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IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI,

Petitioner,

v.

RICHARD McLEAN,

Respondent.

CASE NO. 80,575

REPLY BRIEF OF THE CITY OF MIAMI

On Review of Two Certified Questions from
the First District Court of Appeal

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Table of Contents

Table of Authorities

Page

Cases

Other

Argument

I. The *Barragan*[1] decision should not be given retroactive effect.

1. No binding presumption of retroactivity exists.

In its initial brief, the City argued that the *Barragan* decision should not be given retroactive effect. The City there identified the rule of law, articulated in the *Brackenridge*[2] and *Strickland*[3] decisions, that a precedent-overruling decision is given both prospective and retroactive effect if there is no indication to the contrary in the opinion itself, but that reliance of the prejudiced party on the prior state of the law would justify treating the decision as prospective only. The *Brackenridge* and *Strickland* cases are acknowledged by McLean as being among the governing authorities. Consequently, there should be no dispute between the parties that if the City's reliance was justified, that *Barragan* may be limited to prospective application only.

The *Barragan* opinion did not express the Court's position on retroactivity.[4] Accordingly, the issue of retroactivity boils down to a question of whether the City justifiably relied on the state of the law as it existed before the *Barragan* opinion was issued. There is nothing in McLean's brief that suggests, let alone compels a different conclusion.

1/ *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989).

2/ *Brackenridge v. Ametek*, 517 So. 2d 667 (Fla. 1987), *cert. denied*, 488 U.S. 801 (1988).

3/ *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251 (Fla. 1944).

4/ *Barragan's* silence on the question of retroactivity does not bind the Court to a compelled finding of retroactive application, as suggested by McLean. (Ans. B. at pp. 8-9.)

2. The City's justifiable reliance was established.

In its initial brief, the City explained at considerable length its justifiable reliance on pre-*Barragan* law. (*See* Ans. B. at pp. 6-14.) McLean contests the notion of justifiable reliance by the City with essentially four propositions: an alleged failure by the City to adduce factual evidence of reliance before the Judge of Compensation Claims in this proceeding, (Ans. B. at pp. 9-10); an alleged failure to raise "detrimental reliance" as a defense at the pre-trial hearing, (Ans. B. at p. 10); an alleged requirement for a "change of position" by the City, (Ans. B. at pp. 15-20); and a microscopic analysis of pre-*Barragan* case law to argue that the City could not, in fact, have relied on these decisions. The City will demonstrate that none of these arguments negate in the slightest the City's justified reliance on the pre-*Barragan* state of the law with respect to pension offsets.

In this case, and the several other proceedings in which *Barragan's* retroactive application is being challenged by the City, the requisite elements of *Strickland* have been met. A statute had received a given construction by a court of supreme jurisdiction -- that is, Miami's pension ordinance had consistently and uniformly been construed by the district courts of appeal, acting as courts of last resort, to *allow* the City's pension offsets -- and property or contract rights were indeed acquired under and in accordance with such construction -- that is, *the City's* contract rights vis-a-vis employees were acquired under the ordinance and in accordance with the construction given by district courts of appeal over a period of 27 years. The *Strickland* test is clear and compelling: those contract rights "should not be destroyed" by giving the *Barragan* decision retrospective operation. 18 So. 2d at 253.

(a) Contrary to McLean's contention, justifiable reliance is not an evidentiary issue.

McLean is wrong in suggesting that the City was required to present factual evidence of justifiable reliance on the pre-*Barragan* state of the law. For the purpose of a retroactivity analysis of reliance, a "legal" basis for reliance is adequate. Indeed, the *Strickland* case itself involved a legal, as opposed to factual foundation for justifiable reliance.

Justifiable reliance was found controlling in *Strickland* based on the state of the law with respect to the forum in which Strickland was obliged to file his appeal from a deputy commissioner of industrial relations. Until overruled, judicial precedent had required that appeals be taken directly to circuit court. Strickland was held to have filed his appeal in justifiable reliance on precedent, notwithstanding that the court subsequently overruled those decisions and held that appeals must be taken to the Industrial Relations Commission. Strickland had acted in accordance with the legal requirement for filing his appeal, as announced in prior precedent, just as the City had acted in accordance with its court-validated ordinance to offset pension benefits.

Without expressly saying so, McLean seems to be saying that the City was deficient in not producing the testimony of its lawyers that, over the years, they concluded that the City could properly follow the string of appellate decisions expressly upholding the City's ordinance on pension offsets. Obviously, the decisions themselves are all the "evidence" needed to justify the City's reliance.

(b) Contrary to McLean's contention, detrimental reliance has always been an issue in these proceedings.

A string of last-resort, final appellate decisions were issued by the Florida courts from 1973 to 1989. There is no question that *Barragan* was a 180°, overruling turnabout from those precedents. The City obviously had relied to its detriment on the outcomes of those cases by continuing its offset of pension benefits under the City's ordinance. Moreover, the defense of detrimental reliance was presented by virtue of the City's pled and argued position that the reliance exception to retroactivity applied in this proceeding. (R. 12-14, 68, 209-14).

(c) Contrary to McLean's contention, detrimental reliance for the purpose of barring retroactivity need not entail a change of position.

For the purpose of barring retroactivity a party's change of position is not the only way to demonstrate detrimental reliance. A party's maintenance of a prior position, based on conclusive judicial determinations that it need not change, also constitutes a legally sufficient specie of detrimental reliance.

The question for retrospective application is framed as whether previous conduct was "in reliance upon a prevailing decision . . . ." *Strickland*, 18 So. 2d at 253-54. *See also Brackenridge*, 517 So. 2d at 669 (issue posed as whether the party acted "in reliance on" a previous judicial declaration).

There is not an ounce of veracity in the hair-splitting notion that reliance cannot be demonstrated from the continuation of conduct in compliance with pre-*Barragan* case law. *Strickland* and *Brackenridge*, in fact, do not differ at all on this score from the present case. Each is a situation dealing with the application of previous judicial

decisions interpreting statutes. The City cannot be held to or penalized by a higher standard of prognostication than the judiciary for its inability to anticipate that the appellate decisions validating the ordinance would years later be declared invalid.

(d) The City relied on its ordinance, as upheld by the courts, and not on the court decisions themselves.

McLean argues that the City could not have relied on past court decisions because they are factually distinguishable. This assertion is founded on a false premise, as made clear in the very first sentence of the City's initial brief: "Based on an ordinance originally adopted by the City of Miami in 1940, the City reduced disability pension benefits for its retired employees . . . ." The ordinance, not the case law, guided the City's reliance. Naturally, the City was comforted by the offset-permitting rationale of the several district court decisions, but the ordinance was the linchpin of reliance. It was reliance on the ordinance, repeatedly assailed unsuccessfully in court challenges, that justified the City's initial and continuing offset procedure.

(e) The reasons asserted for *Barragan* retroactivity do not withstand analysis.

McLean argues against the legitimacy of reliance by the City on decisions made after the legislature's 1973 repeal of section 440.09(4), and on decisions in which the employee was injured prior to that statutory repeal. These arguments reflect the myopia mirrored in McLean's other efforts to marginalize the City's detrimental reliance on the ordinance which those cases sustained.

The basic point ignored by McLean is that both pre- and post-repeal decisions legitimized the City's use of its ordinance to make the offsets. The date of repeal of section 440.09(4) was not the triggering feature for the City's detrimental reliance. In

fact, that date was specifically held to have been irrelevant in one district court precedent. *Hoffkins v. City of Miami*, 339 So. 2d 1145 (Fla. 3d DCA 1976), *cert. denied*, 348 So. 2d 948 (Fla. 1977). It was not made a relevant point of departure until *Barragan* made it so, some 12 years later. For the same reason, neither pre- nor post-repeal date of injury was a determinative feature in the City's reliance on its 1940 ordinance, despite *Barragan's* use of the repeal date some 49 years later as the crucial moment for invalidation of that ordinance.

McLean conjectures, unpersuasively, that the City should have relied not on its ordinance, but rather on the Court's private employer decisions in *Jewel Tea*, *Brown* and *Domutz*.[5/] That suggestion is ill-conceived legally and practically.

First, none of those cases involved public employers. McLean nowhere suggests why the City should have extrapolated an adverse result from them when the City itself had been taken to court repeatedly, and judicially advised each time that its offset procedure was sound.

Second, the first of those private-employee cases, *Jewel Tea*, was decided a full 30 years after the ordinance had been enacted, and a full 8 years after the first pension offset challenge to the City's procedure had been turned aside by a final appellate court decision. It is ludicrous to suggest that the City lacked any justification for reliance on its ordinance because it failed in 1970 (*Jewel Tea*), 1975 (*Brown*) or 1976 (*Domutz*) to

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5/ *Jewel Tea Co., Inc. v. Florida Industrial Commission*, 235 So. 2d 289 (Fla. 1970); *Brown v. S.S. Kresge Co., Inc.*, 305 So. 2d 191 (Fla. 1975); *Domutz v. Southern Bell Telephone & Telegraph Co.*, 339 So. 2d 636 (Fla. 1976).

disregard court decisions in which the City itself was a party, in favor of an extrapolated position which this Court itself did not discover until 19 years after the *Jewel Tea* case.

Thirdly, neither the City nor its litigation opponents "ignored" the court's decisions. Rather, the First District construed those decisions to be inapposite to the City's ordinance. *See City of Miami v. Knight*, 510 So. 2d 1069, 1073 (Fla. 1st DCA), *rev. denied*, 518 So. 2d 1276 (Fla. 1987). While *Knight* has now been expressly overruled by *Barragan*, that former decision conclusively demonstrates that *Jewel Tea*, *Brown*, and *Domutz* were not ignored.

McLean also reminds us that substantive rights in workers compensation cases are determined by the law in force on the date of the accident. (*See* Ans. B. at p. 12). That principle would seem to be persuasive of the fact that he had *no* right to pension offset amounts at the date of his accident, or at any subsequent time until the *Barragan* bombshell exploded. The "law in force" during those periods was an ordinance, court-validated, saying that the City could offset his pension benefits.

Oddly, McLean strides head first into the utterly unrelated muck of the *Gates* decisions[6/] as part of his argument that the City could not rely on pre-*Barragan* cases to support its offsetting. McLean also argues that the *Gates* litigation established a "breach of trust" by the City towards its employees. (Ans. B. at pp. 17-18). The *Gates* decisions support neither of McLean's hypotheses. In fact, *Gates* specifically rejected "that the fiduciary status of the City . . . may be properly analogized to that of the trustee of an express trust . . . . *Gates*, 393 So. 2d 589, n. 6. Insofar as the reliance issue, the second

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6/ *City of Miami v. Gates*, 393 So. 2d 586 (Fla. 3d DCA), *rev. denied*, 402 So. 2d 608 (Fla. 1981); *City of Miami v. Gates*, 592 So. 2d 749 (Fla. 3d DCA 1992).

Gates decision instructs as to the impossibility that the parties (the City and a class of employees) could have been cognizant of the result in *Barragan* before it came to pass. *Gates*, 592 So. 2d at 752. Obviously, the Third District had no trouble in concluding as to the bona fides of the City's justifiable reliance on "an unbroken line of authority . . . which sustain the validity of the City's pension offset." *Id.* Insofar as the *Gates* discussion of internal accounting procedures, they are unrelated to this case. Indeed, any issue with respect to the internal accounting procedures was put to rest in *Barragan*, where the Court held that the City is a unified whole with its pension trusts, and that one account of the City is just like any other account. *Barragan*, 545 So. 2d at 253.[7/]

Interestingly, of all six answer briefs to which the City has thus far prepared replies in these related cases, McLean's alone seeks comfort in the rationales expressed by the First District in various cases which hold expressly that *Barragan* should be applied retroactively. There should be no comfort in associating with that reasoning.

The First District first determined that the *Barragan* decision was retroactive in *City of Daytona Beach v. Amsel*, 585 So. 2d 1044 (Fla. 1st DCA 1991). In that case, the court gave three reasons for applying *Barragan* retroactively. First, the court found unavailing the "well-recognized" exception to presumptive retroactivity -- justifiable reliance. The court declared that the City's reliance on this exception failed "in light of the concomitant rule that the laws in force at the time a contract is made form a part of the contract as if expressly incorporated into it." *Amsel*, 585 So. 2d at 1046. This

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[7/] McLean's contention concerning a "second deduction" by the City is wrong, (Ans. B. at p. 17), and he and other employees involved in *Gates* took the pre-*Barragan* stance that the issues litigated had nothing to do with the pension offset.

justification for rejecting justifiable reliance does not answer, but rather begs the question of whether *Barragan* should be applied retroactively.

The City made the point in *Amsel* that it had contractual relationships with employees prior to *Barragan*, premised on an ordinance which had consistently been held by Florida's courts of last resort to be proper. The City asserted that those contract relationships constituted a right which should not be destroyed by retrospective operation of a subsequent overruling decision. For the district court to reference as a rule of law that the City's contracts with its employees incorporated the laws in force at the time the contracts were made is to *confirm*, not refute, that pension offsets were proper under the law previously in force, for the "law" at that time was the court-validated offset ordinance. In other words, the First District's explanation in *Amsel* as to why the City should lose the argument on retroactivity is in fact an explanation of why the City should have won. The district court's rationale in this regard could only mean that *Barragan* should *always* have been the law -- a conclusion which abjures analysis by begging the very question that was being asked.

The *Amsel* court next rejected the City's position against retroactivity on the basis of "the rationale underlying the *Barragan* decision." (*Id.*) As understood by the *Amsel* court, that rationale was that section 440.21 prohibited a deduction of compensation benefits from an employee's pension benefits, as a consequence of which the City's ordinance (to quote *Barragan*) was contrary to state law. That rationale, too, is premised on faulty, result-driven reasoning. It disguises the reality that a line of pre-*Barragan* judicial precedents had expressly addressed and harmonized section 440.21 with the City's pension offset ordinance. Again, the First District was simply playing the 20-20

hindsight game to say nothing more than that *Barragan* "should" always have been the law.

As a third point, the *Amsel* court commented that the decretal language and remand "for further proceedings" in *Barragan* constituted an implicit determination that the decision was to have retroactive application. (*Id.*) This is the weakest justification for retroactivity of the lot. Actually, this statement by the court is a clear contradiction of the *Strickland* and *Brackenridge* cases themselves. There is no question that Messrs. Barragan and Giordano won their appeals and were entitled on remand to the benefits of the Court's *Barragan* decision. But if every determination on the merits in an overruling precedent were an "implicit" determination of general retroactive application to others, there would be no need for a presumption of retroactivity in the absence of a statement one way or the other, and there would be no reason for an exception to that presumption when the overruling decision is silent on the point. Every law-setting precedent would simply apply retrospectively. The district court's result-oriented decision in *Amsel* illogically reached too far when it read into the Court's remand in *Barragan* an "implicit" determination of retroactivity.

An analysis of the First District's second decision on the point -- *City of Miami v. Burnett*, 596 So. 2d 478 (Fla. 1st DCA), *review denied*, 606 So. 2d 1164 (Fla. 1992) -- similarly suggests the porverty of McLean's reliance on that case. The *Burnett* decision by a panel of three judges (two of whom sat on the *Amsel* panel) declared that the court's "reading of *Barragan* convinces us that the supreme court did not intend to excuse retroactive application of its decision." 596 So. 2d at 478. By this statement, the court meant that *Barragan's* holding that the City's ordinance was in contravention of section

440.21 "is interpreted by this court to mean that the ordinance was void effective July 1, 1973, and therefore was not part of the law comprising the contract for benefits between the employer and employee." (*Id.*) This declaration was immediately followed by a citation to *City of Miami v. Jones*, 593 So. 2d 544 (Fla. 1st DCA), *rev. denied*, 599 So. 2d 1279 (Fla. 1992), evidencing further the district court's exclusive reliance on contract concepts between the City and its employees.

The contract analysis in *Burnett*, like its counterpart in *Amsel*, completely sidesteps the principles for determining retroactivity which were established in *Strickland* and *Brackenridge* -- namely, whether the City, as the adversely affected party, justifiably relied on the pre-*Barragan* state of the law.[8/] Put another way, neither the *Amsel* nor *Burnett* decisions ever addressed the issue at the heart of a retroactivity determination -- justifiable reliance by the City on an ordinance which was consistently sustained in court against employee challenges. That issue of justifiable reliance is analyzed fully in the City's initial brief at pp. 6-13. As the arguments there asserted are neither addressed in the First District decisions explaining their determinations of *Barragan* retroactivity, nor in McLean's answer brief, it would seem to be unnecessary to repeat them here and the City merely invites the Court's review of the reasons as there expressed.

Lastly, McLean suggests that the Court has already ruled that *Barragan* is retrospective by denying the City's motion for rehearing following issuance of the *Barragan* opinion. The contention is made that the City argued for prospective effect in its motion for rehearing, so that the Court's denial in effect constituted a determination

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[8/] The *Jones* decision, of course, came three years after *Barragan*. The district court's reliance on its own post-*Barragan* decision is a bootstrap position.

on the merits of the retroactivity issue. (Ans. B. at p. 13.) This assertion is a gross distortion of the record, and it is legally flawed. Contrary to the assertion, the City never argued to this Court that the *Barragan* decision should be given retrospective effect.

In its rehearing request, the City asserted that, because the City would be bound by the *Barragan* decision but the Miami Firefighters' and Police Officers' Retirement Trust ("FAPO") would not, the City would have to bring a declaratory action against FAPO to subject it to liability for pension offset claims unless the Court recognized FAPO and the City as being separate and distinct entities. In that context, the City noted for the Court that the City's suit against FAPO for the erroneous calculation of pension benefits "will also call into question whether the [*Barragan*] opinion is prospective or retroactive in nature."

Notably, the City distinctly did not ask this Court to rule on prospectivity. Rather, it noted for the Court's interest that a refusal to distinguish FAPO from the City would result in a separate declaratory lawsuit being filed, in which prospectivity would be an issue *for consideration in the trial court*. Nowhere in its motion for rehearing did the City ask the Court to limit its *Barragan* decision to prospective effect, or suggest that the issue of retroactivity was appropriate for consideration by the Court on rehearing.

In any event, McLean's contentions with respect to the rehearing process in *Barragan* are legally untenable. The rule of law governing retroactivity and prospectivity starts from the articulation of a directive for one, the other or both in the decision itself. *Strickland, supra*; *Brackenridge, supra*. No opinion was written on rehearing in *Barragan*. As a consequence, the denial of rehearing stands on no better footing in regard to an articulation of policy as to retroactivity than does the original decision itself.

Still another reason compels the conclusion that the Court's denial of rehearing in *Barragan* did not constitute a ruling on the City's reference to retroactivity in its motion for rehearing. No issue regarding retrospective application of a potentially adverse decision was raised by the City or McLean prior to issuance of the Court's *Barragan* opinion. The only issues which may properly be raised on rehearing are those in which the court has either "overlooked or misapprehended" a point of law or fact. *See* Rule 9.330(a), Fla. R. App. P. For all anyone knows, the Court's denial of rehearing may well have been nothing more than a determination that any reference to the issue of retroactivity (had one been raised) would be an improper argument in the motion for rehearing.

II. The City should not be subject to the 20% statutory penalty for its refusal to pay a compensation claim.

The City contends that the 20% penalty imposed by the Judge of Compensation Claims and affirmed by the district court, based on the 1975 provisions of the workers compensation statute, is improper and unconscionable. The City has argued that the language of that statute provides no foundation for the penalty, that the policy reasons for a 20% penalty have no possible relevance to the City's declination to make a lump sum retroactive payment following the *Barragan* decision, and that the "penal" nature of the 20% penalty is inappropriate where the City was guilty of no misconduct cognizable in the statute or the policies governing its imposition. (Init. B. at pp. 13-17.)

McLean responds that the penalty has nothing to do with events or the City's conduct prior to the finality of *Barragan*, that the workers' compensation law is self-executing so as to create an obligation for employers to inform employees what is owed

and what is being denied, and that in this fiduciary capacity the City was obligated to file a "notice to controvert" immediately after *Barragan* became final in order to notify McLean that the City did not intend to treat the *Barragan* decision as retroactive. (Ans. B. at pp. 21-22). This argument notably fails to meet the contentions of the City and is contrary to the very provisions of the workers' compensation law on which McLean relies.

McLean describes the City's refusal to accept *Barragan* as automatically having a retroactive effect as "misconduct" which makes the 20% penalty appropriate. This argument is premised exclusively on the notion that the City did not notify the Division of Workers' Compensation and McLean of its position on retroactivity within 21 days after the *Barragan* decision became final on denial of rehearing on July 14, 1989. Plainly, simply and unadorned, McLean is contending that the City "had reason to know" that *Barragan* would be given retrospective operation. That, plainly put, is nonsense, and certainly is not the law.

It may be true that the City should have "presumed" that *Barragan* was retroactive as well as prospective, under the rationale of the *Strickland* and *Brackenridge* cases. But the City also "had reason" to analyze its eligibility for the justifiable reliance exception to that presumption. It cannot be rationally or legally held that on July 15, 1989 (after *Barragan* became final) the City knew or should have known that, some two years later, a district court would hold that the City would not be accorded the benefit of the "justifiable reliance" exception. McLean, and the First District's majority in *Bell* (and thus in *McLean*), treat the City's post-*Barragan* stance as a litigation risk for which the City must now be made to pay the penalty. But as earlier noted, neither McLean's nor

the district court's conceptualizations are informed by the factors relevant to a determination of retroactivity. The parties had not litigated the retroactivity question in *Barragan*, and the City quite reasonably was entitled to maintain the impropriety of retroactive application to its former employees who were not parties to the *Barragan* litigation.

In any event, it is inaccurate to suggest that the statutory scheme of the workers' compensation law, and particularly section 440.20, required the City to file a notice to controvert with the Division and the employee within 21 days of the finality of the *Barragan* decision. McLean's position is not consistent with the language and operation of the statute itself. The suggestion presumes that retroactive offsets were benefits being withheld, and that the statute requires notices to be filed controverting the claims before those claims were even filed. There is no such statutory requirement imposed on employers.

This and other flaws with respect to imposition of the penalty are discussed in Judge Booth's dissent in the *Bell* decision. There is no need for the City to rehash here the more complete and compelling discussion which is there set out. *See* 606 So. 2d at 1190-92. It is inherently repugnant to assess penalties for a judicial mistake.

Certificate of Service

I hereby certify that a true and correct copy of this reply brief was mailed on February 16, 1993, to Paul J. Kneski, Esq., Biscayne Building, Suite 807, 19 West Flagler Street, Miami, Florida 33130.

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