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IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI,

Petitioner,

v.

ROBERT THOMAS,

Respondent.

CASE NO. 80,683

REPLY BRIEF OF THE CITY OF MIAMI

On Review of a Certified Question from
the First District Court of Appeal

A. Quinn Jones, III, Esq.
City Attorney
Florida Bar No. 292591
Kathryn Pecko, Esq.
Assistant City Attorney
Florida Bar No. 508380
City of Miami
Attorneys for Petitioner
300 Biscayne Boulevard Way
Suite 300
Miami, Florida 33131
(305) 579-6700

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Charles M. Auslander, Esq.
Florida Bar No. 349747
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

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Argument

I. The Court should accept jurisdiction.

As a threshold matter, Thomas argues that the court should decline jurisdiction in this case, despite the district court's certified question on the penalty issue presented. Thomas' argument on jurisdiction seems to be that despite the great public importance recognized by the district court, jurisdiction should not be taken because a ruling for the City would send a bad message.[1/]

> A ruling for Petitioner would send a signal to municipalities that if they pass ordinances in conflict with State Law and are later required to make restitution for benefits illegally or improperly withheld as a result of those ordinances, that they would not suffer an additional penalty because their actions were 'presumed' to be in good faith reliance on their ordinance. The Court should not accept jurisdiction of the case and certainly should not send that message.[2/]

In other words, the Court should not accept jurisdiction because municipalities who experience the same 27-year sequence of events which the City experienced in litigating pension offsets, will be led to believe that they can escape the penalty imposed by the workers' compensation laws. Municipalities do not govern their behavior by relying on court decisions to avoid penalties.

In any event, all decisions by the Florida Supreme Court send a "message." The future behavior of citizens and governments is always propelled toward or repelled from courses of action sanctioned or rejected by the Court in pending cases.

The value of the Court's exercise of jurisdiction in this case in reality is seen in Thomas' use of previous First District "penalty" cases which that court itself refused to

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1/ *See* Ans. B. at pp. 7-9.

2/ *See* Ans. B. at pp. 8-9.

apply against the City.[3] The First District found dubious value in applying those precedents which involved mathematical miscalculations in the context of the judicial mistake relied on by the City,[4] and culminating in the continuing application of its ordinance to offset pensions. It therefore certified the question here in terms of an "increase in workers' compensation benefits . . . in accordance with *Barragan*." Clearly, the First District is asking the court guidance as to whether retroactive payments of pension offset monies constitute installments of compensation worthy of penalties consistent with past jurisprudence on the subject. The district court's concern is a compelling basis for jurisdiction in a circumstance involving not just this case, but a host of companion cases.

II. The *Barragan* decision should not be given retroactive effect.

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*[5] and *Strickland*[6] 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*

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[3] *See Santana v. Atlantic Envelope Co.*, 560 So. 2d 528 (Fla. 1st DCA 1990); *King v. Lord Colony Enterprises*, 400 So. 2d 856 (Fla. 1st DCA 1981).

[4] The Court recognized in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989), that the First and Third Districts had mistakenly concluded that the City's ordinance was valid after repeal of subsection 440.09(4).

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

[6] *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251 (Fla. 1944).

cases are accepted by Thomas as the governing authorities. Consequently, there is no dispute between the parties, 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. 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 Thomas' brief that suggests, let alone compels a different conclusion.

1. The equities balance in favor of the City.

Thomas' argument unfolds with a question begging analysis of the "equities" of this case, pinned to *Barragan's* declaration that the 1940 City ordinance "flies in the face of State Law and cannot be sustained."[7/] Of course, the City's pension offset ordinance did not fly in the face of state law until judicially so construed in *Barragan*, almost 50 years after its enactment. The ordinance had co-existed harmoniously with its statutory counterpart, section 440.09(4), until the latter's repeal in 1973. Thomas' intimation that the ordinance has always been in derogation of state law reflects selective amnesia of the 49-year period from 1940 to 1989. Thomas' contention that equity favors him because the City engaged in illegal activity is hollow. The unbroken line of appellate decisions pre-*Barragan* uniformly validated the City's ordinance notwithstanding the repeal of section 440.09(4).[8/]

[7/] Ans. B. at p. 11.

[8/] *See* the City's Init. B. at pp. 4-9.

The use to which the City put internal funds not paid out as pensions during that 49 years prior to *Barragan* is completely irrelevant.[9/] It has no bearing whatsoever on the unassailable -- and only relevant -- fact that the City's implementation of its ordinance pre-*Barragan* was clothed with statutory and judicial imprimatur until 1989.

2. The City has established reliance on pre-*Barragan* decisions.

Thomas argues that there could be no detrimental reliance by the City because it was merely continuing conduct that began in 1940. He argues that the *Strickland* and *Brackenridge* decisions require detrimental reliance on decisional law, as opposed to reliance on decisional law merely supporting ongoing conduct.[10/] This hypertechnical distinction finds no support in the key retroactivity cases, including *Strickland* and *Brackenridge*. Those cases inquire only whether prior conduct was "in reliance upon a prevailing decision . . . ." *Strickland*, 18 So. 2d at 253-54. *See also Brackenridge*, 517 So. 2d at 669 (question posed as whether the party acted "in reliance on" a previous judicial declaration).

There is not an ounce of veracity in Thomas' 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.

[9/] *See* Ans. B. at p. 11.

[10/] *See* Ans. B. at p. 13.

It was no accident that the City continued its offset after the silent repeal of section 440.09(4) based on numerous appellate validations of this ordinance-based procedure. 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.

3. The City did not ignore decisions of the Court.

Thomas argues, contrary to the arguments made by Messrs. Bell, Meyer and Fair, that the City's obligation to know that pension offsets were inappropriate stemmed not from the *Barragan* decision, but from the 1970 *Jewel Tea* decision, the 1975 *Brown* decision and the 1976 *Domutz* decision.[11/] [12/] The conjecture that the City "ignored" these decisions is ill-conceived legally and practically, if not nonsensical.

First, none of those cases involved public employers. Thomas nowhere suggests why the City should have extrapolated an adverse result from those cases 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 had been turned aside by a final appellate court decision.[13/] It is ludicrous to suggest that the City lacked any justification for reliance on its ordinance

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[11/] *See* Ans. B. at p. 14.

[12/] *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).

[13/] *City of Miami v. Graham*, 138 So. 2d 751 (Fla. 1962).

because it failed in 1970 (*Jewel Tea*), 1975 (*Brown*) and 1976 (*Domutz*) to 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 29 years after the *Jewel Tea* case.

Thirdly, neither the City nor its litigation opponents "ignored" the court's decisions. Rather, in hotly contested litigation, 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*, the former decision conclusively demonstrates that *Jewel Tea*, *Brown*, and *Domutz* were not ignored.

In this case, and the several other proceedings in which *Barragan's* retroactive application is being challenged by the City, 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.

4. The statute of limitations is unrelated to the retroactivity question.

Thomas next contends that in the absence of a statute of limitations bar, he may was entitled to file a claim seeking an adjustment in past compensation benefits going

back to the date of his accident.[14/] It is hardly surprising that he lacks any authority to suggest that "compensation Orders relate back as far as is necessary to correct mistakes of an employer/carrier or self-insured under the self-administering rules of our compensation Act."[15/] This contention is untenable here. Thomas' claim does not arise from a mistake by his employer; it emanates from judicial mistake prior to 1989. The City completely fulfilled its statutory obligation under the workers' compensation law by furnishing weekly compensation checks, at the correct rate, under its court-validated ordinance. Thomas' assertion that the City had "the obligation to know" that the "pension offsets were not appropriate"[16/] is nothing more than a variant of the oft-raised employee argument, in this and companion cases, that *Barragan* "should" always have been the law. That kind of circular reasoning in no way advances the contention that the *Barragan* decision should be applied retroactively.[17/]

5. Claimants' do not rely on the First District's rationale for retroactivity

It should be of interest to the Court that the contentions made by Thomas with respect to retroactivity are completely different from, and unrelated to, the rationale

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14/ Ans. B. at pp. 14-15.

15/ Ans. B. at p. 14.

16/ Ans. B. at p. 14.

17/ Despite Thomas' assertion to the contrary, the statute of limitations is not the only bar to the filing of a claim for past compensation going back to the date of the accident. In certain circumstances, the employee's failure to notify the employer of injury within 30 days bars the employee from filing a claim. *See* 17/§ 440.185(1), Fla. Stat. (1991); *Mello v. K-Mart*, 542 So. 2d 404 (Fla. 1st DCA 1989).

expressed by the First District for holding that *Barragan* should be applied retroactively. Thomas' disassociation from the reasoning of that court is justified.

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

The City of Daytona Beach 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, Florida Statutes, prohibited a deduction of workers 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.[18/]

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 why the claimants (with the exception of McLean) have distanced themselves from that case.

The *Burnett* decision, like *Amsel*, expressly held that *Barragan* should be treated as being retroactive. In that case, 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 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

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[18/] This exposé of the flawed rationales in *Amsel* for holding *Barragan* to be retroactive makes clear why most of the claimants in these companion cases have not adopted that court's reasoning as their own.

Brackenridge -- namely, whether the City, as the adversely affected party, justifiably relied on the pre-*Barragan* state of the law.[19/] Put another way, neither the *Amsel* nor *Burnett* decisions ever addressed the issue which the City and Thomas agree to be 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 pages 4-12. As the arguments there asserted are neither addressed in the First District decisions explaining their determinations of *Barragan* retroactivity, nor in Thomas' answer brief, it would seem to be unnecessary to repeat them here. The City invites the Court's review of the reasons there expressed, and urges the Court to declare that the *Barragan* decision should be given prospective operation only.

III. The City should not be subject to the 10% statutory penalty for its refusal to pay a compensation claim

The City contends that the 10% penalty imposed by the Judge of Compensation Claims and affirmed by the district court, based on the 1975[20/] provisions of the workers compensation statute, is improper and unconscionable. The City has argued that the plain language of that statute provides no foundation for the penalty, that the policy

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19/ 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.

20/ The City concurs with Mr. Thomas that the 1975 provisions of the statute apply to the penalty issue, although the First District did not note this distinction in its decision. The 1975 penalty provisions were also penal in nature and operation, looking to the unexplained fault of the employer in not paying correct installments of compensation. *See* § 440.20(5), Fla. Stat. (1975). This became even clearer when the legislature subsequently pronounced the exaction a "punitive penalty," commencing in 1979.

reasons for a 10% 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 10% penalty is inappropriate where the City was guilty of no misconduct cognizable in the statute or the policies governing its imposition.[21/]

Thomas 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 and creates 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 Thomas that the City did not intend to treat the *Barragan* decision as retroactive. This argument notably fails to meet the contentions of the City. Worse, it is both misguided and contrary to the very provisions of the workers' compensation law on which Thomas relies.

In essence, Thomas describes the City's refusal to accept *Barragan* as automatically having a retroactive effect as "misconduct" which makes the 10% penalty appropriate. This argument is premised exclusively on the notion that the City did not notify the Division of Workers' Compensation and Thomas of its position on retroactivity within 21 days after the *Barragan* decision became final on denial of rehearing on July 14, 1989.[22/] Plainly, simply and unadorned, Thomas 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.

[21/] *See* the City's Init. B. at pp. 12-16.

[22/] Ans. B. at p. 18.

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. Thomas, and the First District's majority in *Bell* (and thus *Thomas*), 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 Thomas' 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. Thomas' position 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 10% penalty are discussed in Judge Booth's dissent in the *Bell* decision. The City will not here restate 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.[23/]

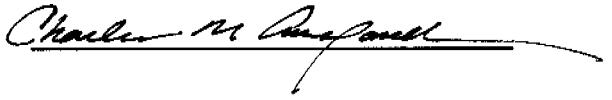
Respectfully submitted,

A. Quinn Jones, III, Esq.
City Attorney
Kathryn S. Pecko, Esq.
Assistant City Attorney
City of Miami
300 Biscayne Boulevard Way
Suite 300
Miami, Florida 33131
Telephone: (305) 579-6700

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Charles M. Auslander, Esq.
Florida Bar No. 349747
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0605

Certificate of Service

I hereby certify that a true and correct copy of this reply brief was mailed on February 16, 1993 to Mark L. Zientz, Esq., 9130 South Dadeland Boulevard, Suite 1100, Miami, Florida 33156.



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23/ The heaping of prejudgment interest onto any part of an award would also be inappropriate. First, the putative pension payments are not equivalent to payments of compensation under Chapter 440. Secondly, the City has always acted in good faith, and in equity that should bar the levy of prejudgment interest prior to the date of claim for a retroactive award. *See Broward County v. Finlayson*, 585 So. 2d 1211 (Fla. 1990).