IN THE SUPREME COURT OF FLORIDA

Case No. 80,998

CITY OF MIAMI, :

Petitioner, :

v. :

KENNETH A. LEIBNITZER, :

Respondent. :

_____ :

BRIEF OF RESPONDENT, KENNETH A. LEIBNITZER

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STATEMENT OF THE CASE AND FACTS

History of the *Barragan* Litigation

On April 20, 1989, the Supreme Court of Florida decided *Barragan v. City of Miami* and *Giordano v. City of Miami,* 545 So. 2d 252 (Fla. 1989).

Barragan and Giordano were Miami police officers who had suffered permanent, work-related injuries. They were both granted workers' compensation benefits and disability pension benefits.

> "In both cases the City, in conformity with a City ordinance, reduced the disability pension benefits by the amount of workers' compensation." Id, at 253.

Both Barragan and Giordano filed workers' compensation claims arguing that the ordinance was unlawful in that it conflicted with state law, and that they had not actually been paid the workers' compensation to which they were entitled. In Barragan's case, the Deputy Commissioner found that the claimant was entitled to a combination of disability pension and workers' compensation benefits up to his average monthly wage. (R. 122-126). He awarded benefits back to Barragan's disability retirement date of November 10, 1983. (R. 124-126). On appeal by the City, the First District Court of Appeal reversed, relying on its own earlier decision in *City of Miami v. Knight,* 510 So. 2d 1069 (Fla. 1st DCA 1987). *City of Miami v. Barragan,* 517 So. 2d 99 (Fla. 1st DCA 1977).

In Giordano's case, the Deputy Commissioner originally held that the offset was impermissible. (R. 127-132). He awarded benefits back to Giordano's disability retirement date of December 3, 1973. (R. 130-132). The City appealed and the First District Court of Appeal per curium affirmed, without opinion. *City of Miami v. Giordano,* 488 So. 2d 538 (Fla. 1st DCA 1986) [*Giordano* I]. When the City continued to deduct Giordano's workers' compensation from his pension, he filed a further claim. The Deputy

Commissioner denied that claim and he appealed. Notwithstanding its prior decision, the First District affirmed the denial. *Giordano v. City of Miami,* 526 So. 2d 737 (Fla. 1st DCA 1988). [*Giordano* II].

The Supreme Court held that the Deputy Commissioner did have jurisdiction to decide these workers' compensation claims which were determined by the issue whether the City could reduce its pension benefits to the extent of workers' compensation benefits.

The Supreme Court cited §440.21, Fla. Stat. which prohibits any agreement by an employee to contribute to a benefit fund maintained by the employer for the purpose of providing compensation and the statute goes on to provide that any employer who makes deductions for such purpose has committed a crime--a misdemeanor. The statute also provides that no agreement by an employee to waive his right to compensation under this chapter shall be valid.

The Supreme Court cited three cases involving private employers: the Jewel Tea Company, the S. S. Kresge Company, and the Southern Bell Telephone and Telegraph Company, in which it had previously held that an employer could not deduct workers' compensation from group insurance benefits, sick leave benefits, or pension benefits (in the latter case, regardless of whether the employee contributed to the funding of these benefits or not.) *Barragan,* at 254. The Court then pointed out that originally the rule was different with respect to public employees, citing its own earlier decision in *City of Miami v. Graham,* 138 So. 2d 751 (Fla. 1962). At that time the Court based its holding on §440.09(4), Fla. Stat. (1957) which had provided that workers' compensation benefits payable to injured public employees would reduce the amount of pension benefits which were also

payable. The Court, however, pointed out that in 1973 the Legislature repealed §440.09(4), Fla. Stat.[1] The Court stated:

> "Thereafter there was no state statute on this subject which authorized public employees to be treated any differently than private employees." *Barragan,* at 254.

The Supreme Court then referred to the Third District Court of Appeal's decision in *Hoffkins v. City of Miami,* 339 So. 2d 1145 (Fla. 3rd DCA 1976), which was a lower court decision holding that the City of Miami's workers' compensation offset ordinance was valid after repeal on the theory that if it had been valid before repeal of §440.09(4), Fla. Stat., it would have been valid thereafter.

The Supreme Court overruled *Hoffkins v. City of Miami,* supra.

The reason given by the Supreme Court was that the Home Rule Powers Act does not allow cities to legislate on any subject expressly preempted by the state government in general law. The Supreme Court stated that there can be no doubt that workers' compensation is such a preemption. The Court noted that this was particularly true because the Legislature had waived sovereign immunity completely for the government with respect to workers' compensation and that every employer is thereby treated the same. §440.02, Fla. Stat.

The Court held:

> "Under state law, §440.21 prohibits an employer from deducting workers' compensation benefits from an employee's pension benefits. Yet, the City of Miami has passed an ordinance which permits this to be done. The ordinance flies in the face of state law and cannot be sustained." *Barragan v. City of Miami,* supra, at 254-255.

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[1] Laws of Florida, Ch. 73-127

The Supreme Court of Florida disapproved of the First District Court of Appeal's decision in *City of Miami v. Knight,* supra, and the Third District Court of Appeal's decision in *Hoffkins v. City of Miami,* supra, and quashed the decisions of the First District Court of Appeal in *City of Miami v. Barragan,* supra, and *Giordano v. City of Miami,* [*Giordano* II], supra, and remanded for further proceedings.

The City of Miami filed a Motion for Rehearing, and argued that the Supreme Court's decision in *Barragan v. City of Miami* should be limited by the Court to prospective application and that it should not be applied to those other disabled workers whose benefits were reduced in the past. (R. 143, 168-169). The City stated in the exhibits attached to its Motion for Rehearing:

> THE CITY contends...that *Barragan* should have prospective effect only. (R. 169).

On July 14, 1989, the Supreme Court of Florida denied the City's Motion for Rehearing. (R. 171).

Post-*Barragan* History

Beginning August 1, 1989, the City ceased taking the workers' compensation offset. It began to pay both workers' compensation and service-connected disability pensions in full to those employees who had received service-connected disability pensions. However, the City did not pay the amount of workers' compensation owed on account of this offset between the date of the retirement of these employees and August 1, 1989. (R. 3-5, 16, 400).

Kenneth Leibnitzer was injured July 13, 1980. (R. 60, 394). He claimed that under *Barragan* he was entitled to the payment of workers' compensation for permanent total disability from the date the City began

deducting his workers' compensation benefits from his pension to August 1, 1989. (R. 55).

The Judge of Compensation Claims heard the claim of Kenneth Leibnitzer and entered his order. At the pre-trial hearing, the City did not raise detrimental reliance on *Hoffkins* as a defense. (R. 61). The City admitted that the claimant was permanently totally disabled from July 30, 1981. (R. 3-5, 61). The City admitted having paid the claimant workers' compensation for permanent total disability but also having deducted those payments from his service-connected disability pension, which began July 30, 1981, until August 1, 1989, at which time the City began to pay both benefits in full.[2] (R. 16, 61). At the hearing, the City presented no evidence of detrimental reliance on any case.

The City raised a number of defenses, one of which was that the decision in *Barragan* should not be applied retrospectively. (R. 61).

The Judge of Compensation Claims held that the *Barragan* decision applied both retrospectively and prospectively, relying on the general rule that a decision is both retrospective and prospective unless the Supreme Court indicates that it is prospective only, which the Supreme Court did not do. (R. 397-398).

The Judge of Compensation Claims awarded the claimant compensation for the non-payment of his permanent total disability from July 30, 1981, to August 1, 1989, on account of the City's unlawful deduction of his workers' compensation from his service-connected disability pension under authority of *Barragan v. City of Miami,* supra. (R. 400-401).

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[2] The amount deducted was mathematically incorrect in the City's favor (R. 400); a matter the City does not now contest.

The Judge also awarded a 10% statutory penalty for the City's failure to file a timely notice to controvert when the City stopped taking the offset as of August 1, 1989, but did not pay compensation which had been offset prior to that date and did not submit a notice to controvert that entitlement to the Division of Workers' Compensation or the claimant until February 28, 1991. (R. 61, 400).

The City appealed and the First District Court of Appeal affirmed unanimously as to the retrospective application of *Barragan* and as to the imposition of the penalty, but certified the penalty issue to this Court per *City of Miami v. Bell,* 606 So. 2d 1192 (Fla. 1st DCA 1992). *City of Miami v. Meyer,* 17 FLW D2405 (Fla. 1st DCA opinion filed October 14, 1992). *City of Miami v. Fair,* 17 FLW D2453 (Fla. 1st DCA opinion filed October 22, 1992). *City of Miami v. Hickey,* 18 FLW D78 (Fla. 1st DCA opinion filed December 15, 1992). *City of Miami v. King,* 18 FLW D194 (Fla. 1st DCA opinion filed December 22, 1992). *City of Miami v. Leibnitzer,* 18 FLW D194 (Fla. 1st DCA opinion filed December 22, 1992).

SUMMARY OF ARGUMENT

This case is about the law of trusts. It could be called the law of trusts meets the Workers' Compensation Law. If "A" (the City) holds money in trust for "B" (the employees) for a specific purpose (pensions), and at the same time "A" owes a debt to "B" for something else (workers' compensation payable in installments), "A" may not dip into "B's" trust fund to pay that debt. If it is caught doing so, "A" must (1) put the money back in trust and (2) pay the debt. There can be no other rule of law.

The City asks for an exception to this rule. It asks that it only be required to pay the installments that were due after it was caught, and not those that were due before. The City asks that this Court change its decision in *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989) to provide that such decision should operate prospectively only.

Prospective Overruling

This Court adopted the rules for prospective overruling in *Florida Forest & Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944) and *Brackenridge v. Ametek, Inc.,* 517 So. 2d 667 (Fla. 1987); appeal dismissed; cert. denied, 488 U. S. 801, 102 L. Ed. 2d 9, 109 S. Ct. 30 (1988).

This Court held that when a court of last resort overrules any of its earlier decisions, such overruling operates both retrospectively and prospectively unless the Court specifically indicates that it operates prospectively only, or a party affirmatively demonstrates that it detrimentally relied upon the overruled decision to acquire property rights.

Following this Court's decision in *Barragan v. City of Miami,* supra, the City of Miami filed a motion for rehearing in which it requested that this Court modify the decision to provide that it be applied prospectively only. This Court denied the City's motion for rehearing, thereby denying

that request. Thereafter, when the decision became final, the City paid Barragan and Giordano from the date of their retirements to the date of the decision, and prospectively thereafter. However, the City treated the Respondent, Leibnitzer, differently. He was only paid from the first of the month (August 1, 1989) following the date on which *Barragan* became final. The City did not pay him from the date of his retirement to August 1, 1989. The City did not notify the Division of Workers' Compensation or the Respondent, Leibnitzer, at that time that it was denying payment from the date of his retirement to August 1, 1989.

Leibnitzer filed claim for this benefit, together with penalties and interest. At the hearing before the trial judge, the City presented no witnesses at all, and it presented no exhibits to support any claim of detrimental reliance on an overruled case or to excuse the penalty. The judge awarded the benefits claimed.

This Court already denied the City's request that *Barragan* operate prospective only when it denied the City's request in that regard on rehearing; therefore, the first exception to the general rule of *Strickland* does not apply. The second exception to the rule of *Strickland* would require that the City affirmatively show by proofs that it relied to its detriment upon the overruled cases. "Relied to its detriment" means that following the first of the overruled cases, the City changed its position to its detriment on account of such decision. The first of the cases upon which the City now claims it relied is *Hoffkins v. City of Miami,* 339 So. 2d 1145 (Fla. 3rd DCA 1976) which was overruled by *Barragan.*

The state statute authorizing a workers' compensation offset against pension benefits was repealed July 1, 1973. Beginning in 1973, the City began taking such offset based on its own ordinance. This was three years

before *Hoffkins* was decided, and therefore, it is impossible for the City to show that it changed its position to its detriment after *Hoffkins* was decided.

The law in Florida is that the substantive right to benefits under the Workers' Compensation Law is fixed by the statute in force on the date of the accident. Hoffkins' accident occurred prior to July 1, 1973, that is, prior to repeal. In the present case, the Respondent, Leibnitzer's accident happened in 1980, which was 7 years after repeal. The City cannot argue that it relied upon *Hoffkins,* a case involving an employee whose accident occurred before repeal, to offset workers' compensation against pension benefits for an employee whose accident occurred after repeal. This is also true of the *West* case.

Beginning in 1973, after repeal of the state statute authorizing the offset of workers' compensation benefits against pensions, the City not only deducted workers' compensation payments from the employees' pensions, but also that year the City issued a check from the pension fund to the City to reimburse the City for the amount of workers' compensation that it had paid to the retired disabled employees in the aggregate. By this bookkeeping device, the City paid no workers' compensation benefits at all. All payments came from the pension fund. The employees brought suit against the City for having done this in 1977 in *Gates v. City of Miami,* Florida 11th Judicial Circuit Case No. 77-9491. On motion for partial summary judgment, the Circuit Court entered an order against the City on the issue of liability for the City having taken money out of the pension trust fund to pay workers' compensation on account of this offset. The City appealed and the Third District Court of Appeal held in *City of Miami v. Gates,* 393 So. 2d 586 (Fla. 3rd DCA 1981) [*Gates* I] that the City had

wrongfully taken money from the employees pension trust fund to pay workers' compensation by means of this offset.

The Workers' Compensation Law waives sovereign immunity completely so that public employers are treated under the statute the same as private employers. §440.02, Fla. Stat. This Court decided in three cases going back to 1970 in *Jewel Tea Company v Florida Industrial Commission,* infra, and 1975 in *Brown v. S. S. Kresge Company,* infra, and 1976 in *Domutz v. Southern Bell Telephone & Telegraph Company,* infra, that workers' compensation offsets against disability insurance, group insurance or pension plans respectively were unlawful under §440.21, Fla. Stat.

In the present case, the City presented no affirmative proof that it detrimentally relied upon any case when it began offsetting under its own ordinance in 1973, after repeal. However, the record does show: (1) This Court had forbidden employers from doing so in the three cited cases; (2) The Third District Court of Appeal held in *Gates* I that the City had engaged in wrongdoing in taking a workers' compensation offset after 1973; (3) The 1976 overruled *Hoffkins* case upon which the City claims it relied was not decided until three years after the City had begun taking such offsets under its own ordinance; and (4) *Hoffkins* was factually not applicable because *Hoffkins* was injured before repeal and the City took offsets in regard to the Respondent and other employees who were injured after repeal.

Therefore, the District Court of Appeal was correct in holding that *Barragan* operates both prospectively and retrospectively with respect to employees whose accidents occurred after repeal of the state statute which had authorized offsets.

Penalty and Interest

The District Court of Appeal was correct in affirming the 10% penalty for the failure of the City to notify the Division or the Respondent in July/August of 1989 that it was denying the payment of benefits for the period from the date of his retirement to August 1, 1989, based on the statute in force on the date of his accident.

The award of penalties has absolutely nothing to do with what the City did, or did not do, prior to July 14, 1989, when *Barragan* became final. The statute forbids an employer from denying a benefit to an employee and not notifying the employee and the Division that it has done so. The statutory penalty provided by the Legislature for this wrongdoing is: if the employer/carrier was incorrect in denying a benefit, to whatever amount is determined to be owed there is added a penalty of 10% for such misconduct. That is precisely what occurred in this case.

The City's argument that an accumulation of unpaid installments for workers' compensation is not an installment of compensation for which penalties and interest are payable is linguistically and legally erroneous.

The City's argument in regard to the 20% penalty for the failure to comply with a mandate does not apply to this case. The First District Court of Appeal has not issued the mandate.

ARGUMENT

POINT I

THE DECISION OF THE SUPREME COURT OF FLORIDA IN *BARRAGAN V. CITY OF MIAMI* OPERATES BOTH PROSPECTIVELY AND RETROSPECTIVELY:

(A) THE SUPREME COURT DID NOT LIMIT *BARRAGAN* TO PROSPECTIVE APPLICATION ONLY, AND

(B) THE CITY'S CLAIM OF DETRIMENTAL RELIANCE ON OVERRULED CASES HAS NO BASIS.

When the Supreme Court of Florida decided *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989), it did not limit its application to be prospective only. This is consistent with the general rule stated in *Florida Forest and Park Service v. Strickland,* 18 So. 2d 251 (Fla. 1944), that when a Court of last resort overrules any of its earlier decisions, such overruling operates retrospectively and prospectively, unless the Court specifically indicates that it operates prospectively only.

Strickland happened to be a workers' compensation case. It was an assault case. The Deputy Commissioner had denied the claim based on the statutory defense regarding assaults. The claimant appealed to the Circuit Court, and the Circuit Court reversed and the employer/carrier appealed to the Supreme Court.

The case discusses that there had been an earlier Supreme Court decision which held that appeals were to be taken from the Deputy Commissioner directly to the Circuit Court, which is what *Strickland* had done. However, about two months after the Circuit Court had rendered its decision in favor of *Strickland,* the Supreme Court decided in another case overruling that earlier decision, that appeals could not be taken from the

Deputy Commissioner directly to the Circuit Court, but that appeals had to be taken to the full commission in order to exhaust administrative remedies. In the case then before the Supreme Court, the Park Service asked that the Circuit Judge's decision in favor of Strickland be set aside for lack of jurisdiction.

In denying that request, the Supreme Court stated the general proposition that overruling decisions operate both retrospectively and prospectively unless the Supreme Court provides that they are to operate prospectively only at the time that the case is decided. The Court stated, however, that there was a further exception when a party could show that it had affirmatively relied upon the earlier decision that had been overruled. In Strickland's case, he was able to do so because the overruling decision was not rendered until two months after the Circuit Court had decided in his favor. The Supreme Court pointed out that the time had now expired for him to go to the full commission, and therefore his reliance on the earlier decision providing that he should go to the Circuit Court directly was to his detriment. Incidentally, the Supreme Court affirmed the Circuit Court order in favor of Strickland. The precise language was:

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. (Citing authorities). Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction, and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving a subsequent overruling decision a retrospective operation. Id., at 253.

The Supreme Court of Florida was confronted with the same question in a more recent case in a different setting, in *Brackenridge v. Ametek, Inc.*, 517 So. 2d 667 (Fla. 1987); appeal dismissed, cert. denied, 488 U. S. 801, 102 L. Ed. 2d 9, 109 S. Ct. 30 (1988).

In that case the plaintiff, Brackenridge, was injured by a laundry extractor more than 12 years after the delivery to its original purchaser. The Third District Court of Appeal had affirmed the dismissal of the complaint, but certified questions to the Supreme Court. The first dealt with statutory construction. The second was whether the subsequent *Pullum* case, which held that the claim was barred, by overruling the earlier *Battilla* case, which held that it was not barred, applied when the cause of action accrued after *Battilla* but before *Pullum.*

This Court introduced the problem by citing the rule in the *Strickland* case and also *Melendez v. Dreis and Krump Manufacturing Co.,* 515 So. 2d 735 (Fla. 1987).

This Court held that *Brackenridge* did not fall within the exception to the general rule stated in *Strickland* because there was no affirmative proof that Brackenridge had been deprived of a property or contract right by relying to his detriment upon *Battilla.*

The Court held:

> He was not deprived of a property or contract right acquired in reliance upon this Court's decision in *Battilla.* His accident was fortuitous and did not occur as a result of conduct prompted by *Battilla.*
>
> ...since there was no detrimental reliance upon *Battilla,* the general rule dictates that *Pullum* be given retrospective application so as to bar his claim. Id., at 669. (Emphasis added).

While *Brackenridge* deals with tort, as distinguished from property, contract, or statutory rights, it was not decided on that basis alone. Rather,

it dealt with a realistic problem. In the case of statutory property or contract rights, both parties acquired certain rights or were deprived of certain rights, and they are entitled to have those rights adjudicated under the statutory construction which is the correct rule of law, not the overruled law. Otherwise, the loser could always say that all overruling, or even reversing, should be prospective only because he must have relied upon the earlier, erroneous court decision. That is bunkum.

In the *Strickland* case, there was detrimental reliance, although it involved a procedural right. That is to say, *Strickland* performed the act which was to his detriment after the decision which was overruled was handed down, but before the overruling decision. His conduct was exclusively governed by the overruled case, and not by anything else. Plainly, the Supreme Court thought that he should have his day in court:

> ...the facts bringing the case within the exception to the generally prevailing rule that court decisions will be given a retrospective as well as prospective operation. to hold otherwise would be, in effect, to deprive the claimant of a potentially valuable claim accruing by reason of his contract of employment prior to the overruling decision, the right to which he has sought to have judicially established by the only court of competent jurisdiction which may try the matter as an original judicial controversy. *Fla. Forest and Park Service v. Strickland,* supra, at 254.

In the present case, the City presented no witnesses at the trial and it presented no documentary evidence at the trial to explain why it began offsetting the claimant's workers' compensation against his pension beginning with his retirement on July 30, 1981.

Therefore, we have to consider whether on the law and facts the City showed affirmative proofs that it had detrimentally relied upon an earlier overruled decision to acquire a property right superior to the employee's so

as to require that *Barragan* not be applied retrospectively. After all, the City is asking that the wrong rule of law be applied with respect to the benefits payable between the claimant's retirement in 1981 and August 1, 1989, so as to deprive him of the property and contract rights that he acquired on account of the repeal of the offset statute by the Florida Legislature in 1973 and his industrial accident in 1980.

The Respondent, Leibnitzer's workers' compensation claim is a valuable contract and property right. *Fla. Forest and Park Service v. Strickland,* supra, at 254. His entitlement is fixed by the statute in force on the date of his accident in 1980. *Sullivan v. Mayo,* infra, as correctly interpreted by the Supreme Court. *Barragan v. City of Miami,* supra. The Respondent, Leibnitzer's pension benefit is a vested property right determined by the law in force on the date of his retirement in 1981. *Florida Sheriffs Association v. Dept. of Administration,* 408 So. 2d 1033 (Fla. 1981).

Thus we return to the test of *Brackenridge* as applied to the present case. In *Brackenridge,* the Supreme Court ruled:

> As stated in *Melendez,* it is a general rule that a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to have prospective effect only. However, there is an except to the rule which provides that where property or contract rights have been acquired under and in accordance with a previous statutory construction of the Supreme Court, such rights should not be destroyed by giving the retrospective operation to a subsequent overruling decision. (Citing authority) *Brackenridge v. Ametek, Inc.,* supra, at 668, 669. (Emphasis added).

Strickland is an example of the exception, and *Brackenridge* is not. Plainly, neither *Strickland* nor *Brackenridge* require prospective overruling in all cases, but are limited to cases in which (1) the overruling case is limited by the Supreme Court to prospective application only when it

is handed down; (*Barragan* was not so limited by the Supreme Court) or (2) there is actual proof that property or contract rights have been acquired under and in accordance with a case of previous statutory construction by the Supreme Court upon which decision the party relied to its detriment.

The City filed a motion for rehearing in *Barragan*. (R. 138). It argued that there were other retirees to whom the *Barragan* decision would apply. (R. 143, 169). In the motion the City argued that there would be over a hundred. (R. 143).[3] In *Barragan*, the City's advocacy was peculiar. The City attached as an exhibit to its motion for rehearing a draft of a complaint which the City threatened to file if it did not win the motion for rehearing. (R. 143, 166). This was a suit for declaratory decree in which the City contended that the *Barragan* decision should be limited to prospective application only with respect to other retirees. (R. 143, 169). The complaint was never filed. Importantly, the City argued to the Supreme Court on rehearing:

> THE CITY contends... that Barragan should have prospective effect only. (R. 169).

The Supreme Court denied the City's motion for rehearing. (R. 171).

The City admits that following the denial of the motion for rehearing that it paid Leibnitzer (and the others) prospectively from August 1, 1989, but declined to pay him from the date of his retirement to August 1, 1989. The ensuing workers' compensation claims for those benefits by Leibnitzer and others were heard before the workers' compensation judges. In Leibnitzer's case, and in all of the other cases, the City presented no evidence of detrimental reliance on the overruled DCA cases.

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[3] The number was never established. The City's later statements in the brief of Petitioner about the number of employees and the amount payable are completely outside the record.

The Court may notice that detrimental reliance was not raised as a defense at the pre-trial hearing. (R. 61). The City does not show the Court that its claim of detrimental reliance upon the overruled cases is supported by evidence in the record of any kind. Indeed, there was no such evidence. Why the City did what it did, we can only speculate. It may have been for no reason at all. It may have been that the City never noticed that the state statute had been repealed. It may have been that it relied upon its own ordinance alone. It may have been that it deliberately decided to ignore the repeal or the Supreme Court cases which did not allow offsets. It may have been that it thought that repeal did not affect the City. It could have been any one of a number of things. We may easily understand why the decisions of the First District Court of Appeal in *City of Miami v. Burnett,* infra, *City of Miami v. Pierattini,* infra, *City of Miami v. Moye,* infra, *City of Miami v. Ogle,* infra, *City of Miami v. Bell,* supra, *City of Miami v. Fair,* supra, *City of Miami v. Meyer,* supra, and the other cases do not refer to such a claim. The City never presented any evidence to support it.

What the record does contain is material which negates any claim by the City of detrimental reliance upon the overruled DCA cases.

In its brief, the City says that there was a long line of earlier cases which supported its position for offsetting the claimant's workers' compensation benefits against his pension. This statement is not true.

The first of the cases upon which the City now says it relied in offsetting Mr. Leibnitzer's benefits was *City of Miami v. Graham,* 138 So. 2d 751 (Fla. 1962) [Petitioner's brief 1, etc.]. *Graham* was the decision by this Court that the pre-1973 state statute providing for the offset was constitutionally valid. In other words, Graham was injured before repeal of the statute authorizing the workers' compensation offset. Plainly it has

absolutely nothing to do with the Respondent, Leibnitzer, whose accident occurred after repeal.

This Court decided in the leading case of *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960) that substantive rights in workers' compensation cases are determined by the statute in force on the date of the accident. This is important because there are so many statutory changes in the Florida Workers' Compensation Law. There can be no doubt that a workers' compensation offset is a substantive right. When the former statute was in force, the employee received less money; whereas after repeal of the statute, he received more money. His substantive rights were affected and so were those of his employer. Whether the employee's industrial accident was before or after the effective date of repeal, July 1, 1973, is of utmost significance. Indeed, in a line of cases after *Barragan*, the City argued that those employees whose accidents occurred before July 1, 1973, were not entitled to benefits on account of the *Barragan* decision. The First District Court of Appeal agreed in *City of Miami v. Jones,* 593 So. 2d 544 (Fla. 1st DCA 1992). Therefore, the *Graham* case, which deals with an accident that occurred before repeal, has absolutely nothing to do with the Respondent, Leibnitzer's case when his accident occurred after repeal.

The first of the cases after repeal upon which the City now claims that it relied in offsetting the Respondent, Leibnitzer's benefits was *Hoffkins v. City of Miami,* 339 So. 2d 1145 (Fla. 3rd DCA 1976). [Petitioner's brief 1, etc.].

In the *Hoffkins* decision, the Third District Court of Appeal stated that the City argued that after repeal of the state statute authorizing offsets in 1973, the City took the offset based on its own ordinance.

The Court stated:

> The City of Miami under the claimed authority of City of Miami Ordinance 41-406(15) has deducted the amount of $66.00 workmen's compensation benefit from the pension check. *Hoffkins v. City of Miami*, supra, at 1145-1146.

In *Hoffkins* the City explained that it was already offsetting prior to the decision being handed down based upon its own ordinance. In the *Hoffkins* case, the first of the lower court offset cases after repeal, the Third DCA stated the City's contention was that it relied upon its own ordinance prior to the case being handed down in order to offset benefits. Therefore, the City cannot now claim that it relied upon the *Hoffkins* case to change its position to its detriment. Yet this is a requirement under *Brackenridge* in order to acquire or be deprive of contract or property rights on account of the decision only. An interesting point is the Court's statement that Lawrence Hoffkins' compensation rate was $66.00 per week, because the $66.00 a week compensation rate became effective July 1, 1972, by Laws of Florida, Ch. 72-198, §1, and it was repealed effective July 1, 1973, by Ch. 73-127, §4, which increased the rate to $80.00. The Court will immediately notice that the provision of Laws of Florida which abolished the $66.00 maximum weekly rate was the same Ch. 73-127 which repealed the workers' compensation offset. Laws of Fla., Ch. 73-127, §2.

What this means is that Lawrence Hoffkins' accident occurred prior to repeal. Therefore, the City would be false in claiming now that it relied on *Hoffkins* to offset benefits for the Respondent, Leibnitzer, or anyone else who was injured after July 1, 1973; that is, who was injured after repeal.

Indeed, the Judge's order states that Lawrence Hoffkins' accident occurred July 10, 1972. (A. 2, 7). The City was a party to that litigation, and is therefore charged with the knowledge that Lawrence Hoffkins was

injured before repeal. Any claim that it relied upon the *Hoffkins* decision to offset workers' compensation benefits against pension benefits for anyone who was injured after repeal would have to be false.

The next cases upon which the City now claims it relied to offset the Respondent, Leibnitzer's benefits, are the Donald Ray West cases, which the City cites as *West v. City of Miami,* 341 So. 2d 999 (Fla. 3rd DCA 1976); cert. denied, 355 So. 2d 518 (Fla. 1978); and *City of Miami v. West,* IRC Order 2-2647 (May 22, 1974); cert. denied, 310 So. 2d 304 (Fla. 1975). [Petitioner's brief 1, etc.].

These two cases actually involve the same claimant and the same decision, both by the IRC and by the Third DCA. The IRC decision, by the way, should be correctly cited as Vol. 9 of Florida Compensation Reports, page 61 (1974). The short form is 9 FCR 61 (1974). The IRC *West* decision, does not state what was Donald West's date of accident, but it does state that he reached maximum medical improvement on September 30, 1971, and filed claim in 1972. Id. at 61. What this means is that Donald Ray West's accident occurred prior to repeal. Indeed, the IRC decision relied upon the *Graham* case, which was this Court's pre-repeal decision. So while the IRC decision in West's case was made prior to the Respondent, Leibnitzer's retirement, it was also a case in which the industrial accident occurred prior to repeal. Therefore it is not applicable to the Respondent, Leibnitzer's case when his accident occurred after repeal.

The Third District Court of Appeal's decision in West's case, 341 So. 2d 999 (Fla. 3rd DCA 1976) is a very short opinion which simply relies on *Hoffkins.* Therefore, the City could not have relied upon it in offsetting Leibnitzer's benefits. Since the accident was pre-repeal, it was not factually applicable also.

Another case upon which the City now claims it relied was *Thorpe v. City of Miami,* 356 So. 2d 913 (Fla. 3rd DCA 1978) [Petitioner's brief 1, etc.]. *Thorpe* is even shorter in simply PCAing on *Hoffkins.* There is no way to tell what the date of accident was. In any event, it does not stand for any proposition by which the City could now claim having relied upon it to meet the proofs required for the exception set forth in the *Brackenridge* case.

The same is true of the City's statement in regard to *City of Miami v. Knight,* 510 So. 2d 1069 (Fla. 1st DCA 1987) review denied 518 So. 2d 1276 (Fla. 1987). [Petitioner's brief 1, etc.]. *Knight* relies on *Hoffkins* and was decided years after the City had already started to offset the Respondent, Leibnitzer's benefits. Therefore, it is impossible for *Knight* to have been a case on which the City relied to its detriment by changing its position after *Knight* in a manner to meet the requirements of the exception set forth in the *Brackenridge* case.

Indeed, in none of the cases can this possibly be true that the City changed its position after any of the lower court decisions. It is abundantly clear that the City had already adopted its position long before any of the cases were decided at all.

Another case that the City now claims it relied upon was the lower court's decision in *Giordano v. City of Miami,* 526 So. 2d 737 (Fla. 1st DCA 1988) [*Giordano* II] [Petitioner's brief 1, etc.].

That claim is also impossible since Giordano had originally received an order from the Judge of Compensation Claims holding that the offset was illegal and ordering the City to pay benefits. That decision was affirmed PCA by the First District Court of Appeal in *Giordano* I in an earlier case. *City of Miami v. Giordano,* 488 So. 2d 538 (Fla. 1st DCA 1986).

[*Giordano* I].[4] Thereafter the City paid Giordano for the benefits that it had illegally offset following the affirmance of the first *Giordano* decision, but then refused to pay any more benefits, and the issue was litigated a second time. Evidently the City now claims that it relied upon the second *Giordano* decision in its favor, but not the first *Giordano* decision against it. Even the second one was the case upon which the First District Court of Appeal certified the question to this Court, which ultimately resulted in an order requiring the City to pay Giordano back to the date of his retirement. *Giordano* was a companion to *Barragan* in this Court.

Finally, the City claims that it relied on the First District Court of Appeal's decision in *City of Miami v. Barragan,* 517 So. 2d 99 (Fla. 1st DCA 1987); reversed, 545 So. 2d 252 (Fla. 1989). [Petitioner's brief 1, etc.].

That claim is astounding because the First District Court of Appeal in *Barragan* held that although it was denying Barragan the benefits which he claimed, the Court believed that its decision was in conflict with this Court's prior decision in *Jewel Tea Co., Inc. v. FIC,* 235 So. 2d 289 (Fla. 1970), *City of Miami v. Barragan,* 517 So. 2d 99, and so it certified the question to this Court.

The City now claims that it relied on overruled cases in offsetting workers' compensation benefits against pension benefits. That is not what they argued to this Court when they were previously here in *Barragan.* Then they argued that they took the offset beginning in 1973 because of their own ordinance and the Home Rule Powers Act. The case states that the City contended that although the state statute authorizing offsets was repealed in 1973, it also happened that the Home Rule Powers Act was

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[4] Although *Giordano* I was PCA'd, the City of Miami was a party and knew of the decision.

passed in 1973, and on that basis the City relied upon its own ordinance and upon the Home Rule Powers Act in taking the offsets after 1973. Id., at 254.

Since the City presented no evidence of any kind of reliance, detrimental or otherwise, it certainly could be argued that the City was very selective. It did not rely upon the Supreme Court's decisions in *Jewel Tea Co., Inc. v. FIC,* 235 So. 2d 289 (Fla. 1970), *Brown v. S. S. Kresge Company,* 305 So. 2d 191 (Fla. 1974), and *Domutz v. Southern Bell Tel. & Tel. Co.,* 339 So. 2d 636 (Fla. 1976), which indicated that offsets were not allowed. *Domutz* was particularly applicable since it was decided in 1976, the same year as *Hoffkins*. In *Domutz,* which was cited by this Court in *Barragan,* the Supreme Court had held that workers' compensation benefits could not be credited against pension benefits.

The City did not rely upon *Department of Highway Safety & Motor Vehicles v. McBride,* 420 So. 2d 897 (Fla. 1st DCA 1982) in which a workers' compensation offset against a pension was disallowed.

The City could not have relied upon *City of Miami v. Gates,* 393 So. 2d 586 (Fla. 3rd DCA 1981) [*Gates* I]. In that case, the employees sued in 1977 complaining that the City of Miami had engaged in a number of breaches of trust, one of which was that the City had paid workers' compensation benefits from the employees' pension trust fund. (R. 95-100, 193-217).

In the Joint Motion for Expansion of Plaintiff Class, Preliminary Approval of Settlement Agreement, Issuance of Notice to Class and Scheduling of a Final Approval Hearing dated March 29, 1985, and signed by the attorneys for the City in the case of *Gates v. City of Miami,* Fla. 11th Judicial Circuit Case No. 77-9491, the City agreed to the following statement:

> As amended, the complaint alleges the City of Miami improperly used funds designated by law for the exclusive purpose of funding pension trusts to pay social security contributions for other City employees, premiums on group insurance policies, legal judgments against the City, and workers' compensation obligations of the City. (Emphasis added). (R. 117).

The Circuit Judge, issued his order of approval of the Joint Motion on April 11, 1985. (R. 120-121).

On May 10, 1973 (the year of repeal), the City changed the procedure for taking the workers' compensation offset. (R. 99-100) (A. 9-10). It deducted the workers' compensation payments from the pension payments of each individual employee, and then it issued a check from the pension fund to the City to pay the City for the amount of workers' compensation. (R. 99-100) (A. 9-10). The net effect was to deduct the money from the pension benefit so that the injured worker did not receive it, and to then deduct the money a second time from the pension trust fund so that the City never paid it. The matter came before the Circuit Judge on a motion for partial summary judgment, and he entered an order in favor of the employees. (R. 100-102). It was affirmed on appeal by the Third District Court of Appeal in 1981. *City of Miami v. Gates,* 393 So. 2d. 586 (Fla. 3rd DCA 1981) [*Gates* I]. The Court commented upon the City's contention that it was permissible to pay the City's workers' compensation obligations from the employees' pension trust fund because both were intended for payment to the employees. *Gates* I, at 588.

The Third District Court of Appeal said of the City's contention:

> This claim amounts to the suggestion that, while one may not rob Peter to pay Paul, it is permissible to take from Paul himself in order to do so. It need hardly be stated that we thoroughly disagree with such a proposition. *Gates* I, at 588.

When Leibnitzer and the others filed their present claims, the City contended that *Gates* was a bar because that litigation which began in 1977 disposed of the issue. *City of Miami v. Gates,* 592 So. 2d 749 (Fla. 3rd DCA 1992) [*Gates* II]. The Circuit Judge decided that it was not a bar because the Circuit Court did not have jurisdiction over workers' compensation claims. (R. 227-228). The Third District Court of Appeal affirmed, since the retirees could not have known of their entitlement prior to *Barragan. City of Miami v. Gates,* 592 So. 2d 538 (Fla. 3rd DCA 1992) [*Gates* II].

In the 1977 *Gates* I case, there was a 1973 City memo that was coincident with repeal of the state statute which was the basis for the summary judgment against the City. (R. 99-100) (A. 9-10). The 1973 memo outlined a plan whereby the City would deduct workers' compensation from the pensions of the totally disabled retirees and then deduct an equal amount from the pension fund to pay the City for the workers' compensation beginning in fiscal year 1973-1974. It reads:

CITY OF MIAMI, FLORIDA

INTER-OFFICE MEMORANDUM

Mr. M. L. Reese City Manager		DATE:	May 10, 1973 FILE:
Attention:	Mr. Joel V. Lanken, Special Assistant to City Manager Employee Services	SUBJECT:	Workmen's Compensation Program Expenditures
		REFERENCES:	
W. R. Bailey Director of Finance		ENCLOSURES:	

This is in response to the request of Joel Lanken, under date of April 20, 1973, for assistance in furnishing estimates related to Workmen's Compensation expenditures for the 1973-74 fiscal year.

To assist the Office of Employee Services in substantiating the current 1972-73 fiscal year's estimated deficit and 1973-74 Budget preparation, the following practices have been effected January, 1973.

1P3 The Workmen's Compensation payment due to retirees on disability pension were either issued a separate payment from the City's Workmen's Compensation Fund and the gross pension issued was reduced by an equal amount of the pension check and rubber stamped to indicate that each check included the amount due as Workmen's Compensation. A separate check was not issued.

As of January 1, 1973, the procedure was changed so that all disability retirees who were to receive Workmen's Compensation received a check from the City for Workmen's Compensation bi-weekly and the equivalent amount was deducted from the retiree's monthly pension check. The total amount deducted from the pension checks as the Workmen's Compensation offset, plus the amount deducted from the retiree for advance Workmen's Compensation deductions, is to be remitted in total to the City as a reimbursement.

Under this procedure the amount to be issued annually to disability retirees as Workmen's Compensation payment will be approximately $135,000.00. The amount that was issued separately as Workmen's Compensation payment under the previous method was approximately $35,000.00 to $45,000.00.

The amount the City will receive from the Retirement System as recovery for Workmen's Compensation will be approximately $145,000.00 annually, based on present estimate this date.

1P3 & 1P4 The present procedure will increase the requirements against the 1973-1974 (104.01.4170) Workmen's Compensation code by approximately $40,000 to $100,000 annually.

Mr. M. L. Reese
City Manager

May 10, 1973

Attention: Mr. Joel V. Lanken, Special Assistant to City Manager Employee Services

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There will be a revenue recovery into the General Fund as "Reimbursement-Recovery from Retirement System on Workmen's Compensation" approximately $145,000 annually on which Revenue Forms for 1973-74 Budget Estimate reflect only one

month of the indicated four (4). 1973-74 Revenue Estimates for the Account should be reported as annual estimate of $145,000.00.

WRB/p

bc: Betty Harris
Joel Lanken

(R. 99-100) (A. 9-10) (Emphasis added).

This was done for several years. *Gates* I, supra at 588. After 1978, it was deducted from the City's contribution. (A. 11-13). By this creative bookkeeping, the City never paid workers' compensation at all. It all came from the pension fund.

It was a breach of trust. If A (the City) holds money in trust for B (the employees) for a specific purpose (pensions), and A also owes B a debt (workers' compensation), A cannot dip into B's trust fund to pay A's debt to B. When A is caught it must (1) put the money taken back into the trust [*Gates* I] and (2) pay the debt. [*Barragan].*

The City asks for an unwarranted exception, which would disturb the law of trusts. The City was caught in the 1977 *Gates* I case and was required to put the money back into the trust, but it never paid the debt. When it was caught in *Barragan* for not having paid the debt, it paid Barragan and Giordano from the date of retirement, but it only paid for the first of the month following the denial of rehearing prospectively, to the other retirees. The City declined to comply with the Court's order and pay the other retirees as Barragan and Giordano were ordered to be paid, back to the dates of their disability retirements.

The maxim is not "Caveat Employee", "Employee Beware". The City was both employer and trustee of its employees. It could not lawfully co-mingle the funds because of those two roles, either under the Workers' Compensation Law or under the laws and principles of trusts.[5]

Frankly, it is surprising that the City would even ask for this exception. First of all, *Barragan* was not a case in which the Supreme Court overruled itself. Rather, it was a case in which the Court sustained its own prior decisions like *Jewel Tea,* which was decided in 1969, *Brown,* which was decided in 1974, and *Domutz,* which was decided in 1976. The City began taking the offset pursuant to its ordinance in 1973 in a manner which was held by the First District Court of Appeal in *Gates* I to have been a breach of trust. Yet the City persisted in continuing to take the offset. The City now claims that it relied upon *Hoffkins,* which was not decided until three years after the City had begun to take the offset per the 1973 City memo. Plainly, the City never changed its position based on any lower

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[5] The City's record of taking trust fund money and of taking workers' compensation from its employees is abysmal. In *City of Miami v. Carter,* 105 So. 2d 5 (Fla. 1958), the City was found liable for having co-mingled funds which were earmarked for fire fighters' pensions with other funds to pay for other employees' pensions, including management. In *City of Miami v. Hall,* 105 So. 2d 499 (Fla. 3rd DCA 1958) (A. 37-39), the City was found liable for having co-mingled funds which were earmarked for police officers' pensions with other funds to pay for other employees' pensions, including management. In *City of Miami v. Gates,* 393 So. 2d 586 (Fla. 3rd DCA 1981) [*Gates* I], the City was found liable for having failed to pay the *Carter* and *Hall* judgments by having transferred money that already belonged to the pension trust to make it appear that the judgments were paid, when in fact they were not; also the City was found liable for having withdrawn money from the pension trust fund to pay the City for workers' compensation which was offset from the disabled employees' pensions after 1973. The City paid no workers' compensation. It paid the employees with their own money. In *Schel v. City of Miami,* 193 So. 2d 170 (Fla. 1967) the Supreme Court invalidated a City Resolution which required the employees to give their workers' compensation permanent disability to the City in exchange for having been paid salary during periods of temporary disability. In *City of Miami v. Herndon,* 209 So. 2d 487 (Fla. 3rd DCA 1968). The City unlawfully reduced retirement benefits by the amount of workers' compensation paid before retirement. In *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989) the City deducted workers' compensation from disabled employees' pensions pursuant to the City's pension ordinance which was invalid after repeal of the state statute which had originally authorized it.

court decision. It could not have detrimentally relied upon *Hoffkins* and its progeny when it had already set out to take this offset years before in 1973. The City presented no evidence of detrimental reliance in the proceedings below, in the present case, or in any of the other cases. Furthermore, *Hoffkins* was injured before repeal and is factually inapplicable. To the contrary, the only evidence is that such a position is not true and cannot be true. To accept the City's argument is to ignore the 1973 City memo, to ignore *Giordano* I, to ignore *Gates* I, to ignore *Jewel Tea, Brown,* and *Domutz,* and to ignore *Barragan.*

The First District Court of Appeal already decided in *City of Miami v. Burnett,* 596 So. 2d 478 (Fla. 1st DCA 1992), *City of Miami v. Moye,* 602 So. 2d 587 (Fla. 1st DCA 1992), *City of Miami v. Pierattini,* 597 So. 2d 963 (Fla. 1st DCA 1992), *City of Miami v. Ogle,* 600 So. 2d 31 (Fla. 1st DCA 1992), and other cases, that the Supreme Court's decision in *Barragan* operates both prospectively and retrospectively. On review the Supreme Court consolidated these cases.

On October 14, 1992, the Supreme Court of Florida issued its order in *City of Miami v. Ogle, et al.,* No. 80,055 (Fla. October 14, 1992), declining to accept jurisdiction to review these decisions. These decisions are now final.

This First District Court of Appeal had already decided in *City of Daytona Beach v. Amsel,* 585 So. 2d 1044 (Fla. 1st DCA 1991), that *Barragan* operates both prospectively and retrospectively. That decision is now final.

The City now claims detrimental reliance on overruled DCA cases but presented no evidence of it. At the same time we know that (1) the City has claimed in the past that it took the offset based on its own ordinance only; (2) the City took the offset following repeal in 1973, long before any of the overruled cases were decided; and (3) the City took the offset beginning

in 1973 which was previously adjudicated in *Gates* I to have been in a manner which was a breach of trust by the actual taking of money from the pension trust fund.

There was no detrimental reliance.

There was no change of position based on overruled cases.

The Respondent, Leibnitzer, had a property and contract right that his benefits should be paid in full per the *Barragan* decision since he was injured after repeal of the state statute, just Barragan and Giordano were.

The decision of the First District Court of Appeal affirming the Judge of Compensation Claims on this point should be affirmed or jurisdiction to review declined.

POINT II

THE AWARD OF A 10% PENALTY FOR THE CITY'S FAILURE TO FILE A TIMELY NOTICE TO CONTROVERT IS CORRECT.

The First District Court of Appeal affirmed the decision of the Judge of Compensation Claims, which imposed the statutory 10% penalty upon the City for its failure to file a timely notice to controvert. He found that the City ceased to take the pension offset as of August 1, 1989. However, at that time it did not pay the claimant retrospectively for the payments which had been withheld prior to that time. Neither did the City file at that time a notice to controvert with the Division of Workers' Compensation or send a copy to the employee in order to notify the Division and him why they were not paying the compensation that was owed from the date of his retirement to August 1, 1989.

The First District Court of Appeal, however, did certify the question to this Court as a question of great public importance as to whether the penalty should have been imposed.

In its brief on this point, the City makes two important mistakes. The 1980 statute applicable to this case refers to the payment of the "10 percent penalty" as an "additional installment of compensation". §440.20(7), Fla. Stat. (1980). It further describes the punitive nature of this "additional payment" by requiring that it be paid by the employer or the carrier, depending upon which of the two was at fault in causing the delay in filing the notice to controvert, and it further provides that the insurance policy cannot provide that this additional payment be made by the carrier if it is determined that the employer was at fault. The City's argument does not discuss what was the City's misconduct which gave rise to the determination by the Judge of Compensation Claims that the penalty

should be imposed. In other words, in their argument they presented the law wrong and they presented the facts wrong.

In his order the Judge of Compensation Claims found:

> From July 30, 1981, to August 1, 1989, there was a deduction of $914.33 per month taken from his pension for the workers' compensation payments. From the beginning of August of 1989 to the present, he has in fact been paid both his workers' compensation and his pension without an offset. (R. 396).

Based on these findings of fact, the Judge of Compensation Claims found:

> The employee is entitled to a penalty of 10% of the benefits payable under this order. *Brazil v. School Board of Alachua County,* 408 So. 2d 842 (Fla. 1st DCA 1982). Claim was filed on February 8, 1991, and a notice to controvert was sent February 28, 1991. The City/self insured could have and should have filed a notice to controvert with respect to the payments from July 30, 1981, to August 1, 1989, as of August 1, 1989, when it began paying the claimant permanent total disability in addition to his service-connected disability pension, but declining to pay "retroactively". The City/self insured has not shown that the failure to pay or the failure to file a timely notice to controvert was due to circumstances beyond its control. (R. 400).

First of all, on the facts, the imposition of the 10% penalty has absolutely nothing to do with the City's taking the offset prior to August 1, 1989. It has absolutely nothing to do with anything that the City did prior to August 1, 1989. It has absolutely nothing to do with why the City did not pay benefits or why it took the offset prior to August 1, 1989. On the facts, the imposition of the penalty was for a different act of misconduct.

The Workers' Compensation Law is a statutory scheme of no-fault liability in which payments for medical care are to be paid as the medical care is furnished and payments for disability are to be made timely as they

are due. This contrasts with common law damages which are payable all at one time, either by settlement or by payment of a judgment.

The Workers' Compensation Law is self executing, which means that the parties have an obligation to each other to inform each other of what is owed, what is being paid, and what is being denied. In this regard, the employer/carrier is a fiduciary to the employee to see that he is paid the proper benefits on time. See *Florida Erection Services, Inc. v. McDonald,* 395 So. 2d 203 (Fla. 1st DCA 1981).

The statutory scheme in §440.20, Fla. Stat. implements this policy.

First of all, because it is a statutory scheme, it is important to know which statute applies because of the numerous statutory amendments to the Workers' Compensation Law. This Court decided in the leading case of *Sullivan v. Mayo,* 121 So. 2d 424 (Fla. 1960), that in regard to entitlement to substantive benefits, the statute in force on the date of the accident applies. Prior enactments or subsequent enactments do not apply, except that subsequent amendments as to procedure may apply. Ibid.

There can be no doubt that the reduction of benefits on account of a workers' compensation offset for pension benefits affects substantive rights. By definition it reduces benefits otherwise payable, and therefore is substantive in nature. Indeed, after *Barragan* was decided, the City of Miami argued that the *Barragan* decision did not apply to those employees whose accidents occurred prior to July 1, 1973, that is to say, prior to repeal. This was a view which was accepted by the First District Court of Appeal in *City of Miami v. Jones,* 593 So. 2d 544 (Fla. 1st DCA 1992). Clearly then, workers' compensation pension offsets are substantive in nature and are governed by the statute in force on the date of accident.

Therefore, in the present case, we must look to the provisions of §440.20, Fla. Stat. as they read on July 13, 1980, when the claimant suffered his industrial accident in order to determine when payment was due.

The amounts provided in §440.20, Fla. Stat., which are payable to employees, though denominated as penalties, are in law another form of workers' compensation payment. This Court so decided in *Lockett v. Smith*, 72 So. 2d 817 (Fla. 1954).

An examination of §440.20, Fla. Stat. in its entirety shows a statutory scheme. Payments are to be made voluntarily by the employer/carrier when benefits are due. Whenever the employer/carrier decides not to pay a benefit which it knows to be due, it must notify the Division of Workers' Compensation and the employee at that time, that it is denying this benefit. At that point, either the Division or the employee can accept that the benefit is not payable, or the employee may then proceed to claim the benefit through workers' compensation proceedings, or the Division may administratively require the employer/carrier to pay it. In this way the law is self executing.

There is, however, the possibility of misconduct by the employer/carrier, which could destroy the workability of this self executing system. Misconduct occurs when the employer/carrier denies a benefit that is due and does not tell the employee or the Division that it has denied that benefit. In such circumstance, neither the employee nor the Division knows that the benefit has been denied. The employer/carrier has wrongfully withheld that information from them. Obviously what could then occur is that the employee, not knowing that the benefit has been denied, will never claim it in workers' compensation proceedings. Thus the employer/carrier could wrongfully withhold a benefit.

Therefore, §440.20, Fla. Stat. requires the employer/carrier to notify the employee and the Division whenever it has denied a benefit. Whether that denial is correct or incorrect has nothing to do with it. Whether the employer/carrier is right or wrong, it is obligated under the statute to inform the Division and the employee of the denial.

Whenever the employer/carrier has filed a timely notice to controvert, if at a later time it is determined that the benefit was not payable, then obviously the benefit is not payable and no penalty is payable. Whenever the employer/carrier has filed a timely notice to controvert, if it is later determined that the denial was incorrect and the benefit was payable, then the benefit is payable, but the penalty is still not payable, because the employer/carrier filed a timely notice of denial.

Whenever the employer/carrier does not file a timely notice to controvert (when it does not notify the employee or the Division at the time that it has denied a benefit [in the trade it is called "hiding in the weeds"]), if it is later determined that the benefit was not payable, then still no penalty is payable. However, whenever the employer/carrier has not filed a timely notice to controvert, if it is later determined that the benefit was payable, then there is a penalty imposed by the statute on account of the employer/carrier's failure to give timely notice of denial. That is the misconduct that gives rise to the imposition of the 10% penalty under the statute.

When confronted with this problem, the Legislature could have devised the penalty differently. It could have given the employee a common law action for fraud. It could have provided that whatever was payable at

that point, for whatever reason, would be trebled. Trebling is not unknown.[6]

It could have imposed a fixed amount penalty: a hundred dollars, a thousand dollars, or ten thousand dollars. It could have provided that should the employer/carrier commit this misconduct more than once, say three times in a year, that the employer/carrier would lose the license to do business in Florida. The choice was for the Legislature to make.

The choice that they made was a modest one: to whatever is owed at that point, 10% is added.

So we see from the statute and the Judge's findings of fact that the 10% penalty was added to the amount of compensation owed because the City did not notify the Division or the employee in July/August of 1989 that it was denying the payment of benefits from the date of the claimant's retirement in 1981 to August 1, 1989. It had nothing to do with why they had not paid those benefits during that period of time. It did not even have anything to do with why they did not pay those benefits in July/August of 1989. The penalty was imposed because the City concealed from the employee and from the Division in July/August of 1989 that it was denying him benefits from 1981 to August 1, 1989. In order to avoid the penalty, all the City had to do was file a notice to controvert in July/August of 1989. They did not. Perhaps they had hoped they would never hear from Mr. Leibnitzer, who did file claim until February 18, 1991. (R. 55, 61).

The employer/carrier did submit a notice to controvert dated February 28, 1991, which was then one year and seven months too late, because it was after the claimant had filed claim. (R. 61). The record does

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[6] E.g. §772.11, Fla. Stat.

not show when it was filed, only that it was prepared that day, but it was already too late.

The statute even contains a safety valve, which allows the employer/carrier to avoid the penalty if they show that their failure to pay benefits when owed was due to circumstances beyond their control. In the present case, the City called no witnesses and presented no exhibits to show any excusable neglect or any other reason why following the decision in *Barragan,* it began paying the claimant his workers' compensation and his pension benefits in full from August 1, 1989, but did not inform him or the Division that it was denying payment of benefits from the date of his retirement in 1981 to August 1, 1989.

The applicable statute is §440.20 of the 1980 Florida Workers' Compensation Law.

Sub-section 1 provides that compensation shall be paid promptly without an award "...except where liability to pay compensation is controverted by the employer".

Sub-section 2 provides that the first installment of compensation shall become due on the 14th day after the employer has knowledge of the injury, at which time all compensation then due shall be paid, and thereafter in weekly or bi-weekly installments.

Sub-section 5 provides:

> Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the division, in accordance with a form prescribed by the division, [LES Form BCL-4] that payment of compensation has begun or has been suspended, as the case may be. (Emphasis added).

Sub-section 6 provides that if the employer initially controverts the right to compensation, he shall file with the Division, on or before the 21st

day after he has notice of the alleged injury, a notice in accordance with a form prescribed by the Division [LES Form BCL-12] stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury, "...and the grounds upon which the right to compensation is controverted, together with a written explanation setting forth in detail the reason or reasons why the claim has been controverted, and a copy of such notice shall be furnished by the carrier to the employee and employer". (Emphasis added).

The statute further provides:

> If the employer/carrier initially accepts the claim but subsequently controverts same, it shall file with the division a notice to controvert, within 10 days after the date of initial cessation of benefits, stating the reasons for the delayed controversion and a copy of such notice shall be furnished by the carrier to the employee and employer.

This is implemented by Rule 38F-3.12, "Fla. Ad. Weekly", Vol. 10, No. 15, at p. 1156 (April 13, 1984).

The role of the Division upon the receipt of this notice is set forth in sub-section 10(b). It provides that the Division:

> Shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examination to be made, or hold such hearings, and take such further action as it considers will properly protect the rights of all parties.

When the employer who denies a benefit to an employee does not file a notice to controvert as required by the statute, not only may the employee not know that he is entitled to claim a benefit, but the Division would not know

that it should investigate the matter. The employer/carrier in such case is literally "hiding in the weeds".

Sub-section 7 provides for the penalty for this misconduct.

> If any installment of compensation for death or dependency benefits, disability, permanent impairment, or wage loss, payable without an award is not paid within 14 days after it becomes due, as provided in subsection (2), subsection (3), or subsection (4), there shall be added to such unpaid installment a punitive penalty of an amount equal to 10 percent thereof, which shall be paid at the same time as, but in addition to, such installment of compensation, unless notice is filed under subsection (6), or unless such nonpayment results from conditions over which the employer or carrier had no control... The insurance policy cannot provide that this sum will be paid by the carrier if the division or the deputy commissioner determines that the 10 percent additional payment should be made by the employer rather than the carrier. Any additional installment of compensation paid by the carrier pursuant to this section shall be paid directly to the employee.

The statute does provide that this 10% penalty is assessable against the employer or the carrier, depending upon who was at fault. It further provided that if the employer is at fault, it is not to be paid by the insurance carrier, but by the employer. In 1979, the statute was amended to provide that this is a punitive penalty so that it will not be included in the rate base for employers. The 1980 statute applicable to the present case refers to the benefits under this section to be an "additional installment of compensation payable to the employee". §440.20(7), Fla. Stat. (1980). This conforms to *Lockett v. Smith,* supra.

Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989) was decided by this Court on April 20, 1989. At that point, the City had reason to know that employees like the Respondent, Leibnitzer, who had had their disability pensions reduced by the amount of workers' compensation from the date of their retirement, would be entitled to the payment of workers'

compensation equal to the amount that had been deducted. Indeed, the awards to Barragan and Giordano in that case by the Judge of Compensation Claims were from the date of their respective retirements. (R. 123-126, 127-132).

The City filed a motion for rehearing in which it told the Court that there were other retirees of the City who would be entitled to a similar benefit as Barragan and Giordano. The City asked the Court to make the decision prospective only. This Court denied the City's motion for rehearing on July 14, 1989.

In its motion for rehearing, the City had asserted that if the motion for rehearing was denied, that the City would file a lawsuit, a suit for declaratory decree, seeking a determination that the decision did not apply to other retirees or that it should be prospective only. (R. 143, 168-169). The City did not file such suit. Instead, it paid Barragan and Giordano from the dates of their respective retirements; but as to the other employees, it stopped taking the offset prospectively as of August 1, 1989. It did not pay the Respondent, Leibnitzer, (or anyone else other than Barragan and Giordano) the amount that had been deducted since the date of his retirement to August 1, 1989.

At that point, the City should have filed a notice to controvert to notify the employee and the Division of Workers' Compensation that it was denying the payment of benefits from the date of retirement to August 1, 1989. If it had done so, it would not now be liable for the 20% penalty. The City should have filed a notice to controvert no later than August 4, 1989.

The sad truth of it that the misconduct which the statute was designed to prevent was exactly what the City did. The City claimed that in *Barragan* and *Giordano* that there were other persons to whom the decision

would apply to whom the City would owe money. By not filing a timely notice to controvert in July/August of 1989 when the benefit was denied, if there be any one of those persons who does not know that the benefit was denied to him, who will not know to claim that it has been denied to him, then the City has just saved the money that is owed to that disabled person; but they would have saved it illegally, even now.

At the hearing, the City presented no evidence, no witnesses, to show that the failure to make payment in July/August of 1989 was beyond the City's control. The trial judge found that they had presented no such excuse. That finding is supported by competent substantial evidence.

The issue is not why the City did not make payment before July 14, 1989. That is not what is involved here. To that extent, the certified question is misdenominated.

The majority opinion of the District Court in *City of Miami v. Bell,* supra, correctly holds that the Judge was correct in finding that in July/August of 1989 the City knew that under *Barragan* it owed the Respondent, Leibnitzer, compensation that was not paid from the date of his retirement to August 1, 1989, and not just prospectively from August 1, 1989. The majority was correct in affirming the Judge's finding that the City knew that it was denying the payment of benefits retrospectively and that it did not notify the Division or the employee at that time in the manner required by law.

The majority correctly held that it was the City's failure to file a notice to controvert in July/August of 1989 that gave rise to the imposition of the 10% penalty and not anything that the City had done, or not done, prior to the *Barragan* decision. In that respect, the holding of the majority of the District Court in *City of Miami v. Bell,* supra, is perfectly in accord with the

statutory scheme as enacted by the Legislature and fully in accord with all of the penalty cases, as well as actual practice. In the Respondent, Leibnitzer's case, the decision was unanimous.

The Petitioner/City relies upon the dissent in *City of Miami v. Bell,* supra, which is just that, a dissent. However, the dissent does not follow the statute. The dissent proposes that an employer/carrier is not obligated to file a notice to controvert when it denies a benefit as the statute requires. The dissent proposes that the employer is not required to file a notice to controvert until an appellate court later decides that it was wrong in denying the benefit. The dissent said that the notice to controvert was not due when the City denied the benefit, but rather should have been filed after the First District Court of Appeal decided *City of Daytona Beach v. Amsel,* 585 So. 2d 1044 (Fla. 1st DCA 1991), by which the City would have absolutely, positively known that the denial was wrong.

§440.20, Fla. Stat. does not deal with whether the employer/carrier is right or wrong, or knows whether it is right or wrong, when it denies a benefit. It simply requires that the employer/carrier notify the Division and the employee that it has denied a benefit. If it is right, no penalty will ever be owed. Even if it is wrong, if it files a timely notice to controvert, it will not owe the penalty. But if it is wrong and it does not file a timely notice to controvert, if it conceals from the Division and from the employee that it has denied a benefit, then the statutory penalty is imposed.

Interestingly enough, the decision of the First District Court of Appeal in *City of Miami v. Bell,* supra, is a substituted opinion for an earlier opinion of the Court. The substituted opinion says that the case was circulated to the Court en banc after the panel decision and with one member recusing himself, the whole Court split six to six, which then had

the effect of reverting the decision to the panel decision. That is the reason given for certifying the case to the Supreme Court. The difficulty, however, is that the decision does not state what was the circulated question, nor does it show which Judges voted, or which way they voted, or why.

The mere fact that a case contains a dissent or that the lower Court may have been divided in some fashion does not make the case one of great public importance.

The case only involves the City of Miami. After repeal of the offset statute in 1973, the State stopped offsetting. All of the counties in Florida stopped offsetting. All of the cities in Florida stopped offsetting; or if they did not, after *Barragan,* with the exception of Daytona Beach and Miami, they fixed it and did not complain. Even Daytona Beach did not complain to this Court about *Amsel.*

The City of Miami uses this certified question to argue that this Court should change its decision in the *Barragan* case of less than three years ago, a decision which everyone else in Florida has apparently complied with, if they needed to.

There is absolutely nothing about the decision affirming the order of the Judge of Compensation Claims awarding the penalty which is in any way a departure from established law, either the statute, case decisions, or actual practice.

In its order setting forth the briefing schedule, this Court deferred deciding whether to take jurisdiction in this case at all. The Respondent, Leibnitzer, submits that the Court should either decline to exercise jurisdiction in this case, or should affirm the decision of the District Court below.

POINT III

(A) THE AWARD OF STATUTORY INTEREST IS CORRECT;

(B) THE AWARD OF THE STATUTORY PENALTY IS CORRECT;

AN ACCUMULATION OF INSTALLMENTS IS STILL AN INSTALLMENT OF COMPENSATION.

The City contends that the award of interest was incorrect. First of all, this was not argued to the Judge of Compensation Claims nor to the First District Court of Appeal below, but is raised here for the first time.

As the City presents this argument it is in tandem with the City's contention that the payment of workers' compensation, which was unpaid to the claimant on account of the *Barragan* decision, is not an installment of compensation within the meaning of §440.20, Fla. Stat. with respect to penalties and interest. This is the City's argument on the certified question in *City of Miami v. Arostegui,* 606 So. 2d 1192 (Fla. 1st DCA 1992), which is not the question certified in the present case.

According to their argument, if more than one installment is due, then the aggregate amount is no longer an installment.

In *Parker v. Brinson Construction Co.,* 78 So. 2d 873 (Fla. 1955), the Supreme Court held that statutory interest was due on unpaid workers' compensation pursuant to §687.01, Fla. Stat., which at that time was at 6% per annum.

There was a statutory enactment (before Leibnitzer's accident) in Laws of Fla., Ch. 78-300, providing for 12% interest for payments due after July 1, 1978. *Myers v. Carr Construction Co.,* 387 So. 2d 417 (Fla. 1st DCA 1980).

In *Parker v. Brinson Construction Co.*, supra, this Court held:

> The compensation act is to be construed in favor of the working man. Not only have we said this on many occasions but the act itself so provides. Sec. 440.26 FS. If an employer controverts the right to compensation, the penalty fixed by the law for an unsuccessful contest is not only the payment in full of the award from the beginning but also attorneys' fees and other specified costs. If a carrier fails to pay an installment due without an award within the specified period of fourteen days, under specified circumstances, the carrier suffers a penalty of 10% thereof, Section 440.20(5); and if the carrier fails to pay an award within fourteen days, there may be added thereto and amount equal to 20% thereof, Section 440.20(6). The basic philosophy of the act is to insure and secure prompt payment of compensation or other awards to the man who works for wages or his beneficiaries. The Court knows that the smaller the award of compensation, the greater the need for the prompt payment thereof. It is common knowledge that those who work for small wages are dependent upon such wages for their immediate livelihood. Inherent in the act itself is that the intention that if such an award is wrongfully withheld (and under the law it is wrongfully withheld if it be eventually determined that it should have been paid), the person or the party which should have paid it should be compelled to pay, as damages for its detention, lawful interest thereon from the date it should have been paid, and the amount thereof is to be determined by applying Section 687.01 FS 1951, F.S.A., which provides:
>
> 'In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be six percent per annum, but parties may contract for lesser or greater rate by contract in writing.' *Parker v. Brinson Construction,* supra, at 875-876.

The City's argument is: if more than one installment is due, then the amount due is a lump sum and is no longer an installment, Given the purpose of the penalties statute and interest statute, the argument apart from being absurd, is not exactly novel. Somebody tried to argue that before and it was specifically rejected in *Santana v. Atlantic Envelope Co.*, 568 So. 2d 528 (Fla. 1st DCA 1990). *Brinson* is really to the same effect. Interest is

after all automatically payable. *Poole & Kent Co. v. Asbell,* 394 So. 2d 1112 (Fla. 1st DCA 1981).

The City's argument that this is a windfall to these police officers and fire fighters who were totally disabled in the line of duty is offensive. These employees lost their livelihood on account of their injuries. They did not receive what the Legislature intended they should have received on account of the repeal of §440.09(4) in 1973.

The Third District Court of Appeal held in *City of Miami v. Gates,* 393 So. 2d. 586 (Fla. 3rd DCA 1981) [*Gates* I], that beginning in 1973 and for the years thereafter the City took money out of these employees' pension trust fund to pay them their workers' compensation benefits on account of this offset. The Third District Court of Appeal held that this was unlawful. The City now claims it took the money from the trust fund in "good faith". There is no proof in this record that the City acted in good faith and the holding in *Gates* I was that the City had not.

The Judge of Compensation Claims found in the present case:

> Quite simply, the City admits that the claimant was entitled to permanent total disability from July 30, 1981, to August 1, 1989, at $211.00 per week. However, this was not actually paid. (R. 400).

In *City of Miami v. Gates,* 393 So. 2d. 586 (Fla. 3rd DCA 1981) [*Gates* I], the Third District Court of Appeal affirmed the Circuit Judge's determination that the City had taken $145,000.00 out of the pension trust fund beginning in 1973 and similarly in the years thereafter to pay workers' compensation to the totally disabled employees. (R. 99-108). To put it bluntly, because of this offset, the disabled employees never received their workers' compensation and the City of Miami did not pay it. They were

paid with their own money. This is the holding of *Gates* I. This is the holding of *Barragan*.

On this point also, the decision should either be affirmed or review declined.[7]

CONCLUSION

Affirm or decline to review.

Respectfully submitted,

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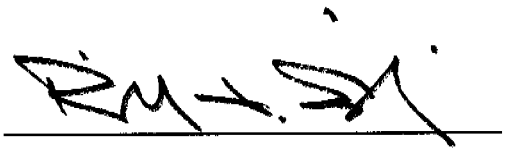
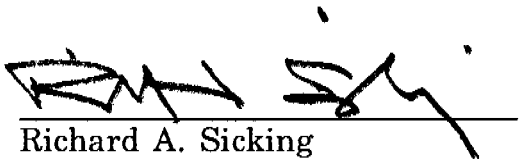


[7] The City also makes a contention that the 20% penalty for failure to comply with a mandate should not be applied. However, in the present case, the District Court of Appeal has not issued the mandate. Such argument does not apply to the present case. Perhaps they have simply copied this argument from one of their other briefs.

Certificate of Service

I certify that a copy of the foregoing has been furnished by mail this 18 day of February, 1993, Kathryn S. Pecko, Assistant City Attorney, Attorney for Petitioner, 300 Dupont Plaza Center, 300 Biscayne Boulevard Way, Miami, Florida 33131; Arthur J. England, Jr., Esquire, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; and to the State of Florida, Department of Labor & Employment Security, Division of Workers' Compensation, 220 Forrest Building, 2728 Centerview Drive, Tallahassee, Florida 32399-0685.



Richard A. Sicking