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IN THE SUPREME COURT OF FLORIDA

SARASOTA COUNTY,

Petitioner,

v.

SARASOTA CHURCH OF CHRIST, INC., et al.,

Respondents.

_____/

CASE NO. 84,414
(DCA No. 93-01902)

BRIEF OF AMICI CURIAE WATER OAK MANAGEMENT CORPORATION AND JOHN RICHARD SELLARS IN SUPPORT OF RESPONDENTS

ON REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

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SUMMARY OF ARGUMENT AND INTRODUCTION

Water Oak Management Corporation ("Water Oak") and John Richard Sellars ("Sellars") are Plaintiffs and Appellants in *Water Oak Management Corporation, et al. v. Lake County, Florida, etc., et al.*, Case Number 94-02729 before the Fifth District Court of Appeal ("*Water Oak*"). Water Oak and Sellars represent a certified class of property owners in Lake County subject to special assessments for fire protection and solid waste management. Water Oak and Sellars file this brief as amici curiae in support of Respondents.

Water Oak shares the following issues with this case: (1) the constitutional limitations upon the imposition of a special assessment; (2) the standard by which courts should determine whether property receives a special benefit; (3) the type of benefit that constitutes a "special benefit" for purposes of constitutional review of special assessments; (4) whether a service which merely benefits the community generally provides the "special benefit," in the constitutional sense, required for special assessments; and (5) whether refunds should be granted if a special assessment is constitutionally invalid. The decision of this Court in this case will substantially affect the interests of the class represented by Water Oak and Sellars in *Water Oak*.

The churches contend that Sarasota County has impermissibly characterized its exaction for storm water management as a special assessment. They contend that the county has foresworn constitutionally permissible means of funding its storm water

control program, such as through ad valorem taxation, by levying a counterfeit special assessment for a function which does not provide the constitutionally required special benefit to assessed properties. The churches point out that the county has thus deprived them of the benefit of a statutory exemption from ad valorem taxes, an exemption they would properly enjoy had the county not unconstitutionally levied a special assessment.

The issue presented has far-reaching implications for all property owners in Florida. Sarasota County's actions here, and the arguments it presents in justification, affect the constitutional protections extended to homestead owners and to other property owners. For, if a county may characterize a charge as a special assessment though the program provides no special or peculiar benefit to assessed property, then the county may as easily deprive homestead owners of their constitutional protections as it may deprive the churches of the benefit of their statutory exemption.[1] Merely by declaring that a given program provides a special benefit, a county may likewise, with equal ease, circumvent the millage caps of Article VII, Florida Constitution, which are intended to protect all property owners from the overbearing

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[1]The viability of the churches' statutory exemption from ad valorem tax, equally with the viability of the Constitution's millage cap and homestead protections, turns upon the premise that county will conform to the Florida Constitution's limits on the allowable use of power to impose "assessments for special benefits." If the county is not so constrained, then the churches' exemption is meaningless, since it may be easily circumvented by substituting special assessment levies for ad valorem tax levies, just as the millage cap and homestead exemption contained the Constitution would be circumvented by such action.

exercise of local taxing and spending authority. Water Oak therefore urges that these constitutional principles and ramifications be borne in mind when weighing the county's arguments.

The fundamental issue here is whether the record shows a special benefit, in the constitutional sense of that term, required to sustain the county's special assessment for storm water management. Water Oak and Sellars believe that the record requires affirmance of the decision below. Most fundamentally, whatever the fact-specific outcome of this case may be, Water Oak and Sellars wish to emphasize that the Court should not adopt the flawed legal analysis suggested by Sarasota County as a basis for decision.

Sarasota County argues that its quasi-legislative declaration of a special benefit accruing to all property in the county's unincorporated area virtually binds the courts in the exercise of their duty to enforce constitutional discipline on local government. In the alternative, the county suggests that this Court may, and should, relieve the county of the consequences of unconstitutional conduct, by declaring the invalidity of the ordinance to the "prospective only," thus denying property owners refunds of assessments exacted unconstitutionally.

These arguments are wrong and have been repudiated. They contain the seeds of constitutional mayhem. They should not be incorporated into the jurisprudence of this State.

Instead, the Court should adhere to its firmly entrenched decisions. It should hold that the constitutional validity of

special assessments must be supported by a truly special benefit accruing to the assessed properties. It should further hold that the judiciary must independently scrutinize admissible and probative evidence, in a de novo manner, to determine if the requisite special benefit is demonstrated. Only then will the Florida Constitution's blueprint of taxpayer protection be safeguarded, and only then do the courts discharge their duty to enforce the constitutional limits on local government taxing-and-spending power embodied in our Constitution.

In addition, the Court should reaffirm the constitutional principle, recently underscored in decisions of this Court and of the United States Supreme Court, that a refund of taxes or assessments, coercively collected in opposition to constitutional limitations, is constitutionally required as a matter of due process of law. The Court should reject the county's suggestions that this due process guarantee may be defeated by the facile device of making the declaration of unconstitutionality "prospective only." That device is, first, contrary to due process requirements in the circumstances; second, rejected in recent constitutional jurisprudence for sound reasons; and third, inapplicable here in any event, even if it possessed continuing vitality as a doctrine.

ARGUMENT

I. AS A MATTER OF FLORIDA CONSTITUTIONAL LAW, SPECIAL ASSESSMENTS MUST BE STRICTLY LIMITED AND RIGOROUSLY EXAMINED BY THE COURTS.

City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992), reiterates the two prong test for a valid special assessment under the Florida Constitution: (1) "the property assessed must derive a special benefit from the service provided"; and (2) "the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit." This is the test which applies in determining whether the storm water assessment imposed by Sarasota County is a valid special assessment.

A. THE FLORIDA CONSTITUTION CONTAINS PROTECTIONS FOR TAXPAYERS WHICH ARE COMPROMISED BY THE IMPOSITION OF IMPROPER SPECIAL ASSESSMENTS

The 1968 Florida Constitution created a carefully crafted set of protections for Florida property owners and taxpayers. Cities and counties are constitutionally limited in their power to impose ad valorem taxes, the only form of taxation constitutionally committed to use by local governments. Art. VII, § 1(a), *Fla. Const.* Counties may levy not more than 10 mils for county purposes and 10 mils for municipal purposes (when providing municipal-type services in the unincorporated county areas). Art. VII, § 9(b), *Fla. Const.*; *see also* § 125.01(q),(r), *Fla. Stat.* Thus, all taxpayers enjoy the protection that local governments may not tax their properties beyond constitutionally established limits, unless authorized by a vote of the citizens. In addition, homestead owners are given an exemption from ad valorem tax up to a maximum

of $25,000 of assessed value. Article VII, § 6, *Fla. Const.*; § 196.031(3)(e), *Fla. Stat.* Accordingly, the Constitution is designed to ensure that homestead owners will bear a comparatively lesser tax burden for the operation of local government than owners of non-homestead property. No taxes may be collected on homestead property as to the first $25,000 of assessed value. Art. VII, § 6, Art. X, §4, *Fla. Const.* Nor may a lien for debt attach to homestead property without the property owner's consent. Art. X., § 4, *Fla. Const.*

The one exception to this blueprint of taxpayer protection lies in "assessments for special benefits." *See* Art. VII, § 6, *Fla. Const.* Homestead property, though exempt to a significant degree from ad valorem taxation, and though completely exempt from liens for other fees and charges, has no exemption in any amount for, and is not exempt from liens for the payment of, "assessments for special benefits." Art. VII, § 6(a), Art. X, § 4(a), *Fla. Const.* Similarly, though the millage caps of Article VII, § 9(b) apply to ad valorem taxes, there is no cap on the amount of assessments for special benefits. *Lake Howell Water & Reclamation Dist. v. State*, 268 So.2d 897, 899 (Fla. 1972).

Thus, unless local governments' attempts to use special assessments are closely scrutinized and kept uncompromisingly within the intended constitutional channel, the proliferation of charges spuriously called "special assessments" will rapidly erode the protection of homestead property, and the millage limitations on local government taxing and spending powers, embodied in the

Florida Constitution and intended by the Constitution's framers. By using special assessments for general governmental services that provide no special benefit, the funding for which are thus constitutionally intended to be subject to ad valorem millage limits and homestead protections, local governments evade these constitutional limitations. Local governments will thus be able to use millage saved by that device for other governmental programs without engaging in the balancing of priorities among competing governmental services, and between the provision of services and the burden of taxation, that the Constitution contemplates.

B. THE COURTS MUST RIGOROUSLY SCRUTINIZE LOCAL GOVERNMENT SPECIAL ASSESSMENTS TO ENSURE THAT SUCH POWER IS EXERCISED WITHIN CONSTITUTIONAL CHANNELS

This Court has long appreciated that, without the most rigorous judicial scrutiny, local governments' attempts to use special assessments as a funding source will inevitably demolish the taxpayers' shields in the Florida Constitution. In *Fisher v. Board of County Commissioners of Dade County*, 84 So.2d 572 (Fla. 1956), this Court evaluated whether an assessment for street lighting and the paving and repairing of streets was a proper special assessment. In holding the special assessment invalid, this Court specifically noted the tendency for use of special assessments to erode constitutional homestead protections:

> It is perfectly obvious from an examination of the record that [this special assessment] presents an effort to avoid the homestead tax exemption provisions of Section 7, Article X,

> of the Florida Constitution. . . .[2]
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> * * *
>
> When we subject the proposed "assessment" suggested by this record to the test announced by the precedents, we cannot avoid the conclusion that it is purely and simply an ad valorem tax and that it lacks all the elements of an "assessment for special benefits" within the contemplation of the constitutional provision that permits such a levy against homesteads. . . .

Id. at 576-577. *Fisher* also noted that the misuse of special assessments could destroy the constitutional limitations upon local government's powers to issue bonds. *Id.* at 578-579.

In an analogous context, this Court has recently reiterated that courts must be vigilant about the mischaracterization of charges other than taxes, to prevent local governments from avoiding constitutional limitations on taxation. In *State of Florida v. City of Port Orange*, 19 Fla.L.Weekly S563 (Fla. 1994)(*"City of Port Orange"*), this Court faced the question of whether a so-called "transportation utility fee" was properly a "user fee," which the city could legitimately impose and collect, or not. The Court noted that legitimate user fees must be in "exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society," *Id.* at S563, a test functionally equivalent to the first prong "special benefit" requirement for special assessments. The Court held that "the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax." *Id.* at S563.

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[2]*See now* Art. X, § 4, *Fla. Const.*

The Court specifically held that constitutional limitations upon taxation cannot be evaded by improperly mischaracterizing the nature of the charge imposed:

> Finally, we recognize the revenue pressures upon the municipalities and all levels of government in Florida. We understand that this is a creative effort in response to the need for revenue. However, in Florida's Constitution, the voters have placed a limit on ad valorem millage available to municipalities, art. VII, § 9, Fla. Const.; made homesteads exempt from taxation up to minimum limits, art. VII, § 9, Fla. Const.; and exempted from levy those homesteads specifically delineated in article X, section 4 of the Florida Constitution. These constitutional provisions cannot be circumvented by such creativity.

Id. at S564. These same constitutional limitations--ad valorem millage limits and homestead protections--are equally in danger of being improperly circumvented through the funding of governmental services through improper special assessments.

II. TO BE A VALID SPECIAL ASSESSMENT, THE PROPERTIES TO BE ASSESSED MUST BE BENEFITTED IN SOME MANNER DISTINCT FROM THE MANNER IN WHICH ALL PROPERTIES IN THE COMMUNITY ARE BENEFITTED

Sarasota County argues that its storm water assessment provides various benefits to the assessed properties, and thus provides a "special benefit." Sarasota County relies heavily upon cases which the county contends demonstrate that fire protection and solid waste management provide a "special benefit" sufficient to support a special assessment.

Sarasota County ignores the fact that where this Court has squarely faced first prong, "special benefit" issues concerning "special assessments" for fire protection and solid waste

management, it has found that such services do not provide the requisite special benefit for constitutional validity. Nor does Sarasota County discuss this Court's prior decisions clearly establishing that the benefits sufficient to form a "special benefit" for special assessment purposes must be a peculiar benefit, different in character from the benefit accruing to all properties in the community generally.

In *City of Ft. Myers v. State*, 117 So. 97, 104 (Fla. 1928), this Court specifically held that the "special benefit" sufficient to support a special assessment must be different from the benefit accruing to the community generally:

> The fair and just foundation on which special assessments for local improvements rest is special benefits accruing to the property benefitted; that is to say, benefits received by it in addition to those received by the community at large.

Accord, *Atlantic Coast Line R.Co. v. City of Lakeland*, 115 So. 669, 683-684 (Fla. 1928) (Smith, J., concurring) (the special benefit must be a "special or peculiar benefit differing materially and substantially from the benefits flowing to the public generally," and must be "over and beyond the general benefit to the community").

In *St. Lucie County - Fort Pierce Fire Prevention & Control Dist. v. Higgs*, 141 So.2d 744, 746 (Fla. 1962) ("*Higgs*"), this Court held that fire service did not provide the constitutionally required "special benefit" necessary to support a special assessment and avoid constitutional homestead protections:

> We agree with the learned circuit judge that the levy is a tax and not a special assessment for the reason he gave, namely, that no parcel of land was *specially* or peculiarly benefitted in proportion to its value, but that the tax was a general one on all property in the district for the benefit of all. Our view harmonizing with that of the circuit judge, it follows that we also accept his conclusion that the first $5000. of each homestead is exempt because only in the case of special assessments could it be reached. [emphasis added, italics in original]

Similarly, in addressing a garbage "special assessment" and its imposition upon homestead property in *City of Ft. Lauderdale v. Carter*, 71 So.2d 260 (Fla. 1954) ("*Carter*"), this Court invalidated a charge on homestead property for solid waste collection:

> Mrs. Carter brought suit against the city to enjoin the imposition and collection of the tax [for garbage collection] against her property, on the ground that homestead property is exempt from such taxation. The city defended the suit on the theory that the tax imposed amounted to an "assessment for special benefits" as to which homestead property is not exempt.
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> * * * *
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> . . . [N]o special or peculiar benefit results to any specified portion of the community or the property situated therein. It seems clear, therefore, that the charge levied against all real and personal property in the city is a general tax imposed for the support of the government and not an assessment against particular properties for special benefits. The levy, therefore, is without constitutional authority insofar as it applies to homestead property.

Id. at 261 (citations omitted; emphasis added).

Thus, when squarely presented with the issue of whether a charge for fire protection or solid waste collection provides the special benefit sufficient to avoid constitutional taxpayer

protections, the Court's answer has been a clear "no," because such services do not provide a special or peculiar benefit to property different from that enjoyed by the community generally. Similarly, the Court ruled that county health services may not be funded by special assessments, *Whisnant v. Stringfellow*, 50 So.2d 885, 885-86 (Fla. 1951)[3], and that county hospital operations can not be funded by special assessments, *Crowder v. Phillips*, 1 So.2d 629, 631 (Fla. 1941),[4] because such services provide a general community benefit and not a specific benefit peculiar to assessed properties.

Sarasota County relies upon *Fire District Number 1 of Polk County v. Jenkins*, 221 So.2d 740 (Fla. 1969) ("*Jenkins*"), for the proposition that fire insurance protection provides a special benefit and that a reduction in insurance premiums constitutes a special benefit. However, this Court did not overrule *Higgs* in

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[3] "A county health unit is the source of benefits to all the people of the county. It is, in fact, as much 'a current governmental need' and 'as essential to the public welfare as police protection, education or any other function of local government.' State v. Florida State Improvement Commission, Fla., 48 So.2d 165, 166. But there would appear to be no 'special or peculiar benefit' to the real property located in the county by reason of its establishment--no 'logical relationship' between its establishment and the improvement of the real estate situated in the county. It benefits everyone in the county, regardless of their status as property owners. It is a 'governmental need' for which the taxing power of the county may be obligated." (Emphasis added).

[4] The court there noted that the purpose of a hospital is to provide hospital care to all:

> "[W]hether they be the owners of property or not, and such advantages cannot fall in the category of special benefits to real property for which assessments would be authorized."

(Emphasis added).

Jenkins, and was not faced in *Jenkins* with first prong special benefit issues, as it was in *Higgs*. In *Jenkins*, the issue was whether "the special assessment . . . . violated Article IX, Section 13 of the Florida Constitution, F.S.A., relating to assessment of mobile home spaces and that the Act in its application to mobile home parks was arbitrary, confiscatory, discriminatory and disproportionate." *Id.* at 741.

Jenkins did not present this Court with the constitutional policies underlying the special benefit requirement for special assessments. The issue of circumvention of constitutional millage cap limitations by employing an improper special assessment did not arise in *Jenkins* because *Jenkins* dealt with time periods before the adoption of the 1968 Florida Constitution, which imposed a broad cap on millages for general county and city operations for the first time. Art. VII, § 9(b), *Fla. Const.* (1968). The only millage limitation in the 1885 constitution was for county school taxes. 26A *Fla. Stat. Ann.* p. 143-144 (Comment).

Nor did *Jenkins* deal with the question of whether a fire assessment contravened constitutional homestead protection, since the sole plaintiff was a commercial business owner. *Jenkins*, *supra*, 221 So. 2d at 741. Thus, *Jenkins* was concerned with the second prong of the test for a valid special assessment (whether the particular method of apportionment is arbitrary or capricious in relation to the benefit bestowed), not the first prong (whether the benefit is so special or peculiar, in the constitutional sense, that it will support funding by special assessment at all).

Sarasota County also relies upon *South Trail Fire Control Dist. v. State*, 273 So.2d 380 (Fla. 1973) ["*South Trail*"], for the proposition that fire protection provides a special benefit. However, once again, *South Trail* decided only second prong fair apportionment issues, not first prong special benefit issues. The only plaintiffs in *South Trail* were owners of commercial property, *Id.* at 382, and thus had no standing to raise the issue of infringement of homestead exemption by the special assessment. They could have raised the issue that a fire protection special assessment circumvents the millage cap provisions of Article VII, section 9(b), Florida Constitution, but instead presented only the issue of arbitrary apportionment.[5] Thus, the entire discussion in *South Trail* centers upon the second prong of the constitutional test, the fairness of the apportionment, and not on the first prong issue of special benefit.

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[5]At page 382, the Court specified the issues presented in *South Trail* as follows:

> The Owners submit the following question in their brief: "Whether a determination of benefits accruing to business and commercial property by the Legislature is constitutional when the property is assessed on an area basis and all other property in the tax district is assessed at a flat rate basis and the evidence shows that the special assessments paid by business and commercial property as a result are discriminatory when compared with other property."
>
> The Owners say the primary question is one of discrimination in that business and commercial property owners were paying 17.2% of the total assessments, while the value of their property was only 10.8% of all of the property in the district and they receive only 6% of the actual services of the district.

Sarasota County places great reliance upon its theory that the challenged storm water management assessment is similar to solid waste management assessments which allegedly were found to provide a special benefit in *Charlotte County v. Fiske*, 350 So.2d 578 (Fla. 2d DCA 1977) ("*Fiske*"), and *Gleason v. Dade County*, 174 So. 2d 466 (Fla. 3d DCA 1965) ("*Gleason*"). However, as with *South Trail* and *Jenkins*, *Fiske* and *Gleason* did not address first prong special benefit issues.

In *Fiske*, the court framed the issues as follows:

> Plaintiffs/appellees, owners of the residences assessed, brought this action to void the ordinance. They prevailed, the trial court having found: (1) that there is no rational basis for distinguishing the properties subject to the assessment and those not; (2) that some of the properties especially benefitted by the assessment are not subject to the assessment; (3) that the ordinance imposes special assessments without construction of any public improvement from the levy; and (4) that the ordinance does not require that the amount of the assessment equal or approximate the benefit.

350 So.2d at 580. None of the issues raised by the *Fiske* taxpayers are "first prong" special benefit issues. If *Fiske* were indeed a "first prong" special benefit case, then this Court's decision in *Carter*, *supra*, would have controlled and required an result opposite to that reached in *Fiske*.

As for *Gleason*, it merely decided that a recorded county lien for garbage fees was superior to a mortgage lien, by virtue of statute. The *Gleason* court specifically remarked that it was deciding no constitutional issue. *Gleason*, 174 So. 2d at 467. Thus, the issue of whether a charge for garbage collection would

support a constitutionally valid special assessment against homestead property simply was not decided in *Gleason*.

Thus, Sarasota County's attempts to bolster its arguments by alleging that Florida cases have held that fire protection and solid waste management provide a special benefit will not bear close scrutiny. The cases Sarasota County cites addressed second prong fair apportionment issues, not first prong special benefit issues. In none of these cases were the courts squarely faced with first prong special benefit issues and the constitutional policies behind the special benefit requirement. Where this Court has squarely faced the special benefit requirements and its underlying constitutional polices, it has held, in *Higgs* and *Carter*, that fire protection and solid waste management do not provide a special benefit.

In evaluating the "special benefits" that Sarasota County claims are provided to assessed properties by the county's provision of storm water management services, the Court should carefully evaluate whether these benefits are, as required by this Court's prior decisions, materially distinct and in addition to the benefits flowing to the public at large. Any governmental service provides a benefit to the community, else there would be no reason to provide the service. However, if this community benefit were sufficient for a special assessment, then the Florida Constitution's taxpayer protections would be completely eviscerated through the use of special assessments to fund government programs.

III. THE STANDARD OF REVIEW WHICH SARASOTA COUNTY SUGGESTS IS NOT SUPPORTED IN FLORIDA LAW AND, IF ADOPTED, WOULD EVISCERATE THE FLORIDA CONSTITUTION'S TAXPAYER PROTECTIONS

Sarasota County argues that "the determination of the existence and extent of special benefits is a question of legislative fact and is conclusive on all property owners in the absence of a clear and full showing of arbitrary action or a plain abuse." Sarasota County thus argues that a local government's finding of special benefit can only be overturned if a court finds that the local government acted arbitrarily or that the local government's actions were a plain abuse.

This is not the law; nor should it be. In making this argument, Sarasota County cites language in Florida cases which addresses the discretion to be given to legislative apportionment of assessments among properties, i.e., the second prong test for special benefit. Such deference is not accorded in determining the first prong issue whether a special assessment provides a special benefit distinct from that enjoyed by the community generally. To cede such deference to local governments on the question of whether a special benefit exists would eviscerate courts' ability to effectively enforce the Florida Constitution's taxpayer protections.

Sarasota County quotes extensively from *South Trail* for the alleged proposition that a legislative determination of special benefit is well-nigh conclusive on the courts. However, as shown above, *South Trail* involved only second prong fair apportionment issues, not first prong special benefit issues. In the passages

from *South Trail* quoted by Sarasota County, the Court addressed the second prong issue of fair apportionment of benefits, not whether a special benefit existed.

Significantly, Sarasota County does not bring to the Court's attention the completion of the quotation in *South Trail* from 48 Am.Jur. *Special or Local Assessments,* § 29, pp. 588-589, which clearly indicates that the deference to legislative discretion is significantly more limited when the question is whether a special benefit exists at all:

> [The legislature] cannot by its fiat make a local improvement of that which in its essence is not such an improvement, and it cannot by its fiat make a special benefit to sustain a special assessment where there is no special benefit.

South Trail, supra, at 383.

Sarasota County also cites *Martin v. Dade Muck Land Co.,* 95 Fla. 530, 116 So. 449 (Fla. 1928) ("*Martin*"), *appeal dismissed sub nom. M.B. Garris Properties v. Martin,* 278 U.S. 560, 49 S.Ct. 25, 73 L.Ed. 505 (1928), in arguing for a weakened standard of review for first prong special benefit issues. However, while *Martin* uses the terminology "special assessment," *in context Martin* actually addresses the issue of whether an additional ad valorem tax could be imposed within the confines of a multi-county special taxing district. In *Martin*, the Court framed the issue thusly:

> The controversy here does not relate to an assessment against abutting property to pay for a street improvement that should be a special, peculiar, and direct benefit to the abutting property at least equal to the assessment. But <u>the contest is as to an ad valorem assessment</u> upon all the lands in a

> taxing district formed by statute to provide for a public improvement that is a general and common benefit to the district as an entirety. For a general, common, public benefit to a taxing unit as a whole, lands in the taxing unit may be reasonably assessed by legislative authority, even though the lands as such are not immediately or directly benefitted, when the assessment is not an abuse of authority.

Id. at 466-467 [emphasis added]. Thus, the language on which Sarasota County relies in *Martin* was used in the context of a discussion of the legislature's discretion in determining whether lands in a particular district are generally benefitted by certain governmental services, such that an ad valorem tax for general governmental benefits could be imposed, and not in the context of determining whether particular properties are specially benefitted in ways that would justify a special assessment.[6]

Similarly, *Atlantic Coast Line R. Co. v. City of Gainesville*, 83 Fla. 275, 91 So. 118 (Fla. 1922) ("*Atlantic Coast*")involved second prong fair apportionment issues and not first prong special benefit issues. In *Atlantic Coast*, the Court was faced with assessments for street paving. As the Court noted, with street paving abutting properties are presumed to be specially benefitted. *Id.* at 121. Thus, the issue in *Atlantic Coast* was not whether the governmental service involved a special benefit, but how to

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[6]It should be noted that *Martin* was decided during the time that Article X, Section 7 of the 1885 Constitution, providing the homestead exemption, excluded from this exemption "special assessments for benefits." However, as noted by this Court in *Fisher v. Board of County Commissioners of Dade County*, 84 So. 2d 572, 576 (Fla. 1956), in 1938 this language was changed to "assessments for special benefits," and subsequent cases regarding special assessments must be measured by "the standard established in the Constitution as now written." *Id.*

apportion that benefit among properties.

Furthermore, it should be noted that in *Atlantic Coast* the Court struck down the assessment as to the plaintiff railroad, specifically holding that, when the property assessed is not abutting and thus not eligible for the presumption of special benefit, evidence of special benefit accruing to the property assessed must be presented if the assessment is to be upheld:

> Property other than that abutting on an improved street cannot be made to bear a portion of the cost of the improvements of such street, exclusive of the general tax which it pays as part of the general public, unless it is made to appear that it derives some benefit proportionate to the amount assessed against it.

Id. at 123 [emphasis added].

In contrast to the cases the county relies on, when this Court has squarely faced first prong special benefit issues, in the cases implicating the constitutional policies discussed above, this Court has ruled that legislative determinations of special benefit are not conclusive and should be rigorously examined by the Courts. In *Fisher v. Board of County Commissioners of Dade County*, 84 So. 2d 572 (Fla. 1956), this Court faced a special assessment which it characterized as "an effort to avoid the homestead tax exemption provisions . . . of the Florida Constitution." *Id.* at 576. This Court held that the existence of a special benefit is a fact to be ascertained as any other fact and is not reposed in the judgment of local officials, *Id.*, and clearly stated that the courts must independently scrutinize claims of special benefit:

> "[S]pecial benefits" must be made to appear

> and there must be adequate factual data in the record to support the conclusion that the homesteads involved have received the peculiar special benefits charged against them as required by our Constitution.

Id. at 579. Without such judicial review, this Court held, constitutional limitations could be avoided by "the simple expedient of declaring all property in a municipality or other taxing unit to be 'benefitted' by a proposed improvement." *Id.* at 579-580.

Sarasota County confuses second prong fair apportionment analysis and first prong special benefit analysis, and thereby misstates the law. In determining whether a governmental service provides a special benefit--i.e., a benefit to assessed properties distinct from the benefit provided to the public generally--the courts do, and must, employ careful scrutiny to ensure that local governments do not improperly use special assessments to avoid the Florida Constitution's taxpayer protections. The standard of review suggested by Sarasota County would eviscerate the ability of Florida courts to ensure that local governments do not exceed constitutional limitations.

IV. DUE PROCESS REQUIRES THAT SPECIAL ASSESSMENTS IMPOSED AND COLLECTED CONTRARY TO THE REQUIREMENTS OF THE FLORIDA CONSTITUTION BE REFUNDED TO TAXPAYERS WHO BRING ACTIONS WITHIN THE APPLICABLE STATUTE OF LIMITATIONS FOR REFUNDS.

The notion that the states are free to provide "prospective only" relief to taxpayers in cases challenging the constitutionality of a tax or assessment exacted under a coercive collection scheme has long been held contrary to due process requirements. Any lingering debate on the subject was ended by

McKesson Corp. v. Division of Alcoholic Bev. & Tobacco, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990) ("*McKesson*") and *Reich v. Collins*, ___ U.S. ___, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994) ("*Reich*").

McKesson reaffirmed the analysis and holdings of a long line of cases, reaching back to *Ward v. Love County*, 253 U.S. 17, 40 S.Ct 419, 64 L.Ed. 751 (1920), that the states may not deny refunds to taxpayers who successfully challenge a state's constitutional authority to impose an assessment paid under a coercive collection scheme. To deny a refund in those circumstances is an abridgment of due process of law, since exercising such power is a taking of property. *McKesson, supra; see also Reich, supra.*

Florida's method of imposing and collecting special assessments, such as that at issue here, is of the coercive nature which requires the county and the state to afford taxpayers a refund. Florida has constructed a scheme which clearly favors the "'pay first and litigate later'" model. *Reich, supra*, 115 S.Ct. at 551. If the taxpayer does not timely pay the special assessment, he is subjected to a high interest rate for late payment, and his property is placed in jeopardy of alienation to satisfy the special assessment through the extra-judicial process of issuing tax sale certificates and tax deeds. §§ 197.172, 197.3632, 197.432, 197.472, 197.502, 197.542, 197.552, 197.562, *Fla. Stat.* Other limitations and penalties apply to force the timely payment of such assessments. § 197.192, *Fla. Stat.* (no subdividing until paid).

The county is not required to bring an action to impose or enforce the lien. In order to obtain relief, such as enjoining the issuance of a tax deed, the taxpayer must post a bond equal to the amount of disputed tax, interest, and anticipated litigation expenses. *Fla.R.Civ.P* 1.610. This is precisely the sort of duress for which due process of law demands that the state and county extend a post-payment remedy to taxpayers which encompasses retroactive relief - a refund of unconstitutionally collected taxes or assessments. *McKesson, supra*, at 110 S.Ct. 2251, n. 21.[7] *See also Department*

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[7]*McKesson* dealt with an infirmity which was not a constitutional prohibition against the tax, but instead was discrimination against interstate commerce in the manner of taxation. *McKesson*, however, explicitly reaffirmed the holdings of earlier cases that where a tax or assessment is constitutionally prohibited, due process requires a refund of the illegal exaction, without exception:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, ... or because the taxpayers were absolutely immune from the tax, ... no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress.

McKesson, supra, at 110 S.Ct. 2251. The exaction here is completely outside of the county's power to impose if, as the taxpayers contend, no special benefit to assessed properties obtains. To allow a special assessment under those circumstances circumvents not only statutory tax exemptions, but also the millage caps imposed by the Florida Constitution on local governments, and homestead protection. *E.g., State v. City of Port Orange, supra; Carter, supra; Higgs, supra*. Taxpayers are immune, by virtue of the Florida Constitution, from such improper special assessments.

of Revenue v. Kuhnlein, 646 So. 2d 717, 19 Fla. L. Weekly S467 (Fla. Sept. 29, 1994).[8]

We note that the cases considering such due process constraints on the states and their counties have usually arisen where the infirmity in a tax or assessment was a violation of the federal constitution. It is of no consequence, however, that the prohibition against imposing a special assessment arises in this case from Florida's Constitution. Property interests, the expectancies which the Due Process Clause of the 14th Amendment protects, usually arise from and are defined, in the first instance, by state law. *E.g., James v. City of St. Petersburg*, 33 F.3d 1304, 1306 (11th Cir. 1994). The property interest here, immunity from alienation for taxes and liens beyond defined limits, has been judged so important by Floridians that it is enshrined in provisions of the Florida Constitution (the millage caps and homestead exemption provisions) so that neither the state nor its political subdivisions, the counties, may abridge it.

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[8]In a supplement to its *Kuhnlein* opinion, this Court recognized that *McKesson* in some circumstances allows a taxing authority to attempt to fashion a retroactive remedy other than a refund for taxes declared discriminatory under the Commerce Clause. *Department of Revenue v. Kuhnlein*, 20 Fla.L.Weekly S5 (Fla. November 30, 1994), *pet. for cert. filed*, 63 USLW 3660 (Feb 27, 1995). However, the issue here is not whether a taxing authority has enacted a tax that illegally discriminates between taxpayers in violation of the Commerce Clause, but rather whether the taxing authority has enacted a special assessment in excess of its constitutional authority. As discussed in footnote 7, *supra*, *McKesson* reaffirms that refunds are always required where the exaction was enacted in excess of the county's authority and where taxpayers are subject to duress with regard to payment.

Those Florida constitutional provisions indisputably create property interests protected by the Due Process Clause of the 14th Amendment.[9] *E.g., James v. City of St. Petersburg, supra.* Due process protections are invoked by creating such property interests, and the state and its political subdivisions must comply with federal commands under the 14th Amendment in dealing with those property interests. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *See also Atkins v. Parker*, 472 U.S. 115, 105 S.Ct. 2520; 86 L.Ed.2d 81 (1985). The state may not deprive a taxpayer of due process protection by denying him the retrospective refund remedy due process demands when assessments wrongfully encroaching on the property interest are imposed by coercive means. *McKesson, supra.* In sum, it makes no difference whether the property interest is created by federal law or by state law. Once the protected interest is brought into being, the Due Process Clause of the 14th Amendment controls the state and the county in dealing with it.

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[9]So does the ad valorem tax exemption extended by statute to the churches. The viability of that exemption is necessarily premised upon the underlying constitutional limitation that the county will not misapply its special assessment power, thereby evading the exemption. Moreover, the churches, in common with all property owners in the county, enjoy the constitutional protection of millage caps under Art. VII, § (9)(b), of the Florida Constitution, protection which the county evades simultaneously with its evasion of the churches' statutory exemption, in improperly employing the special assessment power.

V. THE SO-CALLED "NON-RETROACTIVITY" DOCTRINE CANNOT BE APPLIED AS A DEVICE TO AVOID REFUNDS WHERE THE COUNTY HAS COLLECTED UNCONSTITUTIONAL ASSESSMENTS UNDER DURESS, SINCE TO EMPLOY SUCH A DEVICE WOULD RESULT IN A VIOLATION OF DUE PROCESS.

In recent years, several states have attempted to avoid refunding taxes or assessments exacted unconstitutionally. Those efforts have been rebuffed. *See McKesson, supra; Reich, supra; see also Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). Prominent among those efforts has been the incorrect application of the so-called "non-retroactivity" doctrine, through which a number of states have attempted to declare a particular taxing statute or ordinance unconstitutional, but to limit that declaration so that it lacks retroactive effect.

Those attempts have been rejected. Florida engaged in such a non-retroactive declaration in *McKesson*. *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 524 So.2d 1000 (Fla. 1988). Noting that Florida's collection scheme placed *McKesson* under duress to pay the unconstitutional tax, the United States Supreme Court held that due process required a retroactive remedy. The court held that, in the face of such coercive means of collection, the state could not avoid the due process obligation to provide the taxpayer with retrospective relief on the notion that the state collected the tax in good faith reliance on a presumptively valid statute.[10] *McKesson, supra*.

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[10]Ultimately, the state granted McKesson Corporation a refund, after the trial court on remand determined that curing the discrimination which infected that tax by retroactively taxing McKesson's competing distributors did not comport with due process

As the United States Supreme Court observed in *McKesson*, the state may resort to a number of means to soften the impact of providing refunds of unconstitutional assessments or taxes. It may impose relatively short statutes of limitations on actions seeking the refund of assessments.[11] It may make statutory provision for the pay-out of refunds over time, to allow for financial planning where necessary. *McKesson, supra*, at 110 S.Ct. 2254. But the state and the county may not do what the county argues for here: both impose an unconstitutional special assessment by a coercive collection scheme and then deny refunds on the theory that the assessments were collected in "good faith reliance" on a presumptively valid statute or ordinance. That combination denies taxpayers the due process of law guaranteed them by the 14th Amendment to the United States Constitution. *McKesson, supra.*

VI. THIS CASE PRESENTS NO OCCASION FOR A NON-RETROACTIVE RULING, IN ANY EVENT.

Even if the teachings of *McKesson* and its progeny could be disregarded, this case offers no occasion for positing a forward-looking-only declaration of unconstitutionality. In the sequence of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct.

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guarantees against retroactive taxation as to the competing distributors. *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, Case nos. 86-2997, 92-1200 (*McKesson II*)(unreported decision dated March 4, 1993) (App. 1 to this Brief), *aff'd on other grounds, Division of Alcoholic Bev. & Tobacco v. McKesson Corp.*, 643 So.2d 16 (Fla. 1st DCA 1994), *rehearing denied* (Oct. 31, 1994), *pet. for cert. filed*, 63 USLW 3672 (March 1, 1995).

[11]For example, the state has enacted a short limitation period for refund actions pertaining to state-imposed taxes. §§ 215.26, 72.011, *Fla. Stat.*

2439, 115 L.Ed.2d 481 (1991) and *Harper v. Virginia Dep't of Taxation*, ___ U.S.___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), the United States Supreme Court has come to recognize that the federal experiment with non-retroactive judicial decisions, an idea which came into being only recently in the history of jurisprudence, was ill-conceived in large part. The court restored to federal jurisprudence the "general rule of retrospective effect for the constitutional decisions of" the court, noting the "fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.'" *Harper v. Virginia Dep't of Taxation, supra,* at 113 S.Ct 2516, *quoting Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed.228 (1910) (Holmes J., dissenting), and *quoting Robinson v. Neill*, 409 U.S. 505, 507, 93 S.Ct. 876, 877, 35 L.Ed.2d 29 (1973). Whatever the remaining viability of the experiment, sound jurisprudence rejects it as a doctrine to be casually employed in constitutional jurisprudence. That court's current view is consistent with the views enunciated by Florida's appellate courts. *E.g., Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978).

The doctrine, at its genesis, was to be employed only in those cases where a decision was wholly unanticipated and unforeshadowed, such as where a decision overruled firmly established precedent. *E.g., Harper v. Virginia Dep't of Taxation, supra.* It was never intended to extend to the case where no unforeseen and radical shift in jurisprudence takes place as a result of applying constitutional principles to the facts of a particular action.

E.g., McKesson, supra. In sum, it was never intended, even in its federal heyday, to apply in cases such as this.

As we showed in Sections I-III of this brief, the constitutional principles governing limits of special assessments have long been well established by the jurisprudence of this Court and the other courts of this state. It has been the long-held and consistent view of this Court that, in order to guard the Florida Constitution's taxpayer protections, a special assessment must be accompanied by a truly special benefit, and that a benefit which inures to the citizens and property owners generally within a county from the provision of some governmental service or function is insufficient to support the funding of that governmental service through a special assessment. *Higgs, supra; Carter, supra; Fisher, supra; City of Port Orange, supra*. *See also Hanna v. City of Palm Bay*, 579 So.2d 320 (Fla. 5th DCA 1991). It has been the long-held view of this Court that local governments may not pretermit independent judicial inquiry into the existence of the constitutionally required special benefit by quasi-legislative fiat. *Fisher, supra*. And it has been the consistent view of this Court that creative attempts to circumvent the protections extended to taxpayers by the millage caps on local government and the homestead exemption clauses will not be countenanced. *E.g., City of Port Orange, supra*.

The decision below presents no novel question of law, and certainly did not overrule firmly entrenched precedents and establish a new and unforeshadowed rule. This case merely calls

upon the Court to survey the line of cases we discussed above and apply those precedents to the facts of record here. Either the county has demonstrated through admissible and probative evidence that its storm water management program truly provides a special benefit to properties assessed, a benefit different in kind and degree from the benefits bestowed on the county generally by the program; or the county has failed to do so. If the first, then this special assessment is constitutional; if the second, then it is unconstitutional, and the County must resort to other constitutional funding means, such as ad valorem taxes.

The county's attempt to shoehorn this case into *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973) is misplaced. *Gulesian* involved peculiar factual circumstances not present here. In *Gulesian*, the United States District Court had stricken Article VII, Section (9)(b) of the Florida Constitution because it limited millage elections to freeholders. *Id.* at 327. That court found the freeholder limitation inseparable from the remainder of the provision and struck down Article VII, Section (9)(b) in its entirety. *Id.*

In response to the District Court's ruling, the Florida Legislature passed Chapter 71-263, amending section 236.25, Florida Statutes, to statutorily reinstate the 10 mil cap. However, the amended section 236.25 provided that the 10 mil cap could be exceeded for certain specified purposes. *Id.* There was thus at that time no effective Florida constitutional limitation on ad valorem millage.

Acting in reliance on amended section 236.25, the Dade County School Board imposed in excess of 10 mils, for a purpose for which amended section 236.25 authorized. This levy was collected. Afterwards, the United States Fifth Circuit Court of Appeals, on appeal from the ruling of the United States District Court, found that the offending language regarding freeholder elections in Florida Constitution Article VII, Section 9(b) could be severed and the remainder of Article VII, Section 9(b), including the 10 mil cap, remained valid. *Id.*

Thus, in *Gulesian*, this Court was faced with determining whether a refund would be ordered where the levy was, at the time made, in strict compliance with statutory authority and not in violation of any existing constitutional restriction on the taxing power. The Florida Constitutional provision prohibiting millage exactions above 10 mils was only later reinstated by the decision of the Fifth Circuit Court of Appeals. On these unique and remarkable facts, the *Gulesian* Court resorted to equitable considerations for the purpose of determining whether the declaration of invalidity of the tax levy, caused by the decision of the Fifth Circuit which reinstated the constitutional cap on millage, should be applied retroactively to require a refund. *Id.*

Here, unlike *Gulesian*, the county cannot point to such remarkable and unique facts. There was no judicial excision or suspension of Florida's constitutional limits on the county's power to impose special assessments when the assessments were levied. For the entire time these assessments have been imposed, the

Florida Constitution's limitations on valid special assessments have been in force and effect.

The narrow scope of the refund exception allowed by *Gulesian* was recognized in *Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978). In *Coe*, the court stated: "[W]e believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment. We construe the Supreme Court's ruling in *Gulesian* to have carved out a very narrow exception to the taxpayer's right to a refund." *Id.* at 216 [footnote omitted]. After stating the facts of *Gulesian*, the *Coe* court found that "[in *Gulesian*] [i]t is clear that the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature. A better case of good faith would be hard to find." *Id.* As for significant hardship, the *Coe* court held that "[a] taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes," and rejected as a basis for denial of refund the fact that the taxes collected had already been spent by the taxing authority. *Id.* at 215-217. *Accord, McKesson, supra.* Similarly here, nothing prevents Sarasota County from refunding unconstitutional special assessments and replacing those funds through the proper exercise of its ad valorem taxing power.

CONCLUSION

For the reasons stated herein, Sarasota County's position should be rejected, and the determination below that the storm water management assessment is invalid should be affirmed, without limitation on the temporal effectiveness of the determination of invalidity.

Respectfully submitted,

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ATTORNEYS FOR AMICI CURIAE WATER OAK MANAGEMENT CORPORATION AND JOHN RICHARD SELLARS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **RICHARD E. NELSON**, **RICHARD L. SMITH** and **MICHAEL S. DREWS**, Nelson, Hesse, Cyril, Smith, Widman, Herb, Causey & Dooley, 2070 Ringling Boulevard, Sarasota, Florida 34237; **STEPHEN F. ELLIS**, 1800 Second Street, Suite 806, Sarasota, Florida 34236; and **I. W. WHITESELL, JR.**, 1605 Main Street, Suite 705, Sarasota, Florida 34236, this 12TH day of April, 1995.

DANIEL C. BROWN

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IN THE SUPREME COURT OF FLORIDA

SARASOTA COUNTY,

Petitioner,

v.

CASE NO. 84,414
(DCA No. 93-01902)

SARASOTA CHURCH OF CHRIST, INC., et al.,

Respondents.

_____/

APPENDIX

1. Partial Summary Judgment, *McKesson Corporation, et al. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida*, Leon County Circuit Court, Case No. 86-2997

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

McKESSON CORPORATION, et al.,

Plaintiffs,

vs.

CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, AND
OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,

Defendants.

FLORIDA WEST COAST BEVERAGE
DISTRIBUTORS, INC.,

Plaintiff,

vs.

CASE NO. 92-1200

DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO, DEPARTMENT OF
BUSINESS REGULATION, et al.,

Defendants.

PARTIAL SUMMARY JUDGMENT

Plaintiff, McKesson Corporation (McKesson), and several Intervenors seek summary judgment[1] against Defendants, Division of Alcoholic Beverages and Tobacco (DABT), Department of Business Regulation (DBR), and Office of the Comptroller, State of Florida. The Defendants filed a countervailing Motion for Summary Judgment. This Court has jurisdiction of this case pursuant to remand orders of the United States Supreme Court in McKesson Corporation v.

[1] McKesson did not file a formal motion for summary judgment under Rule 1.510 FRCP. However, McKesson's filing is the functional equivalent of such motion and will be treated as such in the resolution of the issues herein.

Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) and the Florida Supreme Court in Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 574 So. 2d 114 (Fla. 1991).

HISTORY OF THE CASE

This action was originally brought by licensed wholesale distributors of alcoholic beverages doing business in Florida and a manufacturer of wine coolers based in California which sold its products to wholesalers in Florida for resale. Those distributors challenged the statutory taxing scheme contained in Florida Statute §§ 564.06 and 565.12 (1985). These provisions granted tax exemptions and preferences to alcoholic beverages, produced from agricultural crops which were grown in Florida, regardless of their point of manufacture. These provisions also disallowed tax exemptions and preferences to otherwise eligible beverages under certain circumstances.

McKesson and other distributors brought this case as a result of Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). In Bacchus, the United States Supreme Court struck down, as violative of the Commerce Clause, a Hawaiian excise tax exemption for alcoholic beverages produced from local or indigenous products of Hawaii. The Supreme Court found that the exemption discriminated in favor of locally produced products.

As a result of the decision of Bacchus, the Florida Legislature amended the law by enacting Florida Statute §§ 564.06 and 565.12 which granted exemptions to certain alcoholic beverages manufactured from Florida agricultural products and by-products.

This Court invalidated the 1985 taxing scheme as unconstitutional, relying on Bacchus, supra. The Court also denied retroactive relief sought by the licensed wholesale distributors. Although upheld by the Florida Supreme Court in Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So. 2d 1000 (Fla. 1988), the United States Supreme Court reversed the finding that the Plaintiffs had no right to retroactive relief. The case was remanded by the Supreme Court to give Florida an opportunity to devise a method to cure the impermissible discrimination visited upon McKesson by the invalidated statutes.

On November 18, 1991, pursuant to the remand orders, this Court held a hearing on McKesson's Motion to Set Schedule for Further Proceedings on Remand. At that hearing, the Court directed McKesson, Grantham Distributing Company, Inc., National Distributing Company, Inc., Ryals-Lee Sales Company, Inc., (et al), Southern Wine and Spirits of America, Inc., Standard Distributing Company, Inc., and Tampa Crown Distributors, Inc. (the Intervenors) to file within seventy-five days their memoranda challenging the constitutionality of the proposal by the Defendants to engage in retroactive taxation. The Court allowed appropriate time for the Defendants, McKesson, and the Intervenors to submit memoranda of law and any affidavits or other factual materials for consideration by the Court.

McKesson timely filed submissions challenging the constitutionality of the Defendants' proposal for a retroactive remedy. Thereafter, Grantham Distributing Company, Inc. filed a

Motion for Partial Summary Judgment challenging the constitutionality of Defendants' proposal for retroactive taxation, on its face and as applied. Thereafter, Southern Wine, Ryals-Lee, National Distributing, Standard Distributing, and Tampa Crown filed submissions challenging the constitutionality of Defendants' proposal for retroactive taxation.[2]

On April 6, 1992 this Court held a hearing on a motion by Florida West Coast Beverage Distributors, Inc. (FWCB) to consolidate Case No. 92-1200 with this case (86-2997). FWCB also filed a Motion to Amend its Complaint and to Set a Special Briefing Schedule. Over objection, the Court granted FWCB's Motion to Consolidate[3] and Motion to Set a Special Briefing Schedule and denied the Defendants' Motion to Strike portions of McKesson's previous submissions.

On April 22, 1992 Defendant DABT submitted an answer to FWCB's Complaint; DABT also submitted other documents, including their proposed emergency rules and other legal memoranda. Thereafter, FWCB likewise filed its challenge to the constitutionality of the retroactive taxation proposal devised by the Defendants, which this Court will treat as a motion for summary judgment.

On October 15, 1992, this Court held a final hearing on

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[2] Likewise, these submissions will be treated as motions for summary judgment. All these Intervenors moved ore tenus at the hearing for such treatment, without objection.

[3] The Florida Supreme Court having authorized the transfer of FWCB's rule challenge from DOAH to this Court in Department of Business Regulation, et al. v. Ruff, 592 So. 2d 668 (Fla. 1991).

all pending motions to determine the constitutionality of Florida's proposal for retroactive taxation in accord with the remand orders.

CONTENTIONS OF THE PARTIES

McKesson, and the Intervenors (including FWCB) contend that the remedial scheme as proposed by the Defendants is unconstitutional as violative of the Due Process Clause and Commerce Clause of the United States Constitution. Further, McKesson asserts that its only proper, constitutional remedy is a refund of the difference between the tax McKesson paid and the tax it would have been assessed had it been extended the same rate reductions received by its competitors.

Likewise, the Intervenors contend that the retroactive tax proposal of the Defendants violates their rights to due process, in that they were not given adequate notice as to the possibility of a retroactive taxation. They further urge that the proposal of the Defendants unconstitutionally interferes with their settled expectations as taxpayers; and that the retroactive taxation would be unconstitutionally confiscatory.

DABT and the other Defendants contend that the retroactive taxation proposal is not unconstitutional. In the alternative, these Defendants urge that the issue of McKesson's right to a refund is not ripe for this Court's determination; that the State of Florida should be allowed to test the Court's ruling on appeal; and that if the Court's ruling is affirmed, they be allowed to propose another remedy which may meet constitutional muster.

For the reasons discussed below, this Court finds that the proposed remedy is unconstitutional; that the Defendants should be allowed to propose all alternative remedies which may constitutionally, remediate McKesson; and that the Defendants should be required to propose alternative remedial schemes at this time, rather than after another round of appellate proceedings.

LEGAL ANALYSIS AND DECISION

Although counsel for McKesson in response to DABT's summary judgment motion, and for DABT at the hearing, urged that factual disputes prevented the Court from entering summary judgment, this Court specifically finds that there are no material facts in dispute; and the issues presented to the Court for resolution are purely matters of law.

In accord with the decisions of the United States Supreme Court and Florida Supreme Court, DABT and the other Defendants were given an opportunity to devise a method which would remedy the discriminatory tax previously invalidated by this Court and all reviewing courts. DABT promulgated emergency rules pursuant to Florida Statute § 120.54(9)(a).[4] The Court finds that these rules were promulgated by DABT in accordance with applicable law.

Under these rules, the Defendants propose to retroactively tax transactions of other distributors which occurred from July 1, 1985 through May 2, 1988. In 1985, the State represented to taxpayers that the only applicable rates for the favored products were the preferential rates in the applicable

[4] Emergency Rules 7E.R. 91-8, -9 and -10.

statutes. Taxpayers, including the Intervenors herein, who relied on Defendants' representations,[5] would not have entered into the transactions on the favored products if they could reasonably have anticipated that Defendants ultimately would attempt to engage in retroactive taxation of these transactions. In the case of Grantham Distributing Company, Inc., the assessment of retroactive taxes ($1.7 million) exceeds by many times over the amount of gross mark up received (approximately $75,000) from the distribution of the preferred products during the applicable period.

In the case of Standard Distributing Company, Inc., the retroactive tax sought approximates $250,000 and this taxpayer no longer does business in Florida.

The Defendants did not provide these taxpayers with timely and adequate notice concerning Defendants' proposal for retroactive taxation. The proposed taxation in this case would be unduly confiscatory, harsh and oppressive and would unconstitutionally interfere with settled expectations of taxpayers, such as Intervenors, inasmuch as Florida seeks to recover taxes for a retroactive period of more than five years. This Court has been unable to find any case which seeks to impose retroactive taxes for any period close to this.[6]

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[5] These representations were repeated in April 1987 by then DABT Director, Howard Rasmussen, in a letter to one or more distributors. (See Appendix A to Grantham's memorandum filed February 3, 1992.)

[6] The temporal limitation on such retroactive taxation was refined in Welch v. Henry, 305 U.S. 134 (1938). For a case invalidating a similar period of retroactivity for a distilled spirits tax see Kenistor v. Board, 407 N.E. 1275 (MASS 1980).

Further, the Court finds that Defendants proposed remedial scheme is unconstitutional under the Commerce Clause. Since the State of Florida will be unable to collect a significant percentage of retroactive taxes from certain taxpayers and businesses, the proposal for retroactive taxation would necessarily fail to impose a non-discriminatory tax burden on interstate commerce.

Since the State of Florida has failed in this remedial proposal to "create in hindsight a non-discriminatory scheme" as required by the Supreme Court in McKesson, supra, at 40, McKesson asserts that a tax refund is the only appropriate remedy; and that this remedy should be imposed by this Court at this time.

However, the Florida Supreme Court in Division of Alcoholic Beverages and Tobacco v. McKesson, 574 So. 2d 114, 116 (Fla. 1991) stated that in the event the retroactive assessment scheme did not meet constitutional muster, the State should then be allowed to offer an alternative remedy. This direction was reiterated in the Florida Supreme Court's Order of November 10, 1992 in Division of Alcoholic Beverages and Tobacco v. Davey, Case No. 80,740 (Fla. 1992) which denied DABT's Petition for Prohibition and Stay.

This Court must, however, reject Defendants' contention that it be allowed to exhaust all appellate rights in connection with this ruling before being required to propose an alternative remedy. If this course were followed, the resolution of this case would make Sisyphus appear to travel at the speed of light, in

comparison. The conservation of finite judicial resources and McKesson's right to justice without unreasonable delay would be compromised.

This Court finds it more reasonable and appropriate to allow DABT to propose any and all remedial schemes which it feels may comport with the requirements set forth by the United States Supreme Court in McKesson, supra, at 2252. Once this Court has an opportunity to rule on these alternative schemes,[7] then the entire matter may proceed to appellate review for final resolution. Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. The Emergency Rules promulgated by Defendant DABT are unconstitutional as they violate the Due Process Clause and the Commerce Clause of the United States Constitution. Therefore, the Motions for Summary Judgment filed by McKesson Corporation, Florida West Coast Beverage Distributors, Inc., and the other Intervenors, as to this issue are GRANTED.

2. McKesson Corporation's Motion for Summary Judgment on the issue of its entitlement to a refund as the sole constitutional remedy is DENIED.

3. Defendants', Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, Motion for Summary Judgment on the issue of the constitutionality of the proposed rules is DENIED.

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[7] The Court will reserve ruling on McKesson's contention that the U.S. Supreme Court has finally resolved the issue of whether or not a refund would present McKesson with a "windfall."

Defendants' request to make this Order a Final Judgment is likewise DENIED.

4. Within forty-five (45) days of this Order, the Defendants shall promulgate and file with this Court any and all plans, proposals and remedial schemes which may grant McKesson a constitutionally permissible remedy under McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

Within thirty (30) days from that filing, McKesson, and any adversely affected Intervenors, shall file with this Court all objections to Defendants' proposals. Thereafter, the Court will entertain Motions for Summary Judgment or Motions for Judgment on the Pleadings filed by any party within a reasonable time after their filing.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 4th day of March, 1993.

P. KEVIN DAVEY, CIRCUIT JUDGE

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