IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 80,998

CITY OF MIAMI,

Petitioner,

vs.

KENNETH A. LEIBNITZER,

Respondent.

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

REPLY BRIEF OF THE CITY OF MIAMI

ARTHUR J. ENGLAND, JR., ESQ.
Fla. Bar No. 022730
CHARLES M. AUSLANDER, ESQ.
Fla. Bar No. 349747
Greenberg, Traurig, Hoffman
Lipoff, Rosen & Quentel, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

A. QUINN, JONES, III,
City Attorney
Fla. Bar No. 292591
KATHRYN S. PECKO
Assistant City Attorney
Fla. Bar No. 508308
Attorneys for Petitioner
300 Biscayne Boulevard Way
Suite 300
Miami, Florida 33131
(305) 579-6700

TABLE OF CONTENTS

Table of Authorities

OTHER

ARGUMENT

I.

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

Leibnitzer opens his Summary of Argument with the statement: "This case is about the law of trusts." (Ans. B. at 7). This bizarre statement is apparently designed to summarize Leibnitzer's argument for the retroactivity of *Barragan v. City of Miami*, 545 So.2d 252 (Fla. 1989). Yet nowhere in Leibnitzer's brief is a case cited, or a doctrine discussed, regarding the "law of trusts, or its application to workers' compensation law." (*Id.*)

It appears that Leibnitzer's entire argument on the "law of trusts" stems from his preoccupation with the history of the internal accounts of the City's budget, from which payments were or were not made for employee pension benefits and for workers' compensation payments. His diatribe wanders through the analysis and treatment of those internal accounts by the 1981 and 1992 *Gates* decisions. *City of Miami v. Gates*, 393 So.2d 586 (Fla. 3d DCA 1981), and *City of Miami v. Gates*, 592 So.2d 749 (Fla. 3d DCA 1992). This entire topic, however, is legally irrelevant to this proceeding. The decision on review does not implicate any internal account issues and more importantly, any issue with respect to internal accounts was put to rest in *Barragan*, where the Court held that the City is a unified whole with its pension trusts and that one account of the City is just like any other account. *Barragan*, 545 So.2d at 253.

It is surprising that Leibnitzer relies on a hypothetical "trust" thesis to counter the City's challenge to *Barragan* retroactivity. In the first of its two *Gates* decisions, the Third District relied on prior decisions to reject, expressly, "that the fiduciary status of the City ... may be properly analogized to that of the trustee of an express trust...." *Gates*, 393 So.2d

at 589, n. 6. To the extent that Leibnitzer's foremost argument against the retroactivity of *Barragan* relies on any notion of trust law, the City's analysis is strengthened because Leibnitzer's argument is unsupported by law and irrelevant.

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 *Brackenridge v. Ametek*, 517 So.2d 667 (Fla. 1987), *cert. denied*, 488 U.S. 801 (1988) and *Florida Park Service v. Strickland*, 18 So.2d 251 (Fla. 1944), 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. Those cases are accepted by Leibnitzer 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 *Barragan* was issued. There is nothing in Leibnitzer's brief that suggests, let alone compels, a different conclusion.

In its initial brief, the City explained at considerable length its justifiable reliance on pre-*Barragan* law (Init. B. at 5-12). Leibnitzer contests the notion of justifiable reliance by the City with essentially four propositions: an alleged failure by the City to adduce factual evidence of reliance before the Judge of Compensation Claims in this proceeding (Ans. B. at 10, 15, 17-18, 24); an alleged failure to raise "detrimental reliance" as a defense at the pretrial hearing (Ans. B. at 18); an alleged requirement for a

"change of position" which the City never demonstrated (Ans. B. at 29-31); and a microscopic analysis of pre-*Barragan* case law to argue that the City could not, in fact, have relied on these decisions. (Ans. B. at 19-23). The City will demonstrate that none of the arguments presented by Leibnitzer negate in the slightest the City's justified reliance on the pre-*Barragan* state of the law with respect to pension offsets.

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

1. **Contrary to Leibnitzer's contention, justifiable reliance is not an evidentiary issue.**

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

Justifiable reliance was found controlling in *Strickland* based on the state of the law with respect to the forum in which Strickland was obliged to file his appeal from a deputy commissioner of industrial relations. Until

overruled, judicial precedent required that appeals be taken directly to circuit court. Strickland was held to have filed in justifiable reliance on said precedent, notwithstanding that the court subsequently overruled those decisions and held that appeals must be taken to the full Industrial Relations Commission. Strickland acted in accordance with the legal requirement for filing his appeal, as announced in prior precedent, just as the City acted in accordance with its court-validated ordinance to offset pension benefits.

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

2. **Contrary to Leibnitzer's contention, detrimental reliance has always been an issue in these proceedings.**

A string of last-resort, final appellate decisions were issued by the Florida courts from 1973 to 1989. There is no question that *Barragan* was a 180°, overruling turnabout from those precedents. The City obviously had relied to its detriment on the outcomes of those cases by continuing its offset of pension benefits under the City's ordinance. Moreover, the defense of detrimental reliance was presented by virtue of the City's pled and argued position that the reliance exception to retroactivity applied. (R. 7, 36-45, 61).

3. **Contrary to Leibnitzer's contention, detrimental reliance for the purpose of barring retroactivity need not entail a change of position.**

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

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

There is not an ounce of veracity in the hairsplitting 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 was a situation dealing with the application of previous judicial decisions interpreting statutes. The City cannot be held to or penalized by a higher standard of prognostication than the judiciary for its inability to anticipate that the appellate decisions validating the ordinance would years later be declared invalid.

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

Leibnitzer argues that the City could not have relied on past court decisions because they are factually distinguishable. This assertion is founded on a false premise. The City's position was clearly articulated in the very first sentence of its initial brief: "Based on an ordinance originally adopted by the City of Miami in 1940, the City reduced disability pension benefits for its retired employees...." (Init. B. at 1) Naturally, the City was comforted by the offset-permitting rationale of the several district court decisions, but the ordinance, repeatedly assailed unsuccessfully in court challenges, was the linchpin of reliance that justified the City's initial and continuing offset procedure.

5. **The reasons asserted for *Barragan* retroactivity do not withstand analysis.**

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

The basic point ignored by Leibnitzer is that both pre- and post-repeal decisions legitimized the City's use of its ordinance to make the offsets. The date of repeal of section 440.09(4) was not the triggering feature for the City's detrimental reliance. In fact, that date was specifically held to have been irrelevant in one district court precedent. *Hoffkins v. City of Miami*, 339 So.2d 1145 (Fla. 3d DCA 1976), *cert. denied*, 348 So.2d 948 (Fla. 1977). It was not made a relevant point of departure until *Barragan* made it so, some 12 years later. For the same reason, neither pre- nor post-repeal date of injury was a determinative feature in the City's reliance on its 1940 ordinance, despite *Barragan's* use of the repeal date some 49 years later as the crucial moment for invalidation of that ordinance.

Leibnitzer conjectures, unpersuasively, that the City should have relied not on its ordinance, but rather on the Court's private employer decisions in *Jewel Tea*, *Brown* and *Dornutz*. That suggestion is ill-conceived legally and practically. First, none of those cases involved public employers. Leibnitzer nowhere suggests why the City should have extrapolated an adverse result from them when the City itself had been taken to court repeatedly, and judicially advised each time that its offset procedure was sound.

Second, the first of those private-employer cases, *Jewel Tea*, was decided a full 30 years after the ordinance had been enacted, a full 8 years

after the first pension offset challenge to the City's ordinance (*City of Miami v. Graham*, 138 So.2d 751 (Fla. 1962)) had been turned aside by a final court decision, and 3 years before the statutory repeal of Section 440.09(4). It is ludicrous to suggest that the City lacked any justification for reliance on its ordinance because it failed in 1970 (*Jewel Tea*), 1975 (*Brown*) 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 19 years after the *Jewel Tea* case.

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

Finally, Leibnitzer argues in favor of retroactivity on the basis that he, not the City, had a property or contract right for payment in full of his workers' compensation and pension benefits. The exception to retroactivity, as explained in *Strickland* and *Brackenridge*, is unconcerned with Leibnitzer, however. It focuses on the harm which retroactive effect would have on the party who opposes retroactivity because of hardship. That party is the City, not Leibnitzer. It is the City which justifiably relied on decision after decision after decision of the courts, over a 27-year span of time, to plan and to implement its fiscal affairs in accordance with its assailed but unyielding ordinance.

Indeed, Leibnitzer reminds us that substantive rights in workers' compensation cases are determined by the law in force on the date of the accident. (Ans. B. at 19.) That principle seems to be persuasive of the fact

that Leibnitzer had *no* right to pension offset amounts at the date of his accident, or at any subsequent time until the *Barragan* bombshell exploded. The "law in force" during those periods was an ordinance, court-validated, saying that the City could offset his pension benefits.

It should be of interest to the Court that the contentions made by Leibnitzer with respect to retroactivity are completely different from, and unrelated to, the rationale expressed by the First District for holding that *Barragan* should be applied retroactively. Leibnitzer's 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. Ansel*, 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." *Ansel*, 585 So.2d at 1046. This rationale for rejecting justifiable reliance does not answer, but rather begs the question of whether *Barragan* should be applied retroactively.

The City made the point in *Ansel* 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

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 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 analysis, 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 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 any 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 *Ansel* illogically sought to reach too far when it read into the Court's remand in *Barragan* an "implicit" determination of retroactivity.

Analysis of the First District's second decision on the point -- *City of Miami v. Burnett*, 596 So.2d 478 (Fla. 1st DCA), *rev. denied*, 606 So.2d 1164 (Fla. 1992) -- similarly suggests why the parties here (with the exception of McLean) have distanced themselves from that case. The *Burnett* decision by a panel of three judges (two of whom sat on the *Ansel* 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), 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 *Ansel*, completely sidesteps the principles for determining retroactivity which were established in *Strickland* and *Brackenridge* -- namely, whether the City, as the adversely affected party, justifiably relied on the pre-*Barragan* state of the

law. (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. Put another way, neither the *Amsel* nor *Burnett* decisions ever addressed the issue which the City and Leibnitzer agree is the heart of a retroactivity determination -- justifiable reliance by the City on an ordinance which was consistently sustained in court against employee challenges. That issue of justifiable reliance is analyzed fully in the City's initial brief at pp. 5-13. As the arguments there asserted are neither addressed in the First District decisions discussed above nor Leibnitzer's answer brief, 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.

As a final argument, Leibnitzer asserts that the Court has already ruled that *Barragan* was retrospective when it denied the City's motion for rehearing following issuance of the *Barragan* opinion. The contention is made that the City argued for prospective effect in its motion for rehearing, so that the Court's denial constituted a determination on the merits of the retroactivity issue. (Ans. B. at 8.) Contrary to this assertion, which is legally flawed, the City never argued to this Court that the *Barragan* decision should be given retrospective effect.

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

pension benefits "will also call into question whether the [*Barragan*] opinion is prospective or retroactive in nature." (R. 143).

Notably, the City distinctly did not ask this Court to rule on prospectivity. Rather, it noted for the Court's interest that a refusal to distinguish FAPO from the City would result in a separate declaratory lawsuit being filed, in which prospectivity would be an issue *for consideration in the trial court*. (R. 143, 166-70). Nowhere in its motion for rehearing did the City ask the Court to limit its *Barragan* decision to prospective effect, or suggest that the issue of retroactivity was appropriate for consideration by the Court on rehearing.

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

Still another reasons compels the conclusion that the Court's denial of rehearing in *Barragan* did not constitute a ruling on the City's reference to retroactivity in its motion for rehearing. No issue regarding retrospective application of a potentially adverse decision was raised by the City, Barragan or Giordano prior to issuance of the Court's *Barragan* opinion. The only issues which may properly be raised on rehearing are those in which the court has either "overlooked or misapprehended" a point of law or fact. *See* Rule 9.330(a), Fla.R.App.P. Counsel for Barragan and Giordano made precisely that point in the first three pages of their reply to the City's motion for rehearing in *Barragan*. (*See* App. 1) For all anyone knows, the Court's denial

of rehearing may well have been nothing more than a determination that any reference to the issue of retroactivity (had one been raised) would be an improper argument in the motion for rehearing.

II. The City should not be subject to the 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 1979 provisions of the workers' compensation statute, is improper and unconscionable. The City argued that the language of the statute provides no foundation for the penalty, that the policy reasons for a 10% penalty have no possible relevance to the City's failure to make a lump sum retroactive payment sua sponte following of 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. (Init. B. at 13-21.)

Leibnitzer responds that the penalty has nothing to do with events or the City's conduct prior to the finality of *Barragan*, that the workers' compensation law is self-executing so as to create an obligation for employers to inform employees what is owed and what is being denied, and that in this fiduciary capacity the City was obligated to file a "notice to controvert" immediately after *Barragan* became final, in order to notify Leibnitzer that the City did not intend to treat *Barragan* as retroactive. (Ans. B. at 32-44.) This argument notably fails to meet the contentions of the City and is contrary to the very provisions of the workers' compensation law on which Leibnitzer relies.

Leibnitzer describes, as "misconduct" which makes the 10% penalty appropriate, the City's failure to treat *Barragan* as automatically having a retroactive effect. This argument is premised exclusively on the notion that

the City did not notify the Division of Workers' Compensation and Leibnitzer of its position on retroactivity within 21 days after the *Barragan* decision became final on denial of rehearing on July 14, 1989. Leibnitzer's reasoning is summarized in his view that "the City had reason to know" (Ans. B. at 40) that *Barragan* would be given retrospective operation. That, plainly put, is nonsense, and certainly is not the law.

It may be true that the City should have "presumed" that *Barragan* was retroactive as well as prospective. 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. Leibnitzer, and the First District, in its majority opinion in *Bell*, 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 Leibnitzer's nor the district court's conceptualizations are informed by the factors relevant to a determination of retroactivity. The parties did not litigate 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. Leibnitzer's position is not consistent with the language and operation of the statute itself. The suggestion presumes that retroactive offsets were benefits being withheld, and

that the statute requires notices to be filed controverting the claims before those claims were even filed. There is no such statutory requirement imposed on employers. Leibnitzer also ascribes some meaning to the fact that Section 440.20(7) equates penalty payments with additional compensation. This is completely irrelevant because the contest is not whether the penalty itself may constitute compensation. Rather, the City contests that payment of retroactive pension offsets constitutes "compensation" under Chapter 440.

This and other flaws with respect to imposition of the 10% penalty are discussed extensively in Judge Booth's dissent in the *Bell* decision. There is no need for the City to rehash here Judge Booth's more complete and compelling discussion. *See* 606 So.2d at 1190-92. It is inherently repugnant to assess penalties for a judicial mistake; therefore, the penalty award should be reversed.

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing reply brief was mailed to RICHARD A. SICKING, ESQUIRE, 2700 S.W. 3rd Avenue, Suite 1E,, Miami, Florida 33129, this 11th day of March, 1993.

Respectfully submitted,

ARTHUR J. ENGLAND, JR., ESQUIRE
Fla. Bar No. 022730
CHARLES M. AUSLANDER, ESQUIRE
Fla. Bar No. 349747
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quintel, P.A.
Attorneys for Petitioner
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0605

and

A. QUINN JONES, III, CITY ATTORNEY
Fla. Bar No. 292591
KATHRYN S. PECKO, Assistant City Attorney
Fla. Bar No. 508380
Attorneys for Petitioner
300 Biscayne Blvd. Way, Suite 300
Miami, Florida 33131
Telephone: (305) 579-6700

By: Kathryn S. Pecko
Kathryn S. Pecko
Assistant City Attorney

KSP/lb/P1317

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 80,998

CITY OF MIAMI,

Petitioner,

vs.

KENNETH A. LEIBNITZER,

Respondent.

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

APPENDIX TO
REPLY BRIEF OF THE CITY OF MIAMI

INDEX

IN THE SUPREME COURT OF FLORIDA

PAUL BARRAGAN, Petitioner,

v. No. 71,662

CITY OF MIAMI, Respondent.

ANDREW GIORDANO, Petitioner,

v. No. 72,572

CITY OF MIAMI, Respondent.

REPLY TO RESPONDENT'S MOTION FOR REHEARING OR TO STAY MANDATE

Not being satisfied with having had the opportunity to file two answer briefs on the same issue, instead of the usual one, the City has now filed a third brief in the guise a motion for rehearing. In this new brief it not only reargues issues already presented to the court, but argues issues never previously raised and in so doing, relies on matters outside the record.

The City's motion grievously abuses the privilege afforded by Fla.R.App.P.9.330 (a). That rule provides that a motion for rehearing "...shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not reargue the merits of the court's order."

The sole purpose of a rehearing motion is to bring to the attention of the reviewing court certain facts, precedent or rule of law which the court has overlooked or misapprehended in rendering its decision, State ex rel Jaytex Realty Co. v. Green,

105 So.2d 817 (Fla.1st DCA 1958). It is not the purpose of the motion to reargue the case and it is improper for the motion to (1) include a written argument with citations, (2) argue with the court over the correctness of its conclusions or the point it has decided, or (3) reargue the cause in advance of a permit from the court for such reargument, Sherwood v. State, 111 So.2d 96 (Fla.3rd DCA 1959).

This court stated in Texas Co. v. Davidson, 76 Fla.475, 80 So.558 (1919) and reiterated in Department of Revenue v. Leadership Housing, Inc., 322 So.2d 7, 9 (Fla.1975) that:

> "An application for rehearing that is practically a joinder of issue with the court as to the correctness of its conclusions upon points involved in its decision that were expressly considered and passed upon, and that reargues the cause in advance of a permit from the court for such reargument, is a flagrant violation of the rule, and such application will not be considered." 80 So. at 559.

It is also an abuse of the motion for rehearing to refer to matters outside the record, City of Miami Beach v. Daoud, 149 Fla.514, 6 So.2d 846 (1942); North Brevard County Hospital District, Inc. v. Florida Public Employees Relations Commission, 392 So.2d 556, 566 (Fla.1st DCA 1980); to express displeasure with the court's judgment, Whipple v. State, 431 So.2d 1011, 1013 (Fla.2d DCA 1983) or to further delay the termination of the litigation, State v. Green, 105 So.2d 817, 818-819 (Fla.1st DCA 1958, cert.discharged, 112 So.2d 571 (Fla.1959).

The violations by the City of Rule 9.330 (a) and the principles set out above are so egregious that the court should not consider the City's substantive arguments and should summarily deny the motion. If the court should decide to review the City's arguments, the following discussion will reveal their lack of merit.

I

THE COURT SHOULD NOT RECONSIDER ITS JURISDICTIONAL RULING.

The City challenges the court's ruling that the Deputy had jurisdiction to hear the "offset" issue. That issue was briefed by the parties and orally argued to the court. The City has now taken the opportunity to try and "beef up" its previous arguments. This is an abuse of the rule.

The court correctly concluded that "...a Deputy Commissioner may properly increase the amount of Workers' Compensation to offset illegal deductions made on the account of payment of Workers' Compensation Benefits." (Emphasis added) (Opinion, p.2). This conclusion was not only supported by the authorities cited by the court in the last paragraph of page 2 of its opinion, but also by the First DCA in City of Miami v. Knight, 510 So.2d 1069 (Fla.1st DCA 1987) review denied, 518 So.2d 1276 (Fla.1987) the case that gave rise to the issue before the court.

The underlying reason for the jurisdictional ruling is that the city ordinance which creates the offset has the effect of reducing compensation benefits. It is the City's ordinance that

is in question and not the entity that has been created to enforce the Ordinance. The FIPO Board merely administers the Ordinance, it has no power to modify it. Thus, the independence or lack of independence of the Board is of no importance and the Board's presence in the litigation is unnecessary.[1] The issue that was in fact litigated, the legality of the offset created by the Ordinance, was, as the court noted, vigorously litigated by the City. The Board's absence from the proceedings had no effect on the litigation and cannot be the basis for a rehearing.

II

ISSUE PRECLUSION IS NOT AN ISSUE IN THIS CASE.

The City argues that this court's decision will not be binding on the Board and that the City will be forced to sue the Board to recover sums that it will have to expend because of the decision. It has attached as an exhibit to its motion as an exhibit a complaint which it proposes to file if the court does not beat a hasty retreat.[2]

---

[1]The Petitioners note that the references on p.4 of the City's motion to §§175.331 and 185.31 Florida Statutes are new matter introduced into the litigation for the first time in the motion. Furthermore, they are irrelevant, not only because the independence of the Board is irrelevant, but because the Statutes do not govern the FIPO Board, which was created by the Gates case (see, Exhibit A of the motion). An examination of the Statutes and the remedies set out in Gates will reveal that the sources of funding and the composition of the Board are different under Gates and the Statutes. In addition, the motion improperly introduces Gates into the litigation for the first time.

[2]Nothing can be further outside the prohibition against non-record matters being introduced in a motion for rehearing than a complaint in a non-existent law suit.

Grownups and Supreme Court's should not be spooked by hobgoblins. The means by which the City will make good the losses it has caused to its former Employees through the use of the illegal offset, has no bearing on the fact of the illegality. Neither does the ultimate cost to the City of its mistaken policy.

The Gates litigation cited by the City shows that it has played fast and loose with its employee's pension funds before. The huge unfunded liability caused by the City's previous administration of the pension plans was the cause of the Gates litigation and the Gates court did not shy away from holding the City responsible for its defaults merely because the City's liability was large. Neither should this court.

The Petitioners would suggest that before the City proceeds to sue them and the Board, it should consider the testimony of Elena Rodriguez in the Charles W. Smith. pension offset case. Ms. Rodriguez is the Pension Administrator for the City of Miami Firefighters and Police Officers Retirement Trust (FIPO). She testified that prior to 1978 the money offset from pensions was returned to the City. Since that time, it has been used to reduce the City's unfunded pension liability. (See, Exhibit A, attached hereto). If the City chooses to open the can of worms which was capped by the Gates decision, it might just end up becoming immediately liable for its entire unfunded pension liability.

III

THE COURT SHOULD NOT REVISIT THE PENSION OFFSET ISSUE.

The City repeats its argument that it does not take an offset, but merely calculates its pensions with Workers' Compensation Benefits in mind. This issue was fully argued in the briefs and at oral argument. The court correctly decided it. The Petitioners will not here repeat the arguments set out in their briefs. The court should not permit the City to "join issue" with it on this issue.

IV

THE COURT SHOULD NOT REVISIT THE PREEMPTION ISSUE.

Once again, the City joins issue with the court on a question that was fully argued and which was decided adversely to the City's position. The Workers' Compensation Statute clearly preempts the field, even under Florida's restrictive view of preemption. Any other conclusion would create chaos in a field that the legislature already finds difficult enough to deal with.[3]

[3]The court's decision does not impair collective bargaining agreements. Those agreements impliedly incorporate the statutory law in effect at the time of their execution. The prohibition against offsets was in existence when all currently operative collective bargaining agreements were entered into. Therefore, this court's interpretation of the law will be incorporated into the agreements.

V

THE CITY'S EQUAL PROTECTION ARGUMENT IS UNTIMELY AND IS WITHOUT MERIT.

For the first time in this litigation, the City urges that an outcome adverse to its position would create a disparity in treatment between it and private employers that is of constitutional dimensions. The court should not permit this issue to be raised at so late a date; both because a motion for rehearing is an improper vehicle to raise it and because the failure to timely raise it constitutes a waiver.

Substantively, the issue is without merit. Since no suspect classification such as race is involved here, the test of equal protection is whether there is a rational basis for the classification. The burden is on the party challenging the statute to show there is no conceivable factual predicate rationally able to support the classification being attacked. The fact that a statute results in some inequality will not invalidate it; the statute must be so disparate in its effect as to be wholly arbitrary. It is not the court's function to determine whether the legislature achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal, Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So.2d 930 (Fla.4th DCA 1986).

The legislature has a great deal of discretion to enact legislation that may appear to affect similarly situated people

differently, Department of Corrections v. Florida Nurses Association, 508 So.2d 317, 319 (Fla.1987); Melton v. Gunter, 773 F.2d 1548, 1551 (11th Cir.1985).

The City treats Alessi v. Raybestos-Manhattan, Inc., 451 U.S.504, 101 S.Ct.1895 (1981)[4] as if it mandates pension offsets with regard to pensions governed by ERISA, 29 U.S.C., §1001, et seq. It does not. It states that ERISA preempts the field and therefore, state statutes prohibiting offsets are preempted by ERISA. However, it points out that the decision to have or refrain from having an offset is a matter for the contracting parties.

In Florida, the legislature certainly has the right to mandate that public employers refrain from adopting offsets. As a consequence, public employers are in the same position as private employers who do not adopt offsets. Private employers may be equally as restrained from adopting offsets as are public employers. For instance, a subsidiary of a large corporation, as a matter of policy, may be ordered not to adopt an offset and a company facing a powerful union, may be equally as constrained.

Rather than create a disparity, the court's decision eliminates one. Pensioners under FRS and Chapters 175 and 185 do not face offsets. With regard to them, City retirees were at a disadvantage. Now they are not. That is as it should be.

---

[4]Alessi is cited for the first time in the motion for rehearing.

CONCLUSION

We quote from the First DCA's opinion in Daugharty v. Daugharty, 441 So.2d 1160, 1162 (Fla.1st DCA 1983).

> "As was stated by the Queen in Hamlet, 'the lady doth protest too much, methinks.' or as was stated by Boswell in his Life of Johnson, 'I do not love a man who is zealous for nothing.'"

Respectfully submitted,

Williams & Zientz
Two Datran Center, Suite 1100
9130 South Dadeland Blvd.
Miami, Florida 33156
[305] 663-1100

and

Richard A. Sicking
2700 S.W. Third Avenue
Suite 1-E
Miami, Florida 33129
[395] 858-9181

and

Joseph C. Segor
12815 S.W. 112 Court
Miami, Florida 33176
[305] 233-1380

Attorneys for the Petitioners

Joseph C. Segor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was mailed May 12, 1989 to: J.M. Levy, Esq. of Hershoff & Levy, P.A., 6401 S.W. 87th Avenue, Suite 200, Miami, FL 33173 and Jorge L. Fernandez, City Attorney, Martha Fornaris, Assistant City Attorney, and Kathryn S. Pecko, Assistant City Attorney, 700 AmeriFirst Building, One S.E. Third Avenue, Miami, FL 331331, Attorneys for the Respondent.

Joseph C. Segor