IN THE SUPREME COURT OF FLORIDA

CASE NO: 71,662

PAUL BARRAGAN,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.
_____/

PETITION ON A CERTIFIED QUESTION
OF GREAT PUBLIC IMPORTANCE
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF THE RESPONDENT, CITY OF MIAMI

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RESPONDENT'S BRIEF ON THE MERITS

I

PREAMBLE

This proceeding is before the Court upon the District Court's certificate of a question of great public importance. The question certified by the Lower Court is:

> Does the Employer's reduction of Claimant's pension benefits pursuant to the contractual provision for offset of workers' compensation permit the Deputy's application of Section 440.21, Florida Statutes, to award compensation benefits to Claimant "at his combined maximum monthly wage"?

As will be demonstrated, the answer to this question is in the negative.

This is a workers' compensation proceeding involving a set off from BARRAGAN's disability pension of the amount of workers' compensation benefits which he receives, pursuant to provisions of the Miami Florida Code, Section 40-207(J).[1] The Petitioner BARRAGAN was the Claimant and Appellee below and shall be refer-

1. Now renumbered as Miami, Florida Code Section 40-212(N).

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red to as "**BARRAGAN**". Respondent/Self Insured, City of Miami was the Employer and Appellant below and shall be referred to as "**THE CITY**". The Record on Appeal shall be referred to by the letter "R". All emphasis shall be that of **THE CITY** unless otherwise indicated.

II

STATEMENT OF THE CASE

On February 16, 1984, **BARRAGAN** made claim for permanent total disability under the Florida Workers' Compensation Act. His claim was supplemented on October 17, 1984 to include all other benefits sought in prior claims made as a result of his industrial accident of February 25, 1987 and December 4, 1978 (R 179). The parties entered into a Pre-Trial Stipulation (R 191--192). As reflected therein, **BARRAGAN**'s claim was for permanent total disability without any offset for pension benefits (R 191). **THE CITY** defended on the basis that the Court lacked subject matter jurisdiction of the claim since **BARRAGAN** at all times was paid permanent total disability at his maximum compensation rate (R 191). The Pre-Trial Stipulation was approved and an Order entered on same by the Deputy Commissioner on March 22, 1985 (R 192).

On October 8, 1986, **THE CITY** moved to dismiss the matter for lack of subject matter jurisdiction (R 568-684). **THE CITY** maintained that the reduction of **BARRAGAN**'s monthly pension benefits by the amount of monthly workers' compensation benefits he received was a matter that solely involved the Pension Trust.

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Consequently, **THE CITY** maintained that the validity of the pension offset allowed under Section 40-207(J) was for the Circuit Court not the Deputy Commissioner to adjudicate (R 564). The matter was orally argued before the Deputy Commissioner and denied (R 81-93). The cause was tried before the Deputy Commissioner on August 13, 1985 and December 26, 1986.

The Deputy found that **BARRAGAN** filed a claim for permanent total disability on February 23, 1984. **THE CITY** administratively accepted **BARRAGAN** as permanently and totally disabled on March 18, 1984 (R 641). **BARRAGAN** was granted a disability pension by **THE CITY** on November 10, 1983 which paid benefits in the amount of $1,188.00 (R 641). The Deputy noted that although **BARRAGAN** was accepted as permanently and totally disabled, his monthly benefits have not increased, and are still in the amount of $1,188.00 per month, broken down as $541.80 for workers' compensation and $646.20 for pension benefits (R 641).

The Deputy Commissioner determined the pension fund was funded in part by **THE CITY** and in part by the individual employees (R 642). **BARRAGAN** paid in excess of $16,000.00 into the fund which was used initially to pay his monthly pension benefits (R 642). The Deputy determined that after **THE CITY**'s grant to BARRAGAN of a disability pension on November 10, 1983, the amount of the pension was arbitrarily reduced to $646.00 a month, with the balance allocated for the payment of workers' compensation (R 642). This the Deputy Commissioner determined was tantamount to having **BARRAGAN** pay for his own workers' compensation benefit

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entitlement (R 642). As a result, the Deputy ruled **THE CITY** was not entitled to a set off for pension benefits unless the total sum exceeded **BARRAGAN**'s average weekly wage (R 642-643). **THE CITY** was ordered to pay **BARRAGAN** an additional $314.84 representing the difference between the total pension and workers' compensation benefits paid to **BARRAGAN** and **BARRAGAN**'s average monthly wage (R 643).

THE CITY moved for rehearing and contended the payment of workers' compensation benefits was separate and apart from the payment of **BARRAGAN**'s pension benefits (R 647). **THE CITY** noted that the pension offset which the Deputy invalidated had been upheld by the District Court of Appeal, Third District in Hofkins v. City of Miami, 339 So.2d 1145 (Fla. 3DCA 1976). **THE CITY** maintained that the findings of the Deputy Commissioner had no basis in either law or fact (R 647-648).

THE CITY then appealed to the District Court of Appeal, First District (R 182). On appeal, **THE CITY** launched a two-fold attack on the Deputy's Order. **THE CITY** renewed its argument that the Deputy Commissioner lacked jurisdiction to determine **BARRAGAN**'s entitlement to pension benefits. Second, **THE CITY** contended that the offset of pension benefits was valid under state law.

Subsequent to the filing of the **BARRAGAN** appeal, the District Court released its opinion in City of Miami v. Knight, 510 So.2d 1069 (Fla. 1DCA), rev. den., 518 So.2d 1276 (Fla. 1987) which upheld Miami, Florida Code Section 40-207(J) as not vio-

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lating Section 440.21, Florida Statutes. A different panel of the same court then issued the opinion reached in the instant case which reversed the Deputy Commissioner on authority of Knight and certified the cause to this Court. City of Miami v. Barragan, 517 So.2d 99 (Fla. 1DCA 1988). **BARRAGAN** filed a Notice to Invoke this Court's discretionary jurisdiction based upon the certified question which this Court has accepted.

III

STATEMENT OF THE FACTS

BARRAGAN commenced employment with **THE CITY** on April 7, 1970 (R 5). He received a pension from **THE CITY** on November 13, 1983 (R 6). The pension was in the amount of $1,188.00 (R 7). This figure represented one twelth of two-thirds of **BARRAGAN**'s salary for the year prior to his retirement (R 7-8). **BARRAGAN** contributed to the pension fund during his period of employment with **THE CITY** until he was pensioned off (R 9). This contribution was in the amount of $12,000.00 (R 60).

The risk management division of **THE CITY** which handles workers' compensation claims for **THE CITY** (R 22). Risk management sends to the Pension Trust how much compensation is being paid to a Claimant (R 25, 30-31). Risk management pays workers' compensation benefits (R 25). **BARRAGAN** receives $126.00 every week in workers' compensation benefits (R 26). The Pension Trust is notified of the amount of workers' compensation paid by risk management so that it can take an offset allowed under the ordinance in the amount of the workers' compensation benefits (R

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30-32). The Pension Trust deducts from **BARRAGAN**'s pension the amount paid to **BARRAGAN** by risk management from the amount of **BARRAGAN**'s pension and pays that much less in pension benefits (R 32). The maximum a man can get is whatever his maximum pension is (R 33).

THE CITY administratively accepted **BARRAGAN** as permanently and totally disabled on March 18, 1984 after receipt of his claim on March 1, 1984 (R 64). The funds which **THE CITY** uses to pay **BARRAGAN**'s workers' compensation come from **THE CITY**'s general fund (R 123). The employees do not contribute to this fund and the fund is not reimbursed by the Pension Trust for monies paid by workers' compensation (R 124). **BARRAGAN** has been receiving permanent total disability benefits at the maximum compensation rate since March 18, 1984 (R 54-55). These benefits have never been reduced (R 122-123).

Elena Rodriguez is the administrator of the City of Miami Firefighters and Police Officer's Retirement Trust (R 101). She has nothing to do with workers' compensation (R 101). She receives information from Risk Management that a pensioner is receiving workers' compensation benefits (R 102). As of his retirement, **BARRAGAN** had paid in $16,102.56, which includes interest (R 105). Her department has nothing to do with either paying or determining workers' compensation benefits for employees (R 109). The Pension Trust does not reimburse risk management for any benefits offset from **BARRAGAN**'s pension (R 109). The Pension Trust is funded not only by employee contributions, but also by

employer contributions and appreciation from investments made by the trust (R 109).

Robert Dezube is a consulting actuary (R 111). **BARRAGAN** should receive $570,240.00 over his life expectancy in pension benefits (R 115). If the offset for workers' compensation continues to be allowed, **BARRAGAN** will receive $308,160.00 (R 115). Of the original $1,188.00 paid **BARRAGAN** on a monthly basis, approximately $26.50 is attributed to employee contributions which is a return of **BARRAGAN**'s contribution to the fund (R 115, 116). The rest of the monthly amount which he receives is attributable to **THE CITY**'s contribution (R 116). In 1984-1985, **THE CITY** contributed between 10 and 11 million dollars to the pension fund (R 117).

Dean Mielke is a labor relations officer for the City of Miami in charge of handling contract negotiations (R 136-137). He negotiated the contract with **THE CITY** and the Fraternal Order of Police (R 137). All police officers are represented by the Fraternal Order of Police for purposes of labor negotiations (R 139-140). Even if the police officer does not pay dues, he is covered by the agreement (R 140). The contract between **THE CITY** and the Fraternal Order of Police was placed in evidence as the Employer's Exhibit 2C (R 143, 559-601).

Article 24 of the contract states that all benefits provided by ordinance of the city commission and specifically provided for or abridged by the agreement shall remain in full force and effect (R 614).

IV

POINT INVOLVED ON APPEAL

WHETHER THE EMPLOYER'S REDUCTION OF CLAIMANT'S PENSION BENEFITS, PURSUANT TO CONTRACTUAL PROVISION FOR OFFSET OF WORKERS' COMPENSATION, PERMITS THE DEPUTY'S APPLICATION OF SECTION 440.21, FLORIDA STATUTES, TO AWARD COMPENSATION BENEFITS TO CLAIMANT "AS HIS COMBINED MAXIMUM MONTHLY WAGE"?

V

SUMMARY OF ARGUMENT

The undisputed and uncontradicted evidence adduced before the Deputy Commissioner established **THE CITY**'s worker's compensation program administered by the Division of Risk Management was separate and distinct from The Pension Trust which administered by the Pension Trust, an entity independent of City Government. **Miami, Florida Code Sec. 40-207(j)** provides the method for the calculation of a disability pensioner where that pensioner is also receiving worker's compensation benefits. This ordinance allows the Pension Trust to include the claimant's worker's compensation benefits in the calculation of the monthly pension benefits which has the net effect of reducing the monthly pension benefit by the amount of worker's compensation received by the pensioner.

At all times material to this cause **BARRAGAN** has received his worker's compensation benefits at the rate of $126.00 per week, the maximum rate allowed by law. The deduction has occurred not from his worker's compensation but from his disability pension. The deduction has been taken not by the Division of

Risk Management which administers **THE CITY**'s worker's compensation but by the independent Pension Trust. The Trust is not a party to this proceeding and was not before the Deputy Commissioner. To require the City through its Division of Risk Management to increase **BARRAGAN**'s worker's compensation benefits to the amount deducted by the Pension Trust, will require the Deputy to award **BARRAGAN** compensation at a rate in excess of that allowed by law. Whenever this Court has considered an offset case, the party seeking or taking the offset has been properly before the Court. In the instant case that party is not before this Court. Nor was the Pension Trust before the Deputy Commissioner. Consequently, the Deputy lacked jurisdiction to determine the matter.

Each time this Court has considered the worker's compensation offset issue, the case involved two sets of benefits (one being worker's compensation and the other being either sick leave, pension or disability) to which the Claimant was entitled independent of the other. Under such circumstances, this Court disallowed any offset. In the instant case, **BARRAGAN**'s entitlement to his pension is not independent of the worker's compensation benefits since the formula allowed by **Miami, Florida Code Sec. 40-207(j)** to calculate monthly pension benefits requires the reduction of the amount by any worker's compensation benefits. As noted by the District Court of Appeal in City of Miami vs. Knight, supra. relied upon by the Court below in reversing the Deputy Commissioner's ruling, benefits which are dependent upon

one another are not within the rule of this Court's decision of Jewel Tea vs. Florida Industrial Commission, infra. and its progeny. The District Court was correct in so concluding in that **BARRAGAN** has not independent right to his monthly pension benefits unreduced by worker's compensation benefits received as did the claimant in Jewel Tea.

A municipality is granted its power to operate by Article VIII, Section 2(b), Florida Constitution. No separate authority from the legislature is necessary. Unless a subject is expressly prohibited by law, the municipality may regulate such a subject. The subject matter which **Miami, Florida Code Sec. 40-207(j)** regulates, calculation of pension benefits, has never been expressly preempted by the legislature. Consequently, **THE CITY** retains the authority to legislate in this area.

The ordinance in question is invalid as violating **Section 440.21, Florida Statutes.** In the instant case, **BARRAGAN** did not contribute any monies whatsoever to **THE CITY**'s general fund which pays **BARRAGAN**'s worker's compensation benefits. **BARRAGAN** contributed to the pension fund which is paid and maintained by a separate entity, the Pension Trust. Consequently **BARRAGAN** is not paying any portion of his worker's compensation benefits.

As previously decided in Hoffkins vs. City of Miami, 339 So.2d 1145 (Fla. 3DCA 1976), cert. den. 348 So.2d 948 (Fla. 1977), the regulation by the ordinance of its subject matter is valid. The passage by the legislature of the Municipal Home Rule Powers Act allows the municipality to do what the legislature

could previously do. Since the legislature had regulated the same subject matter through **Section 440.09(4), Florida Statutes** (now repealed), **THE CITY** may also regulate this subject matter.

VI

ARGUMENT

> THE EMPLOYER'S REDUCTION OF CLAIMANT'S PENSION BENEFITS, PURSUANT TO CONTRACTUAL PROVISION FOR OFFSET OF WORKERS' COMPENSATION, PERMITS THE DEPUTY'S APPLICATION OF SECTION 440.21, FLORIDA STATUTES, TO AWARD COMPENSATION BENEFITS TO CLAIMANT "AS HIS COMBINED MAXIMUM MONTHLY WAGE".[2]

The offset taken by the pension board is not from **BARRAGAN**'s workers' compensation benefits, but from his disability pension and is authorized by Miami, Florida Code Section 40-207(J) which was upheld by the District Court below. **BARRAGAN**'s challenge before this Court is on two (2) grounds. First, **BARRAGAN** contends the Ordinance violates **Section 440.21(1) and 440.21(2), Florida Statutes** and is invalid. Second, **BARRAGAN** contends the Ordinance is unconstitutional as being contrary to general law and, therefore, beyond the scope of **THE CITY**'s powers under the Municipal Home Real Statute. **Chapter 166, Florida Statutes** (1973). Neither of these contentions has merit.

A. Analysis of Uncontroverted Facts

In order to properly understand **THE CITY**'s position, the undisputed and uncontroverted facts concerning the pension calcu-

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2. **THE CITY** does not agree with the phraseology of the question certified by the Lower Court. The reduction in **BARRAGAN**'s pension is not an offset, but is utilized as part of the calculation of **BARRAGAN**'s pension.

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lation and how it applies to **BARRAGAN** must be reviewed. **BARRAGAN**'s disability pension in the amount of $1,188.00 was awarded to him in November, 1983 by the pension board, a separate legal entity from **THE CITY** (R 71, 101, 109). The pension is paid by the City of Miami Firefighters and Police Officer's Pension Trust (hereinafter "Pension Trust") which is not an entity of the city government. The calculation of the amount of the pension by the pension trust is done independent of any calculation of **BARRAGAN**'s workers' compensation benefits by **THE CITY**'s risk management division.

Workers' compensation is administered by **THE CITY**'s Risk Management Department (R 22). Risk Management administratively accepted **BARRAGAN** as a permanently and totally disabled individual in March, 1984 (R 64). Since that date, **BARRAGAN** has received without fail, $126.00 per week, which represents his maximum compensation rate (R 54-55). At the time Risk Management commenced payment of permanent total disability, it informed the Pension Trust of Risk Management's obligation to pay **BARRAGAN** workers' compensation at the rate of $126.00 per week (R 25, 30-31). The Pension Trust then commenced taking the offset allowed by Miami, Florida Code Section 40-207(J) (R 102). [3]

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3. In his Order, the Deputy found **THE CITY** arbitrarily reduced **BARRAGEN**'s pension to $646.00 per month with the balance allocated for the payment of workers' compensation benefits (R 642). This finding, unsupported by evidence in the Record was not addressed by the Court below in reversing the Deputy's decision. Since this finding is without evidentiary support, it cannot stand on appeal.

BARRAGAN contributed over $12,000.00 to his pension over his twelve (12) years of service for **THE CITY**. With interest, his total contribution into the pension fund is in excess of $16,000.00 (R 105). **THE CITY** also contributed to the pension fund in an amount far in excess of **BARRAGAN**'s contribution. **THE CITY**'s expert actuary, Robert DeZube whose testimony was unrebutted and uncontradicted, testified that based upon **BARRAGAN**'s life expectancy, **BARRAGAN** receives approximately $26.50 on a monthly basis as a return on his contribution made into the plan (R 115-116).[4] Even after the reduction, **BARRAGAN** still receives a monthly amount far in excess of $26.50 per week. Consequently, **BARRAGAN** still receives full payment of the return of his contribution even after the offset is taken.

The validity of Miami, Florida Code Section 40-207(J) has never been considered by this Honorable Court although two District Courts of Appeal have upheld its validity against **Section 440.21, Florida Statutes.**[5] The Ordinance states:

> Any amounts which may be paid or payable under the provisions of any state workers' compensation or similar law to a member of . . . on account of any disability . . . shall be offset against and payable in

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4. **BARRAGEN**'s contention as expressed in his brief is that his contribution is repaid first before **THE CITY** commences its payment. This concept is unsupported by the Record. Since **THE CITY** and **BARRAGEN** contributed to the fund on an annual basis, it is logical that each payment to **BARRAGEN** contains contributions made by each party.

5. However, this Court in City of Miami v. Graham, 138 So.2d 751 (Fla. 1962), did uphold the pension deduction allowed by former **Section 440.09(4), Florida Statutes** against a similar attack.

> lieu of any benefits payable under the funds provided by the city under the provisions of the retirement system on account of the same disability . . .

Section 40-207(J) integrates the amount of workers' compensation benefits received by the pensioner as part of the calculation of the amount of the pension. It is this amount after workers' compensation is considered which the pension trust is contractually and legally obligated to pay under its ordinance.

B. The Deputy Commissioner Lacks Jurisdiction to Consider the Alleged Offset Where the Party Taking the Offset is Not a Party to this Worker's Compensation Cause

Before the Deputy Commissioner and on appeal, **THE CITY** has argued that the Deputy Commissioner lacks subject matter jurisdiction to review this claim. **THE CITY** reiterrates this contention here. The Court in City of Miami v. Knight, supra., held that the issue raised by Knight was his entitlement to additional workers' compensation benefits due to an improper offset. Relying on Jewel Tea Company, Inc. v. Florida Industrial Commission, 235 So.2d 289 (Fla. 1969), the Knight Court held that the offset issue is within the Deputy's jurisdiction to adjudicate.[6]

There are two (2) critical distinctions between this case involving an alleged offset by the Pension Trust and Jewel Tea which were overlooked by the District Court of Appeal in Knight.

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6. On point on the jurisdictional issue is General Telephone Company of Florida v. Wilcox, 509 So.2d 1270 (Fla. 1DCA 1987). There, the Deputy ruled he was without jurisdiction to determine the Employer's claim of credit for sick pay received. The First District held the Deputy had jurisdiction for the purposes of determining a proper compensation offset.

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First, in the instant case, it was undisputed that each week from the date that **BARRAGAN** was accepted as permanently and totally disabled, he had received from the Risk Management, Division of the City of Miami, workers' compensation benefits of $126.00 per week. As Jewel Tea indicates, if the Deputy Commissioner adjudicates the offset issue in favor of **BARRAGAN**, the Deputy will, of necessity, increase the amount of **BARRAGAN**'s workers' compensation benefits to an amount in excess of his maximum compensation rate, which would violate **Section 440.12, Florida Statutes.**[7] Second, calculation of **BARRAGAN**'s pension was made by the Pension Trust, an independent entity separate from **THE CITY**, which is not a party to this cause. In Jewel Tea the employer sought the offset for payments made by the group insurer. The employer was a proper party before the Deputy. In the instant case, **THE CITY** neither took, sought, nor received any benefit from the decrease in **BARRAGAN**'s pension. The Pension Trust was neither before the Deputy nor could the Deputy ever acquire jurisdiction over the Pension Trust in this cause. Consequently the District Court of Appeal erred in determining that the Deputy had jurisdiction to proceed in this matter.

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7. This Court must remember that Risk Management (which pays workers' compensation) and the Pension Trust (which pays pension benefits) are entirely separate entities and that Risk Management has paid **BARRAGAN** permanent total disability at his maximum compensation rate.

C. Review of this Court's Decisions on the Validity of Offsets

The claim made by **BARRAGAN** in the instant case is that the decision in City of Miami v. Knight, supra. is in conflict with three (3) decisions of this Court on the offset issue. The identical contention was advanced by Knight on a Petition for Review filed in this Court which was denied by this Court. Knight v. City of Miami, 518 So.2d 1276 (Fla. 1987). By its denial of the Petition for Review, this Court has already determined there is no express and direct conflict of decision between Knight and the decisions of this Court. Consequently, **BARRAGAN**'s contention of conflict must fall.

This Court has decided three (3) cases concerning the validity of offsets against workers' compensation awards. All of the cases are distinguishable from the instant case. None of this Court's decision are on point with the issue raised herein. In City of Miami v. Knight, supra.the District Court of Appeal distinguished each of this Court's decisions and explained why the pension calculation utilized by the Pension Trust is permissible. **THE CITY** suggests Knight is correctly decided and the District Court's reliance on Knight in the instant case should be affirmed.

The matter first came before this Court in Jewel Tea Company v. Florida Industrial Commission, supra. There, **CLAIMANT** suffered an injury on the job. He collected benefits for thirty--nine weeks under a policy of group insurance. **CLAIMANT** then filed successfully claimed workers' compensation. The employer

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contended that it was entitled to a credit against workers' compensation for disability benefits furnished to **CLAIMANT** under the package insurance plan. The **CLAIMANT** countered that since he had paid a portion of the premiums, no credit could be allowed. The calculation of the disability benefit under the policy and of the amount of workers' compensation were independent. Since **CLAIMANT** was contractually and legally entitled to receive both types of benefits, this Court held **Section 440.21, Florida Statutes** barred the attempted offset by the Employer.

This Court revisited the issue in Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla. 1974). There, after her industrial accident, the **CLAIMANT** received group insurance benefits. She then filed a successful claim for workers' compensation. The **CLAIMANT** did not contribute to the cost of the group insurance policy. Similar to Jewel Tea, **CLAIMANT** was independently entitled to both sick leave and workers' compensation benefits. This Court construed the issue to be whether sick leave benefits were to be credited against workers' compensation. The Court construed **Section 440.21, Florida Statutes** to prevent the offset of compensation benefits by fringe benefits given to the employee. In Brown, the relief sought was a lessening of the amount of workers' compensation that the **CLAIMANT** could obtain from the employee. This, this Court ruled could not be done.

The most recent case decided by this Court on the validity of offsets is Domutz v. Southern Bell Telephone & Telegraph Company, 339 So.2d 636 (Fla. 1976). There, **EMPLOYER** sought a credit

against workers' compensation benefits in the amount of pension benefits CLAIMANT received. CLAIMANT did not contribute to the pension. This Court, relying on Brown held the issue is not who contributed, but whether the combination of workers' compensation plus pension exceeded the CLAIMANT's average weekly wage. As in Jewel and Brown, the benefits sought to be offset were separate and distinct and CLAIMANT was legally entitled to the full value of both up to the amount of CLAIMANT's average monthly wage. See also, Department of Highway Safety v. McBride, 420 So.2d 897 (Fla. 1DCA 1982). The instant cause is not controlled by the foregoing decisions.

D. The Instant Cause Permissably Uses Workers' Compensation Benefits as a Criteria to Determine the Amount of BARRAGAN's Pension.

This cause is different from any previously decided by this Court. Miami, Fla. Code Section 40-207(J) mandates a change in the calculation of the amount of pension benefits when a pensioner receives workers' compensation benefits. In calculating the amount of the monthly pension benefits to which BARRAGAN is entitled, workers' compensation benefit received by CLAIMANT are utilized by the Pension Trust. This readily distinguishes this cause from Jewel Tea, Brown, and Dometz because in those cases, the Employer sought an offset against separate benefits which were determined and calculated independent of workers' compensation. In the instant case, there is no such entitlement to the pension amount unreduced by and independent of workers' compensation.

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The Knight Court recognized this critical distinction between the calculation of a pension under Miami, Florida Code Section 40-207(J) and the offset sought by the Employers in Jewel Tea and its progeny. In Knight, the Court construed Jewel Tea and its progeny to stand for the proposition that workers' compensation benefits may not be reduced by any benefit to which the CLAIMANT is contractually and/or legally entitled independent of workers' compensation. Id. at 1073. The Knight Court noted that City of Miami Code, Section 40-207(J) was part of both Knight's pension and employment contracts. In the Court's words, Knight's entitlement to a specific pension amount was not contractually independent of his entitlement to workers' compensation benefits, but rather expressly dependent thereon.[8] Id. Consequently, the Court distinguished Knight from Jewel Tea and held the pension calculation mandated by Miami, Florida Code Section 40-207(J) to include workers' compensation benefits valid. The result in Knight is correct. The District Court's reliance in the instant case on Knight to reverse the Deputy's decision is appropriate. The decision below should be approved.

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8. This is identical (although stated differently) to THE CITY's contention that the pension ordinance does not create an offset from workers' compensation, but rather includes workers' compensation in the formula by which the amount of CLAIMANT's pension is determined.

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E. Miami, Florida Code Sec. 40-207(j) is Neither Invalid Against Nor Preempted by Section 440.21, Florida Statutes

A two-fold argument is utilized by **BARRAGAN** with regard to preemption. First, **BARRAGAN** suggests that the field of workers' compensation has been preempted by the legislature. Second **BARRAGAN** contends that **THE CITY's** offset ordinance conflicts with **Section 440.21, Florida Statutes.** Under either theory, **BARRAGAN** maintains that **Miami, Florida Code Sec. 40-207(j)** is invalid and consequently, the decision of the District Court below must be reversed. Neither theory has merit.

In Florida, municipalities derive their power from Article VIII, Sec 2(b), Florida Constitution. This section grants to municipalities the following powers:

> (b) POWERS: Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

This section vests municipalities with the authority to conduct municipal government and municipalities are not dependent upon the legislature of further authorization. State vs. City of Sunrise, 354 So.2d 1206 (Fla. 1978).

In 1973 the Florida Legislature clarified the scope of municipal home rule through the passage of the Municipal Home Rule Powers Act, ch. 73-129, Laws of Florida. This law, codified as chapter 166, Florida Statutes, allows a municipality to enact legislation on any subject unless expressly prohibited by law.

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City of Miami Beach vs. Rocio Corporation, 404 So.2d 1066 (Fla. 3DCA), rev. den. 408 So.2d 1092 (Fla. 1981). In this regard, Section 166.021(3) states:

> (3) The legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Article VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act, except:
> ...
>
> (c). Any subject expressly preempted to state or county government by the constitution or by general law.
>
> (Emphasis Added)

Under the scheme of Florida Constitutional Law, in order for a municipality to be deprived of the power to act concerning a particular area, the legislature must expressly preempt the field with regard to that area. The requirement of express preemption requires a specific statement as the preemption cannot be made by implication nor by inference. Board of Trustees of City of Dunedin Municipal Firefighters Retirement System vs. Dulje, 453 So.2d 177 (Fla. 2DCA 1984); City of Venice vs. Valente, 429 So.2d 1241 (Fla. 2DCA 1983). This Court in Tribune Company vs. Cannella, 458 So.2d 1075 (Fla. 1984), noted that the Florida Constitution had a very restrictive preemption doctrine which "left home rule to municipalities unless the legislature has expressly said other-

wise." Id. at 1077. [9] Applying the foregoing to the instant cause, **BARRAGAN** must demonstrate that the legislature has expressly preempted the field with regard the subject matter which Miami, Florida Code Sec. 40-207(j) regulates. This **BARRAGAN** cannot do.

With regard to **BARRAGAN'S** first contention, the ordinance in question regulates not worker's compensation but the amount of **BARRAGAN'S** pension and describes actions that the Pension Trust will take upon payment of worker's compensation benefits to a pensioner. The Legislature has not expressly preempted the field of pensions so as to prevent a municipality from legislating a pension plan. Assuming arguendo that the field of workers' compensation has been preempted by the legislature, Miami, Florida Code Section 40-207(J) neither regulates nor legislates the field of workers' compensation. Consequently, even if the legislature has preempted the field of workers' compensation, the ordinance is valid.

BARRAGAN'S fall back position is that Miami, Florida Code Section 40-207(J) violates **Section 440.21(1), Florida Statutes.** This Statute states in pertinent part:

> No agreement by an employee . . . to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid.

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9. **Section 175.321, Florida Statutes** is an example of express preemption in the field of pensions. This statute by its very language is applicable to municipalities, thereby expressly preempting the field.

This Statute, by its terms, makes it illegal for an employee to pay any portion of the monies utilized by the employer to fund workers' compensation. **Miami, Florida Code Sec. 40-207(j)** does not run afoul of this statute because **BARRAGAN** did not contribute to the general fund which is the source of **THE CITY'S** funds utilized to pay worker's compensation benefits. The unrebutted, uncontroverted testimony of **THE CITY'S** witnesses established that the only plan to which **CLAIMANT** contributed was the pension plan administered not by **THE CITY** through its Division of Risk Management but by the independent Pension Trust. There is no money sent by the Pension Fund to workers' compensation when the Pension Fund utilizes a disability pensioner's workers' compensation benefits to determine the amount of the pension to be paid by the Pension Trust. There is no evidence in this record which establishes or even remotely suggests that **BARRAGAN** was ever called upon to contribute any monies to **THE CITY'S** general fund to fund his worker's compensation benefits. The ordinance does not violate **Section 440.21(1), Florida Statutes.**

The Pension Ordinance in question does not impinge upon the monthly return of **BARRAGAN'S** contribution to the fund. The testimony of Robert Dezube, **THE CITY's** expert actuary, was that **BARRAGAN** received $26.50 on a montly basis as a return on the $16,000.00 he had put into the pension fund. Even after the reduction in **BARRAGAN's** pension due to the inclusion of his worker's compensation in the calculation of his pension, **BARRAGAN** still receives more than $26.50 per month in pension benefits.

Under these circumstances, there is no violation of Section 440.21, Florida Statutes.

The District Court in Knight found that Miami, Florida Code Sec. 40-207(j) did not violate Section 440.21, Florida Statutes. In reaching this conclusion, the Court relied upon in Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3DCA 1976), cert. den., 348 So.2d 948 (Fla. 1977). There, Plaintiff sought a declaratory decree that the ordinance violated Section 440.21(2), Florida Statutes. The Third District held that since the former Section 440.09(4), Florida Statutes allowed for the same type of reduction of pension benefits as THE CITY'S pension ordinance, due to the passage of the Municipal Home Rule Powers Act by the legislature, THE CITY ordinance must also be valid. The Court noted:

> This is especially true in the present instance where, under the Municipal Home Rule Powers Act, Chapter 73-129, Laws of Florida (1973) (Chapter 163, Florida Statutes), municipalities are granted all powers exercisable by the state with the exception of areas expressly forbidden or preempted by the constitution, general laws, county charters, or special laws of the state.
>
> The City of Miami offset does not go beyond its own contributions to the pension fund, and the offset is equivalent to the amount of workers' compensation benefits which is totally financed by the City of Miami.

The Hoffkins Court recognized that the legislature in promulgating the Municipal Home Rule Powers Act had essentially juxtaposed the Municipalities in the same position as the legislature unless the subject matter was expressly preempted by general law.

Therefore since the legislature had regulated the pension deduction area, the Court concluded **THE CITY** could also regulate such an area under its home rule power. **THE CITY** respectfully suggests that the result reached by the Third District in **Hoffkins** is correct. There is nothing to indicate that the legislature intended to preempt the field concerning pension calculation.

It is important to note the temporal connection between the repeal of **Section 440.09(4), Florida Statutes** and the enactment of the Municipal Home Rule Powers Act, **Section 166.011 et seq., Florida Statutes** (1973). On June 7, 1973 the Florida legislature repealed **Section 440.09(4)**, pursuant to Laws 1973, Chapter 73-127, Section 2. On that same date, the legislature enacted the Municipal Home Powers Act pursuant to Laws 1973, Chapter 73-129, Section 1. Respondent contends that the legislative will as indicated by the timing of the above actions was intended to allow municipalities the right to enact by ordinance, the regulations previously authorized by statute.

Contrary to Petitioner's argument, the very fact that **Section 440.09(4), Florida Statutes** was repealed and **Section 166.011, et seq.** was enacted, gives rise to the presumption that the legislature conferred a general grant of power on the municipality, including all powers that are fairly within the terms of the grant and are essential to the purposes of the municipality. State ex rel. Meredith v. Borman, 138 Fla. 149, 189 So. 669 (1939). Sub judice, the repeal of **Section 440.09(4), Florida Statutes**, and the enactment of **Section 166.011 et seq., Florida**

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Statutes merely gives THE CITY a new format by which to operate its pension calculation and does not conflict with Section 440.21, Florida Statutes (1971) which deals exclusively with workers' compensation benefits.

It should be noted that even though Section 440.09(4) was repealed, the policy behind it also applies to Miami, Florida Code Sec. 40-207(J). This Court in interpreting former Section 440.09(4), Florida Statutes stated:

> The legislative intent seems clear: That an employee shall not receive both a pension and workman's compensation from his employer when the employer is the state or any political subdivision . . .

City of Miami v. Graham, 138 So.2d 751 (Fla. 1962). This is especially true where, sub judice, BARRAGAN has received all of his workers' compensation benefits, and only his separate pension benefits, not workers' compensation benefits are at issue here.

It is clear that THE CITY had a contractual right to reduce BARRAGAN's pension benefits, a right vested in the municipality through Section 166.011 et seq., and enunciated in Ordinance 40-207(J). A municipality may exercise those powers expressly granted and such powers as may be implied from or as may be incident to those granted. City of Gainesville v. Board of Control, 81 So.2d 514 (Fla. 1955). Sub Judice, where there is no conflict with any general laws, the municipality has the right to enact those ordinances which it deems necessary to fulfill its municipal needs. Lake Worth Utilities Authority v. City of Lake Worth, 468 So.2d 215 (Fla. 1985). Miami, Florida Code Sec.

40-207(j) is a valid extension of this power, and as applied sub judice, is not in conflict with **Sections 440.21(1) or 440.21(2), Florida Statutes.**

VII

CONCLUSION

Based upon the foregoing cases, statutes, and other authorities, Respondent, THE CITY OF MIAMI, respectfully requests that the decisions of the First District Court of Appeal in both City of Miami vs. Knight and the instant case be upheld and affirmed in all respects.

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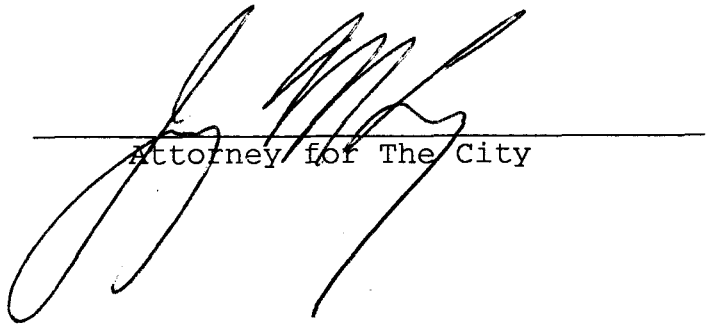
VIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief was mailed this 22nd day of March, 1988 to: JOSEPH C. SEGOR, ESQUIRE, 12815 S.W. 112th Court, Miami, florida 33176; and, WILLIAMS & ZIENTZ, 1100 Datran Center Two, 9130 S. Dadeland Boulevard, Miami, Florida 33156.



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