IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 81,340

CITY OF MIAMI,

Petitioner,

vs.

ORLANDO PAREDES,

Respondent.

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

BRIEF OF THE CITY OF MIAMI

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INTRODUCTION

Based on an ordinance originally adopted by the City of Miami in 1940, the City reduced disability pension benefits for its retired employees in an amount equal to workers compensation benefits to which they were entitled for the same disabling event. This action by the City was challenged in eight lawsuits, and in each case this Court, the Third District or the First District held that the City's offsets were proper.[1] In 1989, the Court held the City's ordinance to be invalid as of 1973, without expressing an opinion whether that invalidation applied both prospectively and retroactively, or only prospectively. Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989).

The primary issue in this case is whether claimants injured between 1973 (the triggering date for ordinance invalidation) and 1989 (the year of the Court's ordinance invalidation) must be paid the amounts previously offset by the City. A determination by the Court adverse to the City will impose a staggering financial blow to the taxpayers of Miami, based on a multitude of

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[1] City of Miami v. Graham, 138 So.2d 751 (Fla. 1962); City of Miami v. Giordano, 526 So.2d 737 (Fla. 1st DCA 1988); City of Miami v. Barragan, 517 So.2d 99 (Fla. 1st DCA 1987), rev'd, 545 So.2d 252 (Fla. 1989); City of Miami v. Knight, 510 So.2d 1069 (Fla. 1st DCA 1987), rev. denied, 518 So.2d 1276 (Fla. 1987); Thorpe v. City of Miami, 356 So.2d 913 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 836 (Fla. 1978); West v. City of Miami, 341 So.2d 999 (Fla. 3d DCA 1976), cert. denied, 355 So.2d 518 (Fla. 1978); Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 948 (Fla. 1977); and City of Miami v. West, IRC Order 2-2647 (May 22, 1974), cert. denied, 310 So.2d 304 (Fla. 1975).

present and potential claims for after-the-fact recoupments of offset sums which are floating in tribunals at various stages.[2]

The second major set of issues relate to imposition of a 10% penalty on the City for failing to treat the Court's 1989 ordinance invalidation decision as being retroactive and simply paying Mr. Paredes' claim. This issue comes to the Court on a certified question. City of Miami v. Paredes, 18 Fla. L. Weekly D561 (Fla. 1st DCA Feb. 17, 1993).

STATEMENT OF THE CASE AND FACTS

Orlando Paredes, a police officer employed by the City of Miami, suffered a compensable accident on November 23, 1979. (R. 9). The City accepted Paredes as permanently and totally disabled on June 18, 1984, with a weekly compensation rate of $195.00. (R. 2, 3). Paredes was granted a service-connected disability pension on March 10, 1984. (R. 2). His gross disability pension was offset by $845.00 monthly until August 1, 1989. (R. 3). This offset amount, together with interest, penalties, costs and attorney's fees, constitutes the amount in dispute in this appeal.

After the Court's decision in Barragan v. City of Miami, 545 So.2d (Fla. 1989), Paredes submitted a claim for reimbursement of his pension offset, together with interest, penalties, costs and

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[2]Some claimants have petitions for review pending in this court, some have cases pending in the First District Court of Appeal, and some have claims pending before Judges of Compensation Claims. The Court denied the City's request to stay these various proceedings pending the outcome of this appeal.

attorney's fees dated January 4, 1991.[3] The City defended, inter alia, on the basis that the Barragan decision should not be applied retroactively to entitle Paredes to reimbursement. (R. 101).

A Judge of Compensation Claims rejected the City's defenses, awarded Paredes permanent total disability benefits of $195.00 per week for the offset period, and further awarded a 10% penalty, interest on the benefits awarded, costs and attorney's fees. (R. 364-73). The First District Court of Appeal affirmed the award in toto,[4] but certified to the Court the same penalty question certified in City of Miami v. Hickey, 18 Fla. L. Weekly D78 (Fla. 1st DCA Dec. 15, 1992), review pending, Case No. 80,981. The question certified in Hickey is the same question certified in City of Miami v. Bell, 606 So.2d 1183 (Fla. 1st DCA 1992), review pending, Case No. 80,524.

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[3]Although various notices of claim and controverts were included in the record on appeal, the notices of claim and suspension pertinent to the pension offset litigation was not included.

[4]In Barragan, supra, at 255, the Court held that "[t]he employer may not offset workers' compensation payments against an employee's pension benefits except to the extent that the total of the two exceeds the employee's average monthly wage." The total of Paredes' workers' compensation and pension benefits exceeded 100% of the average monthly wage by $513.57 per month. In awarding the permanent total disability benefits of $195.00 per week for the offset period, the Judge made such award "subject to a lien in favor of FIPO (the Firefighters' and Police Officers' Retirement Fund) of $513.57 per month...." (R. 366). The First District Court of Appeal, pursuant to the City's request, deleted this provision and substituted the language "subject to an offset in excess of the average monthly wate, which in this case is $513.57 per month."

SUMMARY OF ARGUMENT

When the Court decided Barragan in 1989, it unsettled the City's common, court-approved practice of deducting from pension payments the amount paid to former employees under the workers' compensation provisions of Chapter 440. Once this long-approved practice was deemed contrary to law, the City dealt with the budgetary effects of removing this offset and fully complied with the Barragan decision on a prospective basis. The First District's determination that Barragan is to apply retroactively has caused further financial turmoil and, of course, spun off a legal debate now to be determined for the first time by this Court. The City is convinced that Barragan should not be applied retrospectively to award payments of windfall proportions to claimants.

Prior affirmations of the City's right of offset should put any such use of Barragan completely to rest. Barragan constituted a drastic change in law which expressly overturned several previous district court decisions regarding the same City ordinance. There can be no question that, in taking the offset, the City conducted itself with justifiable reliance on these past decisions. This good faith behavior of the City, coupled with the intent of the workers' compensation law and the obvious inequities befalling the City from a retrospective application of Barragan, demonstrate the appropriateness of prospective limitation.

In a second drain on the City's taxpayers, the First District has imposed a 10% statutory penalty for untimely payment of the retrospective award. This punitive penalty on the City has no logical support in the language of the compensation law, or in the judicial gloss on the statute. Clearly, this is a circumstance where the City had no control over the conditions of nonpayment, and where it possesses a totally valid excuse for not immediately issuing retroactive pension payments. The City's conduct reveals no incidents of contemptuous behavior, but simply an inability to prognosticate the decision in Barragan and its later retroactive application by the First District. Regardless of whether the determination of retroactivity is upheld (and the City vehemently disagrees that it should be), the tack-on penalty cannot be condoned.

Another absolute barrier to the imposition of a 10% penalty is that the increase in benefits awarded to offset pension fund deductions does not constitute an "installment of compensation" under section 440.20(7), Florida Statutes (Supp. 1980). By its terms, that section of the law does not pertain in this case. Moreover, those installments were fully paid by the City, and this language of the Act properly deserves strict construction to exclude what really constitutes a pay back of offsets from pension plan installments. It is clear, as well, that section 440.21(1), which was construed in Barragan, provides for only two things: invalidation of any "offset-establishing" agreements and

the misdemeanor criminalizing of any such agreement. No civil penalty is articulated for a breach of section 440.21, further proving the non-applicability of section 440.20 and the distorting effects of trying to impose a section 440.20 penalty on a Barragan breach of section 440.21.

No prejudgment interest should have been awarded, and certainly none is appropriate dating from 1984 based on retroactive liability (if any). No further penalties would be warranted should the district court issue its mandate during the pendency of these review proceedings.

ARGUMENT

The first and most fundamental issue in this appeal is the retroactivity of the Barragan decision. This issue not only affects Paredes, but numerous other claimants seeking retroactive reimbursement for pre-Barragan disability pension offsets.[5] The second set of major issues address the applicability of the 10% penalty which the workers' compensation law provides for

[5]Six offset reimbursements have been paid, aggregating almost $700,000, as a consequence of the Court's denial of review in City of Miami v. Burnett, Case No. 79,925; City of Miami v. Pierattini, Case No. 79,926; City of Miami v. Johnson, Case No. 79,927; City of Miami v. Majewski, Case No. 79,928; City of Miami v. Moye, Case No. 79,951; and City of Miami v. Ogle, Case No. 80,055. The first of these cases, oddly, was one of the two decisions which held the Court's 1989 ordinance invalidation decision to be retroactive.

employers who inexcusably delay either paying compensation claims or denying that payment is due.[6]

1. **The Barragan Decision Should Not be Given Retroactive Effect.**

In its Barragan decision, the Court did not make a determination one way or the other as to whether the decision would have retroactive effect.[7] Not all precedent-setting cases are given retroactive effect, of course. See National Distributing Co., Inc. v. Office of Comptroller, 523 So.2d 156 (Fla. 1988). While an overruling decision will, as a general rule, be applied retroactively, this Court has scrutinized the reliance of parties on previous precedent to determine if prospectivity alone is the most equitable result. See Brackenridge v. Ametek, 517 So.2d 667 (Fla. 1987), cert. denied, 488 U.S. 801 (1988); Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

(a) **The City's justifiable reliance.**

The district court held that Barragan should be applied retroactively to Paredes' claim for offset reimbursement. The panel actually expressed no analysis of that issue, but merely

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[6]The penalty issue is before the Court on a certified question from the First District Court of Appeal. The retroactivity and other issues are before the Court under the doctrine announced in Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Hillsborough Ass'n for Retarded Citizens v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976).

[7]The issue of retroactivity was never briefed to the Court. The only mention of retroactivity appeared as a question by the City in its motion for rehearing.

adopted by reference previous decisions of other First District panels including City of Miami v. Burnett, 596 So.2d 478 (Fla. 1st DCA), rev. denied, 606 So.2d 1164 (Fla. 1992), and City of Daytona Beach v. Amsel, 585 So.2d 1044 (Fla. 1st DCA 1991), both of which had construed Barragan to be retroactive. The district court was wrong. It is impossible to imagine a clearer instance of a decision which states a new principle of law than the overruling of past precedents on which a litigant relied as a party.

It is relevant to note at this juncture that the multiple district court decisions which were rejected by the Court in Barragan are considered (and properly so) as the final judicial word on the principles of law for which they stood. It is not as if these were interim, or intermediate court decisions. They were tantamount to Supreme Court decisions in every jurisprudential way. District court review is "in most instances...final and absolute." Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958). Their decisions "represent the law of Florida unless and until they are overruled by this Court...." Stanfill v. State, 384 So.2d 141, 143 (Fla. 1980).

The Barragan decision recognized those effects. It announced it was overruling past precedents that were uniformly contrary and clear. Six separate appellate decisions had reached and articulated the conclusion which Barragan overturned, and the Court had even declined "conflict" review in three of these

cases. Most compelling is the fact that the litigant in all of those cases was the City of Miami itself, and the issue in each was exactly the issue in Barragan. There could not be a more lavish demonstration of justifiable reliance on past decisions than that recorded by the City.[8]

Prior to the Barragan decision in 1989, an unbroken line of district court decisions over a period of 27 years had conclusively provided judicial imprimatur for the City to offset amounts due in disability pension benefits by amounts awarded as workers' compensation payments. The Barragan decision held that the Florida Legislature's 1973 repeal of a long-standing, statutory offset authorization -- section 440.09(4), Florida Statutes -- had the effect of invalidating the City's comparable 1940 offset ordinance. The district court decisions in Giordano, Barragan, Knight, Thorpe, West and Hoffkins, however, had all acknowledged and explained the City's right to exercise the offset despite the legislature's repeal of section 440.09(4). A brief excursion into their rationale is instructive as to the City's clear basis for comfortable reliance on this impressive array of cases.

One of the pre-Barragan precedents -- Hoffkins in 1976 -- expressly addressed the repeal of section 440.09(4) and confirmed the manner in which the City had construed its effect vis-a-vis

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[8]The district court obviously understood that effect of Barragan when it wrote in Bell that "the supreme court 'dropped' the Barragan bomb." City of Miami v. Bell, 606 So.2d at 1185.

the City of Miami's pre-existing ordinance. The Third District in Hoffkins saw no reason why the City's ordinance, in existence since 1940, could not maintain its own viability to require disability pension offsets in the exact manner authorized by section 440.09(4) prior to its 1973 repeal. Hoffkins, 339 So.2d at 1146. That was 1976, some thirteen years prior to Barragan.

Eleven years after Hoffkins, in Knight, the First District issued a decision which elaborated on the theme struck in Hoffkins and lent it further credence. In Knight, the court reconciled assertions of disharmony between the City's long-standing ordinance and the equally long-standing section 440.21 of the workers' compensation law -- a statute which appeared to disallow and criminalize any form of benefits reduction. The Knight court analyzed a line of three cases from this Court which had strictly construed section 440.21,[9] and concluded they meant only

> that workers' compensation benefits cannot be reduced by any benefits to which the claimant is contractually entitled independently of workers' compensation.

Knight, 510 So.2d at 1073.

These cases distinguished by Knight were the very ones that the Court utilized to reach the diametrically opposite result in Barragan! Thus, the 11-year string of decisions from Hoffkins

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

through Knight, up to this Court's Barragan decision, had specifically and uniformly upheld the City's right to reduce collectively bargained-for pension payments by amounts received by claimants under the workers' compensation law, based on analyses of both section 440.21 and repealed section 440.09(4).

None of this discussion is intended to re-argue the merits of Barragan. It does verify, however, that the reliance factor in determining whether Barragan should apply retroactively overwhelmingly favors the City. The result reached in Barragan, and the reasoning, constituted 180% departures from clear, past precedent in "City" cases, on which the City obviously and fairly had relied.

The Court's decision in National Distributing provides both the rationale and result to compel non-retroactivity for Barragan. The legislature had enacted laws consistent with its plenary power to regulate alcoholic beverages under the Twenty First Amendment to the United States Constitution. It had acted "in good faith," according to the Court, but had been stung by a "marked departure from prior precedent" of the United States Supreme Court when that court subsequently determined that Florida's laws were in violation of the Commerce Clause -- Article I, Section 8 of the United States Constitution. National Distributing Co., 523 So.2d at 157-58. Yet the Court refused to apply the policy change retroactively in National Distributing. The result there cannot be different than the result here. The

City has acted in no less "good faith" than the legislature did.[10] If the state's lawmakers were stung by a reversal of judicial precedent at the highest judicial level, no less were the City's lawmakers afflicted by this Court's reversal of six district court precedents! The parallels are inseparable.

The First District reasoned that Barragan should be given retroactive application, however, because section 440.21 was the law at the time the claimant entered into his particular contract with the City, and consequently no offset rule could constitute a provision of that agreement. Amsel, 585 So.2d at 1046 (concerning the Daytona Beach ordinance); Burnett, 596 So.2d at 478 (concerning the Miami ordinance).[11] For retroactivity analysis, this rationale is utterly unpersuasive.

The pre-Barragan cases on which the City justifiably relied effectively held that the City's ordinance was neither inconsistent with nor voided by section 440.21. Burnett and Amsel adopted a legal fiction -- that the statute canceled contract provisions. That fiction simply made it possible to rule for the claimants, without saying that the harmonization of statute and ordinance as previously adjudicated in Knight was

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[10]The City's "good faith" in effect has been adjudicated already. The district court in Bell framed its certified question on the 10% penalty in terms of the City's "good faith reliance" on the validity of its offset ordinance. 606 So.2d at 1189.

[11]Burnett states the same conclusion in the negative, by finding that section 440.21 voided the long-standing Miami ordinance as of July 1, 1973. See also, City of Miami v. Jones, 593 So.2d 544 (Fla. 1st DCA), rev. denied, 599 So.2d 1279 (Fla. 1992).

wrong. It is hardly surprising that the City should now cry "foul" at this legal revisionism. The First District's decisions should be rejected, and Barragan should be applied only prospectively.

(b) History and purpose of the rule.

Retroactivity is anathema to workers' compensation. Any retrospective result of substantial effect in workers' compensation cases has been studiously avoided, if at all possible. This thesis emerges both from the case law and from the underlying policy of the statutory scheme. This Court has twice previously expressed the conclusion that "[t]he statutory and decisional law pertaining on the date that an accident has occurred must prevail in a work[ers'] compensation case." Kerce v. Coca-Cola Company - Foods Division, 389 So.2d 1177, n. 1 (Fla. 1980) (emphasis added); Simmons v. City of Coral Gables, 186 So.2d 493, 495 (Fla. 1966).

The workers' compensation statute rests on a policy fashioned to balance stability and predictability. On-the-job injuries and disabilities covered by the Act are compensated on a prompt and stable schedule of payments, in exchange for abrogation of the employee's right to sue in tort. Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986). Lump sum awards representing duplicative and overlapping benefits which had been bargained away -- an aggregation providing a windfall "double dip" -- is completely incompatible with either

the prompt-payment assurances of the Act for workers or the you-won't get-slammed-later assurances of the Act for employers. See section 440.20, Florida Statutes (Supp. 1980); Sullivan v. Mayo, 121 So.2d 430 (Fla. 1960). The lump sum awards being sought here have all the suddenness, unpredictability and devastation of an adverse tort award.

For almost 50 years, Miami's ordinance effectuated a reduction in pension benefits under a contractual arrangement which reduced those payments if a disability was also compensated by workers' compensation payments. Nothing unnatural or unfair inheres in a contractual bargain of that nature.[12] There is no need to elaborate here on the notion that the City had every legitimate right to tailor its financial responsibilities in accordance with the offset ordinance. The policy of the workers' compensation law favoring prompt and settled periodic payment of benefits would be destabilized by a retroactive application of Barragan, causing the dual consequences of providing a non-periodic windfall to former employees and a treasury-busting drain on the employer.

In the past, the Court and the First District have declined to apply statutory amendments to the workers' compensation laws retroactively when the effect is to reduce the measure of damages due a claimant. See L. Ross, Inc. v. R.W. Roberts Construction

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[12]Pension plans under ERISA are allowed by law to be "integrated" with Social Security in exactly in the same fashion. By this means, employers can provide more affordable retirement benefits without duplicating or diminishing those benefits.

Co., Inc., 481 So.2d 484 (Fla. 1986); Sir Electric, Inc. v. Borlovan, 582 So.2d 22 (Fla. 1st DCA 1991). See also, Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), refusing to apply retroactively a judicial declaration of invalidity for a statute amending the workers' compensation law to reduce benefits. The same principle logically holds for a retroactive increase in the damages to be paid out by public employers.

(c) **Inequities imposed by retroactive application.**

Three times recently, the Court has stepped in to reject retrospective application of decisions which could either have unsettled scheduled benefit payments or grievously impacted state and municipal finances. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991); State v. City of Orlando, 576 So.2d 1315 (Fla. 1991); National Distributing Co., Inc. v. Office of Comptroller, 523 So.2d 156 (Fla. 1988). In each instance, the Court warily averted the potential for disrupting fiscal management and government budgets by exercising its prerogative of prospective application.

In Martinez, the Court applied prospectively a decision which held unconstitutional amendments to the workers' compensation law that had reduced benefits to eligible workers. 582 So.2d at 1171-1176. In City of Orlando, the Court applied prospectively its invalidation of certain municipal revenue bonds issued for investment purposes, in order to avoid any effect on bonds that may have been previously issued or approved. 576

So.2d at 1318. In National Distributing Co., the Court refused to apply retrospectively the invalidation of a tax statute, where the effect would have been to provide alcoholic beverage distributors a windfall from repayment (the excess taxes having already been passed on to customers in the pricing of goods). 523 So.2d at 158.

The principle that emerges from these three contemporary decisions is not new. The Court has long been concerned that when "property or contract rights have been acquired under and in accordance with [a previous] construction, such rights should not be destroyed" by retrospective operation of a subsequent overruling decision. Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

The only cumulative conclusion that can be reached by applying National Distributing and additional Florida precedents is that the policy considerations for retrospective limitation are present in this case. There is no legal, equitable, or just basis to impose a retroactive application on Barragan.[13]

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[13] See also, City of Miami v. Gates, 592 So.2d 749 (Fla. 3d DCA 1992), in which the Third District recently concluded that pension plan claimants should not be barred by a class action settlement which did not anticipate Barragan's conclusion that the City's offset ordinance was invalid.

2. The City Should not be Subjected to the 10% Statutory Penalty for its Refusal to Pay a Compensation Claim.

Following the lead in Bell, the 10% penalty issue is the subject of the district court's certified question.[14] The latter engendered the most controversy before the First District in Bell, prompting a 10-page discussion of the issue in the majority decision, a 6-page dissent from Judge Booth, and an even 6 to 6 division among the judges on the district court as to whether the issue should be considered en banc. The City respectfully suggests that, under the circumstances of this case, as well, a 10% penalty on the City is totally unwarranted.

The nub of the district court's decision has to be that, with respect to the penalty-imposing provisions of the workers' compensation statute, the Court's reversal of 27 years of precedents on which the City relied was not a condition "over which [the City] had no control." Bell, 606 So.2d at 1188 (construing section 440.20(7), Florida Statutes (1985)). In this case, it is the 1980 provisions of the statute which control the penalty question since the claimant's compensable injury occurred after July 1, 1979. See section 440.20(7), Fla. Stat. (Supp. 1980). The 1980 version of the Act lends no more righteousness to imposing a 10% penalty than did the 1985 statute applying in

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[14] Because Paredes' injury occurred on November 23, 1979, it is section 440.20(7), Florida Statutes (Supp. 1980), which governs the penalty issue.

Bell. This ruthless application of the statute is exposed for inconsistency and unfairness by Judge Booth in her Bell dissent:

> The majority forgives [the employee's] failure to claim the offset in this 1988 claim because, under the existing law, there was no basis for such a claim. A different rule is applied to [the City], however, who must now pay the offset amounts based on the retroactive application of a change in the law and pay a penalty to boot. Where was [the City's] opportunity to avoid the penalty? What was the effect of the ordinance remaining on the books that authorized the offset?...Only a soothsayer with a crystal ball could have predicted in 1985, when the original claim arose, or in 1987, when the offsetting began, that Barragan would be decided (July 1989) and, eventually (October 1991), be held to apply retroactively.

Bell, 606 So.2d at 1191. The City suggests that this dissent has the better reasoned analysis.

The 10% penalty is a statutory mechanism to compel the prompt payment of workers' compensation claims, or in the alternative, the prompt invocation of administrative processes. Compare Sigg v. Sears Roebuck & Co., 594 So.2d 329, 330 (Fla. 1st DCA 1992). Nowhere in the history or lore of the workers' compensation laws has there been a judicial determination that this penalty should be levied on an employer who has followed the law for 13 years, under six separate and judicially-final appellate court decisions, when those decisions are unexpectedly overturned and then, 2 years later, this reversal is ruled to apply retroactively. None of the statutory subsections invoked by the First District's majority in Bell can be manipulated to

condone this penalty under these circumstances. They are square pegs in ill-fitting round holes.

The penalty in section 440.20(7) is only triggered upon the employer's knowledge of the employee's injury. Section 440.20(2), Fla. Stat. (Supp. 1980). This triggering event is ill-suited to the imposition of a 10% penalty here. The City's knowledge of Paredes' injury dates from 1979, when the City in fact began timely and penalty-free compensation payments. No contortions can fit the blind side of Barragan into this precisely crafted statutory scheme.

Nor can the punitive nature of a 10% penalty, based on the purposes for which it is levied, rest comfortably alongside the City's innocence. As Judge Booth quite logically found in her Bell dissent, the only statutory provision that fits this circumstance is that which makes "the penalty...inapplicable where nonpayment results from conditions over which the employer or carrier had no control." Bell, 606 So.2d at 1192. That exoneration from the imposition of the penalty obviously comes in play here. Other less compelling decisions affecting a compensation loss have rejected the imposition of penalties when the employer has a valid excuse for noncompliance. See Florida Community Health Center v. Ross, 590 So.2d 1037 (Fla. 1st DCA 1991); Four Quarters Habitat, Inc. v. Miller, 405 So.2d 475 (Fla. 1st DCA 1981).

On a policy level, the retroactive imposition of a penalty on a retroactive award is unconscionable. It does not punish behavior which is contumacious or in disregard of the claimant's rights. It merely enriches Paredes for the City's lack of prescience -- failing to anticipate the reversal of an unbroken line of appellate decisions, and then failing to further anticipate that some two years later the reversing decision would be applied retroactively. Surely the City's skill at prognosticating should not be held to a higher standard than the First and Third District Courts of Appeal, both of which were equally off the mark (according to Barragan)[15] in the Knight and Hoffkins decisions. See Hanover Insurance Co. v. Florida Industrial Comm'n, 234 So.2d 661, 663 (Fla. 1970), invalidating a 10% penalty based on "the complicated nature of the cause and the pleadings herein...." If there is just a scintilla of validity in the City's analysis of National Distributing (and the City believes it is compelling), no penalty is warranted for the City's failure to disburse sua sponte vast sums from the City's coffers in the 10th month of its 1988-89 fiscal year.[16] The very thought of applying a punitive financial burden on top of retroactivity is apparently a second bombshell which does not rest comfortably with the district court judges. The issue has

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[15] City of Miami v. Barragan, 545 So.2d at 254-255.

[16] The City's fiscal year runs from October 1, to September 30. The Barragan decision became final on July 14, 1989.

been certified here for resolution, following a 6-6 en banc deadlock in Bell.

In regard to statutory construction, there is precise verbiage in the applicable, 1980 statute which itself suggests the inappropriateness of a 10% penalty. Section 440.20(7) discusses imposition of the 10% penalty dependent on the employer's "fault in causing the delay" in payment. Of course, all words in a statute have meaning,[17] and all penal statutes are to be strictly construed.[18] Use of the term "fault" necessarily infers exercise of the penalty only in circumstances where the employer's conduct is somehow blameworthy in delaying payment of compensation. For what, one must ask, is the City being faulted, and thereby penalized? The City's only volitional behavior in this whole brouhaha was not sending a check to Paredes sua sponte after the Barragan decision for full retroactive reimbursement of prior offset benefits.

3. A Retroactive Barragan Payment Does Not Constitute an "Installment of Compensation" for Purposes of Section 440.20, Florida Statutes (Supp. 1980).

A retroactively-paid Barragan offset, if ordered, does not constitute an "installment of compensation" for purposes of applying the 1980 penalty provisions of section 440.20. On this

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[17] Gretz v. Florida Unemployment Appeals Commission, 572 So.2d 1384, 1386 (Fla. 1991).

[18] E.g., Philip C. Owen, Chartered v. Department of Revenue, 597 So.2d 380 (Fla. 1st DCA 1992); Turner v. Department of Professional Regulation, 591 So.2d 1136, 1137 (Fla. 4th DCA 1992); Gardinier, Inc. v. Department of Pollution Control, 300 So.2d 75, 78 (Fla. 1st DCA 1974).

basis, as well, assessment of a 10% penalty must be rejected. This reasoning was expressed by the First District in two of its decisions.[19] "It does not appear" that a retroactive Barragan award is "part of an 'installment of compensation' as contemplated by section 440.20" (Arostegui, 606 So.2d at 1194) -- a conclusion which seems eminently accurate. Yet, the court felt "constrained" to reach an unwarranted result by a sentence from the Jewel Tea decision[20] which was quoted by the Court in Barragan. (Arostegui, 606 So.2d at 1194). That constraint was unnecessary, and inappropriate.

The question of whether 10% should be added to retroactive awards, as a penalty for failing to pay on a timely basis an "installment of compensation" as referenced in section 440.20(7), Florida Statutes (Supp. 1980), implicates both statutory construction and an understanding of prior decisional law. The district court obviously thought, as a matter of statutory construction, that a lump sum pension payment, ordered retroactively, was not the type of penalty-prompting "installment" which section 440.20(7) contemplated. That conclusion appears irrefutable.

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[19] City of Miami v. Arostegui, 606 So.2d 1192 (Fla. 1st DCA 1992), review pending, Case No. 80,560. City of Miami v. McLean, review pending, Case No. 80,575.

[20] Jewel Tea Co. v. Florida Industrial Commission, 235 So.2d 289 (Fla. 1970).

In both 1979 and 1980, section 440.20(7) provided for a 10% penalty

> If any installment of compensation payable without an award is not paid within 14 days after it becomes due...unless notice is filed [within 21 days]....

The purpose of the penalty, obviously, was to force an expeditious discharge of the obligations of employers to pay or controvert the claims of workers. There is no connection between that statutory purpose and the City's obligation to pay a pension catch-up payment, if now approved by the Court. The statutory purpose is in no way enhanced, let alone served, by the imposition here of the prompt nonpayment penalty. There is no statutory basis to require the City to file an anticipatory notice, controverting claims before they are filed.

Aside from statutory construction, there are two intersecting lines of judicial precedent that affect this aspect of the penalty issue. The first, and the City would argue relevant line, relates to the decision in Brantley v. A D H Building Contractors, Inc., 215 So.2d 297 (Fla. 1968). That decision held that certain payments under the Act are not "compensation" as contemplated by the Act. See also, State Department of Transportation v. Davis, 416 So.2d 1132 (Fla. 1st DCA 1982) (statutory offset in Chapter 440 for social security does not equate latter with "compensation"); and see Whiskey Creek Country Club v. Rizer, 599 So.2d 734 (Fla. 1st DCA 1992); Cox Oil & Sales, Inc. v. Boettcher, 410 So.2d 211 (Fla. 1st DCA

1982). As the district court recognized, those types of payments do not trigger a penalty for failure to pay an installment of "compensation". See Arostegui, 606 So.2d at 1193. A catch-up award for retroactive pension benefits is in the name genre.

This view of the issue was taken by Judge Booth in her Bell dissent. There, she complained that the City had always paid its former employee in excess of the amount owed for workers' compensation; it had simply reduced his separate contractual pension benefits. 606 So.2d at 1190-91.

The other line of cases relate to the authority and jurisdiction of the judges of compensation claims, as defined in the Barragan decision. So far as is relevant here, that decision quoted from and adopted the rationale of Jewel Tea to the effect that a judge of compensation claims has jurisdiction to award an increase in compensation benefits to the extent of a pension offset, because it makes no difference whether the pension or the workers' compensation benefit is reduced for the employee. The net effect, Barragan says, must be that both the full contractual amount (a pension in Barragan) and the full workers' compensation benefit must be paid, subject of course to a cap that may not exceed the employee's average monthly wage. Put another way, Barragan held that both a workers' compensation benefit and a contractual benefit (be it insurance, pension or sick leave benefits) are payable in full, and in order to remedy any offset therefrom, the judges of compensation claims have jurisdiction to

order an "increase [in] the amount of worker's compensation" as necessary to make the claimant whole. One benefit plus another must always equal the sum of the two (subject only to the cap of average monthly wage).

The language of Barragan and Jewel Tea is indeed in terms of "an increase" in the workers' compensation benefit. In a situation where the employee has been paid the full amount of non-controverted workers' compensation benefits from the outset such as the situation here, however, the "catch-up" amount may not and should not, for penalty purposes, be treated as an increase in the workers' compensation benefit. It is a catch-up of post pension benefits, because the offset was in fact taken out of pension payments. The City had always paid the full amount of workers' compensation due to Paredes. For purposes of the penalty provisions of the statute, then, it only makes sense not to treat the reimbursable shortfall (if ordered) as an installment of workers' compensation.

Whether deemed an "increase in compensation," a pension pay back or another descriptive category of award, the amounts paid retroactively (if compelled by this court) do not constitute "compensation" under this statute. Nothing in Barragan or Jewel Tea compels the notion that these retroactively restored amounts "be treated as 'compensation' under Chapter 440 or for the purposes of penalties." Bell, 606 So.2d at 1190 (Booth, J., dissenting).

In any event, Barragan's interpretation of section 440.21 has nothing at all to do with the imposition of penalties under section 440.20. According to Barragan, section 440.21 voids agreements which reduce pension benefits by virtue of compensation paid and criminalizes any such agreement. The institution of a civil penalty is nowhere mentioned in the text of section 440.21, and that lack of expression most reasonably infers that the legislature did not intend a civil penalty for such a violation. Thayer v. State, 335 So.2d 815 (Fla. 1976). While section 440.20 identifies various penalties for situations not applicable here, it makes no provision for a civil penalty for offsets such as that addressed in Barragan. Since statutes which do impose penalties must be construed strictly in favor of one whom would be penalized and "are never intended to be extended by construction," the 10% exaction is illegal. Hotel and Restaurant Comm'n v. Sunny Seas No. One, Inc., 104 So.2d 570, 571 (Fla. 1958). See also Adler-Built Industries, Inc. v. Metropolitan Dade County, 231 So.2d 197 (Fla. 1970).

A Barragan-based payment is not a turn of events contemplated by sections 440.20 or 440.21, or comprehended by the defined scope of the term "compensation" as "the money allowance payable...as provided for in this chapter." Section 440.02(11), Fla. Stat. (Supp. 1980) (emphasis added). Even if a retroactive payment of pension deductions is confirmed by this Court, it does not constitute "compensation," or an "installment of compensation."

4. No Prejudgment Interest Should be Awarded on the Judgment.

The First District affirmed the award of prejudgment interest on the lump sum catch-up pension offset benefits for the period commencing March 10, 1984 to August 1, 1989. The applicable interest rate for this period is 12% per annum. Section 440.20(9), Fla. Stat. (Supp. 1980). The prejudgment interest award was improper for at least three reasons.

First, the allowance of prejudgment interest is provided only for the tardy payment of "any installment of compensation." Section 440.20(9). The previous arguments in this brief demonstrated that the putative pension payments under Barragan are not equivalent to payments of compensation under Chapter 440. On this basis, the prejudgment interest of 12% per annum since 1984 cannot be added to the retroactive award of pension offset benefits.

Second, the City has always acted in good faith throughout the period in question. That is, the City merely followed an ordinance that had been validated by numerous district court decisions prior to Barragan in 1989. Accordingly, the City is entitled to avoid paying prejudgment interest prior to the date of claim for the retroactive award.[21] See Broward County v.

[21]Using the date of claim for the retroactive award as the triggering date for the purpose of assessing interest would be consistent with decisions that hold that prejudgment interest does not begin to run until demand or institution of suit, whichever is first. See, e.g., Manning v. Clark, 89 So. 2d 339 (Fla. 1956); Ball v. Public Health Trust, 491 So. 2d 608 (Fla. 3d DCA 1986).

Finlayson, 555 So.2d 1211 (Fla. 1990), in which the Court abjured a mechanistic application of prejudgment interest against a county for back pay of salary to its employees where the county had acted in good faith consistent with the then applicable collective bargaining agreement. The same can readily be said of the City's compliance with 27 years of pre-Barragan offset-permitting decisions.

A comparable situation pertained in State Industrial Ins. System v. Wrenn, 762 P. 2d 884 (Nev. 1988), where the Nevada Supreme Court reversed an award of prejudgment interest on the delayed payment of workers' compensation benefits. The court rejected the claimant's contention that interest should be assessed as a sanction because the record failed to reveal that the delay was due to any "arbitrary conduct or bad faith practice" of the carrier. Id.

Third, the Court recently acknowledged that "cases recognizing a right to prejudgment interest have all involved the loss of a vested property right." Alvarado v. Rice, 18 Fla. L. Weekly S133 (Fla. March 4, 1993). Paredes and the other Barragan-created claimants surely had no vested property rights to offset monies at the time of their injuries. The longstanding case law held that claimants had no property right at all in the offsets. Paredes and the other Barragan-created claimants' entitlement to interest could not have vested until the Judge of Compensation Claims determined their entitlement to the

retroactive pension offset monies. Alternatively, the vesting did not occur until the date claim was made for said benefits. In no event could the claimants' rights to an award of retroactive benefits vest before (1) Barragan became final on July 14, 1989, or (2) the appellate decisions on which the City relied to follow its ordinance were held inapplicable to the City in City of Miami v. Burnett, supra, decided on March 24, 1992.

5. No Further Penalties are Authorized Against the City Pending Supreme Court Review.

In two companion cases, Arostegui and McLean, the First District has issued mandates despite the City's filing of a notice to invoke the discretionary jurisdiction of the Court within fifteen days of the district court's decision. The City's "Motion to Recall of Mandate" remained pending in the First District when this brief was served. Rule 9.310(b)(2) affords the City a stay of the decision. Although no mandate has been issued below, the City filed a motion to stay mandate in the instant case in an abundance of caution. The First District had not ruled on the motion at the time that this brief was served.

Rule 4.161(d), Fla.W.C.R.P., does not appear to require a contrary result. That Rule directs that any benefits be paid within 30 days of the issuance of the district court's mandate unless a stay is obtained from the Florida Supreme Court, but that Rule (which is applicable both to public and private employers) does not derogate or abrogate the automatic stay to which a public body is entitled.

In this proceeding, the City has been penalized by retroactivity, penalties, interest, costs and attorneys' fees.

It is justifiably concerned with further areas for penalization. The First District's remands in Arostegui and McLean have left open the possibility that an additional, new, 20% penalty will be levied against the City for nonpayment of retroactive amounts affirmed by the First District. The same holds true in this case in the event the First District issues the mandate. This consequence would be yet a further inequity in this proceeding, for it would punish the City for proceeding with review in this Court despite the certification of the penalty question by the First District's opinion. The Court should clarify that no added penalties of any type should be levied against the City for its nonpayment of any award pending review in this Court.

CONCLUSION

The Barragan decision should not be given retroactive effect by this Court. If the Court does extend retroactivity, the district court's imposition of a 10% penalty should be reversed. Prejudgment interest and further penalties are inappropriate.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail to RICHARD A. SICKING, ESQUIRE, 2700 S.W. Third Avenue, Suite 1E, Miami, Florida 33129, this 26th day of March, 1993.

Respectfully submitted,

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KSP/lb/P1327

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 81,340

CITY OF MIAMI,

Petitioner,

vs.

ORLANDO PAREDES,

Respondent.

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

APPENDIX TO
BRIEF OF THE CITY OF MIAMI

Decision of District Court

First, it was an abuse of discretion to require appellant to submit to a deposition over his objection, without counsel, only three hours after denying appellant's motion for appointment of counsel. Instead, the trial court should have set the deposition for a date sufficiently in the future to afford appellant a reasonable opportunity to secure counsel; and told appellant that he would have to appear at that time, whether or not he had counsel.

Second, it was also an abuse of discretion to strike appellant's petition when he failed to appear for his deposition on September 6.

> [T]he right of access to our courts is constitutionally protected and should be denied only under extreme circumstances. . . . To strike pleadings for failure to comply with a discovery order is the most severe of all sanctions and should be resorted to only in extreme circumstances. . . . Only a deliberate and contumacious disregard of the court's authority, bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness will justify a dismissal of pleadings for a violation of discovery procedures.

U.S.B. Acquisition Co. v. U.S. Block Corp., 564 So. 2d 221, 222 (Fla. 4th DCA) (citations omitted), *review denied*, 574 So. 2d 144 (Fla. 1990). *Accord Wallraff*, 490 So. 2d at 51; *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983).

Appellant's failure to attend his deposition was unquestionably willful or intentional in the sense that he intended not to appear. However, the record simply will not support a finding that appellant's failure to attend was contumacious or in bad faith. On the contrary, the only conclusion which can be drawn from a fair reading of the record is that appellant failed to appear as ordered because he believed that he was entitled to a reasonable opportunity to secure counsel; and because he believed that filing a notice of appeal from that order would act as an automatic stay of the order. Moreover, the severity of the sanction should be commensurate with the violation. Here, it is apparent that appellees were not prejudiced in any way by appellant's failure to appear. *See, e.g., Beauchamp v. Collins*, 500 So. 2d 294 (Fla. 3d DCA 1986) (dismissal is inappropriate as a sanction for violation of a discovery order when defendants are unable to demonstrate meaningful prejudice), *review denied*, 511 So. 2d 297 (Fla. 1987).

We reverse the order striking appellant's petition with prejudice, and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED. (ERVIN and BOOTH, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Written judgments and sentences to be corrected to conform to oral pronouncement by eliminating indication of habitual offender status and stating correct terms of incarceration—Defendant could not properly be charged with violating probation which was imposed as part of illegal sentences, nor could that probation be revoked—Trial court failed to comply with appellate court mandate requiring that defendant be resentenced on count for which excessive sentence had been imposed

GLINDER LEE CECIL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-1766. Opinion filed February 18, 1993. An Appeal from the Circuit Court for Bay County. Clinton Foster, Judge. Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Asst. Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Glinder Lee Cecil has appealed from sentence imposed after remand by this court in *Cecil v. State*, 596 So.2d 461 (Fla. 1st DCA 1992). We remand for correction of Cecil's sentence as outlined below.

In October 1990, Cecil pled guilty to two 3d-degree felonies (Case Nos. 89-2561 and 89-2883), and received consecutive 5-year probationary terms. An affidavit of violation of probation was filed based on a new offense, the 3d-degree felony of purchasing cocaine (Case No. 91-418). The trial court revoked probation and, in March 1991, sentenced Cecil as follows: *89-2561* - 3½ years incarceration plus 4 years, 7 months probation concurrent with *89-2883* - 3½ years plus 5 years probation, and *91-418* - 3½ years plus 11 years probation, consecutive to the first two. Cecil appealed and this court reversed, finding that the total of each sentence exceeded the 5-year statutory maximum for 3d-degree felonies. *Cecil*. The court remanded for resentencing, and the mandate issued on February 19, 1992.

On January 2, 1992, an affidavit of violation of probation was filed based on a new offense of possession of cocaine (Case No. 92-3). Cecil pled guilty to the new charge, and admitted the violation of probation. On April 14, 1992, she came on for re-sentencing pursuant to *Cecil*, and for sentencing in 92-3. The trial court revoked probation in 89-2883 and 91-418, and orally resentenced Cecil to 3½ year terms; no habitualization was orally pronounced. However, the written judgments and sentences reflect a sentence of *2½ years* in each case and that, as to each, Cecil was a habitual offender. The trial court relied on the convictions in 89-2883 and 91-418 to habitualize Cecil in 92-3, and she was sentenced in that case to 10 years. The disposition in 92-3 is not at issue herein.

Cecil argues only that the written judgments and sentences in 89-2883 and 91-418 must be corrected to eliminate the indication of habitual offender status as inconsistent with the oral pronouncement of sentence. The state concedes this error, and urges remand for correction. On our own motion, we also note that: 1) Cecil could not properly be charged with violating the probation imposed in 89-2561, 89-2883 and 91-418 as part of illegal sentences, *Cecil*, nor have that probation revoked; 2) the trial court failed to comply with the *Cecil* mandate to re-sentence Cecil in 89-2561; and 3) the 2½ year terms reflected in the written judgments and sentences in 89-2883 and 91-418 are inconsistent with the 3½ year terms orally pronounced at sentencing.

Based on the error raised by the parties, and on the errors noted in the court's own review of the case, we remand with the following directions: 1) re-sentence Cecil in 89-2561, in compliance with the *Cecil* mandate, *see Stuart v. Hertz Corp.*, 381 So.2d 1161, 1163 (Fla. 4th DCA 1980) (district courts of appeal have inherent power to enforce their mandates); 2) strike from the judgments and sentences in 89-2883 and 91-418 any indication that probation was revoked in those cases, in that such probation was part of an illegal sentence stricken in *Cecil*; and 3) conform the written judgments and sentences in 89-2883 and 91-418 to the oral pronouncement of sentence by: a) striking any indication that Cecil was classified as an habitual offender in those cases and b) correcting the terms of incarceration to 3½ years, *see Bennett v. State*, 588 So.2d 672 (Fla. 1st DCA 1991) (written sentence must conform with the oral pronouncement at the sentencing hearing).

Remanded with directions. (JOANOS, C.J., ERVIN and WEBSTER, JJ., CONCUR.)

* * *

Workers' compensation—Penalties—Pension offset monies withheld in reliance on city ordinance—Question certified: Is section 440.20(7) applicable under the circumstances of this case, and if so, can the City of Miami be legally excused from paying a penalty pursuant to that section on the amount of pension offset monies withheld in the past because the city did so in good faith reliance on the validity of the city ordinance authorizing the pension offset in view of the appellate decisions approving its validity?

CITY OF MIAMI, Appellant, v. ORLANDO PAREDES, Appellee. 1st District. Case No. 91-4150. Opinion filed February 17, 1993. An Appeal from an order of the Judge of Compensation Claims. John G. Tomlinson, Jr., Judge. A. Quinn Jones, III, City Attorney; Ramon Irizarri & Kathryn S. Pecko, Assistant City Attorneys, Miami, for Appellant. Richard A. Sicking, Miami, for Appellee.

(PER CURIAM.) In this workers' compensation case, all of the

issues raised on appeal have been addressed recently in *City of Miami v. Hickey*, 18 Fla. L. Weekly D78 (Fla. 1st DCA Dec. 15, 1992), which decision is controlling here. Accordingly, as in *Hickey*, on the issues of retroactivity and penalties, we affirm the decision of the judge of compensation claims and certify to the supreme court the following question, which we believe to be of great public importance:

IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI BE LEGALLY EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION ON THE AMOUNT OF PENSION OFFSET MONIES WITHHELD IN THE PAST BECAUSE THE CITY DID SO IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE CITY ORDINANCE AUTHORIZING THE PENSION OFFSET IN VIEW OF THE APPELLATE DECISIONS APPROVING ITS VALIDITY?

Also as in *Hickey*, on the lien issue, we delete from the order of the judge of compensation claims the language "subject to a lien in favor of FIPO of $513.57 per month"; and in its place substitute the language "subject to an offset in excess of the average monthly wage, which offset in this case is $513.57."

AFFIRMED IN PART; and REVERSED IN PART. (ERVIN, BOOTH and WEBSTER, JJ., CONCUR.)

* * *

Garnishment—Writs of garnishment served upon tenants of judgment debtor's shopping center in an effort to garnish rents being paid to debtor were inferior to mortgagee's previously acquired interest in rents—Assignment of rents to mortgagee pursuant to assignment of rents clause in mortgage became absolute upon mortgagor's default and became operative upon written demand by mortgagee

HOWARD SAVINGS BANK, Appellant, v. EASTERN FEDERAL CORPORATION, Appellee. 1st District. Case No. 92-206. Opinion filed February 17, 1993. An appeal from the Circuit Court for Duval County. A. C. Soud, Judge. Harris Brown and Kevin Vander Kolk, of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, Jacksonville, for appellant. William H. Maness, Jacksonville, for appellee.

(WIGGINTON, J.) Appellant, Howard Savings Bank [Bank], appeals 12 final judgments entered against garnishee tenants of Cedar Hills Shopping Center as well as the trial court's order denying appellant's motion to dissolve the writs of garnishment issued pursuant to those judgments. We reverse and remand.

On January 10, 1990, appellee, Eastern Federal Corporation, obtained a money judgment against Cedar Hills Properties Corporation [Cedar Hills], the owner/landlord of the Cedar Hills Shopping Center. For satisfaction of those judgments, beginning on September 27, 1991, appellee caused to be served writs of garnishment upon the various tenants of the shopping center in an effort to garnish the rents being paid to Cedar Hills Properties Corporation. After the trial court denied appellant Bank's motion to dissolve those writs, final judgments were entered against the tenants in appellee's favor.

Meanwhile, in May 1991, Cedar Hills had defaulted on a mortgage given by it to appellant Bank. The mortgage agreement contained an assignment of rents clause that could be activated upon default under the mortgage. On July 23, 1991, the Bank had provided written notice to Cedar Hills of the enforcement of the assignment of rents clause.

Section 697.07, Florida Statutes (1989) provides that if a mortgage contains an assignment of rents clause, "such assignment shall be absolute upon the mortgagor's default, becoming operative upon written demand made by the mortgagee." Since, pursuant to that statute, the assignment of rents to appellant Bank became absolute and operative by July 23, 1991, appellant's interest in the rents is a superior interest to appellee's later filed writs of garnishment. Thereupon, the trial court's order on the motion to dissolve the writs of garnishment is reversed, as are the consequent final judgments entered against the 12 garnishee tenants. This cause is remanded with directions that the trial court enter an order dissolving the writs of garnishment. *See Citizens in Southern National Bank v. Federal Deposit Insurance Corporation*, 602 So.2d 691 (Fla. 4th DCA 1992); *Federal Home Loan Mortgage Corporation v. Molko*, 584 So.2d 76 (Fla. 3d DCA 1991); *Oakbrooke Associates v. Insurance Commissioner*, 581 So.2d 943 (Fla. 5th DCA 1991).

REVERSED and REMANDED with directions. (KAHN and MICKLE, JJ., CONCUR.)

* * *