SUPREME COURT OF FLORIDA

Case No. 87,594

QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA,

Respondent.
_____/

PETITIONERS' BRIEF ON THE MERITS ON REMAND FROM UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

Petitioners, Quinton Dryden, et al., will be referred to herein as the "property owners." Respondent, Madison County, Florida, will be referred to herein as the "county." References to the record on appeal will be to the appendix filed with this brief and will be delineated as (A-document #-page #). References to the transcript will be delineated as (TR-volume #-page #). References to depositions will be to the amended index and will be delineated as (AI-volume #-document #-page #).

STATEMENT OF THE CASE AND OF THE FACTS

This cause is before this Court on remand from the United States Supreme Court by order dated March 2, 1998. (A-7) In the order, the United States Supreme Court granted the property owners' petition for writ of certiorari, vacated this Court's previous decision, and remanded for further consideration in light of Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998). After the issuance of mandate, this Court established a briefing schedule for the parties by order dated April 16, 1998.

This case arose with the filing of a class action complaint in June 1990 for declaratory judgment and supplemental relief pursuant to chapter 86, Florida Statutes (1989), by the property owners in Madison County, Florida. (A-1-2) The complaint sought to have certain county levies labeled "special assessments/non-ad valorem assessment" and levied pursuant to county ordinances declared illegal, null, and void, in violation of the property owners' rights secured by the due process and equal protection clauses of the Florida and Federal Constitutions, the Florida Constitution's homestead protections, and several Florida Statutes. (A-1-2-3) The complaint also sought a refund of all monies collected pursuant to said ordinances. The property owners included homeowners who had paid the impositions and those who had not paid.

Prior to 1989, Madison County funded garbage disposal, landfill operations, ambulance services, and fire protection in

the rural areas of the county from either ad valorem taxes or from a combination of ad valorem taxes and fees charged for the various services rendered. (AI-II-29-236-240) For instance, persons using ambulance services were billed for the service furnished and either paid the bill directly or paid it through their insurance. (AI-II-32-336-337; AI-II-30-292-300) The City of Madison has a fire department which, by agreement with the county, also answers fire calls within a close radius of the City of Madison when possible. (AI-II-29-246) Since it is a rural farming and forestry area, fire service in the rural area also is provided by the Florida Forestry Service. (AI-II-29-exhibit #1-12)

Garbage disposal in the rural area of the county consists of garbage disposal and collection centers scattered throughout the county. These "green boxes" are used by both property owners and non-property owners as well as transients who either carry their household garbage to such disposal areas or carry it directly to the county landfill. (AI-II-29-236-240) No house-to-house garbage collection service was provided either before or after the adoption of the ordinances and the imposition of the levies challenged. (Id.) A charge was made for fire service if county fire service responded to a call. After the adoption of the 1989 ordinances, in which the assessments challenged were imposed, the garbage collection and landfill operation, as well as the fire and ambulance operations,

continued to be operated in the same manner and through essentially the same facilities as prior to 1989.

Subsequent to the filing of the complaint, the county amended its 1989 ordinances by adopting ordinances in 1990. (A-1-3) The original ordinances were adopted in August 1989 and imposed the assessments as of January 1, 1989, and subsequent years. (A-1-2)

After discovery and a hearing, the trial court entered its final judgment on November 25, 1991, finding that the ordinances and levies were invalid and ordering the county to refund all assessments levied pursuant thereto for years 1989 and 1990. (A-1-15) After suit was filed in June 1990, the county continued to assess, collect, and spend money collected and continued to do so after filing its appeal. (A-2-14)

On appeal, the First District Court of Appeal affirmed the trial court's decision holding the ordinances invalid and the levies null and void. The district court, however, vacated that part of the judgment which had ordered refunds, finding same premature. Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994). (A-10)

When the assessments originally were levied, many persons in Madison County refused to pay. As a result, liens attached to their property that required 18 percent interest to be charged, and assessment certificates were sold to bidders for nonpayment that provided for 18 percent interest if redeemed. (A-2-22)

After the district court ruled that the ordinances and levies were invalid, the county repurchased all the assessment certificates sold, paid 18 percent interest thereon, and cancelled all the liens for persons who had not paid. (A-2-21-22) During the five-year period, the percentage of persons who did not pay the levies was as follows: 1989 - 60%; 1990 - 50%; 1991 - 50%; 1992 - 56%; and 1993 - 71%. (TR-I-176-177)

While the case was pending on appeal to the district court, the county continued to levy and collect the assessments for years 1991, 1992, and 1993 pursuant to the ordinances and advertised and sold certificates for nonpayment of assessments for 1990. (A-2-22) During the appeal, therefore, the property owners filed a separate lawsuit challenging the levies for 1991 on the same grounds as had been asserted in the first lawsuit challenging the 1989 and 1990 ordinances and levies. To avoid another sale of certificates for nonpayment, the parties entered into a stipulation on May 27, 1992. Pursuant to the stipulation, the trial court ordered that assessment certificates and assessment deeds would not be sold but permitted the county to continue to assess and collect assessments; provided that all money collected should be retained to make whatever refunds ultimately were ordered. (A-3-3)

The 1991 complaint subsequently was amended to add challenges to the levies for years 1992 and 1993 while the case was pending on appeal. A similar stipulation and order was executed and entered in March 1993, so that no further assessment

certificates or assessment deeds would be sold. (A-4) The county, however, continued to assess, collect, and spend the money notwithstanding the court's injunction to hold all money collected. (A-2-15)

On remand from the district court's decision, the two cases were consolidated pursuant to the parties' agreement that, since the issues were identical, the decision as to the validity of the ordinances and levies in the first case controlled the validity of the ordinances and levies for the second case. After hearing and testimony, the trial court entered its Order on Remand and ordered refunds for all years involved in the second lawsuit, which were years 1991, 1992, and 1993. The trial court, however, held that the county had acted in good faith in its levies and denied refunds for years 1989 or 1990. (A-2-22-23) In rendering its order, the trial court made a factual finding that the effect of denying refunds for all litigants violated the equal protection clause stating:

> Thus, in its present posture, the County is asking this Court to deny refunds to those who did pay, even though many property owners never paid. This certainly is not fair and does not treat those who did pay and those who did not pay the same. Equal treatment is required of all so that no one should be treated differently. This is recognized in *McKesson* which also points out that failure to give refunds of monies unlawfully collected constitutes a denial of due process. At bar, it would also constitute a denial of equal protection of the law.

(A-2-22)

The property owners appealed the Order on Remand to the First District Court of Appeal. The county cross-appealed, citing as error the trial court's order finding that the refunds were entitled to interest pursuant to section 55.03, Florida Statutes (1997), which provides for interest on all final judgments. The county did not appeal that part of the trial court's judgment ordering refunds for years 1991, 1992, and 1993.

On appeal, the First District Court affirmed the trial court's finding that "good faith" was still a defense which could be used by a county to avoid making refunds, notwithstanding McKesson. The district court also reversed that part of the trial court's order awarding interest, and certified a question to this Court. Dryden v. Madison County, 672 So.2d 840 (Fla. 1st DCA 1996). (A-9)

This Court accepted jurisdiction and answered the following certified question in the affirmative:

> 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 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 (1990), and *KUHNLEIN v. DEPARTMENT OF REVENUE*, 646 So.2d 717 (Fla. 1995).

Dryden v. Madison County, 696 So.2d 728, 729 (Fla. 1997). (A-8)

This Court with one dissent answered this question by holding that, notwithstanding McKesson, federal due process requirements do not require a county to refund assessments collected pursuant to a coercive statutory scheme where payment

is required to prevent a lien from attaching to the property and to prevent sale of tax certificates and tax deeds, and 18 percent interest is charged for late payments and no predeprivation remedy is provided by statute, if the court finds that the levying political entity acted in "good faith." Dryden, 696 So.2d at 730, n.4 ("We agree with the district court that the record supports the trial court's finding of good faith.").

Although this Court's decision mentioned the United States Supreme Court's holding in McKesson, it cited only Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973), as support for its holding. Gulesian is the same case this Court relied upon in McKesson, which was reversed by the United States Supreme Court. Justice Wells' lengthy dissent addresses the reversal of this Court's decision in McKesson and Gulesian stating:

> I dissent from the majority's holding that equitable considerations preclude a refund of unlawful assessments. Precluding any remedy to those taxpayers who complied with the law and paid the invalid special assessments constitutes a denial of due process. Moreover, the majority's reliance on *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), is misplaced. Even if *Gulesian* is still valid after *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)(*McKesson II*), this case does not come within the narrow holding of *Gulesian*. To deny taxpayers who paid the assessments any relief would additionally violate equal protection and is patently unfair.

Dryden, 696 So.2d at 730.

Thereafter, Justice Wells examined the United States Supreme Court's holding in McKesson and concluded that (1) Gulesian, even if still valid after McKesson, does not apply because no judicial decision upholding the involved ordinances existed upon which good faith reliance could be based, (2) McKesson requires that, if a state places a taxpayer under duress to promptly pay an imposition when due and relegates him to a post-payment refund action to challenge its legality, due process requires meaningful backward looking relief, (3) precluding refunds constitutes a denial of equal protection of law because the county subsequently cancelled liens for all those who did not pay, and (4) interest is required. As Justice Wells stated:

> The Fourteenth Amendment provides that a state may not deprive any person of property without due process of law. *See* U.S. Const. amend. XIV, § 1. The United States Supreme Court interpreted this amendment in *McKesson II*, in which it set forth the legal analysis appropriate for determining a state's constitutional duty to provide relief to property owners for the payment of unlawful assessments. In *McKesson II*, the Court reviewed our decision in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988) (*McKesson I*), in which we denied a refund of taxes paid under a statute found to violate the Commerce Clause. We cited *Gulesian* in support of our finding that the prospective nature of the rulings was proper in light of the equitable considerations, including the good-faith reliance on a presumptively valid statute and the possibility that any refund would result in a windfall to those who paid the tax. *Id.* at 1010.
>
> In *McKesson II*, the United States Supreme Court reversed our decision. In so doing, the Court stated that prospective relief by itself did not exhaust the requirements of

> federal law. *McKesson II*, 496 U.S. at 31. The Court explicitly rejected the position that equitable considerations of good-faith reliance by the Division of Alcoholic Beverages and Tobacco on a presumptively valid statute allowed the state to deny a refund. *Id.* at 44, 110 S.Ct. at 2254.

Dryden, 696 So.2d at 731.

The property owners sought review of this Court's decision in Dryden to the United States Supreme Court and argued that the decision contravened their rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The property owners argued that this Court's decision conflicted with McKesson, Reich v. Collins, 513 U.S. 106 (1994), Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), Griffith v. Kentucky, 479 U.S. 314 (1987), and Ward v. Love County Board of Comm'rs, 253 U.S. 17 (1920). The Supreme Court granted the petition of certiorari, vacated this Court's decision, and remanded for further consideration in light of its decision in Newsweek, issued five days prior to its order. (A-7)

SUMMARY OF ARGUMENT

Justice Wells' dissent in this Court's initial decision is a correct expression of the law and should be adopted on remand from the United States Supreme Court. Federal due process and equal protection requires that property owners must receive an adequate postdeprivation remedy of any illegally imposed tax or charge paid under duress where no predeprivation right exists by which to challenge the legality of the tax or charge.

In Newsweek, the First District Court of Appeal had attempted to avoid ordering a sales tax refund, although acknowledging McKesson's requirements of "meaningful backward looking relief" when a taxpayer is forced to pay a tax before having an opportunity to challenge it, on the basis that there was a predeprivation remedy provided in section 72.011, Florida Statutes (1997). Even though there was a specific statute authorizing refunds, the First District Court held that McKesson and the cases cited therein did not require a post-payment refund.

The United States Supreme Court rejected this attempted circumvention citing McKesson and, among other cases, its decision in Reich. The Court held that a state may not "bait and switch" by holding out what appears to be a postdeprivation refund remedy and then declare, only after the disputed taxes were paid, that no such remedy exists because the taxpayer failed to use an available statutory predeprivation mechanism. The Court held that Newsweek "is entitled to a clear and certain

remedy and thus it can use the refund procedures to adjudicate the merits of its claim." Newsweek, 118 S.Ct. at 905.

Unlike the situation in Newsweek, in the instant case there is no predeprivation remedy at all. The impositions for which refund had been sought had been declared illegal, null, and void. They were collected pursuant to a statutory scheme which coerces prompt payment to prevent liens from attaching to the property and which provides for summary collection procedures including forfeiture of property. No predeprivation statutory mechanism exists for challenging the impositions. In addition, no specific statutory postdeprivation relief mechanism exists, such as refunds. The four-year statute of limitations found in sections 95.11(3)(m) and (p), Florida Statutes (1997), would control suits for the refund in this case. Section 95.11(3), Florida Statutes (1997), enumerates actions which are governed by the four-year statute of limitations and among those enumerated is an action which relates to any money paid to any governmental authority by mistake or inadvertence.

In Newsweek, the First District Court of Appeal attempted to avoid the remedy of refunds by emphasizing the existence of a statutory predeprivation remedy. The United States Supreme Court rejected the district court's attempt to distinguish McKesson by again stating that federal due process required a postdeprivation remedy unless the predeprivation remedy was clearly and certainly established as the exclusive means by which to challenge an illegal tax or charge.

In the instant case, this Court's initial decision attempted to distinguish McKesson and deny refunds by asserting the existence of equitable considerations. Equitable considerations and prospective relief were rejected in McKesson, where the Court firmly established that there must be a clear and certain remedy to meet the requirements of due process. Otherwise, the state, or here the county, has the authority to violate the law, unlawfully take a person's property, and avoid all accountability by not refunding the money which had unlawfully been collected. Newsweek again restated that the state must either supply a statutory predeprivation remedy that is clearly established as the exclusive method by which to challenge an unlawful tax or charge, or permit refunds or some other adequate postdeprivation remedy. In the case at bar, no predeprivation remedy existed and the only remedy that complies with the McKesson due process commands is refund.

This Court's initial decision that equitable considerations justified the application of the prospective application of a rule of law is an excellent example of selective prospectivity condemned by the United States Supreme Court in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). At bar, approximately one-half of the property owners in Madison County did not pay the charges levied by the county and suffered liens attaching to their property, which ultimately resulted in the sale of certificates for nonpayment. The county redeemed those certificates sold by paying to the purchasers all amounts

paid plus 18 percent interest. Property owners who did not pay the illegal assessments are thus treated dramatically different from those who paid. This is blatant selective prospectivity. Those who paid are afforded no relief by this Court's initial decision and those who did not pay obtain the benefit of the decision and all liens on their property are cancelled. This certainly is a clear example of "picking and choosing" between persons who receive the benefit of the decision and those who do not.

To deny refunds in this case would squarely conflict with the due process and equal protection requirements articulated by the United States Supreme Court. Those property owners who did not pay the assessments did not have to pay. By cancelling and redeeming all assessment certificates sold plus paying 18 percent interest thereon, the county actually has paid the assessments for them. Equal treatment for all would require that those who paid receive refunds plus the same interest that the county paid to redeem the assessment certificates for all five years. In this case, refunds are the only postdeprivation remedy available.

ARGUMENT

I. The due process clause of the Fourteenth Amendment of the United States Constitution requires a refund of monies paid to discharge impositions levied by county ordinances and collected pursuant a coercive statutory scheme, which such impositions and ordinances were subsequently held null and void, where no predeprivation statutory mechanism exists to challenge the impositions and no other postdeprivation remedy is available.

The United States Supreme Court's decision in Newsweek reiterates the fundamental basis of its holding in McKesson that federal constitutional due process considerations require some type of postdeprivation relief for individuals paying an illegally-imposed tax or charge under duress where no predeprivation right to challenge the tax or charge exists. In a line of decisions since McKesson, the Court has repeatedly adhered to and restated this fundamental concept. See Fulton County v. Faulkner, 116 S.Ct. 848 (1996); National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 115 S.Ct. 2351 (1995); Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745 (1995); Reich; Harper; Chemical Waste Man., Inc. v. Hunt, 504 U.S. 334 (1992); James B. Beam Distilling; Dennis v. Higgins, 498 U.S. 439 (1991).

The Court's decision in Newsweek rejected yet another attempt by a state court to distinguish McKesson and avoid ordering refunds or other postdeprivation relief from taxes or charges illegally imposed. In accordance with these decisions, this Court should adopt Justice Wells' dissent and order refunds

with interest of the illegal assessments for years 1989 and 1990, and interest on refunds for years 1991, 1992, and 1993. Any decision to the contrary would plainly violate the Court's mandate in the instant case and deprive the property owners of Madison County of due process and equal protection under the federal constitution and equal treatment with non-paying property owners.

Newsweek involved the Florida legislature's decision to exempt newspapers but not magazines from sales tax as of January 1, 1988. In 1990, this Court held that this classification was invalid under the First Amendment of the United States Constitution. Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (Fla. 1990), vacated and remanded sub nom., 499 U.S. 972 (1991), reaff'd, 604 So.2d 459 (Fla. 1992). Subsequent to this Court's decision, Newsweek – which had not been a party to that case – filed a claim for refund of sales taxes paid from 1988 to 1990. After the Department of Revenue (department) denied the refund request, Newsweek filed suit. The trial court granted summary judgment in the department's favor and denied a refund.

On appeal, the First District Court also held that Newsweek was not entitled to a refund despite the United States Supreme Court's decision in McKesson. The district court distinguished McKesson on the basis that it only applied to cases where the taxpayer lacked a predeprivation right to challenge the legality of a tax. Because Newsweek had available a

predeprivation procedure by which to challenge the legality of the sales tax and failed to utilize that procedure, the district court reasoned that McKesson did not apply. As the court stated:

> Below the Department contended that *McKesson* is distinguishable because, while the liquor taxes at issue in *McKesson* were not encompassed within the procedures for predeprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a predeprivation proceeding pursuant to section 72.011. We agree that *McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action.

Newsweek, 689 So.2d at 363 (emphasis added).

The United States Supreme Court reversed the district court's decision in a per curiam affirmed decision. The Court rejected the district court's conclusion that Newsweek was afforded due process because it could have pursued the prepayment remedy without suffering onerous penalties. Instead, the Supreme Court held that the district court failed to consider its decision in Reich, where it held that due process required applicability of a state refund statute where "'no reasonable taxpayer would have thought that [the predeprivation procedures] represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes.'" Newsweek, 118 S.Ct. at 905, quoting Reich, 513 U.S. at 111 (emphasis deleted). Newsweek observed that, as in Reich, the taxpayer had

no way of knowing from either the statutory language or case law that it could not pursue a postpayment refund and was relegated to a predeprivation remedy. The Supreme Court then held that:

> Under Florida law, there was a long standing practice of permitting taxpayers to seek refunds under § 215.26 for taxes paid under an unconstitutional statute. *See e.g., State ex rel Hardaway Contracting Co. v. Lee*, 155 Fla. 724, 21 So.2d 211 (1945). At Florida's urging, federal courts have dismissed taxpayer challenges, including constitutional challenges, because § 215.26 appeared to provide an adequate postpayment remedy for refunds. *See Tax Injunction Act*, 28 U.S.C. § 1341 ("The district courts shall not enjoin . . . any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"); *see, e.g., Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231, 1233 (CA11 1990); *Rendon v. State of Fla.*, 930 F.Supp 601 (S.D.Fla. 1966). This Court, too, has interpreted Florida law to provide a postpayment remedy. *See McKesson, supra*, at 24, n.4. ("It appears . . . Florida law does not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a postpayment refund action"). The State does not dispute this settled understanding. The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to § 215.26. <u>While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.</u>

<u>Newsweek</u>, 118 S.Ct. at 905 (emphasis added).

Thus, <u>Newsweek</u> again firmly emphasized that the Court's decision in <u>McKesson</u> and decisions following <u>McKesson</u> stand for the proposition that federal due process requires a postdeprivation remedy for individuals paying an illegally-

imposed tax or charge under duress without a predeprivation method for challenging the tax or charge. Even where a predeprivation remedy exists, the individual cannot be denied a postdeprivation remedy unless the exclusivity of the predeprivation remedy is "clear and certain." Newsweek, 118 S.Ct. at 905. Thus, Newsweek must be reviewed in light of McKesson in evaluating the Court's mandate on remand, and this Court's initial decision must be reviewed in light of both.

McKesson reversed this Court's decision in Division of Alcoholic Beverages & Tobacco v. McKesson, 524 So.2d 1000 (Fla. 1988). The Supreme Court held that, if a state derives an exaction under a coercive scheme which penalizes taxpayers for failure to remit their taxes in a timely fashion and requires them to pay first and obtain review of the levies' validity later, the due process clause of the Fourteenth Amendment requires the state to afford meaningful post payment relief for the illegal taxes already paid. McKesson recognized that an unlawful exaction "constitutes a deprivation of property under the due process clause." 496 U.S. at 19. As McKesson stated:

> Since Florida has established various financial sanctions and summary remedies to encourage liquor distributors to tender tax payments *before* resolution of any dispute over the tax's validity, the State does not provide a meaningful opportunity for predeprivation relief. Thus, in a postdeprivation refund action, the State must provide distributors not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy," *O'Connor, supra*, 223 U.S., at 285, 32 S.Ct., at 217, for any erroneous or unlawful tax collection.

496 U.S. at 19. The Court further stated that:

> Neither of the "equitable considerations" cited by the State Supreme Court is sufficient to override the constitutional requirement of retrospective relief. First, the court's observation that "the tax preference scheme [was] implemented . . . in good faith reliance on a presumptively valid statute" bespeaks a concern that an obligation to provide refunds for taxes collected pursuant to what later turns out to be an unconstitutional tax scheme would undermine the State's ability to engage in sound fiscal planning. But that ability is adequately secured by the State's freedom to impose various procedural requirements designed to allow it to predict with greater accuracy the availability of undisputed treasury funds; for example, it may specify by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint, or it may refrain from collecting taxes pursuant to a scheme declared invalid by a competent tribunal pending further review. Florida's failure to avail itself of such methods of self-protection weakens any "equitable" justification for avoiding its constitutional obligation. Moreover, Florida's tax scheme could hardly be said to be a "presumptively valid statute," since it reflected only cosmetic changes from the prior tax scheme that itself was virtually identical to the one struck down in *Bacchus Imports*.

Id. at 20 (emphasis added). The Court concluded that:

> Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

McKesson, 496 U.S. at 22.

Here, as in McKesson, Florida has established various financial sanctions and summary remedies by which counties coerce property owners to timely pay the assessments levied and penalizes them for failure to remit timely. The assessments are treated identical to ad valorem taxes insofar as collection is concerned. See § 197.3632, Fla. Stat. (1997). A lien attaches as of January 1 of the year levied, and the assessments become due and payable on November 1. They are deemed delinquent if not paid by April 1. See §§ 197.122, 197.172, Fla. Stat. (1997). Thereafter, all unpaid taxes bear interest at 18 percent. § 197.172, Fla. Stat. (1997). Nonpayment results in the sale of tax assessment certificates and, ultimately, a tax deed by which the property owner is divested of the property. See §§ 197.3632(8)(a), 197.432, 197.502, 197.542, Fla. Stat. (1997).

Unlike ad valorem taxes, however, no statutory predeprivation mechanism exists for challenging non-ad valorem assessments. Section 194.171, Florida Statutes (1997), only provides predeprivation remedies in challenging ad valorem taxes. Florida also provides a four-year period for refunds for ad valorem taxes assessed on the county tax rolls. See § 197.182, Fla. Stat. (1997). A similar statute exists for any state levied tax, license, or account due. See § 215.26, Fla. Stat. (1997). No similar statutes exist for special assessments/non-ad valorem assessments, and sections 95.11(3)(m) and (p) contain the applicable four-year statute of limitations.

The Eleventh Circuit Court of Appeals in Zipperer v. City of Fort Myers, 41 F.3d 619 (11th Cir. 1995), has recognized that Florida fails to provide any predeprivation or post-deprivation remedy by which property owners may challenge the legality of a non-ad valorem assessment. Zipperer was a case involving special assessments filed by property owners against the City of Fort Myers. In rejecting the city's contention that the federal court lacked jurisdiction under The Tax Injunction Act, 28 U.S.C., section 1341, the court held that no "plain, speedy, and efficient remedy is available in state courts" to challenge special assessments. Zipperer, 41 F.3d at 622. Zipperer references the statutes cited above which apply to taxes only.

McKesson also cited and relied on Ward v. Love County Board of Comm'rs, 253 U.S. 17 (1920). Ward involved a county's attempt to tax Indian lands previously exempted. There, the Court stated that:

> It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Marsh v. Fulton County* 10 Wall. 676, 684; *City of Louisiana v. Wood*, 102 U.S. 294, 298-299; *Chapman v. County of Douglas*, 107 U.S. 348, 355. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process

> of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

Ward, 253 U.S. at 24 (emphasis added).

In its initial decision, this Court held that McKesson--which relied on Ward which held that the due process clause of the Fourteenth Amendment requires meaningful retroactive relief by way of refund or some other means to treat all equally where impositions are collected under a coercive scheme without a predeprivation process--did not apply because the county acted in "good faith." Thus, this Court held that no refund was required despite the lack of a predeprivation procedure.

This Court also attempted to avoid the United States Supreme Court's decisions in McKesson and Ward by suggesting that the property owners received the benefit of the impositions. "Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, equitable considerations may preclude a refund. Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla.1973)." Dryden, 696 So.2d at 730 (footnote omitted). Considering the United States Supreme Court's decision in Newsweek, this Court's attempt to distinguish McKesson and deny refunds where no predeprivation mechanism existed by which to challenge the assessments denies the property owners due process and equal protection. McKesson already has rejected this Court's reliance on equitable considerations to avoid ordering refunds.

Property owners who paid received no more benefit than did those who did not pay, and no specific service such as house-to-house garbage collection service was furnished to anyone. The impositions were simply a way of funding particular parts of the county's budget. The ordinances merely changed the funding source from ad valorem taxes and fees to assessments and fees. No different "benefit" or new facility or source was created for anyone, and no specific service or benefit was provided to anyone. The assessments, like the ad valorem taxes before them, were used to fund these county operations and did not create any new service or benefit for property owners and residents any more so than the county road department, the county sheriff's department, or any other county government operation.

McKesson was binding not only on the McKesson parties but also should have controlled other pending decisions of all Florida courts. As the Supreme Court held in Harper, McKesson "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or post date the amendment of the rule." Harper, 509 U.S. at 86. McKesson was decided about two weeks before Dryden was filed. In accordance with Newsweek, McKesson, Ward, and Harper, the property owners are entitled to a refund with interest because no predeprivation remedy existed by which to challenge the legality of the special assessments. Prospective application based on good faith is not a viable test which can be applied where refund of illegally-imposed taxes or charges is

sought. In this case, the property owners' federal due process rights cannot be abrogated by reliance upon equitable considerations or good faith.

II. Refusing to require refunds of illegally imposed assessments--where no clear and certain exclusive predeprivation remedy existed--results in the type of selective prospective application condemned by the United States Supreme Court.

The effect of this Court's initial decision was that the trial court's order holding the assessments null and void applied prospectively only by denying refunds or any relief to those persons who had paid for 1989 and 1990, and that the federal due process requirements enunciated in McKesson did not require to the contrary. There was no existing judicial decision which had previously held valid the ordinances and levies, which was generally deemed necessary as the linchpin for good faith and prospectivity. The decisions of the United States Supreme Court indicate that such can no longer suffice even it one did exist.

At bar, approximately one-half of the property owners in Madison County never paid and liens attached to their property. The county subsequently cancelled the liens by purchasing all assessment certificates sold to third parties for nonpayment and paying 18 percent interest. By not ordering refunds to those who had paid the assessments, this Court actually created and applied selective prospectivity in its initial decision. The decision applies retroactive to the nonpayers and prospective to those who paid.

In Harper, the United States Supreme Court addressed the "nature of judicial review" stating as part of the holding of the court:

> This rule fairly reflects the position of a majority of Justices in *Beam* and extends to civil cases the ban against "selective application of new rules" in criminal cases. *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed.2d 649. Mindful of the "basic norms of constitutional adjudication" animating the Court's view of retroactivity in criminal cases, *id.*, at 322, 107 S.Ct. at 713--that the nature of judicial review strips the Court of the quintessentially legislative prerogative to make rules of law retroactive or prospective as it sees fit and that selective application of new rules violates the principle of treating similarly situated parties the same, *id.*, at 322, 323, 107 S.Ct., at 713, 713--the Court prohibits the erection of selective temporal barriers to the application of federal law in noncriminal cases.

Harper, 509 U.S. at 87 (emphasis added). The rule referenced is set forth therein as follows:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.

Id. at 86 (emphasis added).

In the instant case, the denial of refunds to property owners who paid the illegally-imposed assessments results in prospective application and is contrary to the United States Supreme Court's holding that the *nature* of judicial review "strips the Court of the quintessentially legislative

prerequisite to make rules of law retroactive or prospective as it sees fit." Harper, 509 U.S. at 87. It also would violate Harper's pronouncement that "selective application of new rules violates the principle of treating similarly situated parties the same." Id. Such selective prospectivity is especially glaring because the county has discharged the impositions and liens of the property owners who did not pay with interest.

If the county had not assessed and collected the assessments for 1991, 1992, and 1993, any continued adherence to this Court's initial decision would mean that those persons who paid and filed suit in June 1990 challenging the assessments would have received no relief whatsoever. Because the suit was a class action including all homestead and non-homestead property owners in the county, one-half (those who did not pay) have received retroactive relief and the other one-half (those who did pay) received no relief, although they prevailed in the suit. The property owners submit that this is the precise selective application resulting from judicial prospectivity condemned in Harper and recognized by Justice Wells' dissent as constituting a "denial of equal protection of the law and is patently unfair." Dryden, 696 So.2d at 733.

James B. Beam Distilling, cited in Harper, discusses Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (19784), both of which also discuss prospective verses retroactive decisional application. In discussing the Chevron Oil decision, the Court criticized and

rejected prospectivity because it precludes retroactive application of a new rule to some litigants when it is not applied to others.

James B. Beam Distilling arose in the wake of the United States Supreme Court's decision in Bacchus, which held a Hawaii statute invalid because it discriminated between imported and local alcoholic products. The Georgia Supreme Court had refused to order refunds and declared its decision following Bacchus prospective only because there had existed a Georgia judicial decision upon which the litigants could have justifiably relied. The question before the United States Supreme Court was whether the Georgia Supreme Court decision could be applied prospectively only. The Court stated:

> In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.
>
> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.

James B. Beam Distilling, 501 U.S. at 534 (citations omitted). Thereafter the Court opined that:

> But the antecedent choice-of-law question is a federal one where the rule at issue itself

> derives from federal law, constitutional or otherwise.
>
> As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelming the norm, and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law.

Id. at 535 (citations omitted). The Court observed that constitutional thresholds existed in any inquiry into prospective verses retroactive application citing McKesson.

Harper was followed in Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745 (1995). Hyde attempted to rely on a Ohio statute that tolled the statute of limitation in lawsuits involving out-of-state defendants. While her case was pending, the Ohio tolling statute was declared invalid in Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988). The Court rejected Hyde's contention that Bendix Autolite should not be retroactively applied and reversed the Ohio Supreme Court's decision stating: "That court's refusal to dismiss her suit on the ground that she may have reasonably relied upon pre-*Bendix* law is the very sort of justification that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule." Hyde, 115 S.Ct. at 1747.

Hyde had attempted to avoid Harper consequences by characterizing the Ohio Supreme Court's holding as relating to

the remedy. The United States Supreme Court rejected this contention by pointing out that:

> Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law--a reliance of the same kind and degree as that involved in *Chevron Oil*. But, this type of justification--often present when prior law is overruled--is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rules (that had been applied in the case that first announced it). If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on "remedy" rather than "non-retroactivity"?

Hyde, 115 S.Ct. at 1749.

In the instant case, refund is the only relief which could make the property owners whole and treat all similarly situated the same because the liens for all five years were cancelled on property owned by those who had not paid. Hyde, Harper, and James B. Beam Distilling recognize the absolute necessity of equal treatment. As the United States Supreme Court stated in Hyde: "Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups." 115 S.Ct. at 1750.

Here, this Court's initial decision unburdens some and burdens others. There were no changes in the law and no judicial precedent being overruled by a subsequent judicial decision. Previously, Florida courts had recognized the importance of an extant judicial pronouncement which could be relied on for a decision of prospectivity. See Gulesian; State v. Greer, 88 Fla. 249, 102 So 739 (1924); Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978). As Justice Wells' dissent points out, Gulesian does not support the majority holding of prospectivity because no judicial decision existed to form the basis for equitable reliance, even if Gulesian were still viable after McKesson. Thus, refunds with interest for all five years are required in this case.

III. Prospective application of the trial court's decision declaring the assessments illegal violates the property owners' rights secured under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Prospective application of the decision declaring the assessments illegal violates the property owners equal protection rights. Unlike the situation in James B. Beam Distilling, there was no Florida judicial decision which could form the linchpin for equitable reliance at bar. This case was the first case to challenge the involved ordinances and levies. Although James B. Beam Distilling involves a party not participating in the case which overruled a state court precedent, the principle announced

which overruled a state court precedent, the principle announced seems clear that a rule of law announced by a court must apply the same to all similarly situated. The Court stated:

> But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. See R. Wasserstrom, The Judicial Decision 69-72(1961). "We depart from this basic judicial tradition when we simply pick and choose from among similarly situation defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist v. United States*, 394 U.S. 244, 258-259(1969).

James B. Beam Distilling, 501 U.S. at 537-538. In recognizing the strength of this equality principle, the Court further stated:

> *Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See *Estate of Donnelly*, 397 U.S., at 296 (Harlan, J., concurring). Its strength is in fact greater in the later sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See *Griffith, supra*, at 331-332 (WHITE, J., dissenting). Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. *Teague v. Lane*, 489 U.S. 288 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

Id. at 540. Justice Blackmun joined by Justices Marshall and Scalia, authored a concurring opinion stating: "Like JUSTICE SCALIA, I conclude that prospectivity, whether "selective" or "pure," breaches our obligation to discharge our constitutional function." Id. at 548. Justice Scalia also commented that:

> I think I agree, as an abstract matter, with JUSTICE SOUTER's reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls "selective prospectivity" is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

Id. at 548.

Over a five-year period, some property owners were coerced to pay the assessment to prevent the consequences attendant to nonpayment; the attachment of liens, additional 18 percent interest, and possible loss of property through tax certificates and tax deeds. Others withstood the coercion, suffered the consequential liens, sales of tax certificates, restriction on alienation, and risked the loss of the property. For these nonpayers, the county forgave all assessments levied, cancelled their liens, and redeemed all outstanding certificates by repurchasing same from certificate holders which required payment of 18 percent interest. Thus, the county has paid the assessment for all who did not pay. The denial of refunds to those property owners who paid the illegally-imposed assessments

constitutes application of selective prospectivity. A clearer case of dissimilar treatment for identically situated property owners could scarcely be found.

The trial court found that denying refunds of the coerced impositions violated the equal protection clause of the United States Constitution. Justice Wells' dissent agreed. The United States Supreme Court held in Harper and James B. Beam Distilling that equal treatment for similarly situated parties is required by the federal constitution and selective prospectivity violates this principle. Equal treatment for property owners in Madison County requires that those who paid receive refunds plus the same interest that the county paid to redeem the assessment certificates. In this case, refunds with interest for all years are the only postdeprivation remedy available.

CONCLUSION

The Fourteenth Amendment to the United States Constitution focuses directly on state infringement of citizens rights. It states in part:

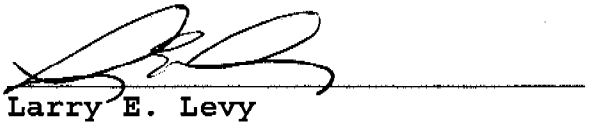
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

The initial arbiter of cases involving citizens' rights is the Florida judiciary. Citizens resort to the judiciary to protect them from illegal state and local government action infringing on

to perform that duty. Seeking ways to avoid protecting citizens' rights from state infringement and granting refunds certainly would not fulfill this Court's obligation under the Fourteenth Amendment.

Based upon the aforementioned arguments and authorities, and the United States Supreme Court's mandate, this Court respectfully is requested to order refunds with interest to property owners who paid the illegally-imposed assessments for years 1989 and 1990, and interest on refunds due for 1991, 1992, and 1993. No other relief will treat those who paid and those who did not pay the same and satisfy the commands of the Fourteenth Amendment.

Respectfully submitted,



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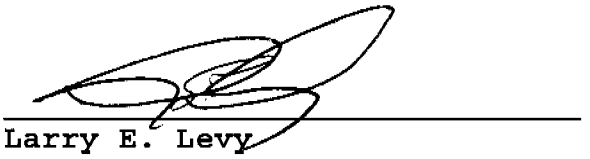
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U. S. Mail to **GEORGE T. REEVES, ESQUIRE**, and **EDWIN B. BROWNING, JR., ESQUIRE**, Davis, Browning & Schnitker, Post Office Drawer 652, Madison, Florida 32340-0652; **KEN van ASSENDERP, ESQUIRE**, Young, van Assenderp & Varnadoe, Post Office Box 1833, Tallahassee, Florida 32302 on this the **1st** day of May 1998.



Larry E. Levy