IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,662

PAUL BARRAGAN, *

Petitioner, *

v. *

CITY OF MIAMI, *

Respondent. *

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

REPLY BRIEF OF THE PETITIONER, PAUL BARRAGAN

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I

THE DEPUTY WAS AUTHORIZED BY SECTION 440.21 FLORIDA STATUTES (1979) AND THE DECISIONS OF THIS COURT TO AWARD WORKERS' COMPENSATION BENEFITS TO THE CLAIMANT IN AN AMOUNT THAT WOULD PROVIDE HIM WITH COMBINED COMPENSATION AND PENSION BENEFITS EQUAL TO HIS AVERAGE MONTHLY WAGE.

The cornerstone of the City's argument is its contention that the reduction in Barragan's pension was not an offset and that his workers' compensation benefit is merely utilized for the purpose of calculating his pension (Appellee's Brief, p.11 n.2 and many other places). Based on this assumption, the City asks the court to conclude that the Deputy did not have jurisdiction over the offset issue and that the City acted properly when it reduced Barragan's pension by 46%.

A. THE DEPUTY HAD JURISDICTION TO DETERMINE THE VALIDITY OF THE OFFSET.

The court should have none of this. Even the Knight court[1] rejected the jurisdictional argument, pointing out that the issue ruled upon by the Deputy in that case was Knight's entitlement to additional workers' compensation benefits based on an allegedly improper offset, 510 So.2d at 1072-1073. Relying on Jewel Tea Company, Inc. v. Florida Industrial Commission, 235

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[1] City of Miami v. Knight, 510 So.2d 1069, 1072-1073 (Fla.1st DCA 1987).

So.2d 289, 291 (Fla.1970) the First DCA affirmed on the question of jurisdiction, but went on to rule that the offset was legal.

The City has attempted to distinguish Jewel Tea Company on two grounds. First, that Barragan received his full workers' compensation benefit from the City's Division of Risk Management and therefore the Deputy's order would require a payment in excess of the compensation rate. That argument is wrong because the reduction in pension benefits had the economic effect of totally nullifying the Claimant's workers' compensation benefit. This court pointed out in Jewel Tea Company that it does not matter which side of the equation the reduction is made, the pension side or the compensation side, the reduction is illegal, 235 So.2d at 291.

In accordance with Jewel Tea the Deputy recognized that Mr. Barragn was not receiving any compensation at all, but was receiving pension payments from two different sources, the Pension Trust and the City's General Fund by way of Risk Management. Consequently, the effect of his order is to authorize compensation benefits of $311.84, an amount well within the allowable compensation benefit of $541.80.[2]

The fact that as a result of its attempt to evade the compensation statute, the City now finds itself paying Mr. Barragan a pension from two differenct sources, is not a reason

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[2]As pointed out in the Appellant's initial brief, the compensation benefit was capped at $311.84 in order to prevent the combined pension and compensation benefits from exceeding Mr. Barragan's average weekly wage.

for denying the Deputy jurisdiction. The City created the situation and can correct it by recouping from the Pension Trust the money it has paid out from the General Fund. The Deputy cannot be divested of jurisdiction over compensation matters by any maneuver of the City regarding the organization of its pension obligations.

For this reason, the City's second basis for distinguishing Jewel Tea must be rejected. The City argues that the Pension Trust caused the pension reduction and the trust was not a party before the Deputy nor could it be brought before him. Obviously, the City cannot prevent the Deputy from determining that the pension reduction was an illegal workers' compensation offset by the artifice of setting up an independent entity to administer pensions. The authority to take an offset derives from a City ordinance and, therefore the City is responsible for causing the reduction. Once it is understood that the pension reduction is, in reality, a reduction in workers' compensation benefits, the mechanism by which the reduction is accomplished becomes irrelevant.

Jewel Tea and Knight as well as Chancey v. Florida Public Utilities, 426 So.2d 1140 (Fla.1st DCA 1983) and General Telephone Co. of Florida v. Willcox, 509 So.2d 1270 (Fla.1st DCA 1987) recognize that the Deputy can determine the legality of an offset without regard to the form adopted by the employer to effectuate the offset. The proper payment of workers'

compensation is the duty of the employer and the Deputy has jurisdiction to enforce that duty.

B. THE DECISIONS OF THIS COURT CONFLICT WITH THE FIRST DCA'S DECISION IN KNIGHT.

The City argues that there is no conflict between Knight, supra and this court's decisions in Jewel Tea Company, supra; Brown v. S.S. Kresge Company, Inc., 305 So.2d 191 (Fla.1975) and Domutz v. Southern Bell Telephone & Telegraph Company, 339 So.2d 636 (Fla.1976) because this court refused to accept conflict jurisdiction in Knight. The inference sought to be drawn from the court's refusal to review Knight is, of course, impermissible.

The court did not give a reason why it refused jurisdiction in Knight. Under the constitution, the court may review cases where there is an express and direct conflict, Article V, Section 3 (b)(3) Florida Constitution. The court's authority to review conflict cases is discretionary, not mandatory, Florida Greyhound Owners Association v. West Flagler Association Ltd., 347 So.2d 408 (Fla.1977), England, J. concurring, and therefore no substantive inference can be drawn from a denial of jurisdiction without opinion.

The other reason given by the City for distinguishing this court's cases is the one relied upon by the First DCA in Knight. The Knight court ruled that the Claimant's in the Supreme Court cases cited above had contractual rights to both full compensation benefits and full fringe benefits. The errors

in that contention have been set out in the Appellant's Initial Brief. It is sufficient to say here that the entitlement to full compensation benefits is guaranteed by the workers' compensation law and that guarantee cannot be modified by private contractual agreements, because such agreements are expressly prohibited, § 440.21 (1) & (2) Florida Statutes (1979).

If the Jewel Tea Company line of cases had been intended by the Supreme Court to turn on the lack of an agreement to limit benefits, there would have been no need to mention the workers' compensation statute. They would have been decided on the basis of contract principles. That is not how they were decided. The decisions involve interpretations of the compensation law only and have nothing to do with the existence or non-existence of agreements to permit offsets.

The argument that the offset is permissable because the City's authorizing ordinance is incorporated in Barragan's employment agreement is an attempt by the City to pull itself up by its own boot straps. The workers' compensation statute clearly prohibits agreements that have the effect of reducing compensation benefits, § 440.21 (1) & (2). Consequently, the existence of such an agreement cannot make legal an offset that would be illegal without the agreement.

Private employers are clearly barred from making such agreements. The only way that the City's agreement can be upheld is if municipal employers stand on a different footing than

private employers. The City's attempts to justify such a distinction are unpersuasive.

C. THE CITY'S OFFSET ORDINANCE MUST FAIL BECAUSE THE FIELD OF WORKERS' COMPENSATION HAS BEEN PREEMPTED BY THE LEGISLATURE AND BECAUSE THE ORDINANCE CONFLICTS WITH SECTION 440.21 FLORIDA STATUTES (1979).

1. THE LEGISLATURE HAS PREEMPTED THE FIELD.

The City's response to Barragan's assertion that the legislature has preempted the field of workers' compensation is two fold: it denies the preemption without providing any analysis to support the denial and it argues that its ordinance does not regulate workers' compensation.

In his initial brief, Barragan pointed out that the workers' compensation statute binds all employers and employees subject to its jurisdiction, § 440.03 Florida Statutes (1979), and that municipalities are employers under the statute, § 440.02 (12). Barragan also stated that § 440.10 requires every employer coming within the provisions of the statute to provide the compensation set out in the law, § 440.11 (1) makes the statute the exclusive remedy against the employer and § 440.55 waives sovereign immunity, thereby putting private and public employers on an equal footing.

The City has not suggested any reason why these provisions do not reflect an express occupation of the workers'

compensation field by the legislature. Instead, it has attempted to elide the issue by arguing that its ordinance does not regulate workers' compensation. The reasons for rejecting that argument have been set out earlier and will not be repeated here. The ordinance clearly affects workers' compensation benefits and must fall because the legislature has preempted that field.

2. THE ORDINANCE CONFLICTS WITH SECTION 440.21 (1) & (2) FLORIDA STATUTES (1979).

The City first argues that § 440.21 (1) has not been violated because there is no evidence that Mr. Barragan ever contributed toward his compensation coverage. That contention can be seen to be incorrect when it is recognized that he contributed toward the pension fund, which in turn was reduced by the amount of his workers' compensation. This scheme can be viewed as one in which the City appropriated a portion of Barragan's pension and applied it to the pensions of other former City employees, thereby freeing City funds, which were then paid to Barragan in the form of workers' compensation. In effect, this is equivalent to a requirement that Barragan contribute toward his compensation payments.

Whether or not the ordinance is deemed to violate § 440.21 (1), it clearly violates § 440.21 (2) which prohibits agreements by an employee to waive his right to compensation. The City relies on Hoffkins v. City of Miami, 339 So.2d 1145

(Fla.3rd DCA 1976) cert.den. 348 So.2d 948 (Fla.1977) to support its position that the ordinance does not violate the statute.

The City construes Hoffkins to hold that the City can regulate the pension deduction field because previously the legislature has regulated that field and there is nothing to suggest that the legislature has preempted the field. The City misstates the holding in Hoffkins.

The Hoffkins court never stated that it was dealing with pension deductions and not workers' compensation. The Hoffkins court always assumed that it was dealing with workers' compensation, but reasoned that if the legislature could authorize the offset under former § 440.09 (4) Florida Statutes (1953) the City could authorize it by ordinance under the Home Rule Powers Act, § 166.011 et seq., Florida Statutes (1973). If, as the City contends, the offset is purely concerned with pension matters, then it follows that the statutory authorization for the offset should have been placed in the pension statute and not in § 440.09 (4) of the Workers' Compensation Statute. That was not done and therefore, the conclusion is inescapable that Hoffkins is a workers' compensation case.

Barragan has explained in his initial brief that Hoffkins was wrongly decided because the legislature preempted the workers' compensation field and because the ordinance violates § 440.21.

To counteract this argument, the City contends that the repeal of § 440.09 (4) Florida Statutes (1953), which authorized

the offset, and the enactment of the Home Rule Powers Act in the same year, indicates that the legislature intended to give the City the power to enact the offset.

The City's conclusion does not flow from the fact that the repeal of § 440.09 (4) and the enactment of the Home Rule Powers Act both occurred in 1973. The legislature certainly did not expressly state such an intent and the more logical assumption is that the repeal of § 440.09 (4) indicates a desire to put public and private employees on the same footing. Absent a clear expression of legislative intent, it should not be assumed that after the repeal municipalities retained their preferred status. Instead, the normal interpretation of repealer statutes should be applied and it should be held that the City's power to enact an offset died with the repeal of § 440.09 (4), Yaffee v. International Company, 80 So.2d 910 (Fla.1955).

Under the Home Rule Powers Act, the City stands in no better position then it did under the old system, where all of its powers were granted by the legislature. Then as now, the City is powerless to enact ordinances that conflict with statutes, City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.1972); City of Venice v. Valente, 429 So.2d 1241 (Fla.2d DCA 1983).

Despite the City's continued assertions that its ordinance involves the pension field and not workers' compensation, it is clear that the pension offset applied in this

case reduces Mr. Barragan's compensation benefits and therefore, conflicts with the workers' compensation statute.

This court should so hold.

CONCLUSION

The court should declare that the offset ordinance is preempted and in conflict with State law. The certified question should be answered in the affirmative, the decision of the District Court should be quashed, City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987), rev.den. 12/07/87 (Fla.) should be disapproved with regard to the pension offset issue and the cause remanded with directions to reinstate the Deputy's order.

Respectfully submitted,

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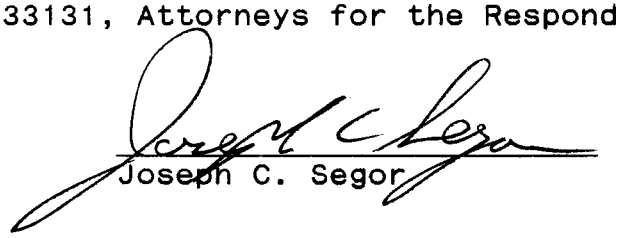
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of the Petitioner, Paul Barragan has been mailed April 8, 1988 to: Jay M. Levy of Hershoff and Levy, P.A., 6401 S.W. 87th Avenue, Suite 200, Miami, FL 33173 and Martha Fornaris, Assistant City Attorney, 700 AmeriFirst Building, One S.E. Third Avenue, Miami, FL 33131, Attorneys for the Respondent.



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