

SPECIAL REPORT Florida Supreme Court

Walking on eggshells

A Florida Supreme Court decision favoring mandatory contributions into the Florida Retirement System said a lot about how the court is evolving.

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The Florida Supreme Court's recent decision on state employee pension contributions may set the tone for 2013 — empathetic to the masses while sparing the Legislature a scenario that would have riled Republicans and created a budget nightmare.

With *Rick Scott v. George Williams*, the 4-3 court split gave a reluctant blessing to 3 percent employee contributions into the Florida Retirement System and the elimination of cost-of-living adjustments for retirees. The majority reassured lawmakers the 2011 pension law, which amounted to an across-the-board pay cut, hadn't illegally encroached on workers' collective bargaining rights.

In the process, court observers got a good look at shifting alliances on a court that can at times be significantly less liberal than its critics claim.

Justice Jorge Labarga, who has been criticized by the right as left of center, wrote the opinion, arguably his most important in four years on the bench. He was joined by a more-established left-of-center justice, Barbara Pariente, and two predictably pro-Republican justices who are in line with the Legislature, Charles Canady and Ricky Polston.

Unlike Pariente, a justice since 1997, Labarga has been more difficult to decipher. He is perhaps the least prolific writer of credited opinions on the court — the largest share of opinions are issued anonymously — and many of his opinions are short and uncontroversial, with fellow justices concurring unanimously.

In rare instances, however, Labarga and

Pariente have shown a willingness to join Canady and Polston. When a "guilty mind" law was overturned by a lower court, hundreds of drug possession cases were at risk of being thrown out. Labarga concurred with Canady, who wrote the majority opinion July 12 upholding a state law that does not consider knowledge of a controlled substance's illicit nature an element in an offense. Pariente concurred with an opinion narrowing her justification.

BUSINESS REACTS

The Jan. 17 pension opinion has reverberated through the business sector. The following week, Fitch Ratings called the decision "a credit positive for both state and local governments." The ratings agency said Jan. 24 that it expects the state Legislature may be "possibly including a measure requiring new employees to participate in a 401(k)-type pension plan rather than the current defined-benefit plan."

State House Speaker Will Weatherford called for the change the same day.

Karen Morinelli, a shareholder at Ogletree Deakins' Tampa office, represents cities on employee benefits issues. She predicts renewed efforts to phase out traditional pension plans.

"Our pension plan is historically well-funded, but it's also one of the few remaining public pension funds that was totally non-contributory," Morinelli said. "That is a vehicle that is quickly becoming obsolete."

Morinelli has been telling public employers to brace for a much harder bargaining environment.

"Now that the unions know their members aren't get-

ting the three percent, they view it as a pay cut," Morinelli said.

The road to the pension decision may offer insights for the year ahead. Pariente's concurring opinion was laced with conciliatory statements intended to help the masses understand why the First District Court of Appeal was wrong to say the Legislature had illegally broken a contract.

"I understand the frustration of state employees," Pariente told the state's 623,000 fund participants. "These changes affect judges and all judicial branch employees as well."

A reading of Pariente's concurrence as apologetic puts it mildly, said Kevin Wagner, an assistant professor of political science at Florida Atlantic University who teaches judicial and Florida politics.

"It's clearly not necessarily a decision that she wanted to reach," Wagner said. "Let's just say there was some sympathy with the plight of state workers."

While justices steer clear of partisan politics, Wagner said politics must have had some influence.

The timing of the opinion's release was weeks before the beginning of the legislative session. Just two sessions ago, the Legislature tried to pack and split the high court and bring candidates for future Supreme Court vacancies under Senate review.

"It's not surprising that the court wants to lower the tension. There is any number of things the Legislature can do," Wagner said. "It can cut their funding. It can and has proposed constitutional amendments to limit their power."

For years, the Republican Party of Florida has tried to consolidate power across all three branches of government, said Rebecca Salokar, chair

of the Department of Politics and International Relations at Florida International University in Miami. However, the state GOP's overt effort to oust three justices, including Pariente, in retention elections last November resulted in a backlash from the legal community. Voters marking the same ballot rejected a constitutional amendment proposed by the Legislature that would have given its members new judicial oversight.

Salokar said it is worth noting that the GOP overreached.

"There may still be some in the Legislature who will look for ways to curtail the power of the courts, but it won't be a full-court press," she predicted.

FORECLOSURE DISMISSALS

Underscoring its willingness to defer to the Legislature, the Supreme Court followed two weeks later with an opinion that unanimously supported legislative authority to set tuition rates at public universities. The decision was a blow to former Democratic Governor and U.S. Senator Bob Graham, who helped craft the constitutional amendment that created the university system's Board of Governors. It was his intent to transfer power to set tuition and fees to the board, but the court concluded the amendment's wording lacked that explicit goal.

And last Thursday, the court took a position favoring banks in *Roman Pino v. Bank of New York*, a Palm Beach County foreclosure case viewed as a test on how willing the court would be to cracking down on robo-signing.

The bank used a

conclusion.

Some critics claim the court drags its feet on more controversial cases. *Pino* took longer to resolve than the pension case, for example. But Julissa Rodriguez, an appellate attorney at Greenberg Traurig's Miami office, has many cases pending before the Supreme Court. She noted the court has an extensive backlog, so decisions may be released out of order for no other reason.

Even older than *Pino* is *Estate of Michelle E. McCall v. United States*, which was argued Feb. 9, 2012. The case tests the constitutionality of Florida's \$1 million cap on pain and suffering in medical malpractice cases, which was passed by the Republican-controlled Legislature under the business mantra of tort reform.

Robert Sanchez, director of policy at the James Madison Institute, a conservative think tank in Tallahassee, considers *McCall* the most important case the Supreme Court is likely to decide this year.

"If the court knocks out the cap on pain and suffering damages, we might have another crisis concerning medical malpractice," Sanchez said.

He intimated the court's composition bodes well for policymakers who sup-



PHIL SEARS

Justice Jorge Labarga, who is criticized by the right, sided with the two pro-GOP justices in a crucial case.



MELANIE BELL

Even left-of-center Justice Barbara Pariente has joined the conservative duo.



Ogletree Deakins shareholder Karen Morinelli expects more efforts to phase out traditional pension plans.



FAU professor Kevin Wagner said it seems the Supreme Court is trying to lower political tension.



J. ALBERT DIAZ

FIU's Rebecca Salokar still expects some state lawmakers to try to curtail the power of the courts but in a more covert fashion.

tactic common among lenders accused of using fraudulent documents to obtain judgments when it voluntarily dismissed the case to avoid sanctions or possible loss of its rights to the mortgage.

Confining the decision to an interpretation of civil procedure rules, the court said trial judges could not reopen dismissed cases.

Critics say the dismissals amount to a massive fraud on the court.

To avoid a Supreme Court review that could have far-reaching consequences, the bank settled. That should have ended it, but the high court took the unusual step of insisting on hearing the case anyway. Thomas Ice of Ice Legal, whose firm represented Pino, was not surprised the bank prevailed, but he hoped for a strong warning from the court that such behavior would not be tolerated.

Instead, the court said motives of the plaintiff are not considered when voluntary dismissals are used.

"The rule presupposes that the plaintiff will have a tactical reason for voluntarily dismissing its lawsuit," said Pariente, the opinion's author.

The opinion was unanimous with a legal asterisk. Canady and Polston concurred "in result only." The two justices regularly distinguish themselves by refusing to concur with the reasoning of another justice but accept the majority's

HIGH-PROFILE PENDING OPINIONS

D.M.T. v. T.M.H.: Challenge by same-sex partner to contract that waives parental rights of human egg and sperm donors where donor did not intend to relinquish the right.

Estate of Michelle E. McCall v. United States: Challenges constitutionality of state's \$1 million cap on pain and suffering damages for medical malpractice.

In re: Admission of Undocumented Immigrants to The Florida Bar: Jose Godinez-Samperio, a Mexican brought to the United States as child, seeks Bar admission.

McKenzie Check Advance of Florida v. Wendy Betts et al: Challenges a payday lender's arbitration class action waiver.

Philip Morris USA v. James Douglas: Questions the application in trial courts of Engle class findings in the progeny cases brought against tobacco companies.

Public Defender, Eleventh Judicial Circuit v. State: Miami-Dade public defender seeks to refuse noncapital felony cases due to excessive caseload.

Shahla Rabie Cortez v. Palace Resorts: California resident sexually assaulted at Mexico-based affiliate of Florida company appeals order rejecting Florida jurisdiction.

Southern Alliance for Clean Energy v. Art Graham: Challenges right of FPL to charge consumers for proposed nuclear plants before operation.

Washington National Insurance v. Sydelle Ruderman: Asks whether insurers are allowed to require policyholders to appear in person to be questioned under oath on personal injury protection claims.

NOTABLE OPINIONS

March 9 — Senate Joint Resolution of Legislative Apportionment: Justices approve the state House redistricting plan, reject the state Senate plan. An amended Senate plan is approved six weeks later.

April 5 — State v. John McMahon: On a question about imposing habitual offender status, court rules state may not appeal a sentence that is otherwise legal on grounds the trial court initiated a plea dialogue with a defendant without invitation of either party.

May 10 — William Telli v. Broward County: Challenge to a county commission term limit ordinance is rejected.

May 31 — QBE Insurance v. Chalfonte Condominium Apartment Association: Florida has no law recognizing a claim for breach of the implied warranty of good faith and fair dealing in a lawsuit by a condo association claiming its insurer unreasonably delayed processing and payment of hurricane claim.

July 5 — Jeffrey Atwater v. Frederick Kortum: A 48-hour ban on a public adjuster's access to property owners unconstitutionally restricts commercial speech.

July 12 — State v. Luke Jarrod Adkins et al: Court upholds state drug possession law regardless of whether defendants know they have a controlled substance.

Dec. 13 — State v. Richard Catalano: Unanimous court strikes down state's noise nuisance law for loud car stereos.

Jan. 17 — Rick Scott v. George Williams: Court upholds state law requiring public employees to pay into pensions for the first time.

Jan. 31 — Bob Graham et al v. Mike Haridopolos et al: Supports legislative authority to set tuition rates at public universities.

Feb. 7 — Roman Pino v. Bank of New York: Supports right of mortgage lenders to voluntarily dismiss foreclosure cases to avoid hearings on allegedly fraudulent documents.

FROM PAGE A9

SUPREME COURT: Same-sex custody case more challenging

port free-market solutions.

“We think they got it right on the pension ruling,” Sanchez said. “Two of the more conservative justices, Ricky Polston and Charles Canady, were joined by two who had been perceived as more liberal, Jorge Labarga and Barbara Pariente. Even presidents who appoint justices to the U.S. Supreme Court are sometimes surprised by the rulings they ultimately make.”

SAME-SEX CUSTODY

Tossing the Legislature a softball on the pension system fight, as contentious as that was among the justices, was still a simpler call than running the risk in *Pino* of dragging out an already epic foreclosure process by giving loan-defaulting homeowners a new weapon.

And both cases are more clear-cut than *D.M.T. v. T.M.H.*, a child custody fight between a separated same-sex couple that examines how judges interpret documents used to terminate parental rights of egg and sperm donors.

The biological mother is at odds with the birth mother over a standard document a doctor had the biological mother sign.

A decision favoring the egg



J. ALBERT DIAZ

Family law attorney Elizabeth Schwartz hopes the Supreme Court finds contract law as applied in a same-sex custody case unconstitutional if the biological mother meets other definitions of parenthood.

donor could strengthen parental rights of homosexual and heterosexual couples. But conservative family rights groups could use the case as fodder to target justices during merit retention elections that they perceive as too liberal. In 2012, Pariente, R. Fred

Lewis and Peggy Quince survived the Republican attack.

Elizabeth Schwartz, a gay rights and family law attorney in Miami Beach, said she would not be surprised if the gestational mother got legal assistance from Alliance Defending Freedom

or National Organization for Marriage. Both are faith-based organizations with anti-gay agendas. “Of course, they want to make sure lesbian couples don’t get the legal recognition they deserve,” she said.

Schwartz is hoping the

Supreme Court affirms the Second District Court of Appeal, which found the contract law as applied in this case unconstitutional because the biological mother met other definitions of parenthood.

ADDRESSING AUDIENCES

The pension case also was remarkable as an example of how the court is putting more effort into addressing audiences rather than simply explaining law, Salokar said. Citing the example of Pariente’s address to unions, she said the justices understand that, unlike the U.S. Supreme Court justices, they don’t have lifetime tenure.

“Those justices in Washington don’t really have to worry about what people think. The Florida Supreme Court is much closer to the people. The unions are large, and the likelihood that their leaders would pick up verbiage in the opinion and relay it to their members is very high,” Salokar said. “They wanted people to know that on the one hand they are empathetic, but that they don’t have control because the law must govern.”

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