 682 So. 2d 1102, 1103 (Fla. 3d DCA 1995); *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993); *Hall v. Key*, 476 So. 2d 787, 788 (Fla. 1st DCA 1985); *Bronson v. Florida Parole and Probation Com'n*, 474 So. 2d 409 (Fla. 1st DCA 1985); *Graham v. Vann*, 394 So. 2d 180 (Fla. 1st DCA 1981). A writ of mandamus may not issue to alter or review action taken in the proper exercise of that discretion or judgment. *Reese v. Baron*, 256 So. 2d 70, 72 (Fla. 3d DCA 1971); *Solomon v. Sanitarians' Registration Bd*., 155 So. 2d 353, 356 (Fla. 1963). If the rule were otherwise, the discretion of a court would be substituted

for that of officers in the discharge of their duty. *State ex rel. Allen v. Rose*, 123 Fla. 544, 167 So. 21, 23 (1936).

5. *No clear legal right to the relief requested*. To be entitled to mandamus relief a Plaintiff *"...must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2010); *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993). A writ of mandamus is the means by which a clear legal right is enforced. *State v. Gamble*, 339 So .2d 694, 695 (Fla. 2nd DCA 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977).

Further, one seeking a writ of mandamus must show that he has a clear legal right to the performance of a clear legal duty by a public officer. *Floyd v. Laramore*, 329 So. 3d 802, 803 (First DCA 2021); *Romine v. Allen*, 262 So. 3d 855, 857 (Fla. 1st DCA 2018); *Plymel v. Moore*, 770 So. 2d 242, 246 (Fla. 1st DCA 2000) (right must be clearly and certainly established). A party petitioning for a writ of mandamus must establish a clear legal right to performance of the act requested. *Radford v. Brock*, 914 So. 2d 1066, 1067 (Fla. 2d DCA 2005); *Scott v. Lee County School Board,* 310 So. 3d 163, 164 (Fla. 2d DCA 2021); *Smith v. State*, 696 So. 2d 814, 815 (Fla. 2d DCA 1997)*; Soto v. Board of County Com'rs of Hernando*, 716 So. 2d 863, 864 (Fla. 5th DCA 1998) (citing *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992).

II. Summary of Argument.

A. Mandamus is Improper Where the Clerk Exercised Her Discretion in Determining that the Private Retirement Contributions Were Unlawful.

6. In determining that the retirement contributions for the Three Commissioners were unlawful, the Clerk exercised the discretionary responsibilities instilled upon her by the Florida Constitution and Florida Statutes to safeguard public funds against improper expenditures.

7. The Florida Constitution establishes that the Clerk serves not only as the accountant to the Board of County Commissioners (the "Board"), but also as **auditor and custodian** of the public's funds. Art. V, §16, *Fla. Const*.; Art. VIII, §1(d), *Fla. Const*.

8. As county auditor, the Clerk conducts pre-payment audits before expending public funds to assure that such expenditures are lawful. The Florida Supreme Court has stated that the Clerk's auditing responsibilities serve as

> *... a watchdog of the board in the case of pre-auditing accounts of the board in determining the legality of an expenditure*."
>
> *Alachua County v. Powers*, 351 So. 2d 32, 37 (Fla. 1977).

9. The First DCA (in a case also involving Escambia County), recognized that a determination by the Clerk of the validity of a county expenditure or claim necessarily involves the exercise of her discretion, to wit:

> *...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.*
>
> *Mayes Printing v. Flowers*, 154 So. 2d 859, 861 (Fla. 1st DCA 1963).

10. If the Clerk determines that a proposed expenditure is unlawful, the Clerk is required to refuse payment. Sec. 129.09, Fla. Stat. (2021).

11. The Plaintiff's position herein that the Clerk has no discretion in approving any expenditure submitted by the County is also refuted by statute. Section 129.09, Florida Statutes, prohibits the Clerk from paying any expense of the County that is not authorized by law.

12. It is clearly the law in Florida that the Clerk's pre-payment audit responsibilities necessarily involve the exercise of discretion to first determine the legality of a County expenditure before making payment.

13. The Clerk performed her pre-payment audit responsibilities and made the discretionary decision to not expend County funds to the private ICMA Plan for the benefit of the Three Commissioners. Thus, there is no legal duty left for the Clerk to perform. The County seeks mandamus to compel a different decision by a Clerk, but mandamus is not the proper legal vehicle to do so. *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993) (citing *Hall v. Key,* 476 So. 2d 787 (Fla. 1st DCA 1985).

B. The County Has No Legal Right to the Requested Relief.

14. A writ of mandamus is the means by which a clear legal right is enforced, and is not the appropriate procedure for the establishment of such a right. *Turner* at 538. Mandamus cannot issue for the performance of an illegal act nor can it be used to litigate the existence of a legal right. *Soto v. Board of County Com'rs of Hernando*, 716 So. 2d 863 (Fla. 5th DCA 1998) (citing *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) (mandamus cannot be used to litigate the existence of a right); *Rodriguez v. Smith*,

673 So. 2d 559 (Fla. 3d DCA 1996) (courts will not command doing of illegal act). Rather, one seeking a writ of mandamus must show that he has a clear legal right to the requested relief. *Floyd v. Laramore*, 329 So. 3d 802, 803 (First DCA 2021).

15. Article II, Section 5(c), Florida Constitution, requires the compensation of elected county officials *"to be fixed by law."* Chapter 145, Florida Statutes, represents the Legislature's enactment of general law throughout the State fulfilling the Constitutional requirement.

16. The public policy for Chapter 145 is expressly set forth in the statutes and provides *"...that a uniform and not arbitrary and discriminatory salary law is needed to replace the haphazard, preferential, inequitable, and probably unconstitutional local law method of paying county officers."* Sec. 145.011(2), *Fla. Stat*. (2021).

17. Section 145.131(2), Florida Statutes, requires that the compensation of county commissioners throughout the State *"shall be the subject of general law, only."* This means that terms for compensation of county commissioners throughout Florida may be established only by statutes adopted by the Florida Legislature. Individual county commissions are prohibited from enacting their own forms of compensation for their county commissioners.

18. A "general law" is one that operates universally throughout the state or uniformly upon subjects as they may exist throughout the state. *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1157 (Fla. 1989). In other words, a general law is one enacted by the Legislature for general application throughout the State. A resolution

of one county commission – such as Resolution 97-1 as referenced in the Complaint adopting the ICMA Plan – is not a general law.

19. Because Section 145.131(2) requires that the subject of compensation for county commissioners be established by general law "only," the Legislature has reserved for the State to enact laws on the subject and thereby precluded local county commissions from doing so.

20. Absent cessation of payments by the Clerk, the Three Commissioners would currently be receiving 51.42% of their statutorily set salary of $86,619.00[10] (or $44,539.49) per year into each of their private ICMA Plan accounts.

21. Such contributions to the private retirement accounts of the Three Commissioners represent unauthorized compensation that is outside the bounds of the general laws of the State of Florida. *Op. Att'y Gen. Fla*. 1991-68 (1991) (contributions to a private retirement account by a county to commissioner who opted out of FRS represents additional unauthorized compensation).

22. Contributions to private retirement plans for the benefit of county commissioners would be valid and lawful county expenditures *only if* clearly and specifically authorized by the Legislature.

23. Yet, there is no general law that allows a county to make retirement contributions on behalf of its county commissioners to a private, non-FRS retirement

[10] Fla. Leg. Off. of Econ. and Demo. Resch., Salaries of Elected County Constitutional Officers (September 2021), http://edr.state.fl.us/Content/local-government/reports/finsal21.pdf.

plan.[11] Rather, the FRS, through chapter 121, Florida Statutes, is the only mechanism set forth in the general laws of the State of Florida through which a county may make retirement contributions for the benefit of its commissioners.

24. In the absence of express authorization in general law for Escambia County to make contributions to the private ICMA Plan on behalf of the Three Commissioners, such manner of compensation would be unlawful. Correspondingly, the County has no "clearly and certainly established legal right" to the contributions and mandamus cannot lie where there is no clear legal right to the requested relief.

III. Argument

A. Mandamus is Improper Where the Clerk Exercised Her Discretion in Determining that the Private Retirement Contributions were Unlawful.

25. The Plaintiff's belief that the Clerk's role in approving County expenditures is simply ministerial demonstrates a fundamental lack of understanding of the system of checks and balances upon county governance established by the Florida Constitution. The Clerk's role, as county auditor, is to assure against the misuse of public funds. The public has the right to be concerned with the legitimacy of every public expenditure and the Clerk is the public's watchdog in this respect.

[11] Here, the County places misguided reliance on its adoption of County Resolution 97-1 as legal basis for the retirement contributions. Yet, that resolution is not a "general law" and does not meet the requirements of Art. II, Sec. 5(c) and Fla. Stat. Sec. 145.131(2) that county commissioners' compensation be prescribed by general law.

i. *The Clerk's Role as County Auditor and Custodian of All County Funds*

26. Article VIII, Section 1(d), Florida Constitution, establishes that the Clerk shall be the "***auditor … and custodian of all county funds****."*

27. Article V, Section 16, *Florida Constitution*, similarly provides:

> *There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and* ***one serving as*** *… ****auditor … and custodian of all county funds****.* (Emphasis added.)

28. All checks and warrants for County expenditures must be signed by the Clerk. Section 136.06(1), Florida Statutes (2021).

29. Further, the statutes also provide that all accounts of the county shall always be subject to examination by the Clerk as the County's auditor. Section 136.08, Florida Statutes (2021).

30. In her Constitutional capacity as county auditor and custodian of all county public funds, the Clerk must review each proposed County expenditure to safeguard that expenditures are legal. Section 129.09, Florida Statutes (2021) (prohibiting the Clerk, acting as County auditor, from signing illegal warrants). Such pre-payment audit authority exists to ensure the Clerk's duty and power to safeguard against the illegal use of county funds. *Brock v. Collier County,* 21 So. 3d 844 (Fla. 2d DCA 2009).

ii. *The Florida Supreme Court Has Recognized that the Clerk, as County Auditor, Must Refuse to Approve Unlawful County Expenditures.*

31. As stated by the Florida Supreme Court in *Alachua County v. Powers*, 351 So. 2d 32, 36 (1977):

> *The clerk, as auditor, is* ***required by law to refuse to sign*** *and deliver a county warrant for an unlawful expenditure, even though approved by the board of county commissioners.* [Citation omitted.] *Although an appropriation of county funds may serve a county purpose****, there must be some type of pre-audit review*** *of the disbursement in order to be sure that the funds will not be used for an unlawful purpose.* (Emphasis added.)

32. The Clerk has the responsibility to perform her auditing functions as a watchdog of the County in pre-payment auditing of accounts in order to determine the legality of proposed County expenditures. *Id.* at 37.

33. Determining the legality of an expenditure includes a determination that (1) the funds are spent for a public purpose; (2) the funds are spent in conformity with county and statutory procurement procedures; (3) the expenditure does not overspend any account or fund of the budget; and (4) the expenditure is lawful. *Id*. at 37.

iii. *The First DCA, in a Decision Involving Escambia County, Confirmed the Clerk's Discretionary Pre-Payment Audit Authority*

34. The First DCA decision of *Mayes Printing Company v. Flowers*, 154 So. 2d 859 (Fla. 1st DCA 1963), is enlightening on this point. That case involved a request by Escambia County to the then Escambia County Clerk (i.e., Joe Flowers -- the Defendant's immediate predecessor) to approve a payment to a vendor. However, the Clerk refused the payment, finding it improper because of the County's failure to have complied with required competitive bidding statutes. Suit was brought against the Clerk asserting – much the same as Escambia County now asserts in the present case – that the Clerk is a mere

figurehead and was required to approve the payment notwithstanding his concern that required bidding procedures had not been followed. *Id.* at 861.[12]

35. The trial court rejected that assertion, instead recognizing that the Clerk is not simply a "figurehead" when it comes to pre-payment audit approval of County expenditures. The First DCA specifically approved the trial court's holding:

> *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.*
>
> *Id.* at 861-862. (Emphasis added.)

36. The First DCA further confirmed the Clerk's discretionary authority to refuse to sign County checks and warrants where it identified (and answered) one of the questions presented on the appeal as:

> *Whether the clerk of the circuit court, as ex-officio auditor of the county, had the authority to refuse to sign and deliver the subject county warrant.* ***We answer this question in the affirmative.***
>
> *Id.* at 863 (emphasis added).

iv. *Decisions of Other DCA's Also Recognize the Clerk's Discretionary Pre-Payment Audit Authority*

37. The Fourth DCA, in *W and F Ltd. V. Dunkle*, 444 So. 2d 554 (Fla. 4th DCA 1984) elaborated on the great public importance of the Clerk's discretionary responsibilities as county auditor. In *Dunkle*, Palm Beach County created a corporation

[12] The Court summarized: *"'The thrust of the plaintiff's argument is that the Clerk is a mere figurehead and consequently when appropriate approval is placed upon a claim against the county by the Board, the Clerk has no alternative, once he has determined the claim's arithmetic correctness, but to issue the warrant and to affix his signature."*

for the purpose of constructing a county administrative complex. The corporation had no members, no stock, no dividends, and distributed no income. The corporation issued revenue bonds to finance the construction of the complex. The funds from the bond issuance were deposited into a bank, which acted as the trustee. As the work progressed, the corporation, an alter ego of the county, submitted requests for payment to the county for reimbursement. The arrangement omitted the Palm Beach Clerk from the payment process, leaving the Palm Beach Clerk with no pre-payment audit opportunity.

38. Disapproving of this scheme, the Fourth DCA laid out importance of a clerk's constitutional duties as county auditor by saying:

> *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. If there is potential for public harm in what the clerk seeks to achieve in this case, the trial court did not perceive it nor do we.*
>
> *Id.* at 558.

39. As did the First DCA in *Mayes Printing,* the Second DCA in *Dunkle* also concluded that the *"clerk has the authority to pre-audit the contemplated expenses"* by the county. *Id.* at 557.

40. The case of *Brock v. Board of County Com'rs of Collier County*, 21 So. 3d 844 (Fla. 2nd DCA 2009) was an instance where a county clerk sued a county to obtain custody over county funds which the county had placed into an outside checking account

for which the clerk was not a signatory. The Clerk also sought to investigate the propriety of certain expenditures from the account.

41. The Second DCA considered the scope of the powers exercised by the Clerk acting in his capacity as county auditor and custodian of all county funds. *Id.* at 845. The Court held that the Clerk has the *"statutory duty to ensure that all payments of county funds comply with applicable legal requirements." Id.* at 847. In doing so, the Court approved the portion of the trial court's ruling stating:

> *Prior to signing any warrant for the payment of any claim, bill or indebtedness from county funds, the Clerk is required to insure that the payment is lawful. Consequently, any auditing necessary to insure the legality of the expenditure prior to the payment is proper.*
>
> *Id.* at 846.

42. The clear significance of these appellate decisions is that, contrary to Plaintiff's cornerstone assertion herein, Pam Childers, in her capacity as the County's auditor and custodian of public funds, has the discretion to determine if a proposed County expenditure is lawful; and her actions in this respect are not simply ministerial.

v. The Importance of Florida Statute Section 129.09.

43. Plaintiff's Complaint repeatedly asserts that the Clerk is unable to exercise any discretion to first determine if a County expenditure is lawful; rather, the Clerk has no choice but to approve any expense submitted by the County (specifically including the

unlawful contributions to the private ICMA Plan for the benefit of the Three Commissioners).[13]

44. However, Section 129.09, Florida Statutes (2021), on the contrary states:

> ***County auditor not to sign illegal warrants.***—*Any clerk of the circuit court, acting as county auditor, who shall sign any warrant for the payment of any claim or bill or indebtedness against any county funds in excess of the expenditure allowed by law, or county ordinance, or to pay any illegal charge against the county, or to pay any claim against the county not authorized by law, or county ordinance, shall be personally liable for such amount, and if he or she shall sign such warrant willfully and knowingly he or she shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.*

45. It is the well settled rule in Florida that if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose, it also confers by implication every particular power necessary or proper for complete exercise or performance of the

---

[13] For instance:

> Paragraph 39: *"The Clerk's duty is to disburse Escambia County funds at the direction of the Board."*
>
> Paragraph 40. *"The Clerk lacks the authority to refuse to disburse funds that are lawfully apportioned and approved."*
>
> Paragraph 86. *"There is no legal basis for the Clerk to disregard the directive of the Board, or to unilaterally refuse to make payments under the County/ICMA contract."*
>
> Paragraph 88. *"The Clerk's duty to implement the County/ICMA contract by making payments is ministerial."*
>
> Paragraph 89. *"... the Clerk has failed to uphold her ministerial duty."*
>
> Paragraph 90. *"It is not within the Clerk's scope of authority to interpret the County/ICMA contract."*
>
> Paragraph 97. *"The Clerk's mandatory duty is to make the payments required by the contract."*

duty. *Peters v. Hansen*, 157 So. 2d 103, 105 (Fla. 2d DCA 1963); *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 792 (1919).

46. It is axiomatic that the Clerk cannot serve as a watchdog of County funds if, as asserted by the Plaintiff, she cannot exercise any discretion in the pre-payment decision making process.

47. The Plaintiff's allegations (footnote 13, above) that the Clerk is unable to exercise pre-payment audit discretion to determine the legality of a County expenditure have been specifically rejected by the First DCA. The Court succinctly stated:

> *Implicit in the word 'auditor' itself is that some responsibility shall attach to inquire into the legality of the claim. Be that as it may, to follow the argument of the plaintiff would be to completely disregard the provisions of ... Section 129.09, Florida Statutes.*
>
> *Mayes Printing Company v. Flowers*, 154 So. 2d 859, 861 (Fla. 1st DCA 1963).

48. The Clerk, as the County's auditor and custodian of the County's public funds, not only has the discretion to determine the propriety of a County expenditure before making payment thereof, but is statutorily prohibited from approving illegal County expenditures. With respect to her pre-payment auditing (and rejection) of County-requested retirement contributions to the ICMA Plan for the Three Commissioners, the Clerk exercised her discretion as watchdog of County funds to protect the public from unlawful expenditures. A writ of mandamus may be issued to command the performance only of an act involving no exercise of discretion. *Martin v. Marko*, 564 So. 2d 518 (Fla. 4th DCA 1990). Mandamus does not lie for the performance of a discretionary act. *Martin v. Wilkin*, 784 So. 2d 526 (Fla. 4th DCA 2001); *Caruso v. Baumle*, 776 So. 2d 371 (Fla.

5th DCA 2001); *City of Miami Beach v. Mr. Samuel's, Inc.*, 351 So. 2d 719 (Fla. 1977). Accordingly, mandamus cannot be directed at a Clerk's determination as it involved the exercise of her Florida Constitutional and statutory discretion. While Plaintiff may disagree with the Clerk's determination, a writ of mandamus cannot be used to compel a public official clothed with discretion to exercise that discretion in any particular manner. *Kraft v. State*, 156 So. 3d 1116, 1118 (Fla. 4th DCA 2015); *Turner v. Singletary*, 623 So. 2d 537, 538 (Fla. 1st DCA 1993); *Hall v. Key*, 476 So. 2d 787, 788 (Fla. 1st DCA 1985); *Bronson v. Florida Parole and Probation Com'n*, 474 So. 2d 409, 410 (Fla. 1st DCA 1985); *Graham v. Vann*, 394 So. 2d 180, 182 (Fla. 1st DCA 1981). *Reese v. Baron*, 256 So. 2d 70, 71 (Fla. 3d DCA 1971); *Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963).

B. The County Has No Legal Right to the Requested Relief.

49. A writ of mandamus is the means by which a clear legal right is enforced. Mandamus cannot issue for the performance of an illegal act. Rather, a party seeking a writ of mandamus must show that it has a clear legal right to the requested relief. *Soto v. Board of County Com'rs of Hernando*, 716 So. 2d 863 (Fla. 5th DCA 1998) (citing *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) (right to be enforced must be clearly and certainly established in the law)). Mandamus cannot issue to compel a government official to perform an act that the official cannot legally perform. *Rodriguez v. Smith,* 673 So. 2d 559 (Fla. 3d DCA 1996). A party seeking a writ of mandamus, in this case the County, must show that a legal right which is clearly and certainly established in the law exists to validate the expenditure of the County's funds to the private retirement accounts

of the Three Commissioners. The County has failed to show and will be unable to show a clearly and certainly established right in the general laws of the State of Florida.

50. In this instance, the payment of retirement contributions for the Three Commissioners to the private ICMA Plan is unlawful. The County, therefore, does not have a legal right to have the Clerk approve such payments (i.e., the County does not have a clear legal right to the relief it seeks). As such, mandamus cannot issue where the County does not have a legal right to the requested relief. Instead, the County seeks to compel the Clerk to perform an illegal act – which, under Fla. Stats. § 129.09, she is prohibited from doing.

51. In Florida, the compensation of a county commissioner can be established only by statutes adopted by the Florida Legislature. Local county commissions are prohibited from adopting their own forms of compensation for their county commissioners. As it pertains to retirement benefits for county commissioners, the ICMA Plan is not a manner of retirement benefit allowed by the Florida Legislature. Rather, that plan was adopted solely at the local level by the Escambia County Commission without statutory authority. Correspondingly, the County is prohibited from making contributions to the ICMA Plan for the Three Commissioners. Thus, the County has no legal right to the said contributions. A writ of mandamus is not permissible where the party seeking the writ is unable to show the existence of a clear legal right to the requested relief.

i. Compensation of County Commissioners Can ONLY Be Established By General Law Enacted by the Legislature.

52. Article II, Section 5(c) of the Florida Constitution provides *"The powers, duties, compensation and method of payment of state and county officers* ***shall be fixed by law.****"* (Emphasis added.) Thus, the compensation of the Three Commissioners must be "fixed by law."

53. As explained by the Florida Supreme Court, the word "law" as used in the Florida Constitutional sense means *"a statute adopted by both Houses of the Legislature."* See, *Advisory Opinion to Governor,* 22 So. 2d 398, 400 (Fla. 1945). Moreover, the term *"fixed by law"* as set forth in Article II, Section 5(c) means a law enacted by the Florida Legislature. *Op. Att'y Gen. Fla*. 91-68 (1991). Accordingly, compensation for county commissioners must be established by statutes adopted by the Legislature.

54. Counties have no independent authority to establish compensation of county commissioners. *Id.*

ii. Chapter 145's References to "General Law" Limits Retirement Contributions for County Commissioners to Those Expressly Provided by Florida Statutes.

55. Chapter 145, Florida Statutes, represents the Legislature's enabling structure for the requirement in Section 5(c), Article II, of the Florida Constitution. Chapter 145 was enacted *"to provide for the annual compensation and method of payment for the several county officers named herein."* Sec. 145.011(1), Florida Statutes (2021).[14] (emphasis supplied). Explaining the need for enacting Ch. 145, the Legislature determined:

[14] County commissioners are among the numerous county officers named in Ch. 145.

> *... that a uniform and not arbitrary and discriminatory salary law is needed to replace the haphazard, preferential, inequitable, and probably unconstitutional local law method of paying elected county officers.*
>
> § 145.001(2), Fla. Stat. (2021). (emphasis supplied).

56. Retirement contributions by a county on behalf of its county commissioners represent a part of a commissioner's total compensation. *Op. Att'y Gen. Fla*. 86-102 (1986); *Op. Att'y Gen. Fla*. 91-68 (1991).

57. Florida Statute § 145.131(2) states: *"The compensation of any official whose salary is fixed by this chapter shall be the subject of* ***general law only****."* (emphasis supplied). The compensation of county commissioners is fixed in Section 145.031. Thus, the source of the County's retirement contributions for the Three Commissioners must be found in "general law." If it is not, then the contributions would not be legal.

58. The source of the County's contributions to the ICMA Plan is Escambia County Resolution 97-1.[15] As that County resolution is not "general law," the County's retirement contributions to the ICMA Plan for the Three Commissioners is unlawful.

59. A "general law" is one that operates universally throughout the state or uniformly upon subjects as they may exist throughout the state. *Dep't of Bus. Regulation v. Classic Mile*, *Inc.*, 541 So. 2d 1155, 1157 (Fla. 1989). In other words, a general law is one enacted by the Legislature for general application throughout the State. A resolution

[15] See Paragraphs 14 – 17 of the Complaint.

of one county commission – such as Escambia County Resolution 97-1 adopting the ICMA Plan – is not a general law.

60. As Ch. 145 contemplates that county commissioners' compensation must be provided by general law, only forms of compensation established by Florida Statutes are permissible. *Op. Att'y Gen. Fla*. 91-68 (1991).

61. The FRS-sponsored retirement and pension benefits contemplated in the Florida Retirement System Act, Ch. 121, Florida Statutes, represent the only retirement plans contemplated by general law for county commissioners in Florida.

62. The Three Commissioners withdrew from the FRS in favor of attempting to get significantly more lucrative benefits from the private ICMA Plan.[16] Although county commissioners are allowed to withdraw from the FRS (that is, to decline to receive any retirement benefits from their county), counties are not allowed to make retirement contributions on the commissioners' behalf to private, non-FRS retirement plans.

iii. The Florida Attorney General Has Unequivocally Opined that Counties Are Prohibited from Making Retirement Contributions for Its County Commissioners to an Alternative, Non-FRS Retirement Plan.

63. In 1991, the Florida Attorney General addressed legal issues identical to those in this case. In *Attorney General Opinion* 91-68 (Sept. 13, 1991), Lee County posed the following question:

> *If a county commissioner opts-out of the Florida Retirement System ... may the public funds which were allocated to fund the*

[16] Instead of the 10.28% County contribution for its commissioners who participate in the FRS, (see, Sec. 121.71(4), *Fla. Stat.* (2021)), the Three Commissioners seek 51.42% contributions purportedly allowed by the ICMA Plan.

> *commissioner's retirement plan be used to fund a private retirement plan of the commissioner's choice?*

64. This is exactly what the Three Commissioners have sought for Escambia County. Having opted out of the FRS, the Three Commissioners sought to have Escambia County use the funds otherwise targeted as contributions for their FRS plans instead used to fund their private ICMA Plan.

65. In his summary answer, the Attorney General succinctly stated:

> *In the event that a county commissioner chooses not to participate in the Florida Retirement System, the county funds which were allocated to fund the employer's portion of the commissioner's retirement plan* ***may not be used to fund an alternate retirement plan.*** (Emphasis added.)

66. Just as the Clerk has reasoned above that contributions for the three Commissioners to the ICMA Plan is unlawful, the Florida Attorney General likewise stated:

> *However, pursuant to s. 5(c), Art. II, State Const., "[t]he ... compensation ... of ... county officers shall be fixed by law," i.e., a law (special or general) enacted by the State Legislature. As this office commented in AGO 81–7... "it appears that the Constitution requires that the compensation or salaries of all county officers ... 'shall be fixed by law.' "* ***Thus, counties have no independent authority to set the compensation of county officers.***
>
> *Chapter 145, F.S., represents the Legislature's enabling scheme for the requirement in s. 5(c), Art, II, State Const. This chapter was enacted "to provide for the annual compensation and method of payment for the several county officers named herein."*
>
> *Section 145.031, F.S., provides the compensation to be paid to members of the board of county commissioners. As with the salaries of other county officials prescribed in this chapter, the salaries for county commissioners are based on the population of the county in which they serve. As discussed above, the moneys which are*

> *contributed to the state retirement system by the county on behalf of an officer or employee represent a part of an official's total compensation.*
>
> ***Thus, in the absence of specific statutory authority for a county's contribution to a private retirement fund on behalf of a county commissioner, such a contribution would appear to be additional, unauthorized compensation. Because the compensation of a member of a board of county commissioners must be fixed by general law …, the payment of county funds into a private retirement fund not authorized by general law is prohibited.*** (emphasis supplied).
>
> *Op. Att'y Gen. Fla*. 91-68 (1991).

67. Following the unequivocal reasoning of the Florida Attorney General, Escambia County's proposed contributions to the private ICMA Plan for the benefit of the Three Commissioners is prohibited. Thus, the County does not have a "clearly established legal right" to the contributions. Mandamus cannot issue where the County does not have such a clearly established legal right.

iv. Escambia County is Misguided in Relying on Its Home Rule Powers as Legal Justification for Contributing to the ICMA Plan for the Three Commissioners.

68. In its Complaint, Escambia County asserts that notwithstanding the above Constitutional and statutory provisions to the contrary, the County has the "home rule" power to adopt and make contributions to the ICMA Plan for the benefit of its County Commissioners.[17] The County's reliance on its home rule authority demonstrates a lack of understanding of the limits of county home rule doctrine.

[17] See, Paragraph 32 of the Complaint (*"… a non-charter county has full authority to act through the exercise of home rule power.)* Also, see Page 22 (*"Escambia County's broad home rule authority is sufficient to authorize this contract.*)

69. Under Article VII, Section 1(f), of the *Florida Constitution*, non-charter counties (such as Escambia County) have *"such power of self-governance as is provided by general or special law."* That section of the Constitution goes on to state:

> *The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances* ***not inconsistent with general or special law****....* (Emphasis added.)

70. A county governing body has full authority to act, through the exercise of home rule power, unless the legislature has preempted a particular subject relating to county government by either general or special law. *Santa Rosa County v. Gulf Power Co*., 635 So. 2d 96 (Fla. 1st DCA 1994). If a statute has a general and uniform operation throughout the state, a county may not legislate on the subject unless authority is expressly granted. *Broward County v. Janis Development Corp*., 311 So. 2d 371 (Fla. 4th DCA 1975); *Abenkay Realty Corp. v. Dade County*, 185 So. 2d 777 (Fla. 3d DCA 1966); See also, *Everett,* 840 F. Supp. at 1541 (holding that home rule power allows a local government to do anything that "fulfills a municipal purpose" and which it is not otherwise "prohibited from doing by the United States or Florida Constitutions, general or special laws, or a county charter").

71. Here, the dictates of the Florida Constitution and Florida Statutes Ch. 145 have clearly reserved to the Legislature the enactment of laws pertaining to the compensation of county commissioners.

a. Art. II, Sec. 5(c), Fla. Const.: *"compensation ... of county officers* ***shall be fixed by law.****"*

b. Fla. Stat. Sec. 145.131(2): *"The compensation of [county commissioners]* ***shall be the subject of general law only.***"

72. Without question, the County's adoption of the ICMA Plan – to the extent that it allows the County to make retirement contributions on behalf of its commissioners[18] -- is inconsistent with Article II, Section 5(c) of the Florida Constitution and Chapter 145 of the Florida Statutes.

73. By virtue of its clear and unequivocal statements in Ch. 145, the Legislature has preempted to the State the authority to enact laws on the subject of compensation for county commissioners. Consequently, Escambia County is prohibited from taking action that provides additional forms of compensation for its commissioners than those prescribed by general law. The County's adoption of Resolution 97-1 (to the extent that it allows additional compensation for Escambia County Commissioners than the compensation contemplated in general law) violates the preemption doctrine. As Escambia County's "home rule" authority cannot be used to provide supplemental compensation for the Three Commissioners, its attempts to make retirement contributions for the Three Commissioners to the ICMA Plan are unlawful.

v. Escambia County's Assertion that Florida Statute 121.182 Authorizes the Retirement Contribution for the Three Commissioners is Disingenuous.

74. The County appears to recognize the shortcomings of its positions. While the bulk of the Complaint asserts that the Clerk's role in this instance is purely ministerial

[18] Again, the Clerk has not challenged the validity of the ICMA Plan to the extent that it allows the County to make retirement contributions for unelected County personnel.

– a position that has been demonstrated above to be in error, the County also made a half-hearted effort to argue that the County could make the retirement contribution for the Three Commissioners by virtue of its "home rule" powers. Apparently realizing that position also lacks merit and that it must point to some general law which authorizes the retirement contributions, the County shifts its argument to assert that Florida Statute § 121.182 provides the authority.[19] This, in and of itself, supports the argument that right to be asserted is not clearly and certainly established in the law.

75. As demonstrated several times, above, the County's contributions to the ICMA Plan for the benefit of the three Commissioners is justified ONLY if there is an express statutory authority for such alternative retirement contributions. Sensing that its other argument will fail, the County – in a last-ditch chance to justify the actions it has taken – then claims that Fla. Stat. § 121.182 authorizes the contributions. This position is disingenuous, at best.

76. On four instances does the Plaintiff cite Section 121.182 in the Complaint.

- In Paragraph 11, the County asserts: *"In Section 121.182, Fla. Stat., the Legislature authorized counties to create local supplemental retirement programs."*

[19] If, indeed, as Escambia County repeatedly asserts in its Complaint, the Clerk's role is purely ministerial, there should be no need for the County to assert alternative arguments (e.g., "home rule" power, Fla. Stat. 121.182, etc.).

- In Paragraph 12: *"In Section 121.182, Fla. Stat., the Legislature also authorized counties to invest funds, purchase annuities, or provide local supplemental retirement programs."*
- In Paragraph 13: *"Section 121.182's sole requirement is that any local supplemental retirement program established thereunder must comply with Art. X, Section 14 of the Florida Constitution, which requires that the program be actuarially sound."*
- In Paragraph 34: *"The County/ICMA contract is the type of contract contemplated by Section 121.182."*

77. Not once in those instances did the County mention the limitations set forth in Section 121.182. Instead of quoting the entire statute, the County instead references merely one phrase from one sentence. A reading of the entire statute shows that it clearly does not apply.

78. Florida Statute § 121.182, in its entirety, states:

> ***Retirement annuities authorized for city and county personnel***.—
>
> *Municipalities and counties are authorized to purchase annuities for all municipal and county personnel with 25 or more years of creditable service who have reached age 50 and have applied for retirement under the Florida Retirement System. No such annuity shall provide for more than the total difference in retirement income between the retirement benefit based on average monthly compensation and creditable service as of the member's early retirement date and the early retirement benefit. Municipalities and counties may also purchase annuities for members of the Florida Retirement System who have out-of-state service in another state or country which is documented as valid by the appropriate city or county. Such annuities may be based on no more than 5 years of out-of-state service and may equal, but not exceed, the benefits that would*

> *be payable under the Florida Retirement System if credit for out-of-state service was authorized under that system. Municipalities and* ***counties are authorized to*** *invest funds, purchase annuities, or* ***provide local supplemental retirement programs*** *for purposes of providing annuities for city or county personnel. All retirement annuities shall comply with s. 14, Art. X of the State Constitution.*

79. Pretending as if the other portions of the statute don't exist, the County simply relies on a phrase in the fifth sentence *"counties are authorized to … provide local supplemental retirement programs."*

80. The Plaintiff did not share the entire sentence. The entire sentence makes it clear that counties are authorized to provide supplemental programs *"for purposes of providing* ***annuities*** *for city or county* ***personnel****."*

81. The ICMA Plan is not one that provides "annuities" (also known as a defined benefit plan where upon retirement the participant is paid set benefit on an annual or periodic basis). Rather, the ICMA Plan is a defined contribution plan where a set amount is contributed to the plan each year and, upon retirement or upon separation of service, the participants can withdraw contributions.

82. Moreover, the above sentence from Section 121.182 allows counties to provide annuities *"for county personnel."* County "personnel" does not include elected county officers as such is understood within chapter 121. As an example, to be a member of the Senior Management Services Class an employee must either: (1) head an organizational unit; or (2) have the responsibility to effect or *recommend personnel*, budget, expenditure, or policy decisions in his or her areas of responsibility. §

121.055(1)(b)(c), Fla. Stat. (2021). Employees who are within the Senior Management Services Class do not recommend to hire, fire, promote, or demote elected county officers.

83. A review of the entire statute – one paragraph – makes it clear that it does not authorize Escambia County to make contributions to the ICMA Plan for the three Commissioners.

84. The first sentence authorizes

- The purchase of annuities for
- County personnel with at least 25 years of service;
- Who have reached age 50; AND
- Have applied for retirement under the Florida Retirement System.

The Three Commissioners: (i) are not County "personnel;" (ii) do not have at least "25 years of service" with the County; (iii) some have not reached "age 50;" (iv) have not "applied for retirement;" and (v) have not sought retirement under the FRS (rather, having withdrawn from the FRS, they are cannot be deemed to be members of the FRS).

85. The second sentence also applies only to the purchase of annuities (i.e, where the sentence begins: *"No such annuity ..."*). The limitation on the annuity benefit (i.e. that it shall not be more than the reduced early retirement penalty under the FRS) reinforces the interpretation that the annuity as it is understood in section 121.182 must be a defined benefit, and not a defined contribution plan.

86. The third sentence allows counties to:

- Purchase annuities for

- Members of the Florida Retirement System;
- Who have out-of-state service.

Here, the ICMA Plan is not an "annuity" plan; the Three Commissioners are not "members of the Florida Retirement System;" and the Three Commissioners do not have "out of state service"

87. The fourth sentence again makes it clear that the statute pertains to the purchase of annuities (i.e., where the sentence begins *"Such annuities ..."*).

88. The sixth sentence yet again demonstrates that the subject of Section 121.182 is "annuities" (i.e., where it provides that *"All retirement annuities ..."*).

89. Contrary to what the County would like this Court to see, Section 121.182 allows the County to purchase annuities for certain types of employees. Annuities are not the same type of investment as a defined contribution plan. The County's suggestion that the statute allows counties to provide all manners of supplemental retirement plans (including defined contribution plans) is nothing more than pure legal fiction. To use only a few words of a statute that are taken out of context is the personification of deception.

90. It is improper for the County to rely on only one phrase of one sentence of Section 121.182. A statute must be construed in its entirety. *Koile v. State*, 934 So. 2d 1226 (Fla. 2006); *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000). It is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent. *State v. Gale Distributors, Inc*., 349 So. 2d 150 (Fla. 1977). All parts of a statute must be read together in order to achieve a consistent whole. *Owens v. State,* 303 So. 3d 993 (Fla. 1st DCA 2020).

91. Reading the entirety of Section 121.182 together (much less just the entirety of just the fifth sentence of the statute), it is abundantly clear that the statute has no application here.

92. The County's disingenuous reliance on Section 121.182 is further demonstrated where it seeks to validate the ICMA Plan under section 121.182 and then circumvent compliance with Art. X, Sec. 14, Fla. Const. The last sentence of the statute requires: *"All retirement annuities shall comply with s. 14, Art. X of the State Constitution."*

93. That section of the Florida Constitution provides:

> *A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system* ***unless such unit has made*** *or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.* (emphasis supplied).
>
> Art. X, Sec. 14, *Fla. Const.*

94. Although it is readily apparent that Section 121.182 does not apply in this case, the County nonetheless tries to evade Article X, Section 14 by asserting in Paragraph 71 of the Amended Complaint that *"[t]he FRS rates are set by law following actuarial studies, and the Local Plan utilizes the FRS-set contribution rates."* As emphasized above, the Florida Constitution prohibits *"the governmental unit responsible for the"* the retirement plan (in this instance, Escambia County) from increasing benefits unless "<u>such unit</u>" makes provision for the funding of the benefits on a sound actuarial basis. In other words, following the Plaintiff's arguments, Escambia County – and not some other entity

-- must have made provision for the funding of the retirement benefits on a sound actuarial basis.

95. Yet, the County acknowledges in its Complaint that it, the governmental unit responsible for the ICMA Plan, did not make provision for the funding on a sound actuarial basis.

96. Section 121.182 does not apply in this circumstance; but, even if it did, the County's reliance thereupon as express statutory authority for the retirement contribution is misguided because, clearly, the County did not comply with the actuarial soundness requirement of Art. X, Sec. 14, Fla. Const. The County, as the governmental unit responsible for the ICMA Plan, was required to assure actuarial soundness; yet, it did not do so.

IV. CONCLUSION

97. The County has failed to show that it is entitled to a peremptory writ of mandamus compelling the Clerk to make payments to the ICMA Plan for the benefit of the Three Commissioners for the two primary reasons set forth above. First, the Clerk's pre-payment audit determination involves the act of discretion. Second, the monetary contributions of public funds to the private ICMA Plan accounts of the Three Commissioners represents additional unauthorized compensation and is thus illegal. The Three Commissioners, despite the allegations to the contrary in the Complaint, have an alternative legal remedy available and may at any time rejoin the Florida Retirement

System upon notification to the Secretary of the Department of Management Services.[20] Based on the foregoing, the Alternative Writ of Mandamus should be quashed and the Plaintiff's Amended Complaint dismissed with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Troy A. Rafferty at TRafferty@levinlaw.com, William F. Cash III, at BCash@levinlaw.com and Michael C. Bixby, at MBixby@levinlaw.com, respectively, Levin, Papantonio, Rafferty, Proctor, Buchanan, O'Brien, Barr, and Moughey, P.A., on the 1st day of March, 2022.

Matt E. Dannheisser

Matt E. Dannheisser, P.A.
Florida Bar Number: 367616
504 North Baylen Street
Pensacola, Florida 32501
Telephone Number: (850) 434-7272
Primary Email:
mdannheisser@dannheisserlaw.com
Secondary Email:
lglassman@dannheisserlaw.com
Counsel for Escambia County Clerk of the Circuit Court and Comptroller

Edward P. Fleming

EDWARD P. FLEMING
Florida Bar No.: 615927
R. TODD HARRIS
Florida Bar No.: 651931
MCDONALD FLEMING LLP
719 S. Palafox Street
Pensacola, FL 32502
(850) 202-8531
flemingservice@pensacolalaw.com
rtharris@pensacolalaw.com
Counsel for Escambia County Clerk of the Circuit Court and Comptroller

Codey L. Leigh

Codey L. Leigh, Esq.
Florida Bar No. 65405
Clerk of the Circuit Court and Comptroller
190 W. Government Street
Pensacola, Florida 32502
(850) 595-0504
legal@escambiaclerk.com
Counsel for Escambia County Clerk of the Circuit Court and Comptroller

[20] Florida Statute Section 121.052(3)(d)3 allows *"[a]ny elected officer who has withdrawn from the Florida Retirement System ... shall be permitted to rejoin the Elected Officers' Class upon written request to the administrator."*