IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,956

PALM BEACH COUNTY,

Petitioner,

v.

TOWN OF PALM BEACH, et al.,

Respondents.
_____/

PETITIONER'S INITIAL BRIEF

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PREFACE

Petitioner, Palm Beach County, will be referred to as the "County". Respondents will be referred to as the "Cities". The Appendix to this Brief will be abbreviated as "App.".

STATEMENT OF CASE AND FACTS

The initial dispute in this case concerned the application of Section 336.59, Florida Statutes (1983)(repealed October 1, 1984), which provided for the levy of a countywide special ad valorem tax not exceeding 10 mills to be expended for work on the public roads and bridges in each county. The statute required that one-half the amount realized from such special tax on the property in incorporated cities and towns shall be "turned over" to such cities "to be used in constructing, repairing and maintaining the roads, streets and bridges thereof...". Under prior decisions of this Court, funds used for roads and bridges were not permitted to be obtained entirely from revenue other than the road and bridge tax, however, there was no set minimum millage for this tax. City of Orlando v. County of Orange, 276 So.2d 41 (Fla. 1973).

A special road and bridge tax was levied by the County pursuant to Section 336.59 at the rate of .9102 mills in fiscal year (FY) 1980/1981, .0479 mills in FY 1981/1982, and .0001 mills in FY 1982/1983 and in FY 1983/1984. The County remitted one-half of these proceeds to the Cities but also expended other ad valorem and non-ad valorem revenues during these years for road and bridge purposes. At trial, the Cities maintained that they were entitled to one-half of such other revenues which the County had spent for road and bridge purposes. Specifically, the Cities challenged the following budgetary actions of the County:

1. Budgeting a portion of local government half-cent sales taxes in the County Transportation Trust Fund during FY 1982/1983 and FY 1983/1984;

2. Using a portion of the County's countywide ad valorem tax to partially fund the Capital Outlay Fund since expenditures for road construction projects were accounted for in such fund;

3. Using federal revenue sharing funds to fund road construction projects; and

4. Budgeting the County Engineering Department in the General Fund rather than the Transportation Trust Fund.[1]

After trial, the circuit court entered final judgment against the County in favor of the Cities in the total amount of $7,223,881 based on both ad valorem and non-ad valorem revenue which the County had spent for road and bridge tax purposes for FY 1977/1978 through FY 1983/1984.(App.1)

The County appealed this judgment to the Fourth District Court of Appeal which substantially reversed the trial court in Palm Beach County v. Town of Palm Beach, 507 So.2d 128 (Fla. 4th DCA 1986) [hereafter Palm Beach I].(App.2) In Palm Beach I, the Court held that there was a sufficient levy under the road and bridge

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[1] Four county funds or accounts were involved in the original suit: (1) the General Fund; (2) the Capital Outlay Fund; (3) the County Transportation Trust Fund and (4) the Federal Revenue Sharing Fund. Three sources of revenue other than the road and bridge tax under Section 336.59, were also at issue: (1) the federal revenue sharing funds; (2) the countywide ad valorem tax; and (3) the local government half-cent sales tax.

tax, Section 336.59, for the fiscal years prior to FY 1982/1983. The Fourth District held, however, that the .0001 mill levy under Section 336.59 for FY 1982/1983 and FY 1983/1984 was an insufficient road and bridge tax under the statute and, therefore, other revenue expended by the County for road and bridge tax purposes must be shared with the Cities. The Court held, however, that only ad valorem revenues used for road and bridge purposes must be shared and, therefore, gas tax, sales tax and federal revenue sharing funds need not be shared. This decision by the Fourth District was the first time a Florida Court had held county road and bridge tax levy under Section 336.59 was not a sufficient levy, triggering a requirement that other ad valorem taxes used for road and bridge purposes must be shared.

As a result of the decision in Palm Beach I, the Cities sought entry of an amended final judgment in the circuit court based upon the Fourth District decision. The original judgment had awarded the Cities $1,900,242 for each of two fiscal years, FY 1982/1983 and FY 1983/1984, based upon the half cent sales tax used to fund road and bridge construction from the Transportation Trust Fund. Because this was non-ad valorem revenue, it was not properly awarded pursuant to the decision in Palm Beach I. In addition, all amounts which had been awarded for years other than FY 1982/1983 and FY 1983/1984 were not owed by the County based upon Palm Beach I since the Court had held there was a sufficient road and bridge tax levy for the other years.

The amount owed as a result of Palm Beach I was stipulated by the parties to be $803,930 rather than the $7,223,881 in the original judgment, a reduction to almost one tenth the original amount. After hearing, the trial court entered an amended final judgment in that amount with no allowance for interest.(App. 3) This hearing was not reported. The amended final judgment made no specific findings regarding interest but merely stated that the judgment was "without interest". The Cities then appealed the amended final judgment to the Fourth District Court of Appeal alleging that the County was obligated to pay postjudgment interest upon the principal amount of the amended final judgment from the date of the original judgment. On January 18, 1989, the Fourth District reversed the amended final judgment holding that the Cities are entitled to postjudgment interest. Town of Palm Beach v. Palm Beach County, 573 So.2d 1055 (Fla. 4th DCA, 1989) hereafter Palm Beach II).(App. 4) The Fourth District, however, certified the following question to the Supreme Court as a matter of great public importance:

> IS A GOVERNMENTAL ENTITY IMMUNE FROM THE PAYMENT OF POSTJUDGMENT INTEREST UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY?

The County filed a motion for rehearing on February 2, 1989, which was denied by the Fourth District on February 28, 1989. The County filed a timely notice to invoke the discretionary jurisdiction of this Court on March 28, 1989.

SUMMARY OF THE ARGUMENT

Under long established law in Florida, a county is not liable for interest unless specifically provided by statute or contract. There is no applicable statute or contract in this case specifically allowing interest and, therefore, sovereign immunity protects a county from payment of postjudgment interest. Contrary to the Cities' argument and the opinion below, a careful analysis of existing court decisions demonstrates that Section 55.03(1), Florida Statutes, governing interest on judgments, does not, by itself, waive sovereign immunity nor demand payment of interest by the County.

Even if the County were not absolutely immune from the payment of postjudgment interest, equitable considerations, which have long been a factor considered by Florida courts in determining the availability of interest, would require that no interest be assessed in this case. This case involved a highly complex and technical interpretation of the prior judicial decisions construing Section 336.59. The Fourth District Court in Palm Beach I for the first time held that other ad valorem taxes used for road and bridge purposes were required to be shared with municipalities if a road and bridge tax levy was insufficient in contrast with prior statements by this Court that there is no minimum tax under Section 336.59. The Fourth District in Palm Beach I, in fact, reversed a substantial portion of the final judgment which had been entered by the trial court, thus, the County substantially prevailed on

appeal. Until the issue was resolved on appeal, the County could not determine whether any funds were owed and what amount, if any, was owed.

The county is also immune from payment of interest because this case involved the levy of taxes which is a purely governmental function. Public policy dictates that such functions as the levy of taxes be immune from payment of interest if the governmental action is subsequently declared invalid. Otherwise, there would be a marked chilling effect upon a governmental entity challenging on appeal any adverse determination concerning taxes.

ARGUMENT

POINT I

UNDER FLORIDA LAW, PALM BEACH COUNTY IS IMMUNE FROM POSTJUDGMENT INTEREST IN THIS ACTION

The Fourth District Court of Appeal in the decision below, Palm Beach II, held that the Cities are entitled to postjudgment interest. As authority for charging interest against the County, the Court cited Section 55.03(1), Florida Statutes (1985), and two prior decisions from that Court, Department of Transportation v. Tsalickis, 372 So.2d 500 (Fla. 4th DCA 1979) and Broward County v. Finlayson, 533 So.2d 817 (Fla. 4th DCA 1988). The Court in Palm Beach II, nonetheless, certified the following question to this Court as a matter of great public importance:

> IS A GOVERNMENTAL ENTITY IMMUNE FROM THE PAYMENT OF POSTJUDGMENT INTEREST UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY?

The principle that the State and its subdivisions are immune from the payment of interest absent a waiver of sovereign immunity by statute or contract has been often repeated, however, a review of individual cases demonstrates several different factors in addition to specific waiver which are considered in determining whether interest should be allowed. Furthermore, close review of the reported decisions shows that Section 55.03(1), Florida Statutes, does not provide a waiver of sovereign immunity from

payment of interest. While this Court's decision in Roberts v. Askew, 260 So.2d 492(Fla. 1972) appears, at first glance, to conclude that Section 55.03(1), Florida Statutes, waives the immunity of the State from postjudgment interest, a close review of that decision in the context of prior and subsequent decisions shows that such conclusion is not correct. This court's decision in Berek v. Metropolitan Dade County, 422 So.2d 838(Fla. 1982) most clearly demonstrates that Section 55.03(1), is not an independent waiver of the sovereign immunity of the State and its subdivisions from payment of postjudgment interest since Berek bars postjudgment interest in a tort action against the State in excess of the limits of the waiver of sovereign immunity under Section 768.28, Florida Statutes.

The other factors weighed by the courts in determining if interest against a governmental entity should be allowed include whether there are equitable considerations, whether the activity engaged in by the state is a business activity or a governmental function and whether the outcome is in doubt. In some decisions, more than one of these factors appear to play a role.

A. THE SOVEREIGN IMMUNITY OF A GOVERNMENTAL ENTITY FROM PAYMENT OF POSTJUDGMENT INTEREST HAS NOT BEEN WAIVED

In the district court below, the Cities maintained that Section 55.03(1), Florida Statutes, provided a sufficient statutory basis for the waiver of the immunity of the State and its subdivisions from payment of postjudgment interest. The Fourth

District apparently agreed with that position. Section 55.03(1) provides as follows:

> A judgment or decree entered on or after October 1, 1981, shall bear interest at the rate of 12% a year unless the judgment or decree is rendered on a written contract or obligation providing for interest at a lesser rate, in which case the judgment or decree bears interest at the rate specified in such written contract or obligation.

The statute clearly makes no reference to the State and its subdivisions or to any waiver of sovereign immunity.

This Court first discussed the applicability of Section 55.03 to the State in Florida Livestock Board v. Gladden, 86 So.2d 812 (Fla. 1956). In that case, Mr. Gladden obtained a final judgment awarding a sum of money for the Florida Livestock Board's destruction of a herd of his diseased hogs. The trial court entered judgment against the Board plus interest from the date of judgment. The Florida Livestock Board argued to this Court that an agency of the State is not liable for interest in the absence of a specific statute or contract providing for interest. Mr. Gladden, on the other hand, contended that Section 55.03, was such a specific statute authorizing the payment of interest and that it applied to all judgments and made no exception in favor of the State. This Court upheld the interest award, but on different grounds, stating as follows:

> The conclusion we here announce is grounded upon the particular statute which we are called upon to consider in the matter before us. This statute is Section 585.03, Florida Statutes, F.S.A., and reads in part as follows:

> "The said Florida Livestock Board shall be a body corporate, having the usual powers of a body corporate for all purposes necessary to further carry out the provisions and requirements of Chapter 585, including the right to contract and be contracted with, to sue and be sued, as well as all of the rights and immunities usually enjoyed by bodies corporate." Gladden at 812-813.

This Court noted that the authority to sue and be sued contained within Section 585.03 placed no restriction whatever on the nature of the suit or the amount of the recovery. The Court stated, further, as follows:

> Where statutory authority to sue a state agency is given, payment of interest on a claim adjudicated under the statute may be impliedly authorized when the nature of the claim and the object designed in permitting such suits against the State or its agency warrant such implication. We are of the view that the implication is warranted in the case before us. Gladden at 813 (emphasis added).

Thus, this Court did not hold in Gladden that Section 55.03 waived sovereign immunity and authorized payment of interest. On the contrary, this Court relied upon the provisions of a separate statute authorizing suit. Therefore, in Gladden there was a specific, separate statute authorizing suit against the Florida Livestock Board. This statute made the Board liable as any other corporate body thus making it liable for interest. Clearly, however, the case does not authorize payment of interest based upon Section 55.03. By contrast, there is no applicable statute broadly waiving the immunity of the County in the instant case.

The next discussion by this Court of the liability of the State or its subdivisions for payment of postjudgment interest

under Section 55.03, comes in Roberts v. Askew, 260 So.2d 492 (Fla. 1972). In Roberts, the Court was called upon to determine whether interest could be assessed against the Board of Trustees of the Internal Improvement Trust Fund in a quiet title action. The trial court had entered final judgment quieting title and provided that costs could be taxed upon motion. The Board of Trustees filed an untimely appeal and the appeal was dismissed. Subsequently, the landowner moved to tax costs and costs were awarded by the trial court. The Board of Trustees did not appeal that order.

The Board of Trustees refused to comply with the trial court order awarding costs and, subsequently, the landowner sought a writ of mandamus in this Court to require compliance. In response to that petition, the Board of Trustees attempted to collaterally attack the order awarding costs. The Court refused to consider such a challenge on equitable principles and stated as follows:

> We next consider whether petitioners are entitled to interest on their money judgment at the lawful rate from the date of its entry until paid. Traditionally, the State and its agencies have been held to be immune from the obligation to pay interest on money judgments.
>
> The respondents Trustees daily engage in those activities which are commonly held to be business activities, such as buying, selling and leasing land, the sale of fill material, granting of leases for various business activities, and similar business related activities. Fla. Stat. Ch. 253, F.S.A.
> Roberts at 494. (emphasis added)

Thus, Roberts reaffirmed the state's immunity from payment of postjudgment interest but found there was a separate statute involved which authorized the Trustees to engage in essentially

private business activities. The Court did not further discuss this statute but stated as follows concerning interest:

> Fla. Stat. s. 55.03, F.S.A., provides that all judgments and decrees shall bear interest at the rate of 6%. This statute and other applicable statutes make no exemption in favor of the Trustees from the obligation to pay interest on a judgment rendered against the Trustees. The same reasoning employed by this court in Simpson v. Merrill, supra, should apply here and the Trustees should be required to pay interest just as they are required to pay court costs. Roberts at 495.

Further analysis, however, establishes that Roberts v. Askew does not support an award of interest based solely on Section 55.03.

In Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), cited in Roberts v. Askew, this Court held that Section 57.041, Florida Statutes, which provides for award of legal costs to the party recovering judgment, also applied to the State. However, in a later decision, University Presbyterian Homes, Inc. v. Smith, 408 So.2d 1039 (Fla. 1982) this Court, by adopting the district court decision in that case, concluded that interest is not the same as costs in the context of sovereign immunity.

In Smith v. University Presbyterian Homes, 390 So.2d 79 (Fla. 2nd DCA 1980), the Second District held that a taxpayer was not entitled to an award of interest on a tax refund. The taxpayer had argued that Simpson v. Merrill supported its claim for interest. The Second District, however, declined to award interest stating "Simpson v. Merrill only dealt with the parties right to recover costs against a State agency as contrasted to interest".(emphasis added). This Court adopted the Second District decision as its own

in University Presbyterian Homes, Inc. v. Smith, supra. Therefore, since Roberts v. Askew relied upon the rationale of Simpson v. Merrill, it cannot be read as requiring that interest be paid by the State based solely upon Section 55.03.

Furthermore, the distinction between an award of interest and an award of costs as established in University Presbyterian Homes is logical and real. An assessment of costs against a governmental entity when the entity loses in a court proceeding is necessary to allow private citizens a meaningful access to the courts in seeking redress from the government or in protecting themselves from government. In Simpson v. Merrill, this Court quoted its prior decision in Corneal v. State Board of Control, 101 So.2d 371,372 (Fla. 1958) as follows:

> The costs of a successful proceeding instituted by one in the protection of his constitutional rights to restrain the unlawful exercise or abuse of governmental power should not fall on the threatened party, but on those whose action make the institution of the proceeding necessary. Simpson at 351-352.

The issues and policy involved in assessing the costs of litigation against a governmental entity are not present in considering an assessment of interest. Interest is different from costs. When a judgment is entered against a governmental entity, payment of the damages in due course is free from doubt as stated in Treadway v. Terrell, 158 So. 512,517 (Fla. 1935):(quote from p. 16)

> The law contemplates that legal claims against the State shall be paid in due course, and that suits against the State and the payment of interest on claims against the State will not in general be necessary to conserve property rights. Treadway at 517-518.

The next relevant decision by this Court is Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982). In Berek, a tort action was brought against Dade County resulting in a jury verdict of $85,000. The trial court entered judgment for $50,000 which was then the limitation of liability under the waiver of sovereign immunity statute, Section 768.28, Florida Statutes (1979). The trial court denied a motion for costs and postjudgment interest. The District Court found postjudgment interest and costs could be recovered but only to the limit of the waiver of liability, $50,000. Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3rd DCA 1981) This Court in Berek upheld the District Court reasoning that it is the specific language of Section 768.28, Florida Statutes, the waiver of sovereign immunity statute, which allows the general interest provisions of Section 55.03(1), Florida Statutes, to apply to Dade County. The Court specifically noted that Section 768.28, Florida Statutes, provides that the State:

> shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." Therefore the general provisions which make costs and interest recoverable by the prevailing party are applicable when a tort claimant prevails against the State. The availability of interest is further indicated by the next immediately following language in the statute:
>
> > 'But liability shall not include punitive damages or interest for the period prior to judgment.' Berek at 840.

The Court in Berek noted that waiver of sovereign immunity must be strictly construed and, therefore, limited total recovery, including postjudgment interest, to $50,000.

From Berek, it can be seen that Section 55.03(1), Florida Statutes, does not alone authorize the imposition of interest against a governmental body. If that were so and Section 55.03(1) was, in and of itself, a waiver of sovereign immunity, then the postjudgment interest in Berek would not have been deemed included within the $50,000 limit of liability but would be recoverable without limit. Indeed, any judgment against the State or its subdivisions in any case would necessarily accumulate interest without limit at the statutory rate. Obviously, this is not what Berek says. On the contrary, Section 55.03(1), Florida Statutes, must be read in conjunction with the statute upon which the underlying lawsuit is maintained to determine whether sovereign immunity has been waived and postjudgment interest is assessable.

Based on traditional notions of sovereign immunity, Florida courts have long held that a county is not liable for interest on its obligations in the absence of a statute or an express contract. Duval County v. Charleston Engineering and Contracting Company, 134 So. 509 (Fla. 1931), Treadway v. Terrell, 158 So. 512 (Fla. 1935). Furthermore, any waiver of sovereign immunity must be clear and unequivocal. Arnold v. Schumpert, 217 So.2d 116 (Fla. 1968). This Court in Treadway, explained as follows concerning immunity from interest:

> There is no provision in the Constitution or in the statutes of the State expressing the immunity of the State from liability for interest payments not assented to. Such immunity is an attribute of sovereignty and is implied by law for the benefit of the state; and the immunity may be waived in any way that is manifested or authorized by statute, as

> justice may require to conserve the welfare and honor of the State. Treadway at 517-518.

The applicable statute in Treadway authorized suit against the state road department for "any claim arising under contract for work done." The Court in Treadway concluded, under the applicable statute authorizing suits against the state road department and under the provisions of the specific contract involved, that interest against the state may be authorized and, therefore, refused to issue a writ of prohibition against the board of arbitration which had awarded interest under the contract. The Court, however, also stated:

> Where there is statutory authority to sue, not the state generally for matters affecting its sovereign governmental functions, but upon "any claim arising under contract for work done" for a state agency having specific statutory authority to contract for the construction of highways for the state and to pay for the work when done under contract,...the general principles of liability for interest may be applied in proper cases of contract obligation, where to do so comports with the statutory authority to sue and will do justice in the case consonant with law and equity and the dignity and honor of the sovereign. Treadway at 518.

Presumably, the Court considered that the statutory authority to sue for "any claim arising under contract for work done" was sufficient authority to allow interest.

The above cited decisions where interest is allowed each involve an independent statute which contains specific provisions consistent with the waiver of sovereign immunity from interest.

In Berek, there is a specific statute authorizing suit and providing equal liability for the State in all respects. Similarly, there was such a statute in Treadway and Gladden. Where there is such a statute, interest follows. In this case, there is no such statute providing a broad waiver of sovereign immunity which can be read as including a waiver of immunity from interest, therefore, Section 55.03(1) does not, by itself, waive the County's immunity from postjudgment interest.

In addition to Section 55.03(1), Florida Statutes, the Fourth District in the decision below relied upon Department of Transportation v. Tsalickis, supra. In Department of Transportation v. Tsalickis, the parties to a condemnation action entered into a consent judgment and, ten months later, the property owner filed a motion for interest which was granted. The Fourth District held simply that the trial court had no jurisdiction to award interest ten months after the final judgment was entered. In dicta, the Fourth District commented that Section 55.03(1), Florida Statutes (1985), would apply from the date of final judgment. It is clear, however, that postjudgment interest was not an issue in Tsalickis and, furthermore, the State's immunity from payment of interest was neither raised nor discussed in the decision.

The Federal Courts follow a similar rule that the United States may not be held liable for interest on a claim absent a statute or contract. U.S. v. Louisiana, 446 U.S. 253, 100 S.Ct. 1618, 64 L.Ed. 2d 196 (1980). As to back pay awards, for example,

the Federal Courts that have applied this principle found no support for either prejudgment interest or postjudgment interest. See Blake v. Califano, 626 F.2d 891 (D.C.Cir. 1980), and Krodel v. Young, 624 F.Supp. 720 (D.D.C. 1985). The other states also generally follow the rule that a county is not liable for interest absent a specific waiver of immunity by statute or contract. See Annotation, 24 ALR 2d 928 (1952).

As outlined above, Section 55.03(1), Florida Statutes, does not, by itself, automatically waive the immunity of the State and its subdivisions from the payment of interest on its obligations. In order for such a waiver to be found, the statute upon which the suit against the State or one of its subdivisions is filed must clearly waive all immunity or there must be a waiver of immunity from interest through contract. The applicable statute upon which the underlying cause of action in this case was based, Section 336.59, Florida Statutes (1983)(repealed October 1, 1984), provides no specific waiver of immunity for payment of interest nor any general language from which such waiver could be inferred. That section merely provides for a levy of a tax not to exceed ten mills for road and bridge purposes and the payment of one-half of that tax to the cities and towns within a county.

B. POSTJUDGMENT INTEREST AGAINST A GOVERNMENTAL ENTITY MAY BE PROPERLY DENIED BASED UPON EQUITABLE PRINCIPLES

Even where there is some implied waiver of immunity, the existing decisions in Florida provide that equitable consideration

may act to bar payment of interest by the State or its subdivisions.

The role of equitable principles in determining whether interest may be awarded against a governmental entity, even where a waiver of sovereign immunity exists, can be seen in Treadway v. Terrell, supra. Therein, this Court repeatedly qualified its discussion concerning interest against the state with equitable principles:

> ...and interest may be awarded on such implied statutory authority when the nature of claims on which suits may be maintained and the object designed in permitting suits against the state or its agencies warrant it. Treadway at 518.
>
> ...the general principles of liability for interest may be applied in proper cases of contract obligation, where to do so comports with the statutory authority to sue and will do justice in the case consonant with law and equity and the dignity and honor of the sovereign. Treadway at 518. (emphasis added)
>
> The statute authorizes suits against the state road department on any claim arising under contract for work done since June 7, 1923, and the contracts for road and bridge construction which the state road department is authorized to make may be of such a nature that the payment of interest on amounts due and unpaid by the state may be necessary to do complete justice between the parties... Treadway at 519. (emphasis added)

The thread of equity also runs through Roberts, supra and Gladden, supra in determining whether interest should be imposed against a governmental entity. In Roberts, the Board of Trustees had filed an untimely appeal from a quiet title judgment awarding

costs, the appeal was dismissed and the Board then refused to comply with the trial court order awarding costs. The landowner sought a writ of mandamus and the Board of Trustees attempted to collaterally attack the judgment. The Court stated:

> The respondent's, elected officials, suffered an adverse judgment in a court of competent jurisdiction, then declined to follow available appellate procedure. Instead, respondents refused to recognize the order of the trial court. Respondents are not in a position to seek on their behalf the invocation of any equitable consideration. Roberts at 494.

In Roberts, the equities were against the Board of Trustees.

In Gladden, Mr. Gladden's hogs had been destroyed by action of the Florida Livestock Board. The Court upheld an award of interest stating:

> Where statutory authority to sue a state agency is given, payment of interest on a claim adjudicated under the statute may be impliedly authorized when the nature of the claim and the object designed in permitting such suits against the State or its agency warrant such implication. We are of the view that the implication is warranted in the case before us.
>
> ***
>
> Appellee's hogs were destroyed in the public interest to prevent the spread of the disease. Destruction of his property was pursuant to the order of the State Board. Complete justice suggests that he should have been paid long ago. Gladden at 813 (emphasis added)

In Gladden, the equities were against the Florida Livestock Board.

Even the Fourth District decision in Broward v. Finlayson, 533 So.2d 817 (Fla. 4th DCA 1988), which is cited by the court

below as authority for the award of interest in this case, recognizes the roles of equity in awarding interest against a governmental entity. Citing Flack, the court recognized that "Interest should only be denied when its exaction would be inequitable". Finlayson at p. 818.

In Flack v. Graham, 461 So.2d 82 (Fla. 1984), this Court reiterated the State's immunity from payment of interest as follows:

> As a general rule, a government is not liable for interest in the absence of an express statutory provision or a stipulation by the government that interest will be paid. Immunity from interest is an attribute of sovereignty, implied by law for the benefit of the State. (citations omitted) Flack at 83.

In Flack, the Supreme Court had previously ordered the State to pay Judge Flack for back salary for her full term as a county judge. Subsequently, Flack filed a petition for writ of mandamus seeking interest on each monthly installment of back pay from the date due. Therefore, Flack's claim for interest apparently included both prejudgment interest and postjudgment interest since portions of the claim would be for interest owed after the date of the Court's order awarding back pay.

The Court in Flack quoted the United States Supreme Court decision in Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289 (1939), as follows:

> Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.

This Court in Flack stated further, as follows:

> In choosing between innocent victims the court found it would not be equitable to put the burden of paying interest on the public. This case is similar to Jackson County in that we are left with two innocent victims - the state and Flack. Flack has made a full recovery of the salary she would have received if she had filled the complete term as a county judge. It would be grossly inequitable to make the citizens of Florida also pay interest. We therefore refuse to mandamus payment of the interest sought here and dismiss the petition. Flack at 84 (emphasis added).

Similarly, in this case, there are two innocent parties. The County, which was in legitimate doubt concerning the Cities right to the funds and the amount of any such funds owed, and the Cities, which were seeking distribution of certain County revenue and taxes collected. As the Fourth District decision below in Palm Beach I acknowledged, the County did not quit spending money on roads but spent more than ever. Clearly, an award of interest in this case serves no equitable interest. All the money found owing here was in fact spent on roads and bridges in Palm Beach County to the general benefit of all County residents which includes residents of the Cities. The amount for the judgment in this case will necessarily come from residents of the unincorporated area of the County who have already paid their taxes and it will go to the Cities who have already received benefit from the expenditure of those funds.

Furthermore, what could the County have done to forestall or shorten the time periods in this action? The County had relied on existing case law that there was no minimum road and bridge tax

which must be imposed and that it need not distribute any non-ad valorem revenue used for road and bridge purposes. Based upon this existing case law, the County had an obligation to the taxpayers to appeal the initial final judgment and, clearly, its actions were substantially ratified on appeal. Therefore, there was obviously a legitimate dispute involved. As in Flack, it would be "grossly inequitable" to make the citizens of the County pay interest where the Cities had received "full recovery" of the taxes found owing in a case involving a matter of legitimate dispute.

C. PURELY GOVERNMENTAL FUNCTIONS REMAIN IMMUNE FROM PAYMENT OF INTEREST

Where a governmental entity is sued for a purely governmental decision such as the levy and collection of taxes, such actions remain immune from liability for interest, even if there is general authority to sue. As stated in Treadway v. Terrell, supra:

> Where there is statutory authority to sue, not the state generally for matters affecting its sovereign governmental functions, but upon "any claim arising under contract for work done"...the general principles of liability for interest may be applied in proper cases of contract obligation... Treadway supra at 518.
> (emphasis added)

Similarly, in Roberts the Court emphasized that the Trustees of the Internal Improvement Trust Fund daily engaged in business activities.

The suit in this case was based upon the levy of a road and bridge tax under the authority of Section 336.59, Florida Statutes.

The levy of taxes is clearly a purely governmental function and not a business activity. Although Section 336.59 provided for levy and collection of a road and bridge tax, it made no specific provisions concerning the authority to sue for refund or distribution of such taxes. In cases involving taxes, the courts have uniformly held that the government is not liable for interest.

In Mailman v. Green, 111 So.2d 267 (Fla. 1959), the issue was whether interest was due based on overpayment of estate taxes to the State. Under Florida law, the Florida estate tax is limited to the credit which the United States will give against the Federal estate tax for any State estate tax. Therefore, the amount of tax owing to the State was dependent upon the Federal tax due. The estate in Mailman challenged the Federal tax due in Tax Court and, after eleven years, a judgment was entered by the Tax Court that there had been an overpayment of Federal estate taxes. [It is not clear from the opinion, but, apparently, there was no appeal of the Federal Tax Court's decision]. Thereafter, the estate requested a refund of State estate taxes paid plus interest. The State Comptroller denied liability for any interest but refunded the principal amount of overpayment. The Court in Mailman commented that the Comptroller had no discretion to make the payment until the Federal Courts had decided the issue. Furthermore, the Court in Mailman noted that there was no authority in the statutes or decisions for payment by the Comptroller of interest on any overpayment of tax "even had the amount been certain before entry

of the judgment of the Federal Tax Court." The Court in Mailman stated further at page 269:

> To repeat, the amount ultimately to be paid was throughout the litigation in doubt. Whether the Comptroller should refund any or all of it could not have been divined by that officer and that being the case, we have found no room for the play of equitable principles relative to unjust enrichment of the State at the expense of its citizens, or failure of the State to deal fairly with them.
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> * * *
>
> The money was not inequitably withheld by the State and used by it to the detriment of petitioners. The matter was simply in suspense, pending settlement by a court of a dispute to which the State was not directly but only vicariously interested.

The Court in Mailman declined to award interest on the tax refund. The instant case is analogous to Mailman in that there was a legitimate tax dispute involved and the matter was merely in suspense pending final resolution by the Court.

Similarly, in Department of Revenue v. Goembel, 382 So.2d 783 (Fla. 5th DCA 1980), the Fifth District reiterated the principle that interest has not been allowed in tax refund claims because of the absence of statutory authority citing Mailman. Clearly, any other result in tax refunds would have a chilling effect upon the government challenging on appeal any adverse determination concerning taxes.

The different treatment of judgments against the State from judgments generally is consistent in other areas. For example, a government agency obtains an automatic stay of a judgment merely

by filing an appeal pursuant to Rule 9.310, Florida Rules of Appellate Procedure. Also, it has long been held that, despite specific statutes allowing execution upon judgments, public property cannot be executed against. Meriwether v. Garrett, 102 U.S. 472 (1880). Florida law is also clear that a judgment against a government entity "cannot be enforced by execution; neither is it a lien upon any of its property." Little River Bank and Trust Company v. Johnson, 141 So. 141 (Fla. 1932). If it were otherwise, then any judgment against the State could be used to seize the state capital, the Governor's Mansion or even the books in this Court's library. Therefore, even though there is no specific exemption for governmental entities in the laws governing execution of judgments, governmental entities remain immune from execution because of traditional notions of immunity relating to governmental functions.

CONCLUSION

Section 55.03(1), Florida Statutes, does not, by itself, waive a county's sovereign immunity from payment of interest. On the contrary, the courts of this state have long upheld a county's immunity from interest. Before such immunity has been found waived and interest is found to be owed, there must be another statute upon which the suit is based which specifically waives the county's immunity and puts it in the same posture as a private defendant. A review of the line of cases addressing liability for interest, culminating in this court's decisions in Berek v. Metropolitan Dade

County, 422 So.2d 838 (Fla. 1982) and Flack v. Graham, 461 So.2d 82 (Fla. 1984) leads inevitably to the conclusion that the County is not subject to postjudgment interest in this case. Even where there is a general authority to sue, equitable considerations may be considered as a factor in awarding interest and, in this case, support the denial of interest. The County collected a road and bridge tax in good faith and spent it, along with other ad valorem revenues, throughout the County for road and bridge purposes. It is unconscionable and in conflict with prior decisions of this Court to require that the citizens of the County also pay interest where the Cities will receive full recovery of the taxes found owing.

Finally, the levy of taxes is a purely governmental act and such acts have been held immune from payment of interest apart from any other principles of immunity which might apply.

Therefore, the decision of the District Court should be reversed.

Respectfully submitted,

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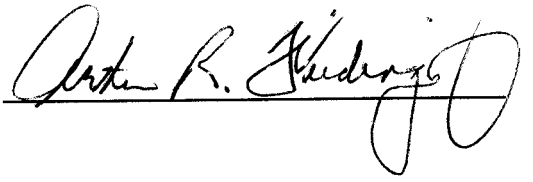
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief and attached Appendix has been furnished by U.S. Mail to the parties on the attached Service List, this 16th day of May, 1989.



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