IN THE SUPREME COURT OF FLORIDA

DAVID KUHNLEIN and **SCOTT ENOS, BARBARA BLANCHARD, JOEL CURRAN,** and **KATHERINE CURRAN**, both individually and on behalf of all others similarly situated,

Appellants/Plaintiffs.

vs. Case No. 85,618

FLORIDA DEPARTMENT OF REVENUE; et al.,

Appelleess/Defendants,
_____/

ON APPEAL FROM A DECISION OF THE NINTH JUDICIAL CIRCUIT COURT, IN AND FOR ORANGE COUNTY, FLORIDA

APPELLEES' ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0337609

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5865
(904) 488-6589 (FAX)

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA LAW

CONSTITUTION

STATEMENT OF THE CASE AND FACTS

The Appellees accept the Statement of the Case and Facts as submitted by the Appellants with the exception of the following corrects and additions. Pursuant to Fla. R. App. P. 9.210(c), the Appellees hereby supplement Appellants' Statement of the case and Facts.

At the time of the commencement of the Appellants' action, the Appellants did not place any request for prejudgment interest in their Complaint (R: 10-21), Amended Complaint (R: 141-155) or their motion for summary judgment. (R:680-683 & 634-679) When the trial court issued its Final Summary Judgment for Class Plaintiffs on November 30, 1993 (R: 1522-1546), there was no mention of any award of prejudgment interest to the Appellants in that Final Order. At no time after the issuance of the "Final Summary Judgment" and the appeal of that decision did the Appellants make any request for prejudgment interest. Appellants filed no motion for rehearing, clarification or any other motion with the trial court seeking prejudgment interest. Appellants' first request for prejudgment interest occurred until December 8, 1994. (R: 1695-1699).

After Appellants made their requests for prejudgment and postjudgment interest, the Appellees filed a memorandum in opposition to the awarding of interest in any form. (R: 1848-1881) On February 10, 1995, the trial court held a joint hearing on prejudgment and postjudgment interest. Contrary to the implication of the Appellants, this was a full-blown evidentiary hearing on the question of prejudgment interest. At the trial, Appellants introduced documentary evidence and testimony on the question

of whether the State acted "inequitably" toward the Appellants. See (R: 2051-2318; Transcript of the trial) and (R: No pages assigned) the documents introduced into evidence at the trial). The Appellants also introduced into the record depositions the Appellants took of State employees involved in the impact fee administration and enforcement process, including all documents produced for the depositions. (R: No page assignments yet)

The Appellees also responded to the trial court's request for supplemental briefing. In Appellees' Response to the Court's Questions On The Timing And Rate Of Interest (R: 1941-1973), the Appellees brought to the trial court's attention this Court's decision in McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992), and the requirement that an award for prejudgment be part of the "final judgment" or it is waived by the prevailing party.

The trial court issued two separate decisions on Appellants' separate requests for prejudgment and post judgment interest, denying both requests. (R: 2023-2025 - postjudgment) and (R: 2026-2034 - prejudgment) Contrary to Appellants' assertions in the Statement of the Case, the trial did not "refuse[ ] to apply the standard adopted by this Court whereby a plaintiff may recover prejudgment from the State," (Initial Brief, p.4) The trail court analyzed this Court's many decisions on the subject and made its ruling. (R: 2023-2025) and (R:2026-2034) Also unstated is the fact that the trial court considered all the testimony and evidence presented and came to the conclusion that the State, through its employees, had not acted inequitably toward those who paid the impact fee. (R: 2026)

SUMMARY OF THE ARGUMENT

A number of issues are presented to this Court by this appeal. The first is one that has been faced by this Court and the district courts of appeal before; "Is the State required to pay pre-judgment interest on the refunds of taxes after the litigation on the issue of the applicability of the taxes is resolved in the taxpayer's favor?" The Appellees would submit that the Court has not issued an opinion that has found that the Legislature has provided for interest in any refund statute and the Court has not found that tax refunds fall into the same class of actions by the State, i.e., torts, contracts or business dealings, that permit a court to award both prejudgment and postjudgment interest. The Legislature has not waived the State's immunity for interest in tax refund cases and the State has no engaged in any "inequitable conduct" that would warrant an award of interest. The trial court found no "inequitable conduct." The appellants have failed to cite to the Court any facts in the record that would justify a reversal of the trial court's order. Finally, after weighing the equities on both sides, the public will be hurt far more than the individuals who paid the impact fee.

Second, and this is a case of first impression before this Court, is whether "the State is required to pay postjudgment interest on a tax refund while the State litigates the correctness of the trial court's order requiring the payment of a refund to the challenging taxpayer?" The Legislature has not provided an express waiver of the State's immunity. Postjudgment interest is confined to "money judgments" and a tax refund is not a "money judgment." The case law does not place tax refunds into those class of cases where postjudgment interest is paid. Interest is interest; where

prejudgment interest is authorized against the State, so is postjudgment. The contrary should also be true; where no prejudgment interest is awardable, postjudgment interest should not be awarded.

As to prejudgment interest, this Court's decision in McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992), provides the Court with an independent grounds to uphold the denial of interest. At the time of the trial court's Final Summary Judgment on November 30, 1993, there was no inclusion of prejudgment interest in the Order. Appellants sought no correction of that Order. The case on the merits was appealed to this Court and decided on September 29, 1994. It was not until after the remand of this case on the merits by this Court back to the Circuit Court for the Ninth Judicial Circuit, on December 8, 1994, that the Appellants first sought prejudgment interest. Under McGurn v. Scott, the Appellants' failure to have prejudgment interest included in the Final Order of November 30, 1993, was a waiver of interest by the Appellants.

Finally, there are solid public policy reasons for not extending prejudgment and postjudgment interest to tax refunds. The Legislature, except of limited occasions, enacted laws permitting interest on the debts and tax refunds of the State. Had the Legislature wanted to extend interest to tax refunds it could have done so. The costs have never been budgeted or appropriated for by the Legislature. The disruption to the State and the State agencies to pay interest on all tax refunds would be harmful.

ARGUMENT

OPENING STATEMENT

In order to understand the two issues before the Court, and the position taken below by the Appellees and accepted by the trial court in its final order, one has to understand the history of the payment of prejudgment interest before one moves on to the question of postjudgment interest. Thus, in all due respect, the Appellants have placed the cart before the horse by presenting their argument on postjudgment interest before their argument on prejudgment interest. Appellees will reverse this order and present their argument on why prejudgment interest cannot be awarded in tax refund cases, and especially this case. Next, the Appellees will discuss why the theories on prejudgment interest not being paid on tax refunds also applies to an award of postjudgment interest in a tax case.

I SOVEREIGN IMMUNITY AND INTEREST; THE INTERPLAY OF TWO CONFLICTING GENERAL RULES

A. *SOVEREIGN IMMUNITY GENERALLY PROTECTS THE STATE FROM THE PAYMENT OF INTEREST, WHETHER PREJUDGMENT OF POSTJUDGMENT*

1. Sovereign Immunity Generally

There exists a "clearly established principle of law" in the statement that the State of Florida cannot be sued without its consent; Florida is protected by the doctrine of sovereign immunity. Article X, Sec. 13, Florida Constitution. This Court has long recognized the State's absolute sovereign immunity absent a waiver by the Legislature or constitutional amendment. Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113, 1114-1115 (Fla. 1976), citing

Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958); Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 (1925). The immunity possessed by the State is "absolute and unqualified." Hampton v. State Board of Education, 90 Fla. at, 105 So. at 326.

This purpose of the doctrine of sovereign immunity is to protect the public from encroachments on the public treasury, Jaar v. University of Miami 474 So. 2d 239, 245 (Fla. 3rd DCA), rev. denied, 484 So. 2d 10 (Fla. 1985) (citing Spangler, 106 So. 2d at 424), and the need for orderly administration of government, Berek v. Metropolitan Dade County, 396 So. 2d 756 (Fla. 3rd DCA), approved, 422 So. 2d 838 (Fla. 1981). The doctrine that the State cannot be sued, **and the protection of the public treasury**, rests on public policy that should be liberally construed to effectuate the purpose for which it was designed. State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So. 2d 868, 869 (1941).

The Legislature, by general law, is empowered to waive the immunity and authorize suits against the State. Florida Livestock Board v. Gladden, 86 So. 2d 812 (Fla. 1956); Southern Drainage District v. State, 93 Fla. 672, 112 So. 561 (1927). Since the State cannot be sued without its consent, Valdez v. State Road Department, 189 So. 2d 823 (Fla. 2nd DCA 1966), until such consent is given there can be no suit against the State; where there is a question of the existence of a waiver of immunity, the courts must rule against a waiver. Consent, when given, must be clear and unequivocal. Rabideau v. State, 409 So. 2d 1045, 1046 (Fla. 1982). Even where a waiver of the State's immunity does exist, such statutes must be read narrowly and

construed *strictly in favor* of the State. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So. 2d 926, 928 (Fla. 1983); Carlile v. Game and Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977). The State's consent to suit is limited in its scope to the narrowest of interpretation and can be extended no further than the conditions and limitations prescribed by the Legislature in its grant of consent. State ex rel. Florida Dry Cleaning and Laundry Board v. Atkinson, 136 Fla. 528, 188 So. 834, 838 (1939); Valdez v. State Road Department, 189 So. 2d at 824 (citation omitted).

2. Absent statutory authority, the State is not required to pay interest on its debts

Interest, whether prejudgment or post judgment, is normally awarded as a matter of course in a case. However, the awarding of interest against the State in any form, is contrary to the Constitutional prohibition of sovereign immunity. Under the doctrine of sovereign immunity, the State is not liable for the payment of interest in cases of money judgments in absence of express statutory authorization or where the government has waived its immunity, either by contract or actions. State v. Family Bank of Hallandale, 623 So. 2d 474, 479 (Fla. 1993) ("general immunity from interest is an attribute of sovereignty, implied by law for the benefit of the state."); Flack v. Graham, 461 So. 2d 82, 83 (Fla. 1984) (same); Roberts v. Askew, 260 So. 2d 492, 494 (Fla. 1972); Treadway v. Terrell, 117 Fla. 838, 158 So. 512, 517 (1935).

3. Absent statutory authority, the State has not been required to pay interest in tax refund cases.

A Florida taxpayer cannot receive interest from the State when the taxpayer receives a refund of any taxes or fees paid into the State Treasury. State ex rel. Four-Fifty Two-Thirty v. Dickinson, 322 So. 2d 525, 529-530 (Fla. 1975); Mailman v. Green 111 So. 2d 267 (Fla. 1959); Treadway v. Terrell, 117 Fla. 838, 158 So. 512, 517 (1935). See also State of Florida, Department of Revenue v. West Flagler Associates, Ltd., 646 So. 2d 353 (Fla. 3rd DCA, 1994); Brooks v. School Board of Brevard County, 419 So. 2d 659, 662 (Fla. 5th DCA 1982); Lewis v. Anderson, 382 So. 2d 1343 (Fla. 5th DCA 1980); Department of Revenue v. Goembel, 382 So. 2d 783, 786 (Fla. 5th DCA 1980); Hansen v. Port Everglades Steel Corporation, 155 So. 2d 387, 391 (Fla. 2nd DCA 1963).

4. The Florida Legislature has not expressly allowed the payment of interest in tax refund cases

A review of the Florida Statutes will not reveal the existence of the authority to pay interest on a refund of sales or use taxes, excise fees and, in this case, fees paid to the Department of Highway Safety and Motor Vehicles under Ch.'s 319 and 320, Fla. Stat.. It is not as if the Florida Legislature does not know how to create a refund statute containing the authority to pay interest on the refund paid; they have already done so. Under Sec. 220.723, Fla. Stat.[1/], the Department of Revenue pays interest on overpayments of the corporate income tax. See also, Sec. 215.422, Fla. Stat.

[1/] First enacted in 1971 in Sec. 19,, Ch. 71-359, Laws of Florida, and codified at Sec. 214.14, Fla. Stat., it was later moved to Ch. 220 when the income tax code was revised in 1991 as part of Ch. 91-112, Laws of Florida.

(State's failure to timely pay its bills)

This Court, on two occasions, has stated very clearly that the general refund statute, Sec. 215.26, Fla. Stat., does not authorize the payment of interest. State ex rel. Four-Fifty Two-Thirty v. Dickinson, 322 So. 2d, at 530 ("Neither Section 215.26 nor Section 199.252, Florida Statutes [intangible taxes], . . . , provide for the payment of interest); Mailman v. Green, 111 So. 2d, at 269 ("here we have found no provision for payment of interest on refunded taxes"; also finding no such authority under Sec. 198.29, Fla. Stat.[estate taxes]). See also Hansen v. Port Everglades Steel Corporation, 155 So. 2d, at 391 (ad valorem taxes).

There exists the presumption that the Legislature is cognizant of the judicial construction of prior laws. State v. Dunmann, 427 So. 2d 166 (Fla. 1983). There is also a presumption that the Legislature is acquainted with the prior judicial decisions on a subject on which the Legislature subsequently enacts a law. Ford v. Wainwright, 451 So. 2d 471 (Fla. 1984); Adler-Built Industries, Inc. v. Metropolitan Dade County, 231 So. 2d 197 (Fla. 1970). Finally, there is the presumption that the Legislature is presumed to know the meaning of the words used in a law and to have expressed the Legislature's intent in the act by the use of the words found in the statute. Aetna Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315 (Fla. 1992); Thayer v. State, 335 So. 2d 815 (Fla. 1976). Thus, one cannot argue that the Florida Legislature has not considered the payment of interest on tax refunds. Since the Legislature has restricted refund interest to the corporate income tax, it cannot be argued that interest is to be paid on all tax refunds, no matter the implementing tax.

B. *EXCEPTIONS TO THE GENERAL RULE OF IMMUNITY*

1. Non-Tax Refund Situations

The Appellees acknowledge that the State has been ordered to pay interest, prejudgment and postjudgment in such cases as torts, contracts and some employment cases. See, e.g., Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990)(contract dispute); Florida Livestock Board v. W.G. Gladden, supra (tort claim). However, these cases are obviously inapposite to the situation at hand, the refund of taxes.

The question of the waiver of the payment of interest was faced by the Court in Treadway v. Terrell, supra. In that case there existed a legislatively created waiver of immunity from suit against the former State Road Department ("SRD"). The SRD could be sued on claims arising under contracts for work done on the state roads. The SRD was sued for moneys allegedly owed by it to certain contractors and an award was made to the contractors after arbitration. Included in the ruling was an award of **both** prejudgment and postjudgment interest. Id. 158 So., at 516.[2]/ A writ of prohibition was sought to restrain the arbitration award requiring the state to pay interest. This Court, citing United States v. North Carolina, 136 U.S. 211, 10 S.Ct. 920 (1890), held that a state "is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of the legislature, or by lawful contract of its executive officers." Treadway, 158 So. at 517. This Court went on to state:

---

[2]/ "Interest on the amount awarded is allowed at the rate of six per cent per annum from July 18, 1927, to date of entry of judgment and from the latter date at the same rate to date of payment."

> There is no provision in the Constitution or in the statutes of the state expressing the immunity of the state from liability from 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.

Id. This Court went on to discuss that, under limited circumstances, where the immunity from suit may be waived, the waiver may be read to include the payment of interest, even though the express language of the statute did not include interest. Id., at 518. But this Court stated that such implied authority to pay interest by the State would be the same as adjudication between private parties. Id. That reasoning is consistent with this Court's cases concerning contract and tort cases against the State or its agencies. However, there is no equivalent between private parties for the sovereign act of tax collection and tax refunds (see, discussion below).

Having stated the general rule of immunity, this Court looked to see if the immunity had in fact been waived, either expressly or through such implication by the nature of the case and the act of the Legislature. This Court stated that:

> laws may authorize suits against the state on any or all liabilities that may arise against the state, and may be intendment authorize an adjudication of claims of liability of the state for interest as a legal incident or a part of claims against the state such as those arising under contract for work done, even though the payment of interest by the state is not expressly provided for by statute or in the contract.

Id., at 518. But this Court did not mean by this language that every act permitting a suit against the State it was permitting the payment of interest. Rather, such situations were restricted to:

> [w]here 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 [work] for the state and to pay for the work when done under contract, and there are no pertinent limitations contained in the authority to sue or in other statutes controlling the subject as to payment of interest on debts due on contracts made for the state by its authorizing agency, the general principles of liability for interest may be applied in 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 of the sovereign.

Id. (e.s.) (citations omitted). This Court also stated that it would be acceptable to allow the State to pay interest where "such adjudication would be legal and just as between private parties." Id.

Since Treadway, the Court's decisions have been consistent. Where the State, and the political subdivisions of the State, have entered into contracts, caused tortious injury, conducted its affairs as would a private party or otherwise engaged in proprietary conduct, the authority has been found for the payment of interest, whether prejudgment or post judgment, against the State. Florida Livestock Board v. Gladden (tort), Roberts v. Askew (real estate operations), Broward County v. Finlayson (contract employment compensation), Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984) (contract breach by State agency). The unifying factors permitting interest are suits for claims of some sort arising from non-sovereign governmental functions *and the award of a money judgment*, the assessment, collection or refunding of taxes.

The process of when an award of interest has evolved. The process is no longer just cut and dried. The decision to award interest has been tempered by looking to the equities between the State and the claiming party. This Court stated in

Flack v. Graham, supra, even where interest may be payable, a "balancing of interests" needs to be done before interest is ordered against the State. Flack concerned the question of whether a removed county court judge, later reinstated, was entitled to interest on the back pay awarded upon reinstatement. This Court began its discussion by reciting the following from the United States Supreme Court's opinion in Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 352 (1939):

> 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 extraction would be inequitable.

Flack, 461 So. 2d, at 84. This Court continued by stating:

> In choosing between innocent victims the [United States Supreme] Court found it would not be equitable to put the burden of paying interest on the public. [The Flack] 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 county judge. It would be grossly inequitable to make the citizens of Florida also pay interest.

Flack, at 84.

This Court has consistently used the "balancing of interests" test in Flack. See Broward County v. Finlayson, 555 So. 2d, at 1213 ("We did not recede from [Flack's] principle in Argonaut Insurance [3]/ or Kissimmee Utility Authority [4]/.); Chiles v. United Faculty of Florida, 615 So. 2d 671, 678 (Fla. 1993) (On Motion For Clarification - *per curiam* - Legislative unilateral modification and abrogation of agreement for pay raise;

---

[3]/ Argonaut Insurance Co. v. May Plumbing Co., supra.

[4]/ Kissimmee Utility Authority v. Better Plastics, Inc., 526 So. 2d 46 (Fla. 1988).

modification and abrogation reversed and pay raises ordered paid; interest not required to be paid on back pay). Most recently, the Court found the "law [on the payment of interest by the State] is not absolute and a judicial determination regarding interest may depend on equitable considerations and whether the claim warrants a prejudgment interest award." State v. Family Bank of Hallandale, 623 So. 2d, at 479.

2. Tax Refund Situations

While this Court has permitted interest in cases concerning claims against the State arising out of arising from non-sovereign, proprietary governmental functions and the awards of money judgments, this Court has not permitted the awarding of interest, prejudgment or postjudgment interest, in tax refund cases. This refusal to permit such an extension is because it would involve the invasion into the "governmental-governmental" sovereign functions of the State.

There is a vast difference between proprietary functions and "governmental-governmental" sovereign functions. The former are carried on by the State as if they were a private party, but the latter has no private opposite. The distinction between a sovereign governmental function and a proprietary function is a question of law which the court must determine based on the examination of the function being performed. If the function being performed is a function which can, through contract, be performed by someone other than the governmental entity, then the function is proprietary. Daly v. Stokell, 63 So. 2d 644 (Fla. 1953). See also, St John's Associates v. Mallard, 366 So. 2d 34, 35 (Fla. 1st DCA 1978) As this Court has stated, a sovereign governmental function "has to do with the administration of some phase of

government, that is to say, dispensing or exercising some element of sovereignty." Daly., 63 So. 2d at 645 (citations omitted).

Only government has the right to impose and raise taxes. Unlike a proprietary function, the imposition and collection of taxes cannot be delegated. Taxation is one of the very elements of sovereignty that allows government to exist at all. It has no product to sell, it is created by the people for the "public purpose.' This Court recognized the very nature of governmental function in the State of Florida v. City of Port Orange, 19 Fla. L. Weekly S563 (Fla. November 3, 1994). This Court's refusal to so extend interest to tax refund cases is consistent with the Treadway line of cases.

This Court's decision in Mailman v. Green began the tax refund line of cases. In Mailman, the estate of the deceased, Olof Zetterlund, filed papers with and paid the estate taxes due to the United States Government.[5]/ Id., 111 So. 2d at 267-268. The estate paid the Comptroller the State's proper share of estate taxes on the percentage due the Federal Government. Id., at 268. For reasons not explained in the Opinion, the estate challenged the estate taxes due the Federal Government. Id. Eventually, the U.S. Tax Court ruled that there had been an overpayment of taxes by the estate and, from the information present, determined the correct amount due the State of Florida. Id. The estate then made a demand on the Comptroller for a refund of the overpayment of the estate taxes, as permitted by Sec. 198.29, Fla. Stat. (1959).

---

[5]/ The facts contained in Mailman v. Green are deceptively simple and apparently led the Appellants to believe that the fact that the Federal Government was involved in the case was crucial and resulted in the Appellants interpreting the decision as they did. However, the presence of the Federal Government in the case has no effect whatsoever on the meaning of the Mailman opinion.

Interest on that amount for the time the State had the overpayment was also requested. Id. The Comptroller refunded the principal amount but refused to pay the demanded interest to the estate. The estate then brought a mandamus action against the Comptroller.

This Court in Mailman began its legal discussion by looking to the statutes to see if the Legislature had waived the State's immunity and authorized the payment of interest on the refund of estate taxes. The Court could find neither general authorization nor specific authorization under Sec. 198.29 or Sec. 215.26, Fla. Stat.. Id. at 268-269. The Court, in dicta, then discussed the legal situation, or dilemma, faced by the Comptroller because of the absence of statutes. The Court made the following statements:

> It is plain that **the actions of the Comptroller with references to the handling of the fund in question were ancillary to the actions, legislative and judicial, of the Federal government**. The Congress controlled the life of the tax and the proportion of it to be received by the state while the Federal Tax Court adjudicated the dispute that arose about its amount.
>
> * * * * *
>
> We have already commented on the position this official in relation to the part played by the Federal government which convinces us that he was **not free to exercise discretion or judgment on behalf of the state**. Furthermore, we have not found authority in the statutes or decisions for the payment by the Comptroller of interest on the overpayment even had the amount been certain before entry of the judgment of the Federal Tax Court.
>
> * * * * *
>
> 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..
>
> * * * * *

> . . . the Comptroller paid to petitioners the exact amount to which they were entitled. This, in our opinion, was all **he was required to do and he could not have done it earlier**.

Id., at 268-269. (e.s.) This Court, in refusing to order interest, did not permit the consideration of equitable principles. Id., at 269. This exact language has been repeated by this Court in State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson, supra and by the Fifth District in Lewis v. Anderson, supra.

The Appellees assert that, since there has been no waiver by the Legislature of interest, taxpayer's ability to rely upon "equitable principles" to receive an award of any interest lies in the following one paragraph in the dicta contained in Mailman:

> 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. [6]/

Id., at 269. A clear understanding of the total import of this paragraph is important to the end result in any case seeking interest of any kind on a refund of taxes or fees from the State. The Appellees assert that this Court set up certain conditions that must be overcome by a taxpayer **before** the taxpayer can address "equitable principles."

It is the Appellees' position that this Court created four important, yet distinct, portions within the critical paragraph. Those separate portions of the paragraph are:

---

[6]/ This particular paragraph was repeated exactly in State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson, 322 So. 2d at 530 and Lewis v. Anderson, 382 So. 2d at 1344 (further paraphrased "unfair dealings with the taxpayer by the taxing authority").

1. "To repeat, the **amount ultimately to be paid was throughout the litigation was in doubt**. Whether the Comptroller should refund any or all of it **could not have been divined by that officer** and;
2. *that being the case*;
3. we have found no room for the play of equitable principles;
4. relative to unjust enrichment of the state at the expense of its citizens, or failure of the state to deal fairly with them."

These portions are inseparable and are consecutive in order. They are not separate and distinct thoughts that can be considered out of context. Put plainly, one cannot even move to consider "equitable principles" unless and until it is shown that the Comptroller had clear legal authority to pay a specific refund, because the amount to be paid was not in doubt, **and he refused to do so**. The first three portions are key to the decision of whether equitable principles are to be applied at all; the fourth portion relates to how the "equitable principles" are to be applied, if they are to be applied.

The first step is to ask the question:

> "Was the amount requested to be refunded in doubt because of litigation or was there absolutely no doubt as to the requirement to pay the requested refund?"

That question is easily answered by looking at the facts of each particular refund case and examining the law to be applied to each case. Second, we answer the "that being the case" question. This portion reveals to us that the answer to the first portion of the whole paragraph dictates the actions the court is to follow. Finally, we ask the question, based on the facts and legal circumstances of each case and the "that being the case" question:

> Is there room for the play of "equitable principles" in the case to determine if prejudgment interest is to be awarded?"

In applying the meaning of the whole paragraph, the lesson taught by Mailman is clear. If the refund request itself or the amount of a refund request is in doubt, then the actions or response by the Comptroller "could not have been divined by [the Comptroller] . . ." However, where the right to a refund is NOT in doubt, where the legal right to the refund or amount of refund is clear and all the Comptroller has to do is his ministerial duty to pay the refund, then the Comptroller could "divine" what he is required to do. In the former situation, "equitable principles" are not to be applied. In the latter situation, "equitable circumstances" can be applied. If "equitable principles" are to be applied, this Court's Mailman decision describes two [7]/ "equitable principles." Those two are:

1. "unjust enrichment of the state at the expense of its citizens"; and

2. "failure of the state to deal fairly with [the citizens]."

Id. at 269.

Thus, in summation, before interest can be awarded, the "equitable principles" must be conclusively shown to have been violated **and** the balancing of interests must weigh in favor of the taxpayer over that of the burden on the public in paying interest.

---

[7]/ The Fifth District Court of Appeals stated in Lewis v. Andersen that a third "equitable principle" existed: "excessive taxes." Id., 382 So. 2d, at 1344. While that court appears to base its reasoning solely on this Court's opinions in Mailman and Four-Fifty Two-Thirty Corp., Appellees cannot find any reference to "excessive taxes" as an "equitable principle" in either case.

II. PREJUDGMENT INTEREST CANNOT BE AWARDED AGAINST THE STATE IN TAX REFUND MATTERS AND IN THIS CASE

A. THERE HAS BEEN NO LEGISLATIVE WAIVER OF IMMUNITY

Except for the legislative waiver of interest on overpayment of corporate income tax found in Sec. 220.723, Fla. Stat., there exists no statute within the Florida Statutes that waives the State's immunity permitting an award of prejudgment interest in tax refund cases.

B. THERE HAS BEEN NO JUDICIAL WAIVER OF THE STATE'S IMMUNITY

As this Court found in Mailman, "Sec. 198.29, provides for refund of overpayments of taxes and overpayment of interest 'thereon' but it is silent about payment to the taxpayer by the Comptroller of interest on the overpayment of the tax." Mailman, 111 So. 2d at 269. Neither Sec. 215.26, Fla. Stat., the general refund statute, nor Sec. 319.231(1), Fla. Stat., permitting refunds of impact fees "paid in error," are any different than Sec. 198.29 was in 1959; **both** are "silent about payment . . . of interest on [the refund of] the tax." In fact, this Court actually examined Sec.215.26 in Mailman and "found no provision for payment of interest on refunded taxes." Mailman, 111 So. 2d at 269. In State ex rel. Four-Fifty Two-Thirty v. Dickinson, 322 So. 2d, at 530, this Court found that "neither Section 215.26 nor Section 199.252, Florida Statutes [intangible taxes], . . . , provide for the payment of interest." See also Hansen v. Port Everglades Steel Corporation, 155 So. 2d, at 391 (ad valorem taxes).

C. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN DENYING APPELLANTS' REQUEST FOR PREJUDGMENT INTEREST

The Appellants argue on pp.24-26 of their Brief that the trial court applied the wrong legal standard by finding that interest could "only be awarded where State officials engage in illegal, as opposed to inequitable, conduct." Appellants vastly misstate the trial court's Final Order. The trial court specifically found that "there are no grounds to find that the [Appellees] engaged in any 'inequitable' conduct that would permit the [Appellants] prejudgment interest." (R: 2033, para. 22). This legal conclusion came after a full evidentiary hearing on February 10, 1995, which included live testimony, the introduction of deposition testimony, and the introduction of documentary evidence, both through live testimony and as part of the depositions. As a result of the evidence so adduced, the trial court ruled that the "[Appellants] presented no evidence to show the [Appellees] or other dealt unfairly with the [Appellants]" (R: 2032, para. 17); "the [Appellees] and the others acted in accordance with the law at all times" (R: 2032, para. 18); "[t]here has been no showing by the [Appellants] that there existed any illegal or unlawful conduct" (R: 2032, Para. 19).

From a reading of the entire Order (R: 2026-2034), and a review of the trial transcript and the evidence introduced, one has to come to the conclusion that the trial court considered all facts presented and came to the conclusion that no "inequitable" conduct occurred on the part of the Appellees to require the payment of prejudgment interest.

D. NONE OF THE CONDITIONS WAIVING IMMUNITY EXIST IN THIS CASE

The trial court did not award prejudgment interest because the conditions did not exist that would allow the court to look at any "equitable principles." Further, the facts presented below did not support any recourse to "equitable principles." This Court should affirm both conclusions.

1. The Comptroller was barred by law from paying any refund until Sec. 319.231, Fla. Stat., was declared unconstitutional

The reasons why this Court should not even consider any alleged violation of the "equitable principles" stated in Mailman, and why the trial court did not award interest to the Appellants, is found in this Court's own words in that same decision.

> To repeat, the **amount ultimately to be paid was throughout the litigation was 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. (e.s.)

Mailman, 111 So. 2d, at 269. Until Sec. 319.231, Fla. Stat. was declared unconstitutional by this Court, the Comptroller could not have paid any refunds. The impact fee was, at the time of challenge, presumptively valid and the Comptroller was to abide by the law.

A refund can only be approved and ordered paid by the Comptroller of Florida as he, and he alone, has both the constitutional and statutory duty to settle and approve all accounts and claims made against the State. See, Article IV, Sec. 4(d), Florida Constitution; Sec. 17.03(1), Fla. Stat. (" . . . shall examine, audit, and settle all accounts, claims, and demands, **whatsoever**, against the state, arising under any law

or resolution of the Legislature . . .") (e.s.) C.f., Article IV, Sec. 4(e), Florida Constitution ("The treasurer shall keep all state funds and securities. He shall disburse state funds **only upon the order of the comptroller**.") (e.s.) Thus, for prejudgment interest to be awarded on a refund of money from the State Treasury, it is the conduct of the Comptroller that the Court has chosen in Mailman to examine before awarding interest.

For that reason, let us review the undisputed facts and circumstances in this case. The Legislature enacted Sec. 319.231, Fla. Stat., in 1991. Up to $295 was collected from a person or company titling a motor vehicle that was previously titled in another state. The impact fee was administered, enforced and collected by the Department of Highway Safety and Motor Vehicles ("HSMV") and HSMV's local agents and deposited the collected amounts in the General Revenue Fund of the State Treasury. Appellants first brought into doubt the validity of Sec. 319.231 in 1992. The Appellees, as their duty required, fought the challenge to the constitutionality of the law. The trial court declared the law invalid on November 30, 1993. The constitutionality of Sec. 319.231 was not finally resolved until September 29, 1994, when this Court declared the statute invalid.

Comparing the facts facing the Comptroller with those facts facing the Comptroller in Mailman reveals that both officials were in the same legal position. Both Comptrollers were faced with valid, or presumptively valid, statutes duly enacted by legislative bodies and were subject to the outcomes of the judicial systems. The language of Mailman is as apropos in 1995 as it was in 1959: "It is plain that the

actions of the Comptroller[s] with reference[ ] to the handling of the fund in question were ancillary to the actions, legislative and judicial, of the Federal [and Florida] government[s]. The Congress [and Florida Legislature] controlled the life of the tax and the proportion of it to be received by the state while the Federal Tax Court [and the Florida court system] adjudicated the dispute that arose about its [validity and] amount." Mailman, 111 So. 2d, at 269.

Until September 29, 1994, the validity of Sec. 319.231, Fla. Stat., was in doubt. The finality of its unconstitutionality was not resolved until that date. The Court, in Mailman, stated "[w]hether the Comptroller should refund any or all of it could not have been divined by that officer." Id. The same is true here; until September 29, 1994, the Comptroller could not have divined whether a refund was going to be due or not. In fact, the Comptroller had to deny any refund requests as the law was presumed to be constitutional until September 29, 1994, and the Comptroller cannot refund money unless the law directs him to do so. As also in Mailman, the Comptroller here "was not free to exercise discretion or judgment on behalf of the state." Id., at 269. The Comptroller has been prepared to refund the monies to those who paid the impact fee when so permitted by the courts. The Comptroller has been so prepared since September 29, 1994. Again, with reference to Mailman, the Comptroller is now "required to [pay the refund] and he could not have done it earlier" than September 29, 1994. Id., at 269. Because

1. the validity of Sec. 319.231, Fla. Stat., was in doubt until September 29, 1994;
2. the Comptroller could not have divined that the statute would have been declared invalid and could have done nothing before September 29, 1994;

3. the Comptroller's actions were ancillary to the actions of the Florida Legislature and judiciary; and
4. the Comptroller was not free, under Florida law, to exercise his discretion or judgment in declaring Sec. 319.231, Fla. Stat., unconstitutional or in ordering a refund of a presumptively valid taxing statute,

"*that being the case*, [this Court can find] 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." Mailman, 111 So. 2d, at 269.

Thus, it is the Appellees' position that when the facts and circumstances of this case are laid over the facts and circumstances of Mailman, the language in Mailman requires this Court to affirm the denial of Appellants' request for prejudgment interest. This Court should do this without resorting to any considerations of "equitable principles" because such considerations can only be applied, as clearly directed by the Court's language in Mailman, where the validity of the underlying taxing statute or the amount of taxes contested was **never** in doubt and could not have been so divined by the Comptroller.

2. *Appellees had not engaged in any "inequitable conduct" to warrant an award of interest*

Additionally, even if the Court were to examine to see if "equitable principles" were to exist to warrant an award of interest, the Court would find that the facts entered into the record below confirm the trial court's order, finding no inequitable conduct toward the persons who paid the impact fee exists. The facts in the record were properly considered by the trial court and this Court should affirm the trial court's conclusions without reweighing the evidence. However, there are other grounds for this Court affirming the trial court's decision. They all lie with the fault of the

Appellants to present record reasons why this Court should reverse the trial court.

While the Appellants recognize the existence and importance of the two "equitable principles" set forth in Mailman ("unjust enrichment of the state at the expense of its citizens" and "failure of the state to deal fairly with [the citizens].") and the balancing test of Flack v. Graham (as restated in State v. Family Bank of Hallandale, cited by the Appellants on page 3 of their Motion) (R:1687), Appellants did not below, or before this Court, define or analyze the "equitable principles" or the balancing test used by this Court.[8]/ Appellants merely came to the conclusion, below and here, that the existence of the undisputed facts amount to "inequitable" circumstances, irrespective of whether this Court can even consider such facts to reach a legal conclusion.

Nowhere in their Brief do the Appellants state the standard of review that must be addressed when challenging a trial court's final order issued after the conclusion of an evidentiary trial. They not only do not mention it, but they make no attempt to discuss how the trial court allegedly erred or what testimony or documents it

---

[8]/ Appellants did not define what constitutes "unjust enrichment" (Motion, p.7); there is no weighing of what became of the monies collected, or how this injured the Appellants; and there is no discussion whatsoever on whether or not Appellants **benefitted** from any of the state programs (i.e. schools, parks, health, welfare, etc.) funded by the General Revenue Fund. Moreover, there is no statement of any facts on how the taxing authority dealt unfairly with the Class Members, other than merely collecting the impact fee in the first place. *If collecting a presumptively lawfully* imposed fee or tax that is later declared to be invalid, without more, constitutes "unfair dealings with the taxpayer," then that fact alone will **always** lead to interest in refund cases. That would also lead to the Executive Branch second guessing the legislative acts without the benefit of a judicial decision that the law in invalid. In other words, this creates a separation of powers problem.

misinterpreted in reaching its conclusion. In fact, there are **no** references whatsoever to the trial transcript or trial record revealing error. It has long been held that the judgment of the trial court comes on appeal with the presumption of correctness. First Atlantic National Bank of Daytona Beach v. Cobbett, 82 So. 2d 870 (Fla. 1955); Canto v. J.B. Ivey and Co., 595 So. 2d 1025 (Fla. 1st DCA 1992). It is the duty of the appellant to show reversible error, see, e.g. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979), and to present a complete record evidencing the error and overcoming the presumption of correctness. McNair v. Pavlakos/McNair Development Company, 576 So. 2d 933 (Fla. 5th DCA 1991). This presumption also applies to findings of fact of the trial court after an evidentiary bench trial, entitling the findings of fact to the same weight of a jury verdict. Marsh v. Marsh, 419 So. 2d 629 (Fla. 1982); Florida East Coast Railway Company v. Department of Revenue, 620 So. 2d 1051, 1061-1062 (Fla. 1st DCA), review denied, 629 So. 2d 132 (Fla. 1993). Conclusions of law are to be upheld unless the appellant shows that they are completely erroneous. Florida East Coast Railway. In particular, an appellate court is not to reevaluate or reweigh the evidence considered and decided by the trial court and substitute its own judgment for that of the trial court. Prevatt v. Prevatt, 462 So. 2d 604 (Fla. 2nd DCA 1985); Deakyne v. Deakyne, 460 So. 2d 582 (Fla. 5th DCA 1984). The decision will be upheld if supported by substantial competent evidence. Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984); Holland v. Wood, 89 So. 2d 255 (Fla. 1956).

Yet despite the clear duty on the Appellants, they fail to show reversible error in their Brief. For example, Appellants claim that the trial court's ruling that the Appellants "presented no evidence to show the [Appellees] or other[s] dealt unfairly with the [Appellants] is refuted by overwhelming evidence in the record to the contrary." Appellants' Brief, p. 32. Yet after making this claim, Appellants make absolutely no reference to the record to provide this Court with even one example of such "contrary" evidence. This they cannot do! Appellants must specifically cite in the record the reversible errors of the trial court. Appellants claim the trial court "fails to account for the injury to [Appellants]." There is no cite at all to the record to support Appellants' assertion. In fact there is no such evidence. The Appellants did not produce any evidence whatsoever to show injury to any member of the class. And throughout this part of the Brief Appellants claim the State was "unjustly enriched." Again, there are no record cites as there was no such evidence so introduced. The trial court heard testimony and received documents that the money collected was placed in the General Fund and used to fund public education, prisons and social welfare as well as running Florida's government. No evidence was abduced on how this "enriched" the State. It is the Appellee' contention that the claims asserted by the Appellants on pages 32 and 33 are completely unsupported by the record; otherwise, why no citations to the trial transcript of documents that support their conclusions.

For this reason alone the Court must ignore Appellants' argument about reversible error by the trial court at the trial. Its the Appellants' duty to present a record and brief showing detailed reasons how and where the trial court erred in

considering certain evidence and what evidence the court should have considered. Appellants' Brief is devoid of such an analysis. The Appellees presented evidence and argument that the Legislature passed a tax law, the state agency responsible enforced the law and collected the impact fee, and the executive branch did its duty by defending the law when challenged. The trial court rejected the Appellants' contentions that such actions on the part of the Appellees amounted to "inequitable conduct" toward the persons who paid the fee. The Final Order reflects such a conclusion. Appellants have failed to present any reason why the trial court's decision must be overturned.

E. IT WOULD BE A GROSS INEQUITY TO REQUIRE THE CITIZENS OF FLORIDA TO PAY INTEREST TO THOSE WHO PAID THE IMPACT FEE

Nowhere in Appellants' Brief do they even attempt to do a balancing of interests, as was done in Flack, Broward County v. Finlayson, Chiles v. United Faculty of Florida, or State v. Family Bank of Hallandale, to determine if the taxpayers or the public would be injured more whether interest were paid to the Appellants. If a valid assessment under Flack had been done, it would have become apparent that it would be a far greater burden on the citizens of the State to pay interest of any sort than it would be not to pay interest to the Appellants.

The Appellants, while having in their possession the total amount of the impact fees paid to the State, have neither informed this Court of the amount of the prejudgment (or post judgment) interest presently at stake. Nor have Appellants informed this Court out of what funds these interest payments will come or what effect

on the Florida budget the payment of interest will have. The estimated total prejudgment and postjudgment interest through June, 1995, will be more than $50 Million, with interest accruing at more than $2 Million a month until fully paid, at 12%, if interest is awarded. The interest payment would not come out of the impact fees collected, but would have to be taken directly out of the General Revenue Fund. As a consequence, either taxes will have to be raised or the budget will have to be cut.

Like in Flack, those who paid the impact fee will receive a return of the impact fee money they paid. However, those same persons have also received the direct and indirect benefit of the State funded services such as education, welfare, law enforcement, prisons and parks and recreation that the impact fees helped fund. To now receive their money back AND receive interest, the Appellants would have received service paid by others and now avoided by them. The Appellees assert that this case does not warrant an award of interest.

III ANOTHER, INDEPENDENT GROUND EXISTS TO UPHOLD THE DECISION OF THE TRIAL COURT DENYING THE APPELLANTS PREJUDGMENT INTEREST IN THIS CASE

The law in this State is clear on this point, an appellate court must affirm a decision of a trial court if the court's decision is supported by any theory of law even though the trial court did not rely on that particular theory of law. Vandergriff v. Vandergriff, 456 So. 2d 464 (Fla. 1984). Applegate v. Barnett Bank of Tallahassee, supra; Chase v. Turner, 560 So. 2d 1317 (Fla. 1st DCA 1990). In this case, an alternative to upholding the trial court's denial of prejudgment interest rests on the theory that the Appellants failed to preserve their right to prejudgment interest by

failing to seek such an award at the time the judgment in this case became final. Because of this failure, the Appellants have run afoul of this Court's decision in McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992). Appellants were required, under McGurn, to seek and be awarded prejudgment interest in the final judgment before an appeal was taken of that final judgment. Because such an award was not made, and since prejudgment interest cannot be "reserved," Appellants have lost their right to prejudgment interest.

Interest is defined as the compensation allowed by law for the use or detention of money; interest is merely another element of **pecuniary damages**. Florida Steel Corp. v. Adaptable Developments, Inc., 503 So.2d 1232,1236 (Fla. 1986); Argonaut Insurance Co. v. May Plumbing Co., Id., 474 So.2d 212, 214 (Fla. 1985).[9]/ However, as a mere element of damages, prejudgment interest must be determined and awarded to the prevailing party **before** the court's ruling becomes a "final" judgment.[10]/ That is the lesson this Court taught us in McGurn v. Scott, supra. The issue before this Court in McGurn was whether "a trial court may issue a final appealable order

---

[9]/ See also Peavy v. Dyer, 605 So. 2d 1330, 1332 (Fla. 5th DCA 1992), where the District Court stated the following:

> Once this element of damages is **awarded in the final judgment**, prejudgment interest, like all other elements of damages, becomes part of a single total sum adjudicated to be due and owing. (e.s.)

[10]/ The Court stated in McGurn that

> "a judgment attains the degree of finality necessary to support an appeal when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment.

Id., at 1043. "Final judgments or orders . . . leave nothing of a judicial character to be done." Id.

while reserving jurisdiction to award prejudgment interest. Id., 596 So. 2d, at 1043. This Court began by noting that a judgment is "final" when there remains no judicial labor except the execution of the judgment. Id. at 1043 (citing, Gore v. Hansen, 59 So. 2d 538 (Fla. 1952)). This Court went on to discuss the nature and status of prejudgment interest, and noted again that prejudgment interest was an element of damages, McGurn, 596 So. 2d, at 1044, and that:

> [a]n element of damages is not ancillary to the subject matter of the cause regardless of how straightforward and ministerial the calculation of those damages may be. Therefore, the determination of prejudgment interest is directly related to the cause at issue and is not incidental to the main adjudication.
>
> By reserving jurisdiction to address the issue of prejudgment interest, the instant trial court failed to dispose of all material issues in controversy and, therefore, the order was not final. It is improper for a trial judge to render an order which in all respects appears to be an ordinary final money judgment, but which leaves the determination of prejudgment interest for future adjudication.
>
> * * * * * * * *
>
> While a judgment or order which reserves jurisdiction to award prejudgment interest technically is not a final order, if a trial court improperly renders such a judgment which appears to be, or has the attributes of a final judgment, the order will be deemed to have become a final judgment requiring review by immediate appeal.
>
> * * * * * * * *
>
> Thus, the parties will be deemed to have waived any matter reserved for future adjudication by the trial court, with the exception of attorney's fees and costs.
>
> * * * * * * * *
>
> Prejudgment interest is an element of damages that must be decided before final judgment is set forth and must be part of the final judgment.

Id., at 1044-1045.

Appellants did not request prejudgment interest in their motion for summary judgment. They did not take any action after the trial court's Final Order of November 30, 1993, to have an award of prejudgment interest inserted into an amended or

corrected order. In fact, the Appellants did not seek prejudgment interest prior to the appeal on the merits or during the time when the case was before this Court. Appellants did not seek interest until December 8, 1994, more than a year after the trial court's Final Order. The Appellants implicitly "reserved" the issue of prejudgment interest until after the appellate process. Appellants did so by not seeking an award of interest from the trial court prior to the appeal by the Appellees. McGurn is clear, "[p]rejudgment interest is an element of damages that must be decided before final judgment is set forth and must be part of the final judgment." Id., 596 So. 2d at 1044-1045. Having not sought to have an award of interest added to the "final" judgment and having a "final" judgment issued not containing an award of prejudgment interest, Appellants have waived any right to such an award. There is absolutely no provision under McGurn to allow a prevailing party to receive an award of prejudgment interest from a trial court after the appellate process has been completed. This Court has no alternative but to affirm the denial of Appellants' request for prejudgment.

IV. POSTJUDGMENT INTEREST CANNOT BE AWARDED AGAINST THE STATE IN TAX REFUND MATTERS

This is a case of first impression in this Court. It is the Appellees' position that there is not only no statutory authority for the State to pay postjudgment interest on tax monies collected and then refunded, but the decisions of this Court have never supported such a position. To the contrary, the Court's decisions have treated interest, whether prejudgment or postjudgment, as equal, Treadway, supra; stated otherwise "interest is interest." That being the case, the refusal to apply prejudgment interest in

a tax refund case would be consistent with the denial of postjudgment interest in the same case. Until now, where the State has been required to pay prejudgment interest it has also been required to pay postjudgment interest. See, e.g. Treadway Thus, in those cases where prejudgment interest is not awardable, neither is postjudgment interest.

Additionally, since the Legislature has not expressly waived the State's immunity for the payment of postjudgment interest, this Court should not create a new, monetary liability on the State where the Legislature has not budgeted for such an expense. Is it not in the public's interest, especially after this year's budget fights, to cause a further bleeding of precious funds away from the public schools and social services just to pay interest on a tax refund.

A. SEC. 55.03, FLA. STAT., DOES NOT MANDATE, MUCH LESS ADDRESS THE STATE'S PAYMENT OF POSTJUDGMENT INTEREST ON TAXES COLLECTED AND THEN REFUNDED

1. *SEC. 55.03, FLA. STAT., DOES NOT ADDRESS TAX REFUND CASES*

Appellants' initial argument on postjudgment interest is that Sec. 55.03, Fla. Stat. (1993), "mandates," "as a matter of right," that this Court reverse the trial court and require the payment of postjudgment interest on the moneys collected under the impact fee. Appellants' Brief, p.6. Sec. 55.03 does **not** mandate the payment of interest on the refund of taxes that are contested through the appellate process. The statute is silent on the point. While the cases of this Court cited by the Appellants, Brief, p. 6, speak for themselves, Appellants' argument runs up against the State's immunity from attacks on its treasury unless waived by the Legislature.

Sec. 55.03(1) states, in pertinent part:

> A judgment or decree entered on or after October 1, 1981, shall bear interest at the rate of 12 percent a year unless the judgment or decree is rendered on a written contract or obligation providing interest at a lesser rate, . . .

There is nothing in the statute that mentions its applicability to the State in general and to tax refunds in specific. When used in the general concept, this Court's holdings on statutory construction in State v. Jett, 626 So. 2d 691 (Fla.1993), City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993), and Holly v. Auld, 450 So. 2d 217 (Fla. 1984), that an unambiguous statute is not to be judicially altered, is the law of the State. However, there is a major exception to this general rule on statutory construction. That exception exists when a party seeks to have a general statute applied against the State and the effect will be a drain on the funds held in the State's Treasury. In that case, the law of sovereign immunity takes precedence over the above-discussed general rule of statutory construction.

Contrary to the assertion of the Appellants, there is a difference between a legislative waiver of the State's immunity to be sued and a waiver of the State's liability to pay interest on its debts. In a tax context, the waiver of the State's immunity must be express.[11]/ See Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975) (Had State waived its immunity so as to be taxed by the City of Tallahassee); State ex rel. Charlotte County v. Alford, 107 So. 2d 27, 29 (Fla. 1958) (Whether the legislative act subjected the State's land to ad valorem taxation) Again, the Legislature has

---

[11]/ See Sec. 196.199(4), Fla. Stat., expressly waiving immunity from taxation to certain government-owned lands

expressly authorized the payment of interest on its debts. See Sec. 215.422(3)(b), Fla. Stat. (interest to be paid to vendors if the State's bills are not timely paid) and Sec. 220.723, Fla. Stat. (interest to be paid on corporate income tax overpayments).

Based upon this Court's long standing precedence, Appellants' interpretation of Sec. 55.03's applicability to the refunds of taxes from the State Treasury must be rejected.[12]/ The rejection would be based on the fact that there is absolutely no mention whatsoever in that statute of a waiver of the State's immunity from the payment of interest or of that statute's applicability to the State Treasury. It is the Legislature's sole prerogative to waive the State's immunity, not this Court's. The express words of the statue do not reveal an intent to waive the State's Treasury protections and permit the award of postjudgment interest from the Treasury. Further evidence in support of this position are the State's budgets enacted over time. There is no mention in any of the appropriation acts contained in the Laws of Florida providing for postjudgment interest on tax refunds. If the Legislature had waived its immunity, such an item would have had to have had an appropriation because taxes are refunded year after year.

Under the present circumstances of this case, Sec. 55.03, when applied to the State and the State Treasury, is "ambiguous." because there is no express language in Sec. 55.03 waiving the State's general immunity. Furthermore, because Sec. 55.03's applicability to the State Treasury in tax refund cases is ambiguous, this Court

---

[12]/ The Court must reject the Appellants' argument in spite of Appellants' reliance on the word "shall" contained in Sec. 55.03 and the cases cited as to that word's generally accepted meaning. Brief, p. 6.

must follow its own long-held precedence and construe the payment of postjudgment interest strictly against the Appellants, rather, finding that public policy be liberally construed to dictate that the Treasury be protected. [13]/

2. *A TAX REFUND IS **NOT** A "MONEY JUDGMENT" SUBJECT TO SEC. 55.03*

Of crucial importance is the fact that Sec. 55.03, Fla. Stat., applies to money judgments. All the cases in which this Court has permitted the payment of both prejudgment and postjudgment interest against the State have been cases where money judgments or similar decrees were entered against the State or a state agency for some breach of contract (Treadway & Pan-Am Tobacco), tort injury (Gladden), business dealings like a private party (Roberts - real estate). Even cases like Palm Beach County v. Town of Palm Beach, 597 So. 2d 719 (Fla. 1991)(wrongful withholding of tax moneys from town), are money judgments. These decisions all involve claims against the State for alleged injuries caused by the State where money will rectify the injury.

---

[13]/ Suspiciously absent from Appellants' discussion of postjudgment interest is the period such interest is to accumulate. While the period in which such interest would apply would have started on November 30, 1993, is the period still running to the detriment of the State when the Appellants :

1. had a stay judicially imposed on the State from paying any refund to those who paid the impact fee, even when the State has been ready and able to pay the refunds since at least October 28, 1994?;
2. any additional litigation since this Court's ruling on September 29, 1994, has all been instigated by the Appellants, thus, causing a further delay in the State's payment of the refund; and
3. the request and judicial determination of the attorney's fees will continue the delay in the payment of the refunds.

Such a delay, if interest is permitted, will cost the State over $2 million a month since September 29, 1994.

But a "refund" is not a money judgment. This Court has stated as much in Mailman and Four-Fifty Two-Thirty Corporation. As described earlier, both cases concerned requests for refunds held in the State Treasury. In Mailman, this Court spoke of the case as one "not an action against the state for recovery of money . . ." Id., 111 So. 2d at 268. This Court's discussion that neither Sec. 198.29 nor Sec. 215.26, Fla. Stat., provides for the payment of interest on refunds and the Court's final decision denying interest, are consistent with the assertion that refunds are not money judgments. This Court in Four-Fifty Two-Thirty Corporation cited the same language in Mailman that the seeking of a refund "was not an action against the state for recovery of money." Four-Fifty Two-Thirty Corporation, 322 So. 2d at 530. In further support of its decision, this Court cited to Hansen v. Port Everglades Steel Corp., supra. Hansen concerned a refund of ad valorem taxes and interest thereon. The refund was ordered but no interest was applied and the taxpayer appealed. Id., 155 So. 2d , at 389. The District Court in Hansen specifically stated that "[t]he decree in this suit did not amount to or contain a money judgment." Id., at 391. That court said this, even though the Comptroller was ordered to order Broward County to refund the money paid under protest. Id., at 389, n.1. Accord, Wilson v. Woodward, 602 So. 2d 545, 546 (Fla. 2nd DCA 1991) ("order directing the clerk to disburse funds from the registry of the court to Woodward is not a money judgment, . . .")

B. THIS COURT'S DECISIONS HAVE NEVER ADDRESSED THE QUESTION OF THE STATE'S LIABILITY TO PAY POSTJUDGMENT INTEREST ON THE REFUND OF TAX MONEY.

Appellants' discussion of the cases of this Court on postjudgment interest leave the impression that this Court has faced the issue presented by the State here before. It has not. Appellants desire to have the Court read its prior decisions as answering the unique issue presented here. Appellants begin with Florida Livestock Board v. Gladden, supra, but ignore the facts and holdings in Treadway. Gladden "is controlled by our decision in" Treadway. Therefore, one cannot state that there are separate and distinct lines of law concerning prejudgment and postjudgment interest without knowing the facts of Treadway. The key fact in Treadway, important for this discussion, was the fact the arbitration awarded:

> Interest on the amount awarded is allowed at the rate of six per cent per annum from July 18, 1927, to date of entry of judgment and from the latter date at the same rate to date of payment.

Treadway, 158 So. at 516. This Court's discussion of the application interest to the State in Treadway did **not** make a distinction between prejudgment and postjudgment interest. Interest is interest. The question then becomes, "has the Legislature waived the State sovereign immunity from payment or has the State engaged in the type of conduct, as described in Treadway, that automatically permits an award of interest, prejudgment or postjudgment?" Gladden is not inconsistent with Treadway. Gladden is not a case concerning a tax refund; it concerned damages for the destruction of pigs. Such a claim could exist between private parties. The very nature of the claim against the State warranted the implication that interest was permissible. Since a

statute existed that allowed the Court to find a waiver of immunity, Sec. 585.03, Fla. Stat., and since this was the type of case Treadway found implied interest, an award of interest against the Livestock Board, whether prejudgment or postjudgment, was permissible. [14]/

Appellants next rely upon Roberts v. Askew, supra.[15]/ In that case, Roberts was seeking postjudgment interest from the Board of Trustee of the Internal Improvement Trust Fund after a quite title action concerning real estate was resolved in Roberts' favor. This Court first noted that the "State and its agencies have been held to be immune from the obligation to pay interest on money judgment." Id., 260 So. 2d at 494. But, like Treadway and Gladden, Roberts applied the exception against the State because the Board, instated of being involved in a strictly sovereign governmental function, "daily engage[d] in those activities which are commonly held to be business activities . . ." Roberts, 260 So. 2d at 494. Therefore, the Roberts' decision is consistent with the dichotomy of proprietary and governmental functions.

---

[14]/ Appellants cite Stone v. Jeffres, 208 So. 2d 827 (Fla. 1968). This is not a case concerning the return of collected taxes but a case between private parties arguing over interest on an award of attorney's fees in a worker's compensation case. That case did not even involve the State as a party in the action. That case's application to the facts and circumstances of this case are not the least bit controlling or persuasive.

[15]/ Appellants claim Simpson v. Merrill, 234 So. 2d 350. (Fla. 1970), supports the Roberts' decision. Appellees do not agree. Without a discussion of the Constitutional prohibition against the judicial waiver of sovereign immunity, the Court in Simpson, interpreted Sec. 57.041, Fla. Stat., to require the State to pay out of the Treasury the costs of litigation in which it loses.

But there are troubling statements in Roberts. In dicta, the Court states that Sec. 55.03:

> provides that all judgments and decrees shall bear interest at the rate of six percent. This statute and other applicable statutes make no exceptions in favor of the Trustees from the obligation to pay interest on a judgment rendered against the Trustees.

Id., at 495.[16]/ Appellants turn this statement against the Trustees, against whom interest is awardable, into the implication that this Court was making postjudgment interest awardable against *the State and all state agencies* under every and all circumstances. Appellants' Brief, p.11. Roberts did not deal with the issue presented here and it did not have a detailed discussion on why Sec. 55.03, Fla. Stat., waived the State's immunity against interest. See 260 So. 2d. at 494. If applied as suggested by the Appellants, such a reading would be totally inconsistent with all of this Court's rulings on sovereign immunity and how a statute, to be applied against the State, is to be interpreted. As such, the Appellees submit that any such implication must be clarified or receded from to bring consistency in the sovereign immunity and tax refund cases of this Court.

Appellants look to this Court's decision in Palm Beach County v. Town of Palm Beach, supra, because postjudgment interest was awarded against the County in that case. Appellants' reliance on this case is misplaced. First, and contrary to the Appellants' statement otherwise, this is **not a tax refund case**. The County and Town were fighting over how much tax monies were turned over by the County to the Town.

---

[16]/ This statement is repeated, though under the same factual and legal circumstance, in Palm Beach County v. Town of Palm Beach, 597 So. 2d at 720.

The amount to be given to the Town was controlled by Sec. 336.59(2), Fla. Stat. The County had refused to turn over the required amount as the Legislature had directed. In other words, this was akin to a tortious conversion or unlawful withholding case. It was only happenstance that taxes were involved at all. Second, the question of governmental immunity was resolved against the County *and not appealed*, Id., at 720. Therefore, Palm Beach County is consistent and in line with Treadway, Gladden and Roberts, as noted in footnote 2 of the decision. Palm Beach County, 579 So. 2d at 720. Appellants' other cited cases, claiming to support an award of postjudgment interest, are clearly distinguishable from the issue before this Court. Those cases are consistent with this Court's decisions permitting an award of interest in contract, tort or other cases where private parties are involved. [17]/

The only case that has allowed the awarding of postjudgment interest has been Miller v. Agrico Chemical Company, 383 So. 2d 1137 (Fla. 1st DCA 1980).[18]/ The

---

[17]/ The cited cases did not involve a tax refund by the State and, therefore, did not address the issue before this court; Berek v. Metropolitan Dade County, 442 So. 2d 838 (Fla. 1982) (a tot case consistent with Treadway, Gladden and Roberts; the Court did discuss waiver of immunity at page 840); Governing Board of the St. Johns River Water Management District v. Lake Pickett Limited, 543 So. 883 (Fla. 5th DCA 1989); City of Miami Beach v. Jacobs, 341 So. 2d 236 (Fla. 3rd DCA 1976), cert denied, 348 So. 2d 945 (Fla.), cert denied, 434 U.S. 039 (!977) (city, not state, fee; no discussion of sovereign immunity) City of Miami Beach v. Lewis, 104 So. 2d 70 (Fla. 3rd DCA 1958) (tort case).

[18]/ While the Lewis v. Andersen court did state that Sec. 55.03, Fla. Stat., would authorize the payment of postjudgment interest, 382 So. 2d at 1343, n.1, that statement is pure unsolicited dicta since the issue of postjudgment interest was **not** before the court. Id. ("The sole issue involved in this appeal is . . . interest on the tax refund from the dates of payment to the date of judgment . . ."). Neither was there any discussion of the State's immunity from interest, as stated by this Court, nor did the case cited by the court reflect on such a discussion.

Appellees would submit that this decision is wrong and that this Court should overrule it. The First District did not delve into any of this Court's cases on sovereign immunity generally, or the immunity and waiver of immunity in certain classes of cases. That court did not discuss why there was a difference between prejudgment and postjudgment interest as far as the State was concerned. Miller is inconsistent with Treadway. Further, if this Court held twice that Florida's refund statutes did not provide for interest, how did those decisions square with the District Court's decision? Miller is inconsistent with all of the Court's cases on sovereign immunity and when the Legislature may waive that immunity and is in conflict with the principles enunciated in Treadway, Gladden and Roberts, as well as Mailman and State ex rel. Four-Fifty Two-Thirty Corp.. The court in Miller misunderstood that interest is interest and that a specific waiver is necessary. This Court has the opportunity to decide if prejudgment interest is different from postjudgment, and whether Sec. 55.03, Fla. Stat., has waived postjudgment interest in tax refund cases.

Appellants lastly argue that not to award postjudgment interest will cause the Court to engage in a due process analysis. Appellants' Brief. pp. 22-23. This is not the case. Recognizing that the State has an immunity at all, and recognizing that the State may have an immunity different from private citizens and political subdivisions does not raise equal protection concerns. The State cannot be sued under 42 U.S.C § 1983 in a state court. Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989); Hill v. Department of Corrections, 513 So. 2d 129 (Fla. 1987). However, political subdivision can be sued. Howlett v. Rose, 496 U.S. 356, 110 S.Ct.

2430 (1990); Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978). The difference is the State's sovereign immunity. Yet there is no equal protection or due process issue raised. Further, this Court has in the past relied on United States Supreme Court decisions to find the State is generally immune from the payment of interest. See, United States v. North Carolina, supra, cited in Treadway, 158 So. at 517, and Board of Commissioners of Jackson County v. United States, supra, cited in Flack, 461 So. 2d, at 84. To recognize that the State may have an immunity from paying any form of interest in tax refund case will not raise constitutional concerns.

V THERE ARE GREAT POLICY REASONS FOR NOT AWARDING PREJUDGMENT OR POSTJUDGMENT INTEREST IN TAX REFUND CASES.

There are a number of policy reasons why this Court should not permit the award of prejudgment or postjudgment interest. One reason is based in this Court's decisions of Mailman and State ex rel. Four-Fifty Two-Thirty Corp.. Both cases recognized that the general refund statute, Sec. 215.26, Fla. Stat., and some particular taxing schemes, Sec. 198.29 (estate tax) and Sec. 199.252 (intangible tax) do not provide for the payment of any interest, pre or postjudgment.

Second, the situation would lead to the circumstances that, in order to avoid the payment of interest on a refund, the taxing authorities would issue refunds to avoid interest on the refunds if the case were to be contested. This is a separations of powers problem. This Court discussed that point clearly in Chiles v. United Faculty of Florida, supra. There is no need at this date to create such a problem

The payment of interest would also be a radical departure from this Court's treatment of tax refund cases. For example, no interest in any form was ordered to be paid by the State in the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation v. McKesson, 524 So. 2d 1000 (Fla. 1988), reversed, McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), on remand, Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So.2d 114 (Fla. 1991). There is no doubt that the United States Supreme Court and this Court knew that the payment of a refund to McKesson was a distinct possibility as a refund or partial refund made up part of two of the three options available to the State.

One of the best policy arguments made for not extending the payment of interest on tax refunds come from the very words of former Chief Justice Ervin in his concurring opinion in Simpson v. Merrill. While the case dealt with this Court's decision to allow "costs" to be assessed against the State, even though no specific waiver of the payment of "costs" had been announced by the Legislature, its application to the forced payment of interest, in whatever form it is labeled, is just as applicable. Chief Justice Ervin agreed with this Court's opinion that costs could be assessed against the State, stating, however, that

> it should be understood that our holding herein in its actual application to particular cases is always *subject to the limitation that the costs can be recovered* ***only if public funds have been duly provided by law, in advance, for such purpose*** and are actually available to the losing governmental entity, officer, agency, instrumentality or political subdivision to pay such costs.

> It could be highly disruptive to orderly governmental administration if a public official or agency were required in all circumstances to pay such costs as a nonrecurring item out of his or its budgetary appropriation to the detriment of normal expenses of the office or the agency, if no provision for funds had been made to pay such costs.
>
> Many officers and governmental agencies operate on very limited itemized budgets. Not infrequently in the normal exercise of their functions they have honest disputes with members of the public and litigation will ensue. Public officers and governmental agencies should not be made timorous in the forthright administration of their duties by the fear that they may be losing parties in such litigation and that the ensuing court costs could seriously jeopardize normal discharge of the duties of such officers and agencies by reducing their operating budgets beyond the point where they could pay their normal salaries and expenses. Litigation costs, including costs of appeals, can in some cases be quite expensive.

Simpson, 234 So. 2d at 353 (J. Ervin, concurring).

That statement is applicable to the case here. The payment of interest will be disruptive. The budgets of the state agencies are limited. Where are the monies to pay the interest to come from? To date, the Legislature has never appropriated any funds to pay interest on refunds. There is no appropriation in the upcoming fiscal year for the interest in this case, over $50 million for both prejudgment and postjudgment interest by the end of June, 1995, and accruing at $2 Million per month from thereon.

A final question, unanswered by Appellants, is under what circumstances would interest be running and when is it tolled? In this case, within 30 days of the date of this Court's decision, the State was ready to begin issuing checks to the persons who paid the impact fee. That is the date a letter was sent to each person who paid informing them of the Court's decision. A check to that person could have easily have been inserted in the envelope with the letter. However, the trial court had stayed all

refund check back on November 30, 1993. That stay is still in place. This litigation continues because the Appellants want interest, wanted to run the claims administration and still have the need for the question of attorneys' fees to be requested, litigated, decided and appealed. Is the State to be charged interest throughout this entire period?

CONCLUSION

For the reasons stated above, Appellees respectfully request that this Court affirm the decision of the trial court below denying Appellants' Motions for both Pre- and Post-Judgment Interest.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0337609

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5899
(904) 488-6589 (FAX)

Counsel for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been FAXED and mailed to CHRISTOPHER K. KAY, Esquire, Foley & Lardner, 111 North Orange Avenue, Suite 1800, Orlando, Florida 32801; and forwarded by U.S. Mail to: JOSEPHINE A. SCHULTZ, Assistant General Counsel, Office of the Comptroller, 400 West Robinson Street, Suite 225, Orlando, Florida 32801; and KIMBALL R. ANDERSON, Esquire, Winston & Strawn, 35 West Wacker Drive, Chicago, Illinois 60601, this 25th day of May,1995.

ERIC J. TAYLOR