

**IN THE FLORIDA SUPREME COURT**

JORGE L. FERNANDEZ,

Petitioner,

v.

THE CITY OF MIAMI,

Respondent.

Case No.

SC14-2164

3D11-2753

Consolidated No.

3D11-1253

3D11-1904

Lt. Case no.

08-17486-CA-13

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**RESPONDENT'S RESPONSE TO  
PETITIONER'S JURISDICTIONAL BRIEF**

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**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE ..... 1  
II. STATEMENT OF FACTS..... 3  
III. STATEMENT OF THE ARGUMENT ..... 6  
IV. ARGUMENT ..... 6  
V. CONCLUSION ..... 10  
CERTIFICATE OF SERVICE ..... 11  
CERTIFICATE OF COMPLIANCE ..... 11

**TABLE OF AUTHORITIES**

**CASES**

*Barakat v. Broward County Housing Authority*, 771 So. 2d 1193 (Fla. 4th DCA 2000) .....2, 8

*Brigham v. Brigham*, 11 So. 3d 374, 386 (Fla. 3d DCA 2009) .....7

*Fernandez v. City of Miami*, 147 So. 3d 553 (Fla. 3d DCA 2014).....2, 6

*Gerlach v. Donnelly*, 98 So. 2d 493, 498 (Fla. 1957).....2, 7

*Moreno v. Allen*, 692 So. 2d 957, 959 (Fla. 3d DCA 1997).....7

*Sink v. Abitibi-Price Sales Corp.*, 602 So. 2d 1313 (Fla. 4th DCA 1992) .....2, 9

## **I. STATEMENT OF THE CASE**

From the time he assumed his position as Miami's City Attorney in September 2004 until he left the job in February 2008, Petitioner Jorge Fernandez abused the trust placed in him by the City Commission. He used public funds to finance his own personal expenses for fine dining and travel. Despite owing fiduciary duties of good faith, fair dealing, and honesty to the City, Fernandez obtained thousands of dollars from the City by submitting false statements certifying that expenses were necessary in the performance of his duties when in fact they were for personal meals and family parties in no way related to City business. To make matters worse, shortly before this ongoing practice was exposed, Fernandez (1) altered the language of his employment term sheet to give himself a generous severance payment that would ostensibly be guaranteed even if he were terminated for committing a crime against the City, and then (2) refused to disclose this potential consequence to his client, the City Commission.

After law enforcement learned of his actions, the City Commission terminated Fernandez's employment. He then demanded that the City pay him \$274,721.01, representing severance, vacation, and sick pay that he claimed was owed to him under the employment terms that he had prepared for himself and never fully explained to his client, the City Commission. The Commission declined

to reward Fernandez for his actions and did not give in to his demands. Fernandez then filed this suit, in response to which the City filed counterclaims.

Following a bench trial, the Court entered judgment in the City's favor for \$6,185.56 on the counterclaims, along with \$1,272.14 in prejudgment interest, \$17,455.68 for costs, and \$95,528.32 for attorneys' fees. The Third District Court of Appeal affirmed the judgment in its entirety in *Fernandez v. City of Miami*, 147 So. 3d 553 (Fla. 3d DCA 2014).

Now, Fernandez attempts to keep his case alive by urging this Court to take jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution because the Third District's decision purportedly "expressly and directly" conflicts with two Fourth District decisions: *Barakat v. Broward County Housing Authority*, 771 So. 2d 1193 (Fla. 4th DCA 2000), and *Sink v. Abitibi-Price Sales Corp.*, 602 So. 2d 1313 (Fla. 4th DCA 1992). Those cases are plainly distinguishable since neither involved an attorney who violated the fiduciary duties owed to his client—let alone one who drafted the very contract terms at issue and stole from that client. Indeed, the decision below is entirely consistent with an extensive body of precedent regarding the obligations of attorneys who enter into transactions with clients, including this Court's decision in *Gerlach v. Donnelly*, 98 So. 2d 493 (Fla. 1957).

## II. STATEMENT OF FACTS

The relevant facts are set forth in the Third District's opinion, which is attached and referred to as (App. x). By way of summary, Jorge Fernandez became the City of Miami's City Attorney in 2004. [App. 2] The City hired Fernandez via a resolution, which, among other provisions, established that the City Commission would have discretion to grant a severance in the event of separation: "At the time of separation, the City Commission may consider the payment of six months compensation as severance, at its discretion." [App. 3] Also relevant to this case, the resolution afforded Fernandez reimbursement for "reasonable expenses not to exceed \$5,000 per year." [App. 3]

Under the City's policies, Fernandez could seek, through itemized requests, reimbursement of "reasonable expenses" incurred in connection with his official business for the City. [App. 3] Through 2006, when Fernandez submitted his itemized reimbursements, he attested that the expenses were "necessary" for the performance of his duties and that the expenses included client meetings and dinners. [App. 4] When the City asked for more information on these meetings, Fernandez, the City Attorney, invoked client-attorney privilege and claimed the meetings were confidential. [App. 4-5]

Despite the statements in his reimbursement requests, Fernandez sought and received numerous reimbursements for expenses that were, in fact, entirely

unrelated to his official duties. For example, in August 2006, Fernandez submitted itemized receipts for a \$530 family dinner at a Manhattan steak house—a dinner wholly unrelated to City business. [App. 7] The next month, Fernandez sought reimbursement for a 45-person brunch for a family celebration—again wholly unrelated to City business. [App. 7] Fernandez has admitted that many more of his expenses reimbursed in 2004, 2005, and 2006 were not related to his duties or the business of the City. [App. 7 n.1]

The record contains extensive evidence of other abuse, too, including the fact that Fernandez took 27 out-of-state trips on the City’s dime, including to destinations such as Honolulu and Las Vegas. These trips exceeded Fernandez’s reimbursement allowance by \$34,000. [App. 7]

While deceiving the City, Fernandez also sought a new employment contract. In July 2006 he drafted a memorandum, which he had one commissioner disperse to the other commissioners. This memorandum evaluated his performance and included “a one-page ‘side by side’ comparison of” his “‘present’ and ‘proposed’ salary and benefits.” [App. 5] Notably, he rewrote the severance provision to remove the Commission’s discretion, changing it to read: “At time of separation, payment of six months compensation as severance.” [App. 5]

As the City considered Fernandez’s salary increase and unconditional severance package, Fernandez never explained to his client, the City Commission,

that he believed the severance would be payable even if he were convicted of a crime or theft involving City funds. [App. 6]. Moreover, he did not suggest that the City undertake independent legal review; nor did he disclose that he wrote the memorandum suggesting his pay increase. [App. 6] In addition, he told no one—and no one knew—that he was swindling the City. [App. 6]

Eventually, an anonymous source complained about Fernandez's itemized receipts. [App. 7–8] The State charged Fernandez with two counts of making false official statements, Fernandez pled, and the court adjudicated him guilty. [App. 8] The City, understandably, terminated Fernandez based on his criminal conduct and violation of the public trust and refused to pay him his demanded severance. [App. 8]

Arguing breach of contract, Fernandez sued for his severance. [App. 8] The City raised numerous affirmative defenses based on Fernandez's breaches of fiduciary duty and unconscionable conduct. It also filed counterclaims. The trial court held a three-day bench trial, and, after reviewing all of the evidence, it entered final judgment against Fernandez and in favor of the City.

Fernandez appealed, and the Third District affirmed. *Fernandez*, 147 So. 3d 553.

### III. STATEMENT OF THE ARGUMENT

The Third District’s opinion neither “expressly” nor “directly” conflicts with *Barakat* or *Sink*. In *Barakat*, the Fourth District declined to rely on reasonableness as a basis to invalidate a severance provision in the contract of an employee convicted of a crime unrelated to his employment. In *Sink*, the Fourth District held that novation might, in certain circumstances, require a severance. Neither case involved an attorney—let alone an attorney who swindled his client and wrote the self-serving severance provision at issue—and neither case involves affirmative defenses like those presented here.

The Third District’s opinion in this case addresses entirely different circumstances and legal concepts, holding that, where the evidence shows systematic fraud and dishonesty by a lawyer toward his client, courts can refuse to enforce the attorney’s contract against the client. Indeed, the Third District focused on a series of cases establishing that an attorney must act with the utmost good faith in transactions with his or her client. This principle is in no way inconsistent with either *Barakat* or *Sink*.

### IV. ARGUMENT

The Third District’s opinion appropriately emphasized the critical fact that Fernandez was the City’s lawyer and explained that “[t]here 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.”

[App. 9] In embracing this legal principle, the Third District cited three Florida cases: *Gerlach v. Donnelly*, 98 So. 2d 493, 498 (Fla. 1957); *Moreno v. Allen*, 692 So. 2d 957, 959 (Fla. 3d DCA 1997); and *Brigham v. Brigham*, 11 So. 3d 374, 386 (Fla. 3d DCA 2009), all of which emphasize the need for careful scrutiny of attorneys' deals with their clients.

As this Court made clear in *Gerlach*, an “attorney is under a duty at all times to represent his client and handle his client’s affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity.” 98 So. 2d at 498. Similarly, the Third District previously held in *Brigham* that “[t]ransactions 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.” 11 So. 3d at 386.

Considering the fundamental duties owed by an attorney to a client, the Third District concluded that, as a result of his deceptive, unethical, and underhanded actions, Fernandez had not “provided his client” any “meaningful advice.” [App. 10] For that reason, the Third District held that Fernandez could not enforce the severance provision. [App. 10] In reaching this decision, the Court readily distinguished *Barakat* and *Sink*.

In *Barakat*, the housing authority employee seeking payment of his severance was not an attorney and did not draft the contract at issue or conceal any of its consequences. *See* 771 So. 2d at 1194. In addition, the severance provision in

*Barakat* was unconditional from the outset, as opposed to the provision in Petitioner’s term sheet, which was discretionary until he changed the language himself. Moreover, *Barakat* was terminated due to the filing of a false income tax return, not the commission of a crime against his governmental employer. *See id.* Finally, unlike in this case, the government party in *Barakat* had not pled unconscionability or shown public policy concerns. *See id.* For all of these reasons, the Third District accurately distinguished *Barakat*. Quite significantly, the difference between the cases is made apparent by the role in the Third District’s opinion of *Gerlach*, *Moreno*, and *Brigham*. In *Barakat*, these opinions are irrelevant; in the Third District’s opinion, they control.

*Sink*’s holding is even less availing than *Barakat*’s. *Sink* involved a non-attorney employee who had negotiated a severance provision at arms’ length and then kept rebate checks because he felt that the company had not honored its severance obligations to him. The decision in that case addresses questions of novation, not any of the issues at hand here. *See* 602 So. 2d at 1315 (“[A]ppellant contends that as a matter of law . . . the March 26, 1990 letter constituted a novation . . . . We agree with appellant . . . .”). Moreover, it presented an entirely distinct set of facts. As the Third District appropriately noted, *Sink* “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.” [App. 11–12]. Simply put, nothing about the opinion in the instant case contradicts *Sink* in any way.

In his jurisdictional brief, Fernandez rehashes in passing his rejected argument that the Third District erred by not granting him relief based on Section 112.313(5) of the Florida Statutes. Although it does not appear that Fernandez is invoking this statute as a basis for jurisdiction, it bears noting that the Third District was correct in determining that the provision in no way excuses Fernandez’s conduct or makes *Barakat* and *Sink* any more relevant. Section 112.313(5) merely allows a local government attorney to consider matters affecting his salary. It does not allow that attorney to breach his fiduciary duties to his client in the course of those negotiations, or to disregard the mandates of *Gerlach* and the related cases. As the Third District explained, the statutory “right to negotiate compensation . . . 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.” [App. 13].

## V. CONCLUSION

For the reasons set forth herein, the City of Miami respectfully requests that this Court decline jurisdiction over this matter and allow the Third District's sound decision to stand.

Dated: December 4, 2014

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail to all counsel of record on the attached service list.

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## CERTIFICATE OF COMPLIANCE

I certify that this response is submitted in Times New Roman 14-point font, which complies with the font requirement of the Florida Rules of Appellate Procedure. *See* Fla. R. App. P. 9.100.

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