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IN THE SUPREME COURT

STATE OF FLORIDA

BROWARD COUNTY,

Petitioner/Appellant,

CASE NO. 73,475

vs.

KEITH FINLAYSON, et al,

Respondent/Appellee.

ANSWER BRIEF OF RESPONDENT/APPELLEE KEITH FINLAYSON, et al

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STATEMENT OF THE FACTS

A. **INTRODUCTION.**

The PARAMEDICS reject the COUNTY's "preliminary statement" and Statement of the Facts found on Pages **2** through 10 of its brief. Although deficiencies in the statement will be addressed here and elsewhere in the brief, one continuing pattern, holding over from the COUNTY's approach in the Fourth District is particularly egregious. As the initial complaint in this cause and all subsequent pleadings thereafter reflect, the Plaintiff has at all times been a Rule **1.220** common law class made up of certain individual paramedics who were employed by the COUNTY during the period commencing July 16, **1978** and ending September **30, 1979.** (See, e.g., **R-214, 305, 352, 391, 728, 757, 940).** At all times relevant to the dispute in this cause, no union represented any member of this class with respect to any terms and conditions of employment during the period in question, although an organizing campaign was underway in which Local Union **2485** of the IAFF became certified and eventually negotiated a contract which took effect on October **1, 1979.**

By definition, the class has no interest here in any of the terms and conditions of employment after October **1, 1979,** and the Local Union has no interest in the overtime prior to that time. Notwithstanding this fact, and for reasons which can only demonstrate an attempt by the COUNTY's specially retained labor law counsel to stir up what it must believe are latent anti-union

feelings, the COUNTY has persistently alleged in its Statement of the Facts and elsewhere such "facts" as that the Local Union appealed the denial of a grievance (COUNTY's brief at 1), that the Local Union commenced the instant action (COUNTY's brief at 11), and that the Local Union appealed to the Fourth District in Finlayson I (COUNTY's brief at **12**). No record support is presented for these representations because there is none. They are simply not true.

Still further, as the COUNTY's labor law counsel must be aware, Florida is a right to work state and thus no paramedic was required to join the union at any time. Florida Constitution, Article I, Section 6 (1968). Similarly, since members of the common law class of individuals who were paramedics during the relevant period were allowed to opt out or be deemed excluded from the class, there was no showing (nor could there have been) of the magnitude to which the members of the class during the relevant period continued in employment with the COUNTY and joined the union thereafter.

B. **FACTUAL STATEMENT.**

The complaint in this cause in essence sought payment of hourly wages, plus premium pay (overtime) for hours worked by the PARAMEDICS beyond the **40** hours for which they were paid pursuant to COUNTY regulations, and consistent with the written representation and schedule of benefits presented by the COUNTY to the PARAMEDICS at the time they were hired. **(R-214,** Plaintiffs' Trial Exhibits 1, 2, AA-1,2). When hired, the PARAMEDICS were required by the COUNTY to work **24** hours on duty

and then have 48 hours off (R-46). During this period of being on duty, all PARAMEDICS were required and were engaged to be at their work stations at all times, waiting to respond immediately to any call for emergency assistance that should be required by citizens in Broward County. (R-47). Although the PARAMEDICS were allowed to sleep and eat as time would allow during their 24 continuous shift, they were required by the COUNTY to be ready to respond to emergency calls within 30 to 60 seconds. Id.

Notwithstanding each PARAMEDIC's continuous duty shift of 24 hours, the COUNTY required each PARAMEDIC to report only 16 hours of work on his or her time sheet, so as to yield a deflated work week of only 40 hours. (R-51). In fact, working 24 hours on and 48 hours off, each paramedic worked either two or three complete 24 hour shifts per week, and, on annual average, was required to be on duty working for just in excess of 56 hours per week. (R-55).

The PARAMEDICS complained from time to time of this deflated work record and in response to those complaints, the COUNTY considered adding the missing 8 hours per shift for each shift in which the PARAMEDIC did not receive five hours of uninterrupted sleep. (R-53-54). It was soon demonstrated to the COUNTY that the PARAMEDICS were able to get that five hours of sleep on only an extremely small number of occasions, and as a result, the COUNTY rescinded its plan to reflect accurately the hours worked.[1] (Id.).

.....

[1] The COUNTY attempted, through a witness with no computer training to explain that somehow the COUNTY's computer was not programmed, or could not be programmed, to understand any work

If, during the relevant period, a paramedic did work more than the required one shift in three, the COUNTY paid overtime (time and one-half) for those hours worked.[2]

The COUNTY's Statement of the Facts suggests that the only guidelines for payment of overtime to COUNTY employees during the period relevant to this suit was Section 103.142 of the COUNTY's Civil Service Rules (quoted in full on Page 4 of the COUNTY's brief) and an Administrative Order. That regulation provided, among other things, that

> After 40 hours, employee [sic] will be paid at the rate of time and one-half.

In March of 1979, the COUNTY issued Administrative Order No. 419, which was not a new ruling, but which was issued as a "clarification" of that which had previously existed. (Plaintiffs' Trial Exhibit 1, AA-1). This administrative order provided information "to insure pay policy application

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week other than a "normal" 40 hour work week. (R-89-90). No explanation was made as to why the COUNTY didn't program the computer to reflect accurately the PARAMEDICS' records, obtain a computer with the capability to reflect accurately the PARAMEDICS' records, or manually adjust the computer work product so as to reflect accurately the PARAMEDICS' records.

[2] See R-943. The reporting practice that the COUNTY required the PARAMEDICS to use actually negated the premium effect of the overtime pay. In other words, if a PARAMEDIC were to work a complete additional shift of 24 hours, he or she would not receive 24 hours of time and one-half pay (or the equivalent of 36 hours of regular pay). Instead, since the COUNTY required all PARAMEDICS to report on their time records only 16 hours for each 24 hours actually worked, the effect of paying time and one-half for those 16 hours of work was to pay that paramedic for 24 hours of work at the regular hourly rate. (Sixteen (reported) overtime hours times 1.5 equals 24 hours). Thus, although by the COUNTY's logic, overtime pay was afforded PARAMEDICS who worked an extra shift, in reality they were simply paid at the COUNTY-designated regular hourly rate for the exact number of hours actually worked.

consistency throughout our jurisdiction," insuring "a single uniform standard." It then significantly concluded "after 40 hours actually worked, the employee will be paid at the rate of time and one-half." (Emphasis in original).

In addition to this rule and administrative order which direct the payment of overtime for hours worked beyond 40, the PARAMEDICS were also presented with a schedule of benefits when they were hired which specifically represented that, in addition to a general annual salary rate and hourly wage, the PARAMEDICS would be compensated at time and one-half for hours over 40 hours weekly. (R-73, Plaintiffs' Trial Exhibit 2, AA-2).

Accordingly, the factual record before the trial court, before the Fourth District, and before this Court establishes clearly that each PARAMEDIC worked slightly in excess of 56 hours each week, that the COUNTY had specifically agreed in writing to pay those PARAMEDICS a defined regular hourly wage, as well as time and one-half for all hours worked beyond 40 per week, and that the COUNTY, by its own regulations and administrative order, was required to pay all COUNTY employees (including PARAMEDICS) time and one-half for hours worked beyond 40 per week. **(R-55, AA-1).**

STATEMENT OF THE CASE

As noted above, the complaint in this cause was filed in July of 1980 and was the complaint upon which this case went to trial. (R-214). The COUNTY's original motion to dismiss raised a subject matter jurisdiction defense, but, after it was denied, it did not resurface until this Court. (R-297, 304). The COUNTY's original answer raised no "defenses," although later amended answers did raise the "defense" of failure to exhaust administrative remedies. At no time after January 15, 1981, however, did the COUNTY argue that its defense deprived the trial court or the Fourth District of subject matter jurisdiction. (R-306, 391, 539, AA-3).

The complaint was filed after the named plaintiff, KEITH FINLAYSON, filed a grievance with her supervisor. (A-2). Notwithstanding Civil Service Rules which require that supervisor to hold a hearing or meeting with the employee, no such meeting was held. (AA-3, R 502-10). Further, the grievance was not "denied" by that supervisor, but was rejected as outside of the grievance process. Mr. Cunningham stated "I cannot accept the attached styled grievance as a bona fide grievance." (A-2). To insure that every possible avenue was covered, the PARAMEDICS filed an appeal to the Fourth District with respect to said rejection, but later dismissed that appeal in favor of the circuit court action. (R-553).

The PARAMEDICS moved for a partial summary judgment on the defense of failure to exhaust administrative remedies and,

following briefing and argument, the motion was granted. (R-502,533,539). From that point until the filing of the COUNTY's brief in the Supreme Court, and most specifically throughout the second appeal to the Fourth District (which this Court is reviewing), the COUNTY never raised any argument with respect to either exhaustion of administrative remedies or subject matter jurisdiction. (AA-3).

On May 30, 1984, the trial court granted final summary judgment for the COUNTY, both because of the trial court's construction of the COUNTY's rules and regulations and because of its conclusion that the class had waived or was estopped from claiming overtime because of acquiescence in the previous system. (R-711).

The Fourth District reversed that summary judgment in Finlayson I and stated:

> The County admits that the EMTs actually worked just over 56 hours per period . . . . Of the 56 hours worked, sixteen were actually overtime.

471 So.2d at 68, A-1.

Thus, construing the controlling regulations, the Court determined that the COUNTY was obligated to pay overtime for hours that the PARAMEDICS work beyond 40 each week.

The COUNTY sought rehearing in Finlayson I, but (1) never challenged the court's determinations that it had admitted that the PARAMEDICS worked 56 hours per week and (2) after denial of the motion, sought no review in this Court. (AA-4).

When the case was remanded to the trial court, the PARAMEDICS moved for the entry of judgment pursuant to Finlayson

11, which directed that the COUNTY was liable for overtime for each hour worked in excess of 40 hours per we k, for such hours as were not paid or fully paid. **(R-757).** After additional motions were filed with respect to the issues to be tried in the case, the court determined that the remaining issue was whether the salary received by the members of the Plaintiff class constituted payment for all scheduled hours worked or just **40** hours per week.

The case came to trial in **1986** and the transcript is in the record **(R-1).** The testimony established that when PARAMEDICS were hired by the COUNTY, they were given a COUNTY document which, fully consistent with the COUNTY's regulation and Administrative Order **419,** gave PARAMEDICS overtime for all hours worked beyond **40** per week. **(R-73,** Plaintiffs' Trial Exhibit **2,** AA-1). For simplicity, the nature of excluded evidence and proffers and the insufficiency thereof will be discussed in the Argument section of the brief.

At the conclusion of the trial, the jury was asked in a special verdict

> Did the annual salary received by each member of the class constitute payment for **40** hours per week or 56 hours on an average per week. **(R-210).**

The jury concluded that the payment had been for only **40** hours per week, thereby entitling each class member to payment for sixteen hours of pay at time and one-half for each week worked during the relevant time period -- July 16, **1978** to September **30, 1979. (R-956).**

The PARAMEDICS submitted a proposed final judgment and, over objection with respect to prejudgment interest, the judgment was entered, including interest from the dates the overtime payments were due. (R-1048-49).

The PARAMEDICS also requested attorney's fees, seeking fees not only for the lodestar (reasonable hours times reasonable rate), but also for a contingency risk enhancement. (R-1040). Prior to the hearing on this motion, the contingent fee agreement with the attorneys for the class was disclosed, which showed that the PARAMEDICS' attorneys were entitled to a non-contingent $10,000 fee regardless of result and a scaled contingency fee, entitling them to $241,233.71. (A-6, R-1045-47). Contrary to the express statement found at Page 18 of the COUNTY's brief, trial counsel for the COUNTY at no time ever argued to the trial court that the existence of the $10,000 non-contingent portion of the fee agreement would in any way bar the court from utilizing a contingency risk enhancement. The Court's attention is directed to the complete transcript on that hearing (R-1272-1323) and more specifically to the pages upon which it is claimed the objection was made (R-1279, 1306-07). The latter pages have been included in the PARAMEDICS' Appendix for this Court's review. (AA-5). The COUNTY also suggests that a contention was made in the trial court that an award for appellate fees was unauthorized. Again, the COUNTY's citation does not support the claim that the issue was presented to the trial court.[3] (R-1276).

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[3]It appears that the COUNTY's reference to the record citations may be misnumbered by one. Accordingly, in an abundance of caution, record citations with respect to the hearing on

Following the hearing, at which the COUNTY continuously argued that the award of attorney's fees was discretionary (R-1306,1309,1314), the court awarded fees of $241,233.71, which is the amount allowed under the contingent fee agreement.

The COUNTY appealed the judgments to the Fourth District in Finlayson 11, arguing some, but not all of the issues which are argued or implied in this brief. Specifically, the COUNTY did not argue the issue of exhaustion of administrative remedies, subject matter jurisdiction, or waiver and estoppel. (AA-3). Following full and complete briefing and oral argument, the Fourth District affirmed all issues, seeing the need to write an opinion only on the issue of prejudgment interest. (A-1). Because the decision in Finlayson II suggested there might be a conflict between it and the decision in Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1989), the COUNTY requested the Fourth District to certify the cases as being in direct conflict. After the PARAMEDICS responded in opposition to that, drawing the Court's attention to the completely different factual context in which Sigman arose, the Fourth District denied the motion to certify.

This discretionary review proceeding in the Court followed.

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attorney's fees are as referred to in the COUNTY's brief. Nevertheless, in the appendix to this brief, an additional page on each side of those cited by the COUNTY has been included for continuity.

SUMMARY OF ARGUMENT

1. The prejudgment interest award on this claim for overtime back wages is fully supported by a long series of cases in Florida which hold that parties lawfully contracting with a governmental entity to provide services authorized by law are entitled to recover prejudgment interest when the government breaches its contractual and statutory obligations to pay for the services rendered. Prejudgment interest is necessary to make the claimants whole and is an essential portion of the claimants' pecuniary damages.

2. The doctrine of exhaustion of administrative remedies involves discretionary deference to such proceedings and not subject matter jurisdiction. Additionally, the exhaustion defense has been waived since it was never argued to the Fourth District.

3. Following the Fourth District's decision in Finlayson I, the issue remaining for trial was essentially determined by the law of the case and the COUNTY has presented or proffered no excluded evidence to this Court which was excluded by virtue of an abuse of discretion. The COUNTY's proffers were either non-existent or related to the conduct of separate entities that were not parties to this litigation.

4. The trial court's enhancement of the lodestar was eminently correct since the fee arrangement was virtually totally contingent. Moreover, the COUNTY has waived its right to

challenge the enhancement since it wholly failed to present that issue to the trial court for its consideration.

ARGUMENT

POINT I ON APPEAL

(PETITIONER'S POINT III ON APPEAL RESTATED)

WHETHER THE TRIAL COURT AND THE FOURTH DISTRICT COURT OF APPEAL COMMITTED REVERSIBLE ERROR IN AWARDING PREJUDGMENT INTEREST ON THE BACK PAY AWARD.

A. Introduction.

The Petitioner's points on review/appeal have been reordered for two essential reasons. First of all, it was the claimed jurisdictional conflict on the prejudgment interest point which brought this case to the Supreme Court in the first place. The PARAMEDICS realize that, while this Court no longer "grants certiorari" in such cases, it has established merit briefing. Accordingly, it is believed appropriate to consider this "jurisdictional issue" first and, should the Court conclude that the decision below is not only correct, but not in jurisdictional conflict, this matter would be resolved.

Secondly, should this Court ultimately determine that it has conflict jurisdiction, requiring it to resolve the issue concerning prejudgment interest, then, while the Court has the power to consider all issues in the case, the weight of Supreme Court authority suggests that the Court's decision to do so is a discretionary one. See generally Freund v. State, 520 So.2d 556, 557, n.2 (Fla. 1988); Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530, 531 (Fla. 1985). Of the many issues the COUNTY preserved in the trial court and on appeal to the Fourth District Court of Appeal[4] in its attempt to avoid the wage claims

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[4] As will be discussed in greater detail hereafter, the COUNTY's

of its employees, only the prejudgment interest issue was found by the court below to be sufficient to warrant substantive discussion. Thus, while each point raised by the COUNTY will be addressed and the reasons for affirmance separately established, the PARAMEDICS felt it appropriate to address the "jurisdictional" issue of prejudgment interest at the outset.

B. Prejudgment Interest on Governmental Obligations.

An understanding of the COUNTY's position on prejudgment interest and of its fatal flaws is quickly appreciated by addressing the case around which the COUNTY has again constructed its argument. Flack v. Graham, 461 So.2d 82 (Fla. 1984). Far from being a broad policy statement against prejudgment interest on back pay claims with respect to contractual obligations of governmental bodies, the Flack case instead acknowledged the many circumstances in which prejudgment interest is properly allowed against a governmental body. It then carefully pointed out why in the unusual facts before it, no interest would be imposed.

In Flack, a judicial candidate had lost an election for County Court Judge, but through a series of actions over three years, was successful in challenging certain ballots and eventually in being sworn in as the county judge who should have been elected in the first place. During that three year period,

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exhaustion of administrative remedies argument was never presented or preserved in its appeal to the Fourth District Court of Appeal below, and its arguments that the partial non-contingency of the fee agreement with the lawyer for the class bars any enhancement, and that appellate fees were not appropriate were never argued to the trial court in any fashion.

the individual who initially "won" the election before Flack brought her successful ballot challenge had served on the bench and had received full compensation for services from the State of Florida. After successfully establishing her right to become a county judge, Flack then brought a separate mandamus action against the Governor and the Comptroller's office in an attempt to establish a clear legal right to prejudgment interest on the salary that was attributable to the judgeship to which she had been elected three years earlier.

Thus, at the factual level, Flack was by no means a typical case by an employee against a recalcitrant employer. In fact, since it was a mandamus case and not a contract case, this Court could hardly have given (and did not give) *any* emphasis to the non-payment of prejudgment interest on contractually based back pay claims.

After reviewing a seemingly conflicting series of cases dealing with a variety of prejudgment interest claims against State agencies, this Court harmonized them by analogizing Flack to the case of Mailman v. Green, 111 So.2d 267 (Fla. 1959). Like Flack, this Court noted that Mailman was not an action against the State for a contractual recovery of money, but was against the Comptroller predicated on the assumption that petitioners had a clear legal right to interest on refunded taxes. Finding no authority for the payment of interest on such a claim, this Court went on to say:

> The money was not inequitably withheld by the State and used by it to the detriment of petitioners. The matter was simply in suspense, pending settlement by a court

> of a dispute to which the State was not directly but only vicariously interested.

111 So.2d at 269.

This was virtually the same position the State was in in Flack. It was not a party to Flack's litigation concerning her seat on the bench and in fact the State had been paying a salary to the temporarily successful judge for the same three year period for which Flack now sought "back wages." In short, Flack requested prejudgment interest on unearned back wages since she did not perform the work of a judge during that time.

This case is quite different. The COUNTY at no time paid anyone else to do the PARAMEDICS' overtime work. Instead, the COUNTY simply failed to honor its own regulations and contractual obligations which required it to pay overtime for hours worked in excess of 40 per week. While Flack did not perform her work in any strict sense, the plaintiff class members always performed the overtime work for which they now seek interest from their employer. The COUNTY has simply refused to pay the PARAMEDICS in this litigation and has been sued for breach of its contract.

The second line of authority discussed in Flack is far closer to the issue before this Court.[5] While not applying these cases to the unusual facts before it in Flack (a non-contract case), this Court by no means rejected the validity of the rule allowing prejudgment interest where a governmental entity was in

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[5] Brooks v. School Board of Brevard County, 419 So.2d 659 (Fla. 5th DCA 1982); Florida Livestock Board v. Gladden, 86 So.2d 812 (Fla. 1956); Treadway v. Terrell, 117 Fla. 838, 158 So. 512 (1935).

a direct contractual relationship with a private party and that party sought prejudgment interest on an unpaid contractual sum.

Accordingly, as this Court stated in Treadway v. Terrell, 117 Fla. 838, 158 So. 512 (1935), quoting United States v. North Carolina, 136 U.S. 211 (1890):

> A State is not liable to pay interest on its debts unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers.

158 So. at 517 (emphasis added). Thus, although Treadway was a case where a statute authorized the suit, the Court also stated "the general principles of liability for interest may be applied in proper cases of contract obligation." Thus, in Treadway, where there was authority (there statutory)[6] to sue the State, any implied immunity from the payment of interest may be waived or impliedly authorized by that statute.[7]

Since the essential claim of the PARAMEDICS here was for breach of contract, this Court's decision in Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984) is also important. The Court there held that:

> Where the State has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the

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[6] Although the precise basis of the claim in this cause was for breach of contract, it should be noted that suits on such employment contracts are expressly or impliedly authorized by Florida Statutes. See Fla. Stat. §§ 125.01, 125.15, and 687.01.

[7] In 1933, this Court in Board of Public Instruction of Okaloosa County v. Kennedy seemed to require a specific statutory provision to award interest on a statutory/contract claim. 147 So. 250 (Fla. 1933). Even though not reversed (or even mentioned) in Treadway, by 1935 this Court acknowledged its willingness to imply an interest obligation, unless there is a pertinent statutory limitation.

> State from action arising from the State's breach of that contract.

471 So.2d at 5. While one court[8] has attempted to limit that provision to only those claims arising from the express written provisions in a contract, the better view clearly is reflected by the decisions in Dade County v. American Reinsurance Co., 467 So.2d 414 (Fla. 3d DCA 1985); and Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988). Those cases necessarily apply Pan-Am to implied conditions as well as express conditions. As stated in Dade County:

> The principle is established in Florida that where the state (or any of its subdivisions) can sue or be sued, the state (or subdivision) is impliedly liable for any interest on a claim against it.

467 So.2d at 418. See also Broward County v. Sattler, 400 So.2d 1031, 1033 (Fla. 4th DCA 1981) (liability for interest "may be implied from statutory authorization to sue a governmental entity . . . despite the absence of a specific authorizing statute or contract").

On our facts, the distinction between express or implied conditions is immaterial. While there was no complete and separate written contract between each paramedic and the COUNTY, the COUNTY's obligation concerning the payment of overtime which is the subject of this lawsuit was an express provision contained in BROWARD COUNTY's written rules and regulations and as such, as a matter of law, was a part of each

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[8] Southern Roadbuilders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986), rev. den. 504 So.2d 768 (Fla. 1987).

and every contractual relationship. It was also a written representation given to PARAMEDICS when they were hired. (AA-2).

From the foregoing analysis, the reasoning of this Court in the Treadway case is wholly applicable. When the authority to sue contains no limitations with respect to the payment of interest on contractual debts, then the general principles of liability for interest can be applied in contract cases, so long as to do so comports with justice, equity, dignity and honor of the sovereign. See 158 So. at 518.

This Court recognized in Argonaut Insurance Co. v. May Plumbing Co., **474** So.2d 212 (Fla. 1985), that Florida is and has been committed to the "loss theory" with respect to the payment of prejudgment interest. To make a claimant whole for the deprivation of a claimant's funds or property requires that the plaintiff be reimbursed, as a matter of law, his prejudgment interest at the prevailing rate "from the date of that loss." **474** So.2d at 215.

In this context, the COUNTY's discussion of the concept of **"equities"** is distressing. Unlike the Court in Flack which was faced with two innocent victims -- the state (which had nothing to do with Flack not being selected judge) and Flack herself -- this Court, like the trial court and the unanimous Fourth District, faces a class of employees on the one hand who had worked each and every hour for the overtime pay that their contractual agreement promised and a COUNTY on the other whose own regulations required overtime to be paid. The equities in the case could not be clearer.

In an attempt to avoid this reality, two arguments have been advanced. The first is a suggestion that the passage of time during which period no class member filed a lawsuit or grievance constitutes the equivalent of a waiver by and estoppel against the class.' Although that theory was an alternative basis of the original summary judgment in favor of the COUNTY, reversed in Finlayson I, that defense was not preserved for consideration by this Court since it was never raised or argued in the COUNTY's appeal in Finlayson 11. To attempt to resurrect it now in the Supreme Court is not only legally incorrect, it is "inequitable." See Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Mariani v. Schleman, 94 So.2d 829 (Fla. 1957); Gifford v. Galaxie Homes of Tampa, Inc., 204 So.2d 1 (Fla. 1967); City of Miami v. Steckloff, 111 So.2d 446 (Fla. 1959).

The second argument addressed to the issue of equities can only be viewed as another deliberate attempt to activate some form of latent anti-union animus against this class of individuals. The actions (corporate and otherwise) of the local union are in no way binding upon the members of this common law class. Although there is some (but undefined) overlap in membership, the representatives negotiate on a broad range of issues, assigning their own priorities, and acts on behalf of different people, at totally different points in time. They are,

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'The COUNTY also argues that the grievance in 1980 was the first disclosure to it of this claim. Not true. The grievance itself demonstrates prior complaints, as does the trial testimony. See A-2, R-53-54).

therefore, concerned with correspondingly different rights and relationships.

The COUNTY's final response is the suggestion that the five day time for the filing of grievances should somehow defeat the two year statute of limitations which governed this case pursuant to Chapter 95 of the Florida Statutes. See Fla. Stat. §§ 95.11(4)(c) and 95.03. Again, the issue was at no time presented to the Fourth District, nor was it presented to the trial court on any issue relating to prejudgment interest. See Gifford, supra; Steckloff, supra.

In short, the PARAMEDICS were hired under a set of rules and regulations that paid them overtime for hours worked beyond 40 hours, and were handed a schedule of benefits that specifically confirmed those regulations. (R-72-74, AA-2). The COUNTY received services from the PARAMEDICS pursuant to these contractual and legal obligations and should not now be heard to attempt to avoid that obligation by suggesting that the "equities" favor the recalcitrant employer.10

When the reported decisions in the State of Florida are reviewed on the issue of prejudgment interest for contractual back pay claims such as this, it is respectfully suggested to this Court that the decision in Finlayson II is both correct and

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10 The COUNTY also suggests that the Argonaut decision was a change in the law and, therefore, it is inequitable to suggest that the COUNTY should go back and correct this contractual wrong which predated the Argonaut decision. A simple reference to this Court's opinion in Argonaut, however, correctly reflects that prejudgment interest has been an element of pecuniary damages in Liquidated damages cases since at least the turn of the century. 374 So.2d at 214.

in no jurisdictional conflict with any other decision. The claimed conflict presented to this Court was with the case of Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1987).[11] The PARAMEDICS' position on the absence of conflict and the significance of the Sigman decision is set forth in detail in their jurisdictional brief and will not be repeated in toto here. Some comparison of the two cases, however, is essential.

The case before this Court is a contractual claim for back wages against a county in a suit authorized both by statute and by the nature of contract. The Sigman case was, by definition, not a contract case. Instead, it was a pure statutory cause of action based upon the provisions of Florida Statute § 295.14. That section, and specifically sub-section 2 applies the penalty provisions only against "any agency, employee, or officer of the state or a political subdivision thereof found to be in violation" of certain veterans' preference statutes. Since the defendant in Sigman was a city and not the state or a political subdivision thereof, the Third District concluded:

> The penalties provided by Section 295.14 Florida Statutes (1985) apply to an agency, officer or employee of this state or one of its political subdivisions. Since the City of Miami is neither an agency, officer, or employee, Section 295.14 does not apply.

Accordingly, although Sigman does not award prejudgment interest to the claimant before it, the basis for the denial was

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[11] Although the original decision in Finlayson II acknowledged that their decision "may well be in conflict" with Sigman, when asked to face the issue directly on a motion to certify that its decision was in conflict with Sigman, the court below declined to make that certification.

that the theory upon which the suit was based -- specific statutory cause of action -- did not authorize prejudgment interest against a municipality, but only against state agencies.[12]

The COUNTY does correctly acknowledge in footnote 11 that the First District in Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432 (Fla. 1st DCA) rev. denied 525 So.2d 877 (Fla. 1988) affirmed a PERC award of prejudgment interest to a public employee and rejected the arguments the COUNTY makes here. The suggestion contained in the balance of that footnote, however, that the Legislature transferred certain jurisdiction to PERC knowing that PERC had a practice of awarding prejudgment interest on back pay claims not only is unsupported by the cases cited, but significantly begs the question -- "How could PERC have awarded prejudgment interest in cases prior to the Legislature's action?" The answer quite simply is that the combined effect of cases such as Treadway, Pan-Am, Argonaut, Sattler, Brooks, and Dade County left the Public Employees' Relations Commission with no alternative other than to award prejudgment interest in such cases.[13] To make

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After determining that there was no statutory cause of action, the Third District did discuss Flack and construed it, in dicta, more narrowly than is appropriate. If such comments can create jurisdictional conflict, they should be corrected by this Court.

[13] Alternatively, the COUNTY argues that prejudgment interest does not commence to run until a "demand for payment" is made. While that was true in the three cited cases because in each case it was the demand that caused the debt to become due, when a debt is owed, irrespective of a demand, then the obligation to award prejudgment interest relates back to the date the debt became due. In this case, and as calculated in the judgment in this cause, the debt became due during each pay period for which the

employees whole for the wrongful act of public employers, the "loss theory" dictates an award of prejudgment interest.

The decisions of the trial court and the Fourth District with respect to prejudgment interest were correct in all respects. They should be affirmed and, to the extent this Court feels that no conflict exists with Sigman, then and in that event this discretionary review proceeding should be dismissed.

COUNTY did not pay overtime. See, e.g., Butler Plaza, Inc. v. Allen Trovillion, Inc., 389 So.2d 682 (Fla. 5th DCA 1980). Compare Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988), Brooks v. School Board of Brevard County, 419 So.2d 659 (Fla. 5th DCA 1982) and Parker v. Brinson Construction Co., 78 So.2d 873 (Fla. 1955) with National Union Fire Insurance Co. v. Gelfand, 477 So.2d 28 (Fla. 3d DCA 1985) and Law v. Blue Lagoon-Pompano, Inc., 470 So.2d 33 (Fla. 4th DCA 1985) (claim not based on sums due pursuant to contractual performance, but rather for the return of a purchase price, necessitating a demand therefor).

POINT II ON APPEAL

(PETITIONER'S POINT I ON APPEAL RESTATED)

WHETHER THE AFFIRMATIVE DEFENSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES DEFEATS THE SUBJECT MATTER JURISDICTION OF THE CIRCUIT COURT AND, IF SO, IS THE DEFENSE WAIVED BY FAILING TO APPEAL THE ISSUE TO THE FOURTH DISTRICT IN FINLAYSON 11.

At the outset, the Court's attention needs to be drawn to the fact, if not otherwise apparent, that the COUNTY has not argued the defense of failure to exhaust administrative remedies to any court in any way since **1983.** Although its original motion to dismiss claimed a lack of subject matter jurisdiction, in neither its answer, nor amended answers, nor memorandum of law in the trial court, did the COUNTY ever try to recloak its affirmative defense as an attack on the trial court's "subject matter jurisdiction." PARAMEDICS moved for partial summary judgment on this issue (R-502) and it was granted. (R-533).

After the **1983** summary judgment nothing was heard of exhaustion of remedies or subject matter jurisdiction -- through all further proceedings in the trial court, the first appeal, the remand, or the second appeal to the district court in Finlayson II, -- until it resurfaced as Point I in the COUNTY's Initial Brief in this Court.

The rationale for the COUNTY's decision to revive this issue as an attack on subject matter jurisdiction, rather than as its status as an affirmative defense, is obvious. Having long since sbandoned the argument below, and most importantly, having never raised it or presented it, particularly in the Fourth District, in Finlayson 11, the affirmative defense has not been preserved

for review by this Court. Dober, supra; Gifford, supra. Since a court's subject matter jurisdiction can be challenged at any time, the reason for the COUNTY's old argument having new trappings, however ill suited, is apparent.

Distilled to its essence, the COUNTY's position is that its civil service rules and regulations can oust a constitutionally created circuit court from its subject matter jurisdiction over those disputes referred to it by general law (here, declaratory judgments under Chapter 86 and breach of contract actions for damages under Chapter 26). Respectfully, the rules do not have that force or effect.

While, in a proper case, if the defense of failure to exhaust administrative remedies has been timely made and preserved, a court should defer or abstain from proceeding until exhaustion has occurred, that deference is not because the court lacks subject matter jurisdiction. Accordingly, the COUNTY's bold opening statement that it is "settled law" that a court lacks subject matter jurisdiction if administrative remedies have not been exhausted is categorically rejected.

Appellate cases in which the doctrine of exhaustion of administrative remedies has been properly preserved in the trial court and brought before the appellate court for review occasionally utilize the word "jurisdiction" in deciding that they will require a plaintiff to exhaust his administrative remedies. A review of cases which have analyzed the question of the court's subject matter jurisdiction, however, yields the inescapable conclusion that courts finding no subject matter

jurisdiction terminology are either confusing the concept with that of primary jurisdiction or are simply misinformed.

Thus, in St. Joe Paper Co. v. Florida Department of Natural Resources, ___ So.2d ___ (Fla. 1st DCA, December 21, 1988, 14 F.L.W. 25), the First District reviewed an order that dismissed a complaint for lack of jurisdiction, based upon a finding that the plaintiff had failed to exhaust its administrative remedies. In a detailed analysis of the questions of power versus deference, the court stated that the issue is one of policy and not jurisdiction:

> Under [the doctrine of exhaustion of administrative remedies], the circuit court cannot be said to have lacked subject matter jurisdiction in this case, but only to have chosen to abstain from exercising that jurisdiction in deference to the administrative process.

Similarly, that court in State Department of General Services v. Biltmore Construction Co., 413 So.2d 803, 804 (Fla. 1st DCA 1982) stated:

> The question of whether or not jurisdiction over a controversy is in the court or in an administrative agency proceeding is one of policy and not of power or jurisdiction. See Gulf Pines Memorial Park v. Oaklawn Memorial, 361 So.2d 695 (Fla. 1978). As a matter of policy, a court should not exercise its jurisdiction if an adequate administrative remedy is available until that remedy has been exhausted. [Citations omitted].

In City of Miramar v. DCA Homes, Inc., 385 So.2d 152 (Fla. 4th DCA 1980), the Fourth District also considered an exhaustion of administrative remedies argument.

> Neither is jurisdiction over the subject matter, in the conventional sense of that phrase, involved here. The defense of failure to exhaust administrative remedies sounds more in policy than in jurisdiction. To be sure, the phrase primary jurisdiction has been employed to describe the seeming lack of power of a court to

> exercise jurisdiction where this defense is successfully interposed. Pushkin v. Lombard, 279 So.2d 79 (Fla. 3rd DCA 1973); School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977). However, we prefer the analysis and language of Jones v. Braxton, 379 So.2d 115 (Fla. 1st DCA 1979) that what is involved in these cases is policy, not jurisdiction.

See also Lambert v. Rogers, 454 So.2d 672, 674 (Fla. 5th DCA 1984); Laborers' International Union v. Greater Orlando Aviation Authority, 385 So.2d 716, 717 (Fla. 5th DCA 1980); Department of Revenue v. Joanos, 364 So.2d 24, 25 (Fla. 1st DCA 1978), cert. den. 372 So.2d 467 (Fla. 1979); Warner v. City of Miami, 490 So.2d 1045 (Fla. 3d DCA 1986) (Judge Ferguson concurring); Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987); National Black Media Coalition v. Federal Communications Commission, 791 F.2d 1016 (2d Cir. 1986); Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983).

Since the rule in Florida and elsewhere is that the failure to exhaust administrative remedies is an affirmative defense governed by the policy considerations of deference, as opposed to the power considerations of subject matter jurisdiction, it also follows that a litigant that does not assert and preserve its available defense in a timely fashion will be deemed to have waived it and will be barred from asserting it in a later proceeding. For instance, the court in Jones v. Braxton, 379 So.2d 115 (Fla. 1st DCA 1979), was faced with a thirteenth hour attempt to raise an exhaustion argument, just as this Court does. In rejecting the contention, the court stated:

> Appellants argue first that this circuit court had no jurisdiction because the appellees failed to exhaust administrative remedies. This issue was not raised until after the final order was rendered by petition for rehearing. Generally error cannot be claimed in judicial acts to which objections were not made at the

appropriate time. See 3 Fla.Jur. 2d, Appellate Review, § 95. Since the question of exhaustion of administrative remedies is "not one of jurisdiction ... but of policy," we will not review it in this appeal. (Citations omitted).

Id. at 117. See also Cutler, supra, at 891.

Leaving aside the dispositive issues that (1) the circuit court did have subject matter jurisdiction over this dispute and (2) the COUNTY has totally failed to preserve its right to have this Court review the summary judgment on its affirmative defense, there is no question that the trial court acted properly in 1983 when it granted summary judgment and struck the COUNTY's defense. At its most basic, the COUNTY's response to KEITH FINLAYSON's grievance filed June 17, 1980 was such that no further effort to resolve this matter through the COUNTY's purported "system" was necessary. First of all, as the COUNTY's own rules and regulations set forth, a division head is required to meet with the grieving party within five days, That never happened. Instead the COUNTY responded the next day, June 8, 1980, in writing, affording Ms. FINLAYSON no access to the grievance process at all.

Moreover, a review of the COUNTY's response demonstrates that it was not a "denial" of the class grievance which could have indicated that further review was available. Instead, what Ms. FINLAYSON's supervisor did was to reject the grievance from the system altogether, saying "I cannot accept the attached styled grievance as a bona fide grievance." Faced with this egregious violation of its own rules and regulations and expulsion of Ms. FINLAYSON from the grievance process, the court

was well within its discretion in determining that the conduct of the COUNTY was such that the prospects of meaningful administrative review were nil. See State ex rel Department of General Services v. Willis, 344 So.2d **580, 590** (Fla. 1st DCA **1977).** Ms. FINLAYSON did not have her grievance denied in an orderly administrative review; she was summarily ejected from the process she had only begun the day before.

In Perry v. City of Fort Lauderdale, **387** So.2d **518** (Fla. 4th DCA **1980)** (referred to as Perry 11), the class of plaintiffs was seeking overtime pay pursuant to its interpretation of the municipality's controlling law much as the PARAMEDICS' case. When the class was met with an exhaustion of administrative remedies argument, the Fourth District rejected that discretionary (or deferential) limitation as follows:

> There is no affirmative administrative action involved here. There is no "grievance" as that term is used to define a problem which must wend its way through the administrative mill. The city has taken one view of its ordinance; appellants take the opposite view. What is at stake is the proper interpretation to be placed on the ordinance, a matter of statutory construction and, therefore, a matter for the courts. There can be no question that an action for declaratory relief is the appropriate method for questioning the interpretation of a municipal ordinance. **§ 86.021,** Fla. Stat. **(1979);** R-C-B-S Corporation v City of Atlantic Beach. **178** So.2d **906** (Fla. 1st DCA **1965).**

In their effort to avoid the obvious import of Perry 11, the COUNTY, at Page 24 of its brief, suggests that the case is inapposite because (1) the PARAMEDICS were seeking retroactive, as opposed to prospective relief, and (2) they did file a formal grievance. Reference to Perry II again negates these arguments. While in **1980** the PARAMEDICS were seeking only retroactive

relief, the Perry decision does not by its terms or its logic require that the interpretation of municipal law be prospective only, retrospective only, or both. It is simply a question of law for the court. Secondly, although Perry acknowledges that no "grievance" was present, the use of the term in quotation marks was obviously done to distinguish that use of the term from the traditional one-on-one dispute between an employee and his supervisor. In Perry, just as before this Court, the dispute between the class of employees and its employer was purely and simply the construction of controlling law with respect to the payment of overtime compensation. No action of any administrator had triggered the legal dispute.

Similarly, the Fourth District in State Department of H.R.S. v. Lewis, 367 So.2d 1042 (Fla. 4th DCA 1979) recognized an exception to exhaustion of administrative remedies by saying:

> A distinction between a proceeding essentially seeking a review of agency action, and one essentially seeking a determination of rights has also been used as a litmus in determining jurisdiction. In the former case, the Administrative Procedure Act controls, whereas in the latter, jurisdiction lies in the circuit court.

367 So.2d at 1045. Quite clearly, on the facts before this Court, there was no administrative action of any sort. Instead, the PARAMEDICS simply sought a declaration of their rights under the COUNTY's own controlling law and regulations.

Accordingly, since the issue of exhaustion of administrative remedies is purely one of defense and deference, rather than of jurisdiction, and since the COUNTY has slept on its rights and failed to argue the issue for almost six years, including two

trips through the Fourth District Court of Appeal, the COUNTY's jurisdictional argument is without merit, and its defense has been waived. Moreover, when the nature of the dispute and the COUNTY's handling of it are reviewed in accordance with Florida law, it is seen that the trial court acted properly in striking the defense initially when it did so in 1983.

POINT III ON APPEAL

(PETITIONER'S POINT II ON APPEAL RESTATED)

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING JUDGMENT ON REMAND FINDING THE COUNTY LIABLE FOR OVERTIME OR BY LIMITING THE ISSUES TO BE TRIED.

A. **Standard of Review.**

As the COUNTY briefly but accurately notes, the standard by which this Court must judge the actions of the trial court on remand is whether it abused its broad discretion conducting subsequent proceedings. Thus, this Court in Lucom v. Potter, 131 So.2d 724, 726 (Fla. 1961) stated:

> It is well settled that, upon reversal and remand with general directions for further proceedings, a trial judge is vested with broad discretion in handling or directing the course of the cause thereafter. See Pritchett v. Brevard Naval Stores Co., 1939, 134 Fla. 649, 185 So. 134; Stossel v. Gulf Life Insurance Co. of Jacksonville, 1936, 123 Fla. 227, 166 So. 821.

See also Veiner v. Veiner, 459 So.2d 381 (Fla. 3d DCA 1984); Harbor Club Condominium No. 3, Inc. v. Sauder, 380 So.2d 449 (Fla. 2d DCA 1979). Unless the COUNTY can be said to have established clearly and beyond peradventure that the trial court abused its broad discretion in determining the issues to be tried on remand, its argument on this point falls of its own weight. Respectfully, the COUNTY has not even tried to address that standard, let alone meet it.

B. **The Trial Court's Actions were Proper in all Respects and Constituted no Abuse of Discretion.**

The decision of the Fourth District in Finlayson I was not taken to this Court for review. What the Fourth District

said on review of all factual presentations (and in what is now the law of the case) was that the summary judgment for the COUNTY was error and that the rules and regulations drafted by the COUNTY when applied to these PARAMEDICS demonstrated their entitlement to overtime for an average of sixteen hours every week.

The COUNTY's sole authority for their argument on this point are the Fourth District's two decisions in Perry v. City of Fort Lauderdale, 352 So.2d 1194 (Fla. 4th DCA 1977) (Perry I) and 387 So.2d 518 (Fla. 4th DCA 1980) (Perry 11). These cases, argued fully to the Fourth District below, suggest no error by the trial court because the question of limitation of issues on remand was presented to neither court. The decision in Perry I was nothing more than a bare declaration as to the meaning of a particular Fort Lauderdale ordinance. No effort was made by the parties or the court to apply the declared meaning of the ordinance to any particular set of facts before it.

Thus, the trial court on remand, reflecting the broad discretion given trial courts on remand, tried the issues that were presented to it without any objection by either party to the breadth of the issues so tried. Similarly, when those issues returned to the Fourth District in Perry II, neither party objected to the trial court's actions on remand, nor suggested that the Fourth District was in any way limited in its ability to review certain topics.

As distinguished from the Perry decisions, the Fourth District in Finlayson I reviewed both the uncontradicted factual

presentation and the law as set forth in the County-drafted rules and regulations. In doing so, the court in Finlayson I determined "of the 56 hours worked, sixteen were actually overtime." 471 So.2d at 68. This was the law of the case from the Fourth District and it limited the issues for trial to the question of whether the pay actually given was for 40 hours or for 56 hours, the only remaining issue which was resolved by the jury in this case.

C. **The Trial Court's Evidentiary Rulings Were Correct in All Respects and Did Not Constitute an Abuse of Discretion.**

As far as the evidence allowed or excluded on remand from the Fourth District in Finlayson I, the trial court committed no error (nor did the Fourth District in summarily affirming the trial court) with respect to the reception and rejection of evidence. Again, as is the case with the scope of the issues on remand in general, the reception and rejection of evidence is also a matter committed to the broad discretion of the trial court. See Atlantic Coastline Railroad Co. v. Ganey, 125 So.2d 576 (Fla. 3d DCA 1960); see generally 3 Fla.Jur.2d, Appellate Review, § 336. The COUNTY has failed to establish any error, let alone abuse of discretion.

1. **Purported Evidence on "Hours Actually Worked" Was Properly Excluded.**

The COUNTY's argument with respect to "hours actually worked" is without merit for four simple reasons. First of all, throughout the trial court proceedings prior to the first appeal, the COUNTY raised no issue as to hours "actually worked"

(acknowledging that the PARAMEDICS were in fact "normally scheduled to work twenty-four (24) hours per day." (R 589). Thus, the Fourth District in Finlayson I correctly noted that "the County admits that the EMTs actually worked just over 56 hours per pay period." 471 So.2d at 68.

Secondly, this point was never challenged on motion for rehearing or on review to this Court. (AA-4). Accordingly, not only is the COUNTY's argument "too late," it is also precluded by the law of the case by virtue of the decision in Finlayson I.

Thirdly, the law is crystal clear in the United States that when an employer requires an employee to be at his work place, on duty, actually working, that employee is "engaged to wait," as opposed to "waiting to be engaged." Thus, because of the COUNTY's rigid requirements, the PARAMEDICS worked each and every hour they were on duty. See generally Skidmore V. Swift & Co., 323 U.S. 134 (1944); Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981); Kelly v. Ballard, 298 F. Supp. 1301 (S.D. Cal. 1969).

Finally, should there be need for any additional reason to defeat this argument, it must be noted that the only purported "proffer" by the COUNTY, at Page 12 of the Record was wholly inadequate, consisting solely of a suggestion that a witness could testify that during some undefined year, the COUNTY was able to compute some average number of runs on a year round basis. There was no showing of what any class member, let alone every class member, did at any point in time during the

applicable period from July **16, 1978** to September **30, 1979.** The exclusion of proffered evidence on '"hours actually worked" was eminently correct.

2. Evidence Relating to the Organizing Activities of Local Union 2485 Was Properly Excluded.

The COUNTY's sole argument on this subpoint (which it claims "severely prejudiced" it) is that the COUNTY would have produced evidence that it was going to change its pay system in some fashion, except for the fact that the presence of a union petition in effect at the time precluded such a change since it would have affected the "status quo" between the parties. The argument is totally without merit.

First of all, at no place in the Statement of the Facts nor in the Argument section on this point is any record citation of competent non-hearsay evidence made, of any sort, supporting this alleged intention and prohibition. While there was evidence that Broward County's computer system was antiquated and, therefore, possibly incapable of complying with its own regulations, that neither excuses the COUNTY's breach of the law, nor constitutes a defense for the balance of time.

More importantly, however, the sole authority with respect to its "preservation of the status quo" argument is inapposite. In Sarasota Professional Firefighters v. Town of Longboat Key, **12** F.P.E.R. **¶ 17323 (1986) (A-5),** the governmental employer unilaterally changed and altered its past pay practices during an organizational period, thereby committing an unfair labor practice.

While a state (as well as a federal) employer may be barred from implementing new pay plans and conditions of employment during a union organizing campaign, the obligations imposed upon the COUNTY by its own rules and regulations were not some sort of a unilateral, discretionary merit increase which could affect organizing efforts or sensitive negotiations. Instead, what was ordered by the court below was for the COUNTY to clean up its act and comply with its own contract and its own binding ordinances which required the payment of overtime beyond 40 hours worked per week. This requirement long predated the local union's organizing activities in this matter and the proper payment of overtime would have given the PARAMEDICS no more than that which they were entitled to by preexisting law.

In a long series of both state and federal cases (construing Florida Statute § 447.501 and its federal equivalent), it was found in fact to be an unfair labor practice for an employer to withhold a "change" in benefits to which the employees would otherwise have been entitled, merely because there happened to be union organizing activity going on at the time. See generally Hernando Classroom Teachers' Association v. Hernando County School Board, 3 F.P.E.R. 246 (1947); N.L.R.B. v. Dothan Eagle, Inc., 434 F.2d 93 (5th Cir. 1970); N.L.R.B. v. Katz, 369 U.S. 736 (1962); City of Ocala v. Marian County Police Benevolent Association, 392 So.2d 26 (Fla. 1st DCA 1980).

It would indeed be a perversion of public employee relations if an employer could legally avoid mandated obligations during a period of union organizing activity simply because the

public employer had been violating the law the day before the union organizing activity began.

Even though no union organizing activities have been described to this Court, the effort to inject the presence of the local union both at the trial and before each of the reviewing courts, demonstrates the COUNTY's unwillingness to recognize the proper status of the party in this case. The local union was never, at any time, a party to this litigation, but was instead a separate entity comprised of a number of paramedics, some of whom are in the class before this Court. The local union, however, has absolutely no legal interest in the overtime benefits the class was entitled to prior to the date when its contract became effective and the class has absolutely no legal interest in the whole range of employee benefits the local union may have to be concerned with after October 1, 1979. Whatever the union may have done to protect its members with respect to its employer/employee relationships once the contract came into effect is irrelevant and an obvious effort by the COUNTY to distract the jury, and this Court from the proper issues before it.

For the reasons set forth above, the unstated union organizing activity, if there was any, was properly excluded from the trial below and the erroneous argument that the COUNTY is precluded from making a "change" in the pay plan during the union organizing period was, if ever presented to the court by proffer or otherwise, properly excluded. See Ritter's Hotel V.

Sidebothom, 194 So. 322 (Fla. 1940); Callihan v. Turtle Kraals, Ltd., 523 So.2d 800 (Fla. 3d DCA 1988).

3. **No Evidence Relating to Collective Bargaining Negotiations was Improperly Excluded.**

The short answer with respect to the claim that "evidence" concerning collective bargaining negotiations was excluded is that nowhere throughout its entire 49 page brief did the COUNTY ever identify one single piece of evidence concerning such negotiations that was alluded to in the trial of this case. Similarly, nowhere throughout the 49 page brief did the COUNTY ever make the barest reference to any proffer that its trial counsel had made with respect to the alleged negotiation evidence that had been excluded. In the absence of any such record before this Court which has been argued by the COUNTY, there is absolutely no legal way that this Court could conclude the significance of such hypothetical evidence, nor is there any way for this Respondent to respond. In the absence of any argument, factual record, proffer and asserted relevance, the argument fails at the outset. Ritter's Hotel, supra; Callihan, supra.

Had the COUNTY in fact put forth evidence of negotiations that took place during the collective bargaining process and had that evidence been proffered to the Court and had the potential relevance of that proffer been argued to the trial court and this Court, they could only have been addressing negotiating positions taken by the Local Union. What the COUNTY fails to understand, or more likely chooses not to, is that the Local Union at no time had as its purpose the representation of a

Rule 1.220 class on overtime benefits earned prior to the effective date of its contract, just as the common law class of PARAMEDICS had no legal interest in negotiating for benefits that would apply after the termination of their class.[14] Whatever issues the Local Union through its representatives may have bargained for to take effect after October 1, 1979, and no matter what arguments they may have negotiated away in exchange for other benefits, those negotiations have not been presented to this Court. Had they been properly presented, they could not have been used to affect the rights of a different group of people governed by a set of regulations which would have no effect once the union contract went into effect. Since no evidence of contract negotiations was proffered in the trial court and absolutely none has been suggested to this Court for this Court's analysis and for the PARAMEDICS' response, and for the further reason that any such negotiations would, as a matter of law, not be binding upon the class of PARAMEDICS, the COUNTY has wholly failed to show any error, let alone reversible error or abuse of discretion in the exclusion of such as yet unidentified evidence.

4. **Collective Bargaining Agreement Properly Excluded.**

The final alleged evidentiary error of which the COUNTY complains was the court's refusal to allow into evidence the

.....

[14]The COUNTY's dogged, yet unsupported effort to turn the Local Union into an agent for the common law class's positions prior to October 1, 1979, if supported either in the record or in the law, would have the counterproductive effect of turning any such negotiations into settlement negotiations as discussed by the trial court. (R 66-68).

collective bargaining agreement entered into between the COUNTY and the Local Union. The COUNTY has argued in its brief that the agreement shows "that the EMTs voluntarily agreed and acknowledged in the contract" certain things. As the COUNTY is well aware, this is totally and absolutely untrue and unsupported by the record. It was the Local Union and not this common law class of employees who saw fit, for whatever reason, to enter into a long and detailed agreement addressing a wide range of employee concerns. What the Local Union (as opposed to this class of PARAMEDICS) agreed to and why was not only irrelevant to the issues concerning the construction of the COUNTY's pay practices prior to the contract going into effect, it had significant prejudicial potential by allowing the injection of a panoply of issues unrelated to the narrow question properly before the Court after remand from Finlayson I.

As it is hoped is painfully obvious by now, the class of PARAMEDICS who are the Plaintiffs in this case at no time entered into any contract with the COUNTY, nor did they bargain away any of their rights with respect to the period for which they earned overtime and have been awarded it in this cause. What the Local Union may have subsequently bargained away and the reasons for that were properly excluded by the trial court and no error, let alone abuse of discretion has been shown to have occurred in the trial court.

For all of the reasons set forth in the foregoing point on appeal, it is respectfully urged that no error, let alone reversible error or abuse of discretion was committed by the

trial court. After a comparable full and complete briefing on these selfsame issues, the Fourth District affirmed across the board, finding so little arguable merit in any point that no opinion or discussion was necessary in that court's opinion.

POINT IV ON APPEAL

(PETITIONER'S POINT IV ON APPEAL RESTATED)

WHETHER THE TRIAL COURT ERRED IN AWARDING ENHANCED ATTORNEY'S FEES IN THIS CASE.

The basis for the award of attorney's fees was **§ 448.08** which allows the court to award fees in actions for unpaid wages. The COUNTY's primary objection now is that a contingency risk enhancement was factored into the ultimate award, increasing the amount from that which would otherwise have been recoverable under the basic lodestar approach.

The fee agreement of the PARAMEDICS' attorneys entitled the attorneys to a non-contingent **$10,000** fee payment from the Local Union, irrespective of the outcome of the case, and further provided for a layered contingent fee ranging from 20 to **10%** in the event of a successful outcome. Since the "lodestar" totaled just in excess of $100,000, the trial court enhanced the award to **$241,233.71,** the maximum amount that could have been earned under the contingency contract with the PARAMEDICS.

The short answer to this point on appeal is that the COUNTY has wholly failed to preserve this issue for review inasmuch as it at no time argued to the trial court that the **$10,000** non-contingent portion of the **$241,000** fee disqualified the class or the attorneys from having the lodestar enhanced. The contention contained on Page **18** of the COUNTY's brief that the enhancement was opposed by the COUNTY in the trial court because the fee agreement was not truly contingent is simply not true.

The fact of the matter is that the COUNTY's trial counsel at no time argued any relationship between the small non-contingent portion of this fee and the entitlement to an enhancement.[15] For ease of reference, the pages of the record relied upon by the COUNTY to support their claim that it made this argument to the trial court have been included in the PARAMEDICS' Appendix. (R 1279, 1306-07, AA-5). As those pages make clear, the COUNTY at all times was arguing (pursuant to Florida Statute § 448.08), that the award of attorney's fees is discretionary. The COUNTY's attorney did acknowledge that a small portion of the total earned fee was non-contingent, but at no time was the court asked, directly or indirectly, to deny enhancement because of that fact. The trial court never having had the opportunity to consider whether a small non-contingency in a fee agreement will bar any enhancement, this Court is precluded from considering that issue on appeal. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981), and cases cited therein.

Even if the COUNTY's position had been developed, presented, argued, and rejected by the trial court, affirmance by this Court would still be required under Florida law. The COUNTY's position on this point was summarily rejected in Finlayson 11. Shortly thereafter, however, the argument was apparently accepted in Head v. Lane, 541 So.2d 672 (Fla. 4th DCA 1989). There, the Fourth District found that a non-contingent agreement to pay $100.00 per hour regardless of the outcome disqualified the fee arrangement

.....

[15] The entitlement to appellate fees from Finlayson I was also not argued to the trial court anywhere.

as a pure contingency agreement and the court concluded no enhancement was appropriate. This is not and should not be the law.

If the issue had been presented sufficiently to preserve this point for appellate review, that review would have to be conducted pursuant to the proper standard -- whether the trial court had abused its discretion. See Lynn v. Lynn, 464 So.2d 614 (Fla. 4th DCA 1985); Adams v. Fisher, 390 So.2d 1248 (Fla. 1st DCA 1980). (Since the issue was not presented to the trial court, it never had an opportunity to exercise any discretion on this topic).

The issue then would boil down to whether a contingency, no matter how small is an absolute bar to risk enhancement. The issue has been twice presented to the Third District, in First State Insurance Co. v. General Electric Credit Auto Lease, Inc., 518 So.2d 927 (Fla. 3d DCA 1987) and in Chrysler Corp. v. Weinstein, 522 So.2d 894 (Fla. 3d DCA 1988). On each occasion, that court concluded that since the fee was at least partially contingent, the application of the enhancement factors as dictated by Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) was appropriate. It is respectfully suggested to this Court that the Fourth District's opinion in Head -- that any non-contingency automatically bars enhancement -- is an unnecessarily arbitrary opinion and that the position asserted by the Third District -- that the type and nature of the non-contingency might affect the size of the multiplier factor,

but not bar it -- is the more reasonable approach consistent with Florida law on this topic.

That conclusion is buttressed when it is understood that the basis of the Head decision was the earlier Second District decision in Lake Tippecanoe Owners' Ass'n V. Hanauer, 494 So.2d 226 (Fla. 2d DCA 1986). The crucial point in understanding Lake Tippecanoe, however, is that the fee agreement in that case was in nowise contingent; there was no risk -- win, lose, or draw. Since there was no risk or contingency with respect to any portion of the fee, it could not be seriously contended that a risk enhancement factor was appropriate.

Where, as here, the only non-contingent portion of the fee was limited to approximately one-tenth of the lodestar and approximately 1/24th of the total fee, it can readily be seen that, although the attorney's risk was slightly reduced, it was still substantial when viewed from any perspective.

It is further suggested to this Court that the Third District's approach which allows a trial court to consider the nature of any non-contingency as a factor in determining the enhancement is fully consistent with Rowe and its general approach. The variable contingency risk multipliers created there allow a trial court to apply a whole range of potential likelihoods of success (or defeat) in contested litigation. Similarly, the trial court is called upon in arriving at a fee to variably factor in "results obtained," recovering on only a portion of the claims, and the relationship between the amount of the fee awarded and the extent of success. Thus, top priority is

placed upon the evaluative skills of the trial court which is the very cornerstone of the Rowe opinion, rather than a black or white rule such as that apparently has been accepted by the Fourth District's panel in the Head. It may also be that the extent of the non-contingency in Head (a guarantee of $100.00 per hour regardless of the results obtained, compared with a normal rate of only $150.00 an hour) provided such a small amount of contingency risk that that panel of the Fourth District was simply persuaded to do away with the risk enhancement factors. Whatever the thinking of that panel may have been, suffice it to say that the panel of the Fourth District in Finlayson II did not even see sufficient merit in the COUNTY's position to warrant discussion of the topic.

In summary, inasmuch as the COUNTY wholly failed to preserve the argument that the small non-contingent portion barred any risk enhancement, and because the better practice allows the extent of any non-contingency to be a factor in applying the risk enhancement, it is respectfully urged to this Court that the decision of the trial court and the appellate court awarding the PARAMEDICS a total fee of **$241,233.71** be affirmed.

CONCLUSION

For the reasons set forth above, the decision of the trial court, as affirmed by the Fourth District, should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 30th day of June, 1989, to JOHN J. COPELAN, JR., County Attorney, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, FL 33301; and to JAMES C. CROSLAND and GORDON D. ROGERS, of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., Suite 3600, Southeast Financial Center, Miami, FL 33131-2338, Attorneys for Petitioner/Appellant, Broward County.

FLEMING, O'BRYAN & FLEMING

By: _____
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