IN THE SUPREME COURT
OF THE STATE OF FLORIDA

QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA, political subdivision of the State of Florida, and WES KELLEY, as his official capacity as Tax Collector, MADISON COUNTY, FLORIDA,

Respondents.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 87,594

RESPONDENTS' ANSWER BRIEF

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INTRODUCTORY NOTES

The Appellants below, QUINTON DRYDEN, et al., will be referred to in this Brief as "Petitioner".

The Appellees below were MADISON COUNTY, FLORIDA, and WES KELLEY, Tax Collector of Madison County, Florida. As WES KELLEY, Tax Collector, is a nominal Defendant, MADISON COUNTY will be referred to as "Respondent", and when the two (2) are referred to it will be as "Respondents".

References to the Record shall be referred to by an "R" followed by the appropriate volume and page number of the Record.

References to the Record on Cross-Appeal shall be referred to by an "R-CA-" followed by the page number.

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STATEMENT OF THE CASE AND FACTS

The facts and statement of the case are partially stated in the Petitioners' brief. However, Respondent wishes to bring to this court's attention certain facts and the posture of this case which were not presented and need to be disclosed in the interest of clarity.

This case had originally been decided in favor of the Petitioners by the Trial Judge, who ordered refunds of invalidly levied special assessments for all years involved. Respondents appealed to the First District Court of Appeal, whereupon, in *Madison County v. Foxx*, 636 So. 2d 39 (Fla. 1st DCA 1994), that court affirmed the Trial Judge's Order in part, but reversed in part. In that opinion, the District Court reversed the Trial Judge's determination that the special assessments in question were impermissible taxes as premature. *Id.* at 33. The District Court also reversed the order of the Trial Judge who had ordered a refund of the special assessments, remanding the refund issue for further proceedings. *Id.* at 34-35.

The District Court determined that there remained factual and legal issues which should be decided by the Trial Judge regarding refunds in this cause. It identified several unanswered questions which relate to the determination of refunds, including whether Respondents acted in good faith, whether a refund was fiscally possible for Respondents and whether the cost of processing such

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refunds would be prohibitive. In identifying these factual issues to be determined on remand by the Trial Judge, the District Court stated its reliance on and directed the Trial Judge to apply *Gulesian v. Dade County School Bd.*, 281 So. 2d 325 (Fla. 1973), and *Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978). Further, the District Court rejected Petitioner's reliance on *Mckesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) by denying Petitioner's Motion for Rehearing. The Petitioners did not attempt to appeal this decision.

On remand, the Trial Judge, taking into consideration *Gulesian*, as directed, determined to allow refunds for the years 1991, 1992, and 1993, but decided that because Respondent acted "within the good faith parameters of *Gulesian*," the Petitioners were not entitled to refunds for 1989 and 1990. (R-I-101-124) Not content with this semi-victory, the Petitioners decided to appeal this second Order of the Trial Judge. (R-I-125-150)

The Trial Judge also heard testimony that the fiscal impact of a refund would be great and also the cost of a refund to Respondent (R-II-225; 275-276; 304) would be of tremendous economic impact on Respondent, because of the expense estimated at $153,000., and $10,000., per year for the refund checks. (R-II-224)

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Respondents Cross-Appealed based upon Petitioners' challenge to the identical special assessment ordinances for the assessment years 1991, 1992, and 1993, that were the subject of the District Court's decision in *Madison County v. Foxx, supra*, and that resulted on remand to the lower court in a refund being ordered with interest from the dates of the payments of the assessments and before the entry of a money order or money judgment. (R-CA-52-75).

The parties while *Madison County v. Foxx, supra* was pending in this Court entered into stipulations for the years 1991 and 1992, holding the subject case in abeyance with the understanding that the decision there would be binding precedent, and further provided that tax certificates would not be issued during the time that the case was being considered and ruled upon by the District Court. This was the only effect of the parties' stipulation.(R-CA-15-18; 32-35). A stipulation was never entered for the year 1993.

On remand from the District Court's decision in *Madison County v. Foxx, supra*, a hearing was held on the refund issue as per the Mandate. After hearing testimony directed to the propriety of a refund the Trial Judge entered an Order on Remand directing refunds for the years 1991, 1992, and 1993, and provided that the plan for the implementation of the refunds would be determined by a separate order after suggestions by the parties. (R-CA-75)

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However, the Trial Judge levied interest against the amount of the assessments previously paid from the dates of their payment as post judgment interest. (R-CA-74) The exact amount of the refund has not yet been determined, and thus a final money judgment has not been entered on the refund. (R-CA-75)

Because the Trial Judge levied interest retroactive to the dates of the payments of the assessments by Petitioners, Respondents filed their cross-appeal challenging the levy of interest by the Trial Judge as actually prejudgment interest and under any labeling previous to the entry of a final money judgment as required for the support of a levy of post judgment interest. (R-CA-76-101)

The First District Court of Appeal once again heard argument in this case on the appeal and cross-appeal of the parties. The District Court issued its ruling on these matters in *Dryden v. Madison County,* 21 Fla. L. Weekly D587, (Fla. 1st DCA March 5, 1996), which was subsequently clarified at 21 Fla. L. Weekly D1121, (Fla. 1st DCA May 7, 1996).

In this opinion the District Court upheld the Trial Judge's order in all respects except the award of interest. *Id.* The District Court found that the Trial Judge's determination that the Respondent acted "within the good faith parameters of *Gulesian* "was based upon its

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findings that the Respondent's actions were based upon information obtained from the State Association of County Commissioners meetings and "expert" outside counsel who helped draft the state legislation on special assessments. *Id.* at 587. The District Court found that the Trial Judge's conclusion that the Respondent acted in good faith was supported by substantial competent evidence. *Id.* at 587.

The District Court further found that the Petitioners were not entitled to any interest and reversed the Trial Judge's order as it pertained to interest. *Id.* at 588. The District Court cited this Court's opinion in *Kuhnlein v. Dep't of Revenue*, (Kuhnlein II) 662 So. 2d 308 (Fla. 1995) as authority for the proposition that there is "no entitlement to prejudgement interest in a tax refund case" and that "post-judgment interest could only run from the time of a final judgment." *Dryden* at 588. It should be noted that contrary to the Petitioners' assertion on page 12 of their Initial Brief, the Trial Judge did not specifically reject the reasoning of *Kuhnlein II, supra*, as the *Kuhnlein II* opinion was filed over four (4) months after the Trial Judge entered his Order concerning interest.

The District Court then considered the assertion by the Petitioners that this Court's decision in *Gulesian* had been overruled by the United States Supreme Court's decision in *McKesson v. Division of Alcoholic Beverages and*

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Tobacco, 496 U.S 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) as well as this Court's decision in *Dep't of Revenue v. Kuhnlein*, (*Kuhnlein I*) 646 So. 2d 717 (Fla. 1994). The District Court rejected this contention stating that the assessments were "invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case." *Dryden* at 588.

However, the District Court did recognize this question as being one of great public importance and stated the question as follows:

> IS THE HOLDING OF *GULESIAN V. DADE COUNTY SCHOOL BD.*, 281 So. 2d 325 (Fla. 1973), WHICH PROVIDES THAT UNDER CERTAIN CIRCUMSTANCES A GOVERNMENTAL ENTITY NEED NOT REFUND PROCEEDS FROM A TAX OR, IN THIS CASE, A SPECIAL ASSESSMENT THAT IS LATER DETERMINED TO BE ILLEGAL, STILL VALID AFTER THE DECISIONS OF *MCKESSON V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), AND *KUHNLEIN V. DEPARTMENT OF REVENUE*, 662 So. 2d 308 (Fla. 1995)

Dryden v. Madison County, 21 Fla. L. Weekly D1121 (Fla. 1st DCA May 7, 1996)

It should be noted that the cite for the *Kuhnlein* case is given as 662 So. 2d 308 (Fla. 1995) in the certified question as stated in the District Court's Order on Respondent's Motion For Clarification. This is the cite for

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the second *Kuhnlein* case (*Kuhnlein II*) which does not address the issue of refunds. In the Respondent's Motion for Clarification the Respondents mistakenly cite *Kuhnlein II* in their requested certified question. Since the District Court originally cited the *Kuhnlein* case as 646 So. 2d 717 (Fla. 1995) (*Kuhnlein I*) which did address the issue of refunds. It is the opinion of the Respondent's that the citation to the *Kuhnlein II* case is an error precipitated by the error of the Respondents and that the District Court in reality is referring to the *Kuhnlein I* case in its certified question.

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ISSUES

The decision of the First District Court of Appeal should be affirmed in all respects and the certified question answered in the affirmative due to the fact that:

1. This Court's decision in the case of *Gulesian v. Dade County School Bd.*, 281 So. 2d 325 (Fla. 1973) has not been overruled by the decisions of *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), and *Dep't of Revenue v, Kuhnlein*, 646 So. 2d 717 (Fla. 1994), as those cases only apply to actions of the government which violate the Federal Constitution.

2. The Trial Judge's findings that the Respondents acted in good faith, within the parameters of *Gulesian,* are supported by substantial competent evidence.

3. The Petitioners are not entitled to prejudgement interest on any refunds as a matter of law, nor are they presently entitled to post-judgement interest as the instant case has not yet been finalized. *Kuhnlein v. Dep't of Revenue,* 662 So. 2d 308 (Fla. 1995).

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SUMMARY OF ARGUMENT

IS THE HOLDING OF *GULESIAN V. DADE COUNTY SCHOOL BD.*, 281 So. 2d 325 (Fla. 1973), WHICH PROVIDES THAT UNDER CERTAIN CIRCUMSTANCES A GOVERNMENTAL ENTITY NEED NOT REFUND PROCEEDS FROM A TAX OR, IN THIS CASE, A SPECIAL ASSESSMENT THAT IS LATER DETERMINED TO BE ILLEGAL, STILL VALID AFTER THE DECISIONS OF *MCKESSON V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), AND *KUHNLEIN V. DEPARTMENT OF REVENUE*, 662 So. 2d 308 (Fla. 1995)

The question certified by the First District Court of Appeal should be answered in the affirmative as *McKesson* and *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (*Kuhnlein I*) only apply to actions of the government which violate the Federal Constitution. In this case the action of the government violated neither the Federal nor State Constitution, but was stricken for not complying with the procedural requirements of the state law. This is completely dissimilar to *McKesson* and *Kuhnlein I*, in that both of those cases involved violations of the Federal Constitution. Had the Courts of the State of Florida ruled that the special assessments in question were enacted in compliance with the state law, there would have been no Federal Constitutional issue. Likewise, in ruling the Special Assessments invalid but applying such ruling prospectively there can be no Federal Constitutional issue. *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287

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U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

Concerning whether *Gulesian* was applied correctly, the District Court in *Madison County v. Foxx*, 636 So. 2d 39 (Fla. 1st DCA 1994), instructed the Trial Judge to make findings of fact as to whether Respondent acted within the "good faith" parameters of *Gulesian*, when levying assessments for the years 1989 and 1990. The District Court found that the Respondents relied upon the advice of "expert" counsel and information it had obtained from the State Association of County Commissioners, therefore ruling that Respondent had in fact acted in "good faith," within the meaning of *Gulesian*. These findings are not clearly erroneous, and are supported by substantial evidence. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

The District Court correctly found that the Trial Judge erred by awarding interest, to accrue from the dates of the payments of the special assessments by the Petitioners. Prejudgment interest is impermissible against a governmental body and post judgment interest is only authorized against a governmental body from the date of the entry of a final money judgment. *Kuhnlein v. Dep't of* Revenue, 662 So. 2d 308 (Fla. 1995) (*Khunlein II*) Thus, the Trial Judge's levy of interest against Respondent, a governmental body, effective as of the dates of the payments of the assessments by Petitioners in 1991, 1992, and 1993,

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is error. This error though can be explained by the fact that the Trial Judge did not have the benefit of this Court's decision in *Kuhnlein II, supra*, when he made his decision.

The Petitioners further assert that certain stipulations mandate the award of interest in the instant case. The District Court correctly found that the stipulations for 1991 and 1992 did not provide any basis for the assessment of post judgment interest. (R-CA-15-18; 32-35; 74) A stipulation was never entered for the year 1993 yet the Trial Judge used the previous stipulations as justification for post judgment interest on payments made in 1993, as well as in 1991 and 1992. The stipulations do not address the payment of interest previous to the entry of a final money judgment, and only provide for the holding of this case in abeyance while awaiting the decision of this Court in the case of *Madison County v. Foxx, supra*, and prohibits the issuance of tax certificates during this waiting period. All other issues are left for adjudication just as if the stipulations were nonexistent. "The agreement is silent as to the payment of any interest." *Dryden*, 21 Fla. L. Weekly D587 at 588

Thus, the entry of an order assessing interest against the Respondent as a governmental agency, effective as of the dates of the payments of the assessments, was properly reversed by the District Court as being error as a

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matter of law. Accordingly, the District Court should be affirmed. *Canakaris v. Canakaris, supra*

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ARGUMENT

I. THE QUESTION CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE AFFIRMATIVE AS THE *MCKESSON* AND *KUHNLEIN* CASES ONLY CONCERN ACTIONS OF GOVERNMENT WHICH VIOLATE THE FEDERAL CONSTITUTION AS OPPOSED TO THE INSTANT CASE WHERE THE ACTION HAS MERELY BEEN FOUND TO BE PROCEDURALLY INVALID.

The First District Court of Appeal has certified the following question as being one of great public importance:

> IS THE HOLDING OF *GULESIAN V. DADE COUNTY SCHOOL BD.*, 281 So. 2d 325 (Fla. 1973), WHICH PROVIDES THAT UNDER CERTAIN CIRCUMSTANCES A GOVERNMENTAL ENTITY NEED NOT REFUND PROCEEDS FROM A TAX OR, IN THIS CASE, A SPECIAL ASSESSMENT THAT IS LATER DETERMINED TO BE ILLEGAL, STILL VALID AFTER THE DECISIONS OF *MCKESSON V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), AND *KUHNLEIN V. DEPARTMENT OF REVENUE*, 662 So. 2d 308 (Fla. 1995)

Dryden v. Madison County, 21 Fla. L. Weekly D1121 (Fla. 1st DCA May 7, 1996)

This question should be answered in the affirmative as it pertains to this case.

It should be noted that the cite for the *Kuhnlein* case is given as 662 So. 2d 308 (Fla. 1995) in the certified question as stated in the District Court's Order on Respondent's Motion For Clarification. This is the cite for the second *Kuhnlein* case (*Kuhnlein II*) which does not

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address the issue of refunds. In the Respondent's Motion for Clarification the Respondents mistakenly cite *Kuhnlein II* in their requested certified question. Since the District Court originally cited the *Kuhnlein* case as 646 So. 2d 717 (Fla. 1995) (*Kuhnlein I*) which did address the issue of refunds. It is the opinion of the Respondent's that the citation to the *Kuhnlein II* case is an error precipitated by the error of the Respondents and that the District Court in reality is referring to the *Kuhnlein I* case in its certified question.

In the instant case, Respondent, levied special assessments which were determined by the First District Court of Appeal to be invalid due to procedural irregularities. *Madison County v. Foxx,* 636 So. 2d 39 (Fla. 1st DCA 1994). The assessments were not then and have not to this day been determined to violate any provision of Federal law or the Federal Constitution. In fact, very similar special assessments which did not have the same procedural irregularities have been recently upheld by the Appellate Courts of the State of Florida. *Sarasota County v. Sarasota Church of Christ, Inc.,* 667 So. 2d 108 (Fla. 1995); *Harris v. Wilson,* 656 So. 2d 512 (Fla. 1st DCA 1995), *review granted,* 666 So. 2d 143 (Fla. 1995)

In its certified question the District Court asks whether *Gulesian* has been overruled by the decisions in

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McKesson and *Kuhnlein I*. Both of these cases are inapplicable to the instant case. The *McKesson* case dealt with a tax which violated the commerce clause of the Federal Constitution. This violation was occasioned by the charging of a higher rate of tax on liquor produced from agricultural products which were not commonly grown in Florida, and a lower rate of tax on liquors which were produced from agricultural products which were commonly grown in Florida. This Court struck down this scheme of taxation as violative of the Federal Constitution's commerce clause. *Div of Alcohol v. McKesson,* 524 So. 2d 1000 (Fla. 1988). This Court however declined to award any refunds to the taxpayers who paid the impermissible tax. The Federal Supreme Court then accepted certiorari and reversed the decision of this Court insofar as it declined to award refunds to the taxpayers who were discriminated against. Stating that a there must be meaningful backward looking relief when a tax violates a provision of the Federal Constitution. *McKesson v. Div. Of Alcohol*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990)

In *Kuhnlein I,* this Court again addressed the issue of how to treat a tax which violates the Federal Constitution. In *Kuhnlein I,* residents of the State brought an action to seek the invalidation of an impact fee imposed upon cars purchased or titled in other states but

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subsequently registered in Florida by state residents. This Court found that this scheme also violated the Commerce Clause of the Federal Constitution. *Kuhnlein I,* 646 So. 2d 717 (Fla. 1994) This Court went on to cite *McKesson* for the proposition that the taxpayers who pay a tax which is in violation of the Federal Constitution must be given a meaningful backward looking relief. This led the Court to find that the Trial Judges award of refunds to the taxpayers who paid the impact fee was within the discretion of the trier of fact. *Kuhnlein I,* 646 So. 2d 717 at 724-727.

As was held by the First District Court of Appeal these facts, make the *McKesson* and *Kuhnlein I* cases inapplicable to the instant case, in that both of these cases deal with violations of the Federal Constitution, and Federal rights. "in the present case, the tax in question was invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. In both *McKesson* and *Kuhnlein I*, the taxes were invalidated based on inconsistencies with the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case." *Dryden*, 21 Fla. L. Weekly D587 at 588,

The State Supreme Court of Utah has recently considered this issue in the case of *Kennecott v. State Tax*

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Com'n, 862 P. 2d 1348 (Utah 1993). In the *Kennecott* case the Supreme Court of Utah struck down a Utah State statute for violating its State Constitution. The taxpayers petitioned for refunds of the amount of the assessments paid pursuant to the stricken law, and cited the *McKesson* case as authority for the proposition that the Federal Constitution mandated such refunds. The Utah Supreme Court flatly rejected such assertion:

> "*McKesson* is inapplicable here. In *McKesson*, the Court repeatedly stated that its decision was based on Florida's violation of the Commerce Clause. In this case, the tax scheme was stricken as a violation of the Utah Constitution's prohibition against unequal taxation. No Federal law was involved. This court has repeatedly recognized that "[t]he purely prospective application of a state court decision overruling prior authority in a civil case [involving state law] violates no right under the United States Constitution." Thus, federal law does not govern the question of whether a state court decision involving state law should be applied retroactively or prospectively." *Kennecott*, 862 P. 2d 1348 at 1353

In reaching this conclusion the Utah Supreme Court relied upon United States Supreme Court's opinion in the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932) in which Justice Cardozo stated:

> "[T]he Federal Constitution has no voice upon the subject [of

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> retroactivity versus prospectivity]. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward....
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts." *Kennecott*, 862 P. 2d 1348, at 1353, and *Great Northern Railway*, 287 U.S. 358, at 364-365

This position, as well as the continued vitality of the *Great Northern Railway* case are supported by *McKesson's* companion case *American Trucking Association, Inc. v. Smith*, 496 U.S. 167, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990), in which the Court stated:

> When questions of State Law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]"), *American Trucking*, 496 U.S. 167, at 177.

Thus, the following cases cited by the Petitioners and Amici, *Reich v. Collins*, U.S., 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994), *Ward v. Love County*, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920), *Cleveland Bd. Of Ed. v.*

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Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), *Atkins v. Parker*, 472 U.S. 115, 102 S. Ct. 2520, 86 L. Ed. 2d 81 (1985), etc., are inapplicable due to the fact that they deal with violations of the Federal Constitution or Federal law. Since in the instant case, *Gulesian* is being applied to a situation free of Federal Constitutional issues "the Federal Constitution has no voice" *American Trucking*, 496 U.S. 167 at 177, upon whether this state requires a refund of special assessments collected in good faith, and does not dictate the overruling of *Gulesian*.

Further, this Court has, on at least two (2) occasions since the *McKesson* case, provided that its decisions would be applied prospectively only, denying Florida residents certain monetary benefits. Those decisions are *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) and *City of Miami v. Bell*, 634 So. 2d 163 (Fla. 1994)

In *Martinez v. Scanlan*, the Court found that a state statute, which reduced worker's compensation benefits, was enacted in violation of the single subject rule of the Florida Constitution. This Court further decided that this statute was not void *ab initio* (from its inception) due to the fact that only its form of enactment was unconstitutional:

> In determining whether a statue is void ab initio, however, this court seemingly has distinguished between the

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> constitutional authority, or power, for the enactment as opposed to the form of an enactment. *McCormick v. Beounetheau*, 139 Fla. 461, 190 So. 882 (1939). Here, we are declaring chapter 90-201 unconstitutional not because the Legislature lacked the power to enact it, but because of the form of its enactment. *Martinez*, 582 So.2d 1167 at 1174.

This Court held that the effective date of the voiding of Ch. 90-201, Laws of Fla., would be the date of the filing of the Court's opinion and that its decision should operate prospectively only. *Martinez*, 582 So. 2d 1167 at 1176. This had the effect of leaving workers who were injured between the effective date of Ch. 90-201, Laws of Fla., and the filing of the Court's opinion in Martinez, with the remedies provided in Ch. 90-201, Laws of Fla., rather than the greater remedies provided in the previous law.

Just as in the *Martinez v. Scanlan, supra* Respondent had the power to enact ordinances which levied the subject special assessments. *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 108 (Fla. 1995) and *Harris v. Wilson*, 656 So. 2d 512, (Fla. 1st DCA 1995) rev. granted 666 So. 2d 143 (Fla. 1995) However, Respondent did not comply with the procedural requirements set out in the applicable provisions of law. *Madison County v. Foxx*, 636 So. 2d 39 (Fla. 1st DCA 1994) Thus, *Martinez*,

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is authority for the prospective applications of a court decision such as the instant case

In *City of Miami v. Bell, supra*, this Court held that its decision in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989) invalidating an ordinance of the City of Miami, would be applied prospectively only. In *Barrangan*, the City of Miami had enacted an ordinance based upon §440.09(4) Fla. Stat., (1971) to reduce disability pension benefits for its retired employees in an amount equal to the worker's compensation benefits they were entitled to receive for the disabling event. The Florida Legislature of 1973 however, repealed the statute which authorized the City of Miami to enact its ordinance. The City of Miami argued that since its ordinance was enacted prior to the repeal of the enacting statute its ordinance was still valid, and continued to deduct this offset after such repeal. The Florida Supreme Court in *Barrangan* ruled that the repeal of §440.09(4), Fla. Stat. (1971) effectively repealed the City of Miami's ordinance and thus invalidated the same.

In *City of Miami* though, this Court held that refunds for such offsets would only be required for any amounts deducted after the effective date of the *Barrangan* decision, rather than the earlier date of the repeal of the enacting statute. As reasons therefore the Court stated "present and future benefits required by *Barrangan* can be

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adjusted without serious financial consequences for city taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the *City of Miami*". 634 So. 2d 163 at 166.

Just as in the *City of Miami* case Respondent believed contrary to State law that it could collect the subject special assessments pursuant to its ordinances. *Dryden v. Madison County*, 21 Fla. L. Weekly D587 at 588. Also like the *City of Miami* case the Trial Judge heard testimony that the fiscal impact of a refund would be great and also the costs of a refund to the Respondent would be of tremendous economic impact on Respondent, because of the expense estimated at $153,000,000., and $10,000., per year for the refund checks. (R-II-224-225; 275-276; 304) Thus, the *City of Miami* case like *Martinez* is authority for the District Court's decision in the instant case.

Both the *Martinez* and *City of Miami* cases were decided by this Court on the basis of the State law claims asserted by the Parties. In the instant case, this Court should likewise view the claims asserted as state law claims and reject any contention by the Petitioners that any Federal Claims are involved, or that the *McKesson* case dictates so. *Kennecott v. State Tax Commission*, 862 P. 2d 1348 (Utah 1993)

Wherefore, the Respondent's request that the

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Supreme Court uphold the decision of the First District Court of Appeal and answer the certified question in the affirmative.

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II. THE DETERMINATION OF THE TRIAL COURT, THAT THE RESPONDENT ACTED WITHIN THE GOOD FAITH PARAMETERS OF GULESIAN IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, THUS THIS COURT, LIKE THE DISTRICT COURT, SHOULD AFFIRM ITS DECISION AS NOT CLEARLY ERRONEOUS. *CANAKARIS V. CANAKARIS*, 382 So.2d 695 (Fla. 1990).

The Petitioners have also argued several other points of appeal which were not part of the certified question, nor have the Petitioners cited any authority or reason for the Court to exercise jurisdiction over such parts of the case. However, the Respondents will briefly address each of the points.

The first point is that the evidence does not support a denial of a refund because *Gulesian* is readily distinguishable. As was found by the District Court of Appeal in this case the Trial Court specifically found that prior to its finding in 1991 that the 1989-1990 special assessments were invalid, the County had acted in good faith based on information obtained from State Association of County Commissioners' meetings and "expert" outside counsel who helped draft the State Legislation on special assessments. *Dryden v. Madison County*, 21 Fla. Law Weekly D587 (Fla. 1st DCA Mar. 5, 1995) The Court found that there was substantial competent evidence to support the Trial Court's conclusion that the County acted in good faith in enacting the 1989-1990 ordinances, thus this decision satisfies the requirements of appellate review of finding of

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facts. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980)

On Page 20 of Petitioners' Brief, Petitioners state that reliance on "good advice" is legally insufficient to constitute good faith within the parameters in *Gulesian*. This is patently incorrect under the *Gulesian* case itself, where the Dade County School Board apparently relied upon the advice of its attorneys that the Federal District Court opinion which overturned Florida Constitutional 10 mil cap, would not be reversed by the Federal Court of Appeals. This also should be incorrect in the *Martinez* case. Presumably the Florida Legislature depended upon staff's "good advice" that the two (2) laws in question when enacted together did not violation the Florida Constitution's Single Subject requirement. Also, in the *City of Miami v. Bell*, the City of Miami presumably relied upon the advice of its attorneys that it could continue collecting amounts levied under its ordinance after that ordinance had been repealed by the repeal of its enacting statute by the Florida Legislature.

The *Martinez* case is particularly applicable because there the Court made the necessary distinction between form and substance, when invalidating a statute. Under Florida's scheme of home rule authority a non-charter county's ordinance should get no less consideration. Art. VIII, § 1(f), Fla. Const., §125.01, Fla. Stat. Petitioners further states that on page 24 that the actions of

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Respondents demonstrate a clear blatant disregard for the law. This seems to be in direct contradiction with the determination by the First District Court of Appeal in *Madison County v. Foxx* that:

> experience lawyers, who have argued cases on the meaning of these statutes and the constitutional provision for several years - one nearly a century ago - argue vehemently such diversion interpretations of these statutes if testament to their confusion message and the need for Legislative action. *Madison County v. Foxx*, 636 So. 2d 36 at 48-49.

On page 27 of the Petitioners' Brief the Petitioners state that "no Florida Court has ever upheld a denial of refund sought by property owners for the public entity acted directly contrary to the intent of the Legislature. This seems to ignore the *Gulesian* case where the public body did exactly that, and levied ad valorem taxes in excess of the limits set out in the Constitution of the State of Florida, which necessarily embodies the intent of both the Legislature and the people. Additionally in the *City of Miami v. Bell*, this Court specifically denied a refund where the public entity collected money contrary to the intent of the Legislature. The only difference was that the people seeking the refunds where not property owners.

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III. THE DECISION OF THE DISTRICT COURT DENYING PREJUDGMENT INTEREST SHOULD BE AFFIRMED AS PREJUDGMENT INTEREST AGAINST A GOVERNMENTAL BODY IS WRONG AS A MATTER OF LAW. *Kuhnlein v. Dep't of Revenue*, **662 So. 2d 308 (Fla. 1995), THE DECISION DENYING POST JUDGMENT INTEREST SHOULD ALSO BE AFFIRMED AS OF THE ENTRY OF POST JUDGMENT INTEREST IS IMPROPER UNTIL THE ACTION IS FINALIZED.** *Kuhnlein v. Dep't of Revenue, supra*

Next, the Petitioners argue that the decision of the First District Court of Appeal in denying interest on such refund should be reversed. In deciding this issue, the District Court of Appeal relied upon the very recent decision of the Florida Supreme Court in *Kuhnlien v. Department of Revenue*, 662 So.2d 308 (Fla. 1995) (*Kuhnlien II*) stating "the Court determined that there was no entitlement to prejudgment interest in a tax refund case, and reaffirmed that post-judgment interest could only run from the time of the Final Judgment". *Dryden v. Madison County*, 21 Fla. Law Weekly D587 at 588 Presently, as in the *(Kuhnlein II)* case there is no Final Judgment due to the fact that the Court has not determined or entered an Order as to attorney's fees and costs to be paid out of the common fund, nor entered an Order to implement the refund plan approved by the Circuit Court. Thus, as stated, by this Court there is no present entitlement to any interest to the refunds.

It is worth noting that contrary to the

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Petitioners' assertion on page 12 of their Brief the Trial Judge did not specifically reject the reasoning of *Kuhnlein II* as the *Kuhnlein II* opinion was filed over four (4) months after the Trial Judge entered his Order concerning interest.

The Petitioners assert here as they did before the First District Court of Appeal that there are two (2) lines of case governing interest. One, apparently contains the case of *Mailman v. Green*, 111 So. 2d 267 (Fla. 1959) and *Kuhnlein II*. The other line apparently contains *Simpson v. Merrill*, 234 So. 2d 350 (Fla. 1970), *Broward County v. Finlayson*, 555 So. 2d 1211 (Fla. 1990), *Palm Beach County v. Town of Palm Beach* (Petitioners' Brief page 34) The Respondents, however, do not agree with this assertion that there are two (2) lines of cases. These cases are all completely compatible with each other.

The first case asserted by Petitioners is *Palm Beach County v. Town of Palm Beach* in which Petitioners assert since that since the Supreme Court ordered an award of post-judgment interest since the entry of the Trial Court's judgment that this is authority for post-judgment interest from the date of the Trial Court's Judgment in the instant case. This is patently incorrect due to the fact that in that case of *Palm Beach County v. Town of Palm Beach*, Palm Beach County was sued by the Town of Palm Beach for recovery of certain monies which the Town of Palm Beach

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deemed entitled through a revenue sharing statute. This case was completely finalized at the time of Trial Court's Judgment since presumably the Town of Palm Beach did not engage in a class action where the Trial Court was required to set attorney's fees and order a plan implementing a refund. Further in foot note 1 of that opinion the Court states that the Parties stipulated to the amount of the amended Judgment thereby relieving the Appellate Court of reviewing such amount. This case is completely consistent with this Court's opinion in *Kuhnlein II*, where the Court stated that since there was "not a final money judgment and therefore there is not at present an entitlement to post-judgment interest." Both cases allowed post-judgment interest at the time there was a final money judgment.

The case of *Simpson v. Merrill* is likewise not in conflict with *Mailman* or *Kuhnlein II* in that *Simpson v. Merrill, supra* provides that landowners may recover all legal costs of recovering a judgment for refund of a tax assessment. This however, is pursuant to a specific statute §57.041, Fla.Stat., which provides for such recover, and thus is not in conflict with *Kuhnlein II* which has no similar statute.

Finally, *Broward County v. Finlayson, supra* is likewise not in conflict with *Mailman and Kuhnlien II*. In this case, this Court found that Broward County would be

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obligated to pay pre-judgment interest on a judgment recovered by Broward County's emergency medical technicians. In the emergency medical technicians had sued seeking a proper definition for overtime under their employment contracts. This Court found that the sovereign immunity doctrine, which normally barrs pre-judgment interest, did not barr pre-judgment interest in a breach of contract action. The Court stated where "the State has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the State from action arising from the State breaching that contract." *Broward County v. Finlayson*, 555 So. 2d 1211 at 1213. In other words when the sovereign engages in the free market as a private individually he will be liable for damages again as a private individual.

This is completely dissimilar in the instant case when the Respondent enacted ordinances which levied special assessments. It is not possible to construe this as a breach of contract action as taxation, and the levying of assessment for special benefits are intrinsically sovereign in nature.

The Petitioners further assert that certain stipulations mandate the award of interest in the instant case. The District Court correctly found that the stipulations for 1991 and 1992 did not provide any basis for the assessment of post judgment interest. (R-CA-15-18; 32-

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35; 74) A stipulation was never entered for the year 1993 yet the Trial Judge used the previous stipulations as justification for post judgment interest on payments made in 1993, as well as in 1991 and 1992. The stipulations do not address the payment of interest previous to the entry of a final money judgment, and only provide for the holding of this case in abeyance while awaiting the decision of this Court in the case of *Madison County v. Foxx*, *supra*, and prohibits the issuance of tax certificates during this waiting period. All other issues are left for adjudication just as if the stipulations were nonexistent. "The agreement is silent as to the payment of any interest." *Dryden*, 21 Fla. L. Weekly D587 at 588

Thus, this Court should affirm the ruling of the District Court that pre-judgment interest may not be levied against the public body as a matter of law, and that post-judgment interest is improper in this case until the final money judgment is entered.

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CONCLUSION

The ruling of the First District Court of Appeal should be affirmed in all respects and the certified question answered in the affirmative.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to LARRY E. LEVY, Post Office Box 10583, Tallahassee, Florida 32302, JOSEPH C. MELLICHAMP, III, Senior Assistant Attorney General, and ERIC J. TAYLOR, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050, KEITH HETRICK, 201 East Park Avenue, Tallahassee, Florida 32301, ROBERT M. RHODES, and VICTORIA L. WEBER, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301, SANFORD A. MINKOFF, Post Office Box 7800, Tavares, Florida 32778, WILLIAM J. ROBERTS, Post Office Box 1386, Tallahassee, Florida 32302, HERBY W.A. THIELE, 301 South Monroe Street, Tallahassee, Florida 32301, and DANIEL C. BROWN, 106 East College Avenue, Tallahassee, Florida 32301, by regular U. S. Mail this 10th day of June, A. D. 1996.

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