District Court of Appeal of Florida,
Third District.
Jorge L. FERNANDEZ, Appellant,
v.
The CITY OF MIAMI, Appellee.

Nos. 3D11–2735, 3D11–1253, 3D11–1904.
June 4, 2014.

Background: Former city attorney brought breach of contract action against city, seeking severance, vacation, and sick leave payments after termination of employment due to conviction for knowingly making false claims for reimbursement to city's finance department. City denied liability, raised affirmative defenses, and counterclaimed for fiduciary duty, fraud, breach of oath of office, civil theft, and conversion. After bench trial, the Circuit Court, Miami–Dade County, Pedro P. Echarte, Jr., J., entered final judgment denying attorney's claims and awarding damages to city on its counterclaims. Attorney appealed.

Holding: The Third District Court of Appeal, Salter, J., held that ample competent, substantial evidence supported trial court's findings in favor of city on its assertions of breach of fiduciary duty and fraud.

Affirmed.

Shepherd, C.J., dissented and filed opinion.

West Headnotes

[1] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In general. Most Cited Cases

An attorney must use particular care in representing himself or herself and the client in a transaction between them providing enhanced benefits to the attorney.

[2] Fraud 184 ⚿58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited Cases

Ample competent, substantial evidence supported trial court's findings in favor of city on its assertions of breach of fiduciary duty and fraud against former city attorney, in attorney's breach of contract action against city seeking severance, vacation, and sick leave payments after termination of employment due to conviction for knowingly making false claims for reimbursement to city's finance department, and thus final judgment denying attorney's claims and awarding damages to city on its counterclaims would be affirmed on appeal; although city commission had approved resolution increasing attorney's compensation

and benefits, including guaranteed severance pay "[a]t time of separation," memorandum evaluating attorney's performance and proposing increase was ghostwritten by attorney, resolution was based on single-page summary of increase that lacked contract language to address varieties of termination scenarios, commissioners were not lawyers and were not represented or advised by independent counsel, attorney failed to suggest independent legal review or explain to commission his view that he would be entitled to severance pay even if he were discharged for committing a crime against city, and commissioners was not aware when they approved resolution that attorney had been charging prohibited personal and family expenses for presentation to city as allowed and reimbursable expenses. West's F.S.A. § 837.06.

Ross & Girten and Theresa L. Girten, Miami, for appellant.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, and Gerald E. Greenberg, Robert T. Kofman and Geri Fischman Satin, Miami, for appellee.

Before SHEPHERD, C.J., and WELLS and SALTER, JJ.

SALTER, J.

***1** Former City of Miami City Attorney Jorge L. Fernandez appeals a final judgment and orders on attorney's fees and costs entered against him after a non-jury trial. Mr. Fernandez, plaintiff below, sought $274,721 in severance, vacation, and sick leave payments from the City in a breach of contract action. Mr. Fernandez's lawsuit followed his plea of nolo contendere and adjudication of guilt on two charges of knowingly making false claims for reimbursement to the City's Finance Department while serving as City Attorney, and the termination of his employment following the adjudication of guilt.

The City denied liability to Mr. Fernandez, raised numerous affirmative defenses against his claim, and counterclaimed for breach of fiduciary duty, fraud, breach of oath of office, civil theft, and conversion. Following three days of trial, which featured numerous documentary exhibits and the testimony of nine witnesses, the trial court entered a detailed final judgment denying Mr. Fernandez's claim and awarding damages to the City on its counterclaims. Judgments against Mr. Fernandez for attorney's fees and costs followed. For the reasons described below, we affirm each of the judgments and orders.

I. *The Facts Established at Trial*

A. *Appointment and Initial Salary/Benefit Summary*

The City Commission appointed Mr. Fernandez to serve as City Attorney in July 2004. A complete written employment agreement was not prepared and signed; instead, the City Commission approved the appointment in a resolution with a single page summary listing a salary, leave time allowance, insurance benefits, expense allowance amounts, deferred compensation, retirement, severance, and relocation and household goods moving expenses. The provision regarding severance stated:

> At time of separation, the City Commission may consider the payment of six months compensation as severance, at its discretion.

The 2004 summary also provided for expense reimbursement of Mr. Fernandez's "reasonable expenses not to exceed $5,000 per year." The single page summary did

not include such terms as a description of duties, prohibition of other work and income, status following death or disability, effect of conviction for crimes or incarceration, breach, or dispute resolution, for example. The single page summary was approved in September 2004. In December 2005, the Commission reappointed Mr. Fernandez.

City policy and practice with respect to expense reimbursement for its key officers required an election between two alternatives: the officer could have the monthly amount included in the regular salary checks (in which event it would be subject to federal income taxes), or the officer could provide itemized reimbursement requests for only those expenses allowed by City policies and incurred in connection with the officer's official business for the City. Under the latter alternative, which Mr. Fernandez elected for the years at issue here, purely personal expenses and certain categories of expenses (alcoholic beverages, for example) were not reimbursable.

B. *Expenses Incurred Before the July 2006 Renewal*

***2** Mr. Fernandez's assistant testified that Mr. Fernandez would keep receipts at home and bring them to the office after several months, and his assistant would then organize them chronologically. Mr. Fernandez instructed the assistant to pick out the larger ones and then others to add up to the maximum pro rata amount allowed for the months. The objective was to consume the allowed amount without itemizing the receipts or indicating the relationship to the City's business.

Mr. Fernandez submitted the bundled receipts with a personal memorandum, which he initialed, stating:

> Attached please find expenses incurred by me, which I have determined are necessary in the performance of my duties. I have attached receipts for a client meeting/dinner at which I hosted prospected [sic] applicants, expert witnesses, colleagues, clients and/or individuals with whom I have had the need to confer regarding issues which I am involved as the City Attorney. The total amount due me is $_____.

In May of 2005, the second sentence of Mr. Fernandez's cover memo for reimbursements was amended to: "I have attached receipts for meetings, dinners at which I hosted prospective applicants, expert witnesses, colleagues, clients or other individuals with whom I have had the need to confer regarding issues with which I am involved as the City Attorney." The balance of the memo was not changed. When asked to provide more detail for meeting expenses, such as the identity of the attendees and the subject, Mr. Fernandez said that the meetings were privileged and confidential and that he could not provide those details.

By August 2006, the City finance director asked for an additional term in the reimbursement cover memo: "All expenses incurred and submitted herein for reimbursement were made in accordance with City policy." The finance director testified that she relied on Mr. Fernandez to be truthful in his reimbursement requests to the City.

C. *The July 2006 Modifications and Resolution*

In mid–2006, Mr. Fernandez sought an increase in compensation and benefits. He prepared a memorandum evaluating his own performance, but to be sent by a City Commissioner to the other members of the

Commission and the Mayor. The memorandum listed a number of perceived accomplishments and included a one-page "side by side" comparison of Mr. Fernandez's "present" and "proposed" salary and benefits. The single page comparison sheet included 20 categories relating to salary, leave time, insurance, and other benefits. Near the bottom of the list, the provision for severance was to be amended to state, "At time of separation, payment of six months compensation as severance." As noted previously, that term had been conditional since 2004—"the City Commission may consider" the payment of a six-month severance.

In July 2006, the City Commission considered and adopted a resolution approving the new terms by a vote of three to two. The resolution did not include the "side by side" comparison, but was instead based on a single-page summary that listed only the proposed new terms. The minutes of the Commission's discussion and vote on Mr. Fernandez's new terms, thirteen pages, include a single comment by one Commissioner about the proposed change in the severance term: "I think it's [the proposed salary increase] around 15 percent, excluding the value of the increased vacation and the guaranteed severance change ...."

***3** Unsurprisingly, there was no discussion regarding whether the severance would or would not be payable in the event Mr. Fernandez was convicted of a crime or theft involving City funds. There was no independent legal review, on behalf of the City, of the proposed changes. There was no suggestion by Mr. Fernandez that such a review would be appropriate. There was no disclosure during the Commission meeting that the memorandum from a Commissioner describing Mr. Fernandez's job performance had actually been authored by Mr. Fernandez. And importantly, the record includes evidence that only one person at that Commission meeting—Mr. Fernandez—was aware that he had been charging prohibited personal and family expenses for presentation to the City as allowed and reimbursable expenses.

D. *The August and September 2006 Reimbursement Requests*

Two false reimbursement requests later became the subject of Mr. Fernandez's criminal charges, plea agreement, and conviction.[FN1] An August 2006 memorandum sought (and resulted in) reimbursement for a $530.00 dinner at a Manhattan steak house for Mr. Fernandez, his wife, his son, and his son's girlfriend, on a Saturday night for a family celebration that did not involve any City business. The following month, Mr. Fernandez submitted a memorandum which sought (and resulted in) reimbursement for a 45–person Sunday brunch at a Miami restaurant for another family celebration that did not involve any City business.

The further evidence at trial presented by the City to prove expense account fraud showed that Mr. Fernandez had taken 27 out-of-state trips between September 2004 and September 2007, including conferences in Honolulu, Las Vegas, Washington, D.C. (eight trips), Chicago (five trips), and New Orleans. These trips by Mr. Fernandez resulted in travel and lodging expenses exceeding over $34,400, above and beyond the $10,000 per year expense allowance, and also took him away from the office for some 65 days (which were not charged to vacation or personal leave days).

E. *Investigation, Negotiation, Termination*

In 2007, the State Attorney's Office and

Internal Affairs Section of the City of Miami Police Department investigated anonymous complaints that Mr. Fernandez was submitting to the City finance department fraudulent claims for reimbursement of purely personal expenses. When the complaints were corroborated, the State, Mr. Fernandez, and his attorney entered into plea negotiations.

On February 14, 2008, the State charged Mr. Fernandez with two counts of making false official statements in expense reports.[FN2] The same day, Mr. Fernandez signed a plea agreement. Mr. Fernandez agreed that he would be adjudicated guilty on the charges and that he would resign his position as City Attorney. He promptly submitted a letter of resignation, to become effective February 19, 2008. However, on February 28, 2008, the City Commission unanimously rejected the resignation and terminated Mr. Fernandez as City Attorney based on criminal conduct and violation of public trust. When Mr. Fernandez's request for a payment of severance and allegedly-unused leave days was denied, he commenced the circuit court lawsuit that culminated in this appeal.

II. *Analysis*

***4** Mr. Fernandez argues here, as he did below, that the one-page summary approved by the City Commission in 2006 is a binding, unambiguous agreement with severance and leave accrual provisions that are operative despite his conceded perpetration of financial crimes against the City while employed to oversee the legal affairs of the City. The City, in its affirmative defenses and counterclaims, has continuously asserted that:

• Mr. Fernandez committed a prior, superseding, material breach of his oath of office and the at-will employment arrangement, excusing any alleged duty of the City to make severance and leave payments;

• The one-page summary sheets were incomplete and did not address criminal acts against the City itself, so that the omission should be construed against the draftsman (Mr. Fernandez);

• Mr. Fernandez breached his fiduciary duty as an attorney to his non-lawyer clients (the Commissioners) by failing to describe the consequences of the revised severance provision and failing to discuss or recommend a review of the terms by independent counsel on behalf of the City; and

• Mr. Fernandez's fraudulent inducement to the City to approve more favorable terms for his own benefit vitiates any right he might have to enforce those terms.

[1] There is no question that a Florida attorney must use particular care in representing himself or herself and the client in a transaction between them providing enhanced benefits to the attorney. *Moreno v. Allen,* 692 So.2d 957, 959 (Fla. 3d DCA 1997) (attorneys' inherent conflicts of interest in persuading client to approve enhanced fees held void for lack of consideration and overreaching); *Gerlach v. Donnelly,* 98 So.2d 493, 498 (Fla.1957) (“The attorney is under a duty at all times to represent his client and handle his affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity. Business transactions between attorney and client are and always ought to be subject to the closest scrutiny because of this underlying relationship”); *Brigham v. Brigham,* 11 So.3d 374, 386 (Fla. 3d DCA 2009) (“Transactions between an attorney and client, where the attorney profits at the client's expense, will, if not void, be closely scrutinized to determine utmost good

faith.").

[2] In the present case, the Commissioners were not lawyers and were not represented or advised by an independent attorney. The loose, single-page summaries lacked contract language to address the varieties of contract termination scenarios (at the instance of the employer, at the instance of the employee, for cause, or not for cause, for example). The notion that Mr. Fernandez could have resigned one day after the passage of the 2006 resolution and demanded a full six-month severance, or that he could have been imprisoned for the misapplication of City funds, and still demand a full six-month severance, betrays the lack of meaningful advice provided his client.

These facts distinguish the present case from those relied upon by Mr. Fernandez. In *Barakat v. Broward County Housing Authority,* 771 So.2d 1193 (Fla. 4th DCA 2000), the employee seeking the payment of a severance benefit was not an attorney. Any legal review of the employment terms and resolution for the County was performed by someone other than the employee claiming the benefit. The severance provision was unconditional from the outset of his employment (in the present case, severance was discretionary until Mr. Fernandez modified the term without an independent legal review or his own affirmative discussion of the change during the course of the Commission meeting). The basis for the employee's termination in *Barakat* was his false federal income tax return—which caused him to be suspended from participation in federal housing programs—not his conviction of crimes against his governmental employer. And finally, the reviewing court determined that unconscionability had not been pled by the employer, and the facts before the court had not shown that the contract was against public policy. *Id.* at 1194.

***5** Similarly, the case of *Sink v. Abitibi–Price Sales Corp.,* 602 So.2d 1313 (Fla. 4th DCA 1992), involves a non-attorney employee who had negotiated a severance provision at arms' length with his corporate employer. The negotiation occurred in connection with the sale by Abitibi–Price of the division headed by Mr. Sink. The legal issue was whether a 1990 termination letter represented a novation displacing the terms of a 1989 management agreement. The opinion does not address a chief legal officer's self-serving recommendation (to his otherwise-unrepresented employer) that his or her contract be changed to assure payment of benefits following the commission of a crime against the employer by the chief legal officer.

Nor does *Nabors v. Miami–Dade County,* 796 So.2d 634 (Fla. 3d DCA 2001), control the case before us. In *Nabors,* a non-attorney employee of the county aviation department pled guilty to accepting unlawful compensation. The employee submitted a resignation and then claimed a right to payment for accrued annual and sick leave. The accrued, unpaid sick leave claim was denied because of a preexisting county employment manual provision precluding such a payment unless the employee resigned "in good standing." A summary judgment on the denial of annual leave benefits, however, was reversed. The employment manual contained no "good standing" requirement as to annual leave. A county ordinance provided that an employee "found by a court of competent jurisdiction to have committed while in county service an offense involving a breach of the public trust shall forfeit all

rights to payment for accumulated sick and annual leave," but the ordinance was enacted after the end of the period during which the employee's annual leave had accrued. *Id.* at 635, n. 2. The ordinance contained no provision for retroactivity, and this Court declined to impose the forfeiture retroactively. In that case, the employee did not persuade the county commission to grant him an increased accrued leave benefit while serving as the commission's chief legal officer.

Finally, Mr. Fernandez argues that section 112.313(5), Florida Statutes (2006), FN3 relieved him of any fiduciary duty regarding the negotiation of his own salary and severance provisions. The right to negotiate compensation in that provision, however, is not a license to ghostwrite a memorandum for a Commissioner suggesting material changes that redound exclusively to the benefit of the municipal attorney without proposing or suggesting any independent legal review. The trial court found, after hearing and considering all of the evidence at trial that Mr. Fernandez "breached his fiduciary duty to the City when he failed to explain to the City Commission the view which he expressed at trial that he would be entitled to the severance pay even if he were to be discharged for committing a crime against the City," and that he submitted false and fraudulent expense reimbursement requests while "failing to explain properly to his client, the City Commission, the consequences of the changes he made to the severance provision of his contract."

***6** The trial court entered its judgment and orders in favor of the City on alternative grounds: ambiguity in the bare-bones resolution (construed against Mr. Fernandez as the draftsman); prior superseding breach; fraud; and breach of fiduciary duty. On the record before us, we conclude that there was ample competent, substantial evidence before the trial court to support the trial court's findings on breach of fiduciary duty and fraud, and we do not address the alternative and independent grounds of ambiguity and prior superseding breach. The trial court's conclusions on breach of fiduciary duty and fraud must be affirmed. *Mitchell v. Higgs,* 61 So.3d 1152, 1154 (Fla. 3d DCA 2011); *CFI Sales & Mktg., Ltd. v. Fla. Marlins Baseball, Ltd.,* 837 So.2d 423 (Fla. 3d DCA 2002).

III. *Conclusion*

The trial court heard and considered extensive evidence proving breaches of two separate duties, each of which is imbued with far more than a garden variety, arms'-length employer-employee relationship in the private sector. As a public officer in a local government, Mr. Fernandez was subject to Florida's statutory declaration of policy that such officers are "agents of the people and hold their positions for the benefit of the public." FN4 As the City Attorney responsible for advising and protecting the City of Miami in legal matters, Mr. Fernandez was required to "represent his client and handle his affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity." *Gerlach,* 98 So.2d at 498.

Mr. Fernandez's attempt to reap the benefit of his own breaches of those duties should not be countenanced, as the trial court found. The final judgment and orders on attorney's fees and costs are affirmed.

WELLS, J., concurs.

SHEPHERD, C.J., dissenting.

I respectfully dissent from the majority's affirmance of this case.

The majority opinion recounts Mr. Fernandez's wrongdoings, concluding therefrom that "Mr. Fernandez' attempt to reap the benefit of his own breaches should not be countenanced." However, the task at hand is not "what should be countenanced," but rather what "is countenanced" under the law. Strict application of the law to the facts of this case requires reversal. A brief summary of the facts and procedural background of this case is necessary to explain my dissent.

Facts and Procedural Background

This is an appeal by Jorge L. Fernandez, a former City Attorney for the City of Miami, from a final judgment rendered after a non-jury trial, rejecting his claim that the Miami City Commission breached his agreement of employment with the City by failing to pay him $274,271 in severance pay and pay for unused vacation and sick days after firing him for submitting false expense reports to the City Finance Department.

Fernandez was appointed City Attorney on July 29, 2004, by Resolution No. 04–0533, drafted by the Interim City Attorney.[FN5] When the City Commission passed the resolution appointing Fernandez, the Commission approved a term sheet (the 2004 term sheet) attached to the resolution, describing Fernandez's salary and other benefits. Pursuant to the resolution, Fernandez initially received a salary of $198,382.08, as well as such benefits as thirty-one vacation days a year, twelve sick days, car and cell phone allowances, and an annual expense account of $5,000. With respect to vacation and sick leave, the term sheet stated, "At time of separation: payment of all accumulated vacation and sick leave." As to severance, it stated, "At the time of separation, the City *may* consider the payment of six months compensation as severance, *at its discretion.*" (Emphasis added.)

***7** In early 2006, Fernandez decided to ask the Commission for an increase in his compensation and benefits, and so prepared a revised term sheet (the 2006 term sheet) for presentation to the Commission. The revised term sheet called for Fernandez's salary to be raised to $218,220.29, retroactive to September 2005, with an additional ten percent increase in September 2006, and a $10,000 incentive. It also increased Fernandez's annual vacation to forty-five days and his expense account to $10,000 annually. There was no change in the number of days of sick leave, or the provision relating to the payment of sick leave on separation. However, the revised term sheet deleted the phrases "the City may consider" and "at its discretion," from the existing severance provision, leaving it to read "At time of separation, payment of six months compensation as severance." As thus revised, the proposed compensation package, including a verbatim, side-by-side comparison of the existing term sheet and the revised term sheet, was circulated by the Commission's designated representative, then Commissioner Tomas Regalado, to the entire Commission for comment, along with a glowing performance evaluation.[FN6]

On July 13, 2006, the Commission passed Resolution No. 06–0434 by a 3–2 vote, approving Fernandez's proposed term sheet without modification. During its deliberations that day, Commissioner Haskins recognized the severance provision as a "guaranteed" severance provision, but in the context of disagreeing with any increase in compensation for Fernandez rather than conditions or limitations on

payment. There was no specific mention of the similar provision relating to payment of vacation and sick leave. Although present at the July 13 meeting of the Commission, Fernandez, made no effort to explain the differences between the initial 2004 term sheet and the one prepared by him and approved on July 13, 2006.

One year later, Fernandez pled *nolo contendere* to two misdemeanor counts of submitting false official statements. Fernandez submitted his resignation to the City, but the Commission, in a public display of indignation and betrayal, rescinded the resignation and terminated him. It also unanimously rejected Fernandez's request for severance pay and pay for unused leave.

In April 2008, Fernandez sued the City in a one-count complaint for breach of contract. In response, the City filed affirmative defenses, including inter alia, that Fernandez's fraud, theft, and alleged lack of candor breached his fiduciary duties and other obligations to the City, and that allowing Fernandez to collect the money would run afoul of Florida's strong public policy against public corruption. The City also counterclaimed for civil theft, breach of fiduciary duty, fraud, conversion, and breach of oath of office.

After a two-day bench trial, the trial court entered Final Judgment in favor of the City on Fernandez's breach of contract claim. The Court reasoned:

> ***8** 6. With regard to the severance pay that Fernandez seeks, the Court finds that the term sheet that Fernandez prepared and presented to his client, the Commission, in or about July, 2006 was ambiguous in that it never addressed whether the severance would be owed even if Fernandez were discharged for cause after being adjudicated guilty of committing a crime against the City. The Court resolves any ambiguity against the drafter of that provision, Fernandez, and therefore concludes that the severance provision cannot be read to require payment in the event Fernandez was terminated for cause after being adjudicated guilty of committing a crime against the City.
>
> 7. The Court further finds that Fernandez breached his fiduciary duty to the City when he failed to explain to the City Commission the view which he expressed at trial that he would be entitled to the severance pay even if he were to be discharged for committing a crime against the City. This breach of fiduciary duty prevents Fernandez from prevailing on his claim for severance.
>
> 8. Separately, the Court determines that Fernandez is not entitled to severance, vacation, or sick leave because he materially breached his contract with the City when he falsified expense allowance reimbursement records, thus stealing from the City and perpetrating a fraud on the City. This conduct, as well as Fernandez's failure to disclose the potential consequences of the change to his severance provision, constituted a material breach of Fernandez's contract. As a result of this breach, Fernandez is not entitled to collect severance, vacation leave, or sick leave.

At the same time, the court found in favor of the City on its counterclaims in the total amount of $3,093, which, after being trebled as required by Florida's Civil Theft Statute and then adjusted to account for a $3,093.44 restitution payment made by Fernandez to the City, resulted in the entry of a final judgment in favor of the City in

the sum of $6,185.56. Soon thereafter, the trial court entered a another judgment in favor of the City against Fernandez for $95,528.32 in attorney's fees pursuant to the Civil Theft Statute and costs in the amount of $17,455.68.

Because I find the severance and leave payment provisions to be unambiguous and enforceable as a matter of law, I would reverse the judgment of the trial court on Fernandez's one-count complaint and remand for entry of judgment in the sum of $274,271 [FN7] in favor of Fernandez, subject, of course, to an offset of the amounts owing on the City's counterclaims.

Analysis

The court below and the City here seek to have us insert a "crime exception" into the two separation clauses in this case. Because the clauses do not expressly address whether the severance and leave payments would be owed if Fernandez was discharged after being adjudicated guilty of committing a crime against the City, the lower court found, and the City continues to assert here, that the provisions are "ambiguous" on the dubious ground that Fernandez was the "drafter" of both.[FN8] However, there is no uncertainty in the phrase following the allocation of days of vacation and sick leave to Fernandez, "At time of separation: payment of all accumulated vacation and sick leave," or on the severance line of the revised term sheet, "At the time of separation, payment of six months compensation." The word "separation" simply means cessation of a contractual relationship, regardless of how or why it occurs. *See Black's Law Dictionary* 1487 (9th ed. 2009) ("[S]eparation ... 3. Cessation of a contractual relationship, esp. in an employment situation."); *see also Webster's Third New International Dictionary* 2070 (1993) ("[S]eparation ... 4 b termination of contractual relationship: resignation, discharge C ~ from the serviceD C ~ from employmentD Ca serious breach of accepted standards of department ... may be punished by loss of social privileges, or ~ ... D").

***9** The plain language of the two phrases covers **all** conditions under which Fernandez might leave the employ of the City. If the City had so desired, it could have inserted a cause provision, or a more limited "crime provision," into the agreement. We cannot. *See Fernandez v. Homestar at Miller Cove, Inc.,* 935 So.2d 547, 551 (Fla. 3d DCA 2006) ("[A] court is powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties." (citing *Emergency Assocs. Of Tampa, P.A. v. Sassano,* 664 So.2d 1000, 1003 (Fla. 2d DCA 1995)); *see also Green v. Life & Health of Am.,* 704 So.2d 1386, 1391 (Fla.1998) ("[C]ourts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute [their] judgments for that of the parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain." (quoting *Quinerly v. Dundee,* 159 Fla. 219, 31 So.2d 533, 534 (1947)). In fact, if we were now to go about attaching conditions to the severance and leave provisions of the parties' agreement, we would be at a loss to know how broad to make the conditions.[FN9]

The City cites two cases in support of its position that the two phrases are ambiguous, *Jenkins v. Eckerd Corp.,* 913 So.2d 43 (Fla. 1st DCA 2005) and *Hunt v. First National Bank of Tampa,* 381 So.2d 1194 (Fla. 2d DCA). The City's reliance upon these two cases is misplaced. *Jenkins* actually supports Fernandez. In *Jenkins,* a

lessor, in a predicament analogous to that of the City in the case before us, sought to insert a phrase, "its successors and assigns," into a shopping center lease agreement which stated, "should Delchamps [the anchor tenant] fail or cease to lease and pay rent for its store in the Shopping Center ... Lessee shall have the right and privilege of ... canceling th[e] lease and terminating all of its obligations hereunder." Shortly after signing the lease, Delchamps merged with Jitney Jungle, a like grocery chain, which took over the operation of the store. Thereafter, Jitney Jungle filed for bankruptcy protection under Chapter 11, and the lease was assigned to Bruno's Supermarkets. Although the anchor space was at all times being operated as a grocery chain, albeit under three different names, Jack Eckerd Drugs, Inc., a concededly proper assignee of the lessee's interest in the lease, invoked the plain language of the lease, i.e. that lessee had the right and privilege to cancel if Delchamps were not present on the property, in an effort to avoid a claim for money damages for breach of lease brought against it by the lessor. The trial court found the lease language to be unambiguous and enforced it as written in favor of the lessee. The Court of Appeal affirmed, reasoning:

> The contracting parties here had the ability to negotiate and establish ... their respective rights, duties and remedies for the entire term of the lease and to express those rights and duties in writing as accurately as feasible.... Although the remedy of termination provided ... may be harsh, it is the remedy the parties negotiated and expressly set forth in writing.
>
> ***10** 913 So.2d at 52.

The second case cited by the City demonstrates the flaw in its reasoning in the case before us. In *Hunt*, an addendum to a 99–year lease provided that a $20,000 annual rent payment was not to commence until such time as lessee completed its "planned construction" of a small shopping center on the premises. Forty-four months into the lease term, lessee had not commenced, let alone completed, the contemplated construction. The lessor sought a declaration of his rights under the lease. Unlike our case, in which the contested phrases by their terms covered **all** contingencies which might occur, the contested phrase in *Hunt* posed unanswered questions: (1) what would happen if construction was never completed; (2) what would happen if instead of commencing and completing construction of the shopping center, the lessee was using a portion of the property for another purpose, such as a truck by-way to an adjacent store. On these facts, the District Court of Appeal in *Hunt* remanded the case for consideration of parol testimony to determine what the parties reasonably intended. The reasoning and holdings of *Jenkins* and *Hunt* are consistent with and support the reversal of the trial court decision in this case.

Moreover, I find *Barakat v. Broward County Housing Authority*, 771 So.2d 1193 (Fla. 4th DCA 2000), to be legally indistinguishable from the case before us. In *Barakat*, Russell Barakat was employed as the Executive Director of the Broward County Housing Authority (BCHA) when, on May 6, 1996, he was convicted of filing a false tax return. As a result of the conviction, the U.S. Department of Housing and Urban Development (HUD) advised BCHA that Barakat was suspended from participating directly or indirectly in HUD programs. As a result of the suspension, Barakat's employment was terminated by BCHA.

The BCHA resolution pursuant to which Barakat was employed provided in part:

> 6. Should Barakat be terminated, then he will be given severance pay in the amount due, as if said contract had run its full length.
>
> 7. In no case, shall Barakat be considered to have a property right in his office. Barakat is not to be considered an at will employee of the Broward County Housing Authority and may not be terminated without cause by the Broward County Housing Authority.

Id. at 1194. The Court of Appeal enforced the contract as written, stating:

> It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain. *Dickerson Florida Inc. v. McPeek,* 651 So.2d 186, 187 (Fla. 4th DCA 1995). A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain. *Green v. Life & Health of Am.,* 704 So.2d 1386, 1391 (Fla.1998). Had the BCHA wanted to provide for severance pay only when Barakat was terminated without cause, it could have made that a requirement in the Resolution.
>
> ***11** *Id.* at 1195.

Sink v. Abitibi–Price Sales Corp., 602 So.2d 1313 (Fla. 4th DCA 1992) also is instructive. Sink was president of Jaffe's Office Products, a division of Abitibi–Price Sales Corporation. Sink was in negotiations with Abitibi–Price for the purchase of the Jaffe Division. To this end, the parties entered into a management agreement which provided Sink would receive as severance, lump sum salary and benefits for twelve or fifteen months should the agreement be terminated. It also stated the agreement would be void if Sink was terminated for cause.

Thereafter, Sink decided not to purchase the Jaffe division and the parties entered into a new termination agreement, including therein a provision for a lump-sum severance of twelve months salary totaling $208,129.32. As in our case, the agreement contained no conditions or limitations on its payment.

Sink was given his severance check. Several days later the comptroller of the company discovered Sink had stolen rebate checks payable to the company, and put a stop payment on the severance check. Sink filed a breach of contract action against Abitibi–Price, who counterclaimed for breach of fiduciary duty. After a bench trial, the trial court entered final judgment for Abitibi–Price on Sink's breach of contract claim and final judgment for Sink on the counterclaim.

Sink appealed. The Fourth District determined that, as a matter of law, a novation occurred and the parties entered into a completely new agreement, which unambiguously entitled Sink to $208,129.42 in severance pay. The case was reversed and remanded to the trial court to enter judgment for Sink.

The City seeks to distinguish these cases on the ground that neither of the plaintiffs in those cases was an attorney. I find the distinction immaterial. During negotiations on the employment contract, the relationship between Fernandez and the Commission was employer/employee and not attorney/client. *Pride Int'l, Inc. v. Bragg,* 259 S.W.3d 839, 850

(Tex.App.2008) ("[A] corporate officer acts in his individual capacity, as is evident that the company and employee are adverse to each other in the context of negotiating that employee's compensation."); *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 49–51 (Del.2006) (determining president did not breach his fiduciary duty when he negotiated and accepted severance provisions of employment agreement or when he accepted full payout upon termination). Fernandez had a statutorily recognized right to negotiate his salary and benefit package with the Commission. *See* § 112.313(5), Fla. Stat. (2005) ("No local government attorney shall be prevented from considering any matter affecting his or her salary, expenses or other compensation as the local government attorney, as provided by law."); *Hillsborough Cnty. v. Sutton*, 150 Fla. 601, 8 So.2d 401 (1942) (enforcing agreement entered by County Commission to hire attorney and pay him an annual salary). It defies credulity to think the five-member City Commission, all of whom were successful businessmen and businesswomen, did not appreciate the context of the moment.

***12** Nor can it be said that this is a case where a more powerful party was seeking to impose his will on a weaker party. *See* Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 Tex. L.Rev. 1783, 1788 (1996) ("[C]haracteristic indicators of impediments to full and equal bargaining [are]: significant disparities in bargaining power between offeror and offeree; contracts of adhesion drafted by the offeror; asymmetries in the ability to breach the contractual guarantee of security; and the inability to seek a market remedy in the event of a breach."). The contracting parties here had the ability to negotiate and establish their respective rights, duties and remedies in such fashion as they wished.

Finally, the City urges us to affirm the judgment in this case on the basis of the state's strong public interest against public corruption. At first glance, the City's suggestion seems appealing. Precluding Fernandez from collecting his severance, unused vacation pay, and pay for unused sick days appears to mete out a kind of "rough justice" to him for his transgressions. Upon closer examination, the City's suggestion is more problematic. The City does not seek to rescind Fernandez's employment agreement. In fact, it has affirmed the agreement and obtained a judgment for sums unlawfully received. By all accounts, Fernandez's service to the Commission was impeccable while he enjoyed the office of City Attorney. He was as contractually entitled to this additional compensation upon termination as he was to every paycheck he received. I can appreciate that the City now finds itself in a spot not to its liking; however, although the law provides for punishment of illegal acts, the forfeiture of earned income under the terms of the contract in this case is not one of them.

I would reverse the final judgment in this case for entry of judgment in favor of Fernandez in the amount of $274,271, subject to an offset of the amounts owing on the City's counterclaims.

> FN1. Although these two reimbursement requests were the only specific offenses charged by the State Attorney's Office, Mr. Fernandez admitted at trial that many more of his expenses reimbursed in 2004, 2005, and 2006 were not related to his duties or the business of the City.

FN2. § 837.06, Fla. Stat. (2008): "**False official statements.** —Whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."

FN3. Section 112.313 provides:

> (5) SALARY AND EXPENSES.—No public officer shall be prohibited from voting on a matter affecting his or her salary, expenses, or other compensation as a public officer, as provided by law. No local government attorney shall be prevented from considering any matter affecting his or her salary, expenses, or other compensation as the local government attorney, as provided by law."

FN4. § 112.311(6), Fla. Stat. (2006).

FN5. Fernandez previously had served as Miami's City Attorney from 1988 to 1991, when he accepted a position as County Attorney in Sarasota, Florida. His tenure there lasted thirteen years when, in 2004, he once again was hired as City Attorney for the City of Miami. Unlike other executives with the City, the City Attorney officially reports to the City Commission.

FN6. A copy of the side-by-side comparison included in the proposed compensation package circulated by Commissioner Regalado is annexed to this opinion as Exhibit "A." The package was provided to each Commissioner approximately one week before the date of the Commission meeting where the package was scheduled for consideration.

FN7. The City does not dispute this calculation. It is composed of $120,876.65 in unused vacation, $25,228.50 in unused sick leave and $128,615.86 in severance pay.

FN8. In fact, he was the drafter of only one of the two clauses, and, as described earlier, the one he drafted merely modified some of the terms of an earlier agreement drafted by a member of the then City Attorney's staff. *See* Exhibit "A."

FN9. For example, the provision might be an absolute cause restriction, a discretionary for cause restriction, a broad illegal acts restriction, or one where only the City was the victim.

Fla.App. 3 Dist.,2014.
Fernandez v. City of Miami
--- So.3d ----, 2014 WL 2515668 (Fla.App. 3 Dist.), 39 Fla. L. Weekly D1182

END OF DOCUMENT